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## Mad Dogs and Englishmen: Pierson v. Post [A Ditty Dedicated to Freshman Law Students, Confused on the Merits]

Ridgely Schlockverse III\*

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# Mad Dogs and Englishmen: *Pierson v. Post* [A Ditty Dedicated to Freshman Law Students, Confused on the Merits]

## Ridgely Schlockverse III\*

### Preamble.

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.  
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.<sup>1</sup>

\* A.B., Frizzleburg State University (1953); J.D., University of South Heidelberg School of Law (1957); M.A., Ph.D., Poet Laureate, Oxbridge University (1959). A.k.a. Kenneth Lasson, Professor of Law, University of Baltimore. The author thanks the editors for inviting him to contribute to this symposium issue on wild animal law.

1. With apologies to Noel Coward, the actual text of whose well-known comic poem has become increasingly obscure. *Pierson v. Post*, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805), however, is cited and discussed in practically every property casebook and hornbook, going back almost a century. See, e.g., *SELECTED CASES AND MATERIALS AND OTHER AUTHORITIES ON PROPERTY* 1 (E. Warren ed. 1915). The author hereby exercises his own poetic license to assume that both litigants and judges in this poor passion play, though then living in the Catskills, were born Englishmen. (The dogs in this doggerel, bred in New York, were likely mad to begin with.)

Coward's verse reads in pertinent part as follows:

*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 gurb of the English Sahib  
Merely gets a bