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MAD DOGS AND ENGLISHMEN: *Pierson v. Post* A Ditty Dedicated to Freshman Law Students, Confused on the Merits

by Ridgely Schlockverse III*



Mad dogs and Englishmen go out in the mid-day sun –
They bark, they pant, they rave and rant – but most of all they run.
Preamble. A monkey's uncle might have tea or sip some lemonade –
Why, even donkeys (turkeys, too) seek shelter in the shade,
But mad dogs and Englishmen go out in the mid-day sun.¹

*In Chile and in darkest Ghana, everybody says "manana"
Once the heat of summer has begun.
All who live near the Equator take a nap until it's later –
Only dogs and Englishmen go out in the mid-day sun.*

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¹With apologies to Noel Coward, the actual text of whose well-known comic poem has become increasingly obscure. The verse reads, in pertinent part:

Mad dogs and Englishmen
Go out in the midday sun.
The Japanese don't care to,
The Chinese wouldn't dare to,
Hindoos and Argentines sleep firmly from twelve
to one.
But Englishmen detest a – Siesta.
In the Philippines there are lovely screens
To protect you from the glare.
In the Malay States there are hats like plates
Which the Britishers won't wear.
At twelve noon the natives swoon

And no further work is done,
But mad dogs and Englishmen
Go out in the midday sun.

Mad dogs and Englishmen
Go out in the midday sun.
The toughest Burmese bandit
Can never understand it.
In Rangoon the heat of noon
Is just what the natives shun.
They put their Scotch or Rye down – and lie down.
In a jungle town where the sun beats down
To the rage of man and beast,
The English garb of the English Sahib
Merely gets a bit more creased.
In Bangkok at twelve o'clock
They foam at the mouth and run,
But mad dogs and Englishmen
Go out in the midday sun.

Mad dogs and Englishmen
Go out in the midday sun.

The smallest Malay rabbit
Deplores this stupid habit.
In Hong Kong they strike a gong
And fire off a noonday gun
To reprimand each inmate – who's in late.
In the mangrove swamps where the python romps
There is peace from twelve to two.
Even caribous lie around and snooze,
For there's nothing else to do.
In Bengal, to move at all
Is seldom if ever done,
But mad dogs and Englishmen
Go out in the midday sun.

The author hereby exercises his own poetic license to assume that both litigants and judges in his "poor passion play" (see *infra* note 2), though then living in the Catskills, were born Englishmen. The dogs in his doggerel, bred in New York, were likely mad to begin with.

**Pierson v.
Post in the
curriculum.**

Who were the characters in this poor passion play²
And who the deuce was dafter after all that torrid day?³
(And why indeed do we still need to study this old case? –
Perhaps the bloody law professors still can find a trace
Of Truth and Confusion to inflict on first year prey.)⁴

*Cannibals wouldn't get caught dead in it, monsters have an
abject dread of it,
Noon's not fit for Vandal nor for Hun.
Some are ghastly, some are ghoulish, some are fierce and some
are foolish
But only dogs and Englishmen go out in the mid-day sun.*

**It was a
beastly day.**

Post⁵ and his hunting hounds left their estate at noon
To fetch a fox – not deer, not cocks, not ferrets, geese, nor 'coon –
All parties were on fire 'cause it was so beastly hot,
And burning with desire (all perspiring a lot)
To nab, grab, and captivate⁶ the fox (who too hoped soon).

*Mexicans choose to take siestas, Spaniards refuse to hold fiestas
Til the heat of day is almost done.
Some like tacos, some tortillas, some have tempers like Pancho Villas,
But only dogs and Englishmen go out in the mid-day sun.*

²Pierson v. Post, 3 Cai. R. 175 (1805). See also Douglas Commissioner, Virginia Marine Resources Commission v. Seacoast Products, Inc., 431 U. S. 265, 287 (1977) (Rehnquist, J. concurring); United States v. Long Cove Seafood, Inc., 582 F.2d 159, 164 (2d Cir. 1978); and dissenting opinions in United States v. Weintraub, 613 F.2d 612, 625-26 (6th Cir. 1979) and State v. Gayette, 407 A.2d 1104, 1110 (Me. 1979).

³The debilitating effects of heat have long been recorded by both poet and scientist. "Plainly he couldn't bear it any longer," wrote Kenneth MacKenzie in "Heat" (*Poetry in Australia*, volume II, pp. 93-94, 1965). "Like the hand of a bored devil placed mercilessly upon a man's head, it maddened him. . . . Often I see him walking down that slope thirsty and mad, never to return, never quenched quite of his thirst, or of his hope that heat would be arrested on its shore." Rudyard Kipling was likewise easy to wilt: "But the worst of your foes is the sun over 'ead: /You must wear your 'elmet for all that is said: /If 'e find you uncovered 'e'll knock you down dead, /And you'll die like a fool of a soldier." (R. KIPLING, *The Young British Soldier*, in *SELECTED PROSE AND POETRY OF RUDYARD KIPLING* 45, 1928). Heat stroke can cause a person to become delirious, have convulsions, and sink into a coma. Heat exhaustion is heat stroke to a lesser degree and can cause fainting. (E.C. POULTON, *ENVIRONMENT AND HUMAN EFFICIENCY* 142-43, 1970).

⁴Pierson v. Post is cited and discussed in numerous casebooks and hornbooks. Among them are R. BOYER, *SURVEY OF THE LAW OF PROPERTY* 680-81 (3d ed. 1981); R. BROWN, *THE LAW OF PERSONAL PROPERTY* 14 n.2, 17 n.3 (W.B. RAUSHENBUSH 3d ed. 1975); *CASES ON PROPERTY* 8 (R. Aigler, A. Smith, S. Tift ed. 1960); *SELECTED CASES AND MATERIALS AND OTHER*

AUTHORITIES ON PROPERTY 1 (E. Warren ed. 1915); *PROPERTY AND LAW* 23 (C. Haar, L. Liebman ed. 1977); *CASES AND MATERIALS ON PROPERTY, AN INTRODUCTION TO THE CONCEPT AND THE INSTITUTION* 1 (C. Donahue, T. Kauper, P. Martin ed. 1974) [hereinafter cited as Donahue]. Intimidation and confusion are apparently part and parcel of the educational process in American law schools. See K. LEWELLYN, *THE BRAMBLE BUSH* (1951). Over three decades ago Jones suggested that in order to minimize the confusion felt by first-year law students there should be a separate course specifically for introduction to legal methods. Jones, *Notes on the Teaching of Legal Methods*, 1 *JOURNAL OF LEGAL EDUCATION* 13-27 (1948). Roth believes that intimidation and confusion are a way of life for first-year students, who he says should accept the inevitable but to whom he offers the famous advice: *Illegitimus non carborundum* (free translation: *Don't let the bastards grind you down*). ROTH, *SLAYING THE LAW SCHOOL DRAGON* 3-5 (1980). Most recently Elkins, in *Reflections on Humanistic Teaching*, 5 *ALSA FORUM* 5-19 (1981), observes intimidation in the light of student expectations: students expect to be intimidated, and so they are.

⁵All we are told of Post, besides his being a frustrated hunter, is that his first name was Lodowick 3 Cai. R. 175 at 177, which is the Scottish form of Louis. See *BAPTISMAL NAMES* (Wiedenham, 4th ed 1936). Both Pierson and Post were young at the time of the hunt: Pierson was born in 1780, Post in 1777. Their fathers – Capt. David Pierson and Capt. Nathan Post – apparently encouraged the litigation as a part of a pre-existing family feud. See J. ADAMS, *MEMORIALS OF OLD BRIDGEHAMPTON* 166, 319, 334 (1962), and Donahue, *supra* note 4, at 6.

⁶Occupy. The court in *Pierson v. Post* dwells on the concept of "occupancy of beasts *ferae naturae*," which it variously defines as "the actual corporeal possession" of wild animals, possession, ensnarement, circumvention, deprivation of natural liberty, and a host of Latin definitions which shall remain untranslated. 3 Cai. R. 175 at 177-78.



**A brief
respite.**

Finally the fox was pooped – but so were Post's poor hounds:
The chase had cost them half a day and all had lost some pounds.
The fox lay down, the dogs did too, and Post slid off his horse;
Surveying the bedraggled beasts and weighing his best course,
He too chose to sleep (perchance to dream of cooler rounds).⁷

*Doctors often get amnesia, dentists don't do anesthesia
Any day from noon 'til half past one.
Some are wise and some are wealthy, some are dumb and some
unhealthy –
But only dogs and Englishmen go out in the mid-day sun.*

**The dastardly
interloper.**

Lo, though, quite suddenly this Pierson did appear,
So calm, so cool (he was no fool – he carried his own beer),⁸
And while the hunter and his hounds lay napping in the heat,
He tip-toed toward the tired fox and tied him by his feet
With rope. Then this interloper stole off to the rear.

*Musicians wouldn't dare to hear of it, cabbies always steer
quite clear of it,
Hedonists hardly think it's any fun.
Some are lazy, some are crazy, some are nasty (or named Nastase) –
But only dogs and Englishmen go out in the mid-day sun.*

**The
pathology
of heat stroke.**

Post woke and saw the bloke who'd sabotaged his work.
He stuttered and he sputtered, "Why, that gentleman's a jerk!"⁹
He sulked and stalked and walked in circles, thinking how he'd chased
Through mid-day sun, of how he'd run, of what an utter waste
Of time and of energy. He went, we'd say, berserk.¹⁰

*Mosquitoes often hold their bite and lightning bugs wait 'til
it's night
And spiders specify their webs be spun
Before the morning dew has dried so that their victims won't be fried.
Only dogs and Englishmen go out in the mid-day sun.*

⁷Cf. these lines from Kipling's "Pagett, M.P.": "We reached a hundred and twenty once/in the Court at noon/(I've mentioned Pagett was portly)/Pagett went off in a swoon." Kipling *supra* note 3 at 980.

⁸Probably a mead or ale, the popular libations of the early nineteenth century. Beer is an American tradition. The earliest record of non-Indian brewing in this country dates from 1587. The first commercial brewery was opened and operated by the Dutch West India Company in Lower Manhattan in 1632. Pierson, however, probably had with him his own brand of home brew since, despite government restrictions for taxation purposes, there were many more stills at that time than commercial breweries. B. ABEL, *THE BOOK OF BEER* 167 (1976); M. JACKSON, *The World Guide to Beer* 202-216 (1977).

⁹A fine example of early English protocol, not seen much more except in the United States Congress. One of the ironies of contemporary legislative etiquette is that the manners-conscious British have raised the parliamentary heckle to a high art form, while the traditionally brash Americans insist on propriety and decorum among their lawmakers. Thus, Senator

Claghorn might be moved to say "the distinguished gentleman from South Carolina is a liar and a cheat." See L. DESCHLER, *JEFFERSON'S MANUAL AND RULES OF THE HOUSE OF REPRESENTATIVES*, §§ I, XV, XVI, and XVII (1943).

¹⁰Weather affects the human mind in various ways. See *supra* note 3. A case study of one Julia Little showed that rises in temperature distinctly altered her mood. Although she was predisposed to psychotic disturbances, "the abrupt changes in the mood of the patient and the subsequent admission to the sanitarium occurred with a sharp accentuation of warm weather." The study concluded that psychotic episodes were but reflections of changing biochemical states with the changing of meteorological conditions. W.F. PETERSEN, *MAN, WEATHER, SUN* 112-116 (1947). Another woman was found "wandering about Hempstead in a conspicuous state of confusion," caused by a change in the weather. See Reese, *The Sign of Meteorologic Environment and Psychotic Episodes*, 9 *JOUR. MT. SINAI HOSPITAL* 719 (1942); and Ward and Rastall, *Prognosis in 'Myxoedematous Madness'*, 113 *BRIT. J. PSYCHIATRY* 149-51 (1967).

Mad dogs and Englishmen pursue their prey in sport
But when they're mad 'cause they've been had they chase their cause
in court.

**Trespass on
the case.**

So Post filed suit in trespass on the case¹¹ (an awkward tool,
Though what else can one do without a precedential rule
In contract, or property, or even one in tort?)

*Swedes think that it's very nice to swim in water cold as ice,
Italians eat spaghetti by the ton;
Many people run the range from mildly odd to wildly strange –
But only dogs and Englishmen go out in the mid-day sun.*

Post won upon the trial but on appeal did worse.
Each barrister was learned and articulately terse.¹²

**O, the
tides of
justice!**

The judges pulled their periwigs and cited legal lore
From Puffendorf¹³ to Bynkershock¹⁴ to Barbeyrac¹⁵ and more:
"Pursuit's not enough for title;¹⁶ therefore, we reverse."¹⁷

*In Japan the favorite dish is actually cold raw fish,
Americans put their 'burgers on a bun;
Grown men have been known to quiver at the sign of Jews' chopped
liver –
But only dogs and Englishmen go out in the mid-day sun.*

"Who, then, would keep a pack of hounds," asked the dissent,
"And who at peep of day would mount his steed and hunt 'til spent,
If just as dusk came on, a mere intruder – a galoot –
Could bear away in triumph the sole object of pursuit?"¹⁸
(*Just mad dogs and Englishmen must be the answer meant.*)

**A noble
dissent.**

¹¹Form of action at common law, adapted to the recovery of damages for some injury resulting to a party from the wrongful act of another, unaccompanied by direct or immediate force or which is the indirect or secondary consequence of the defendant's act. BLACK'S LAW DICTIONARY 1347 (5th ed. 1979).

¹²Mr. Sanford, for Pierson (citing numerous Latin authorities): "There must be a taking. . . even wounding will not give a right of property." 3 Cai. R. 175 at 176-77. Mr. Colden, for Post (citing Puffendorf and Barbeyrac, *infra* notes 13 and 15): "Pursuit. . . gives an exclusive right." 3 Cai. R. 175 at 176.

¹³Samuel Puffendorf (1632-1694) was the world's first professor of international law. He was also the founder of the naturalist school of legal philosophy, which held that the prepolitical state of the law of nature was binding on all men and that the sole source of international law came from the law of nature rather than from the consent of states. G. VON GLAHN, LAW AMONG NATIONS 43-44 (2d ed. 1970).

¹⁴Cornelius van Bynkershock (1673-1743) was a prominent Dutch jurist and the leading exponent of the positive school of legal philosophy. Unlike the naturalists, this school believed that the basis of international law was founded only in the common consent of nations, by virtue of either treaties or custom. *Id.* at 43-44.

¹⁵Aside from mention in this case, Barbeyrac's name is not found in conjunction with Puffendorf anywhere else.

Whatever his criticisms of Puffendorf, they appear to have faded from history *in toto*.

¹⁶3 Cai. R. 175 at 179. Cf. *Sollers v. Sollers*, 77 Md. 148, 26 A. 188 (1893), where the court held that fish captured and placed in an inlet with a fence which blocked their access to a main stream could still be captured by another fisherman.

¹⁷3 Cai. R. 175 at 180.

¹⁸Judge Livingston's dissenting opinion was a good deal more eloquent in the original:

This is a knotty point, and should have been submitted to the arbitration of sportsmen, without poring over Justinian, Fleta, Bracton Puffendorf, Locke, Barbeyrac, or Blackstone, all of whom have been cited: they would have had no difficulty in coming to a prompt and correct conclusion. In a court thus constituted, the skin and carcass of poor Reynard would have been properly disposed of, and a precedent set, interfering with no usage or custom which the experience of ages has sanctioned, and which must be so well known to every votary of Diana. But the parties have referred the question to our judgment, and we must dispose of it as well as we can, from the partial lights we possess, leaving to a higher tribunal the correction of any mistake which we may be so unfortunate as to make. By the pleadings it is admitted that a fox is a 'wild and noxious beast'. Both parties have regarded him, as the law of nations does a pirate, *hostem*

humani generis, and although *'de mortis nil nisi bonum'* be a maxim of our profession, the memory of the deceased has not been spared. His depredations on farmers and on barnyards, have not been forgotten; and to put him to death wherever found, is allowed to be meritorious, and of public benefit. Hence it follows that our decision should have in view the greatest possible encouragement to the destruction of an animal, so cunning and ruthless in his career. *But who would keep a pack of hounds; or what gentleman, at the sound of the horn, and at peep of day, would mount his steed, and for hours together, 'sub jove frigido', or a vertical sun, pursue the windings of this wily quadruped, if, just as night came on, and his stratagems and strength were nearly exhausted, a saucy intruder, who had not shared in the honors or labors of the chase, were permitted to come in at the death, and bear away in triumph the object of pursuit?* 3 Cai. R. 175 at 180-81. (emphasis added).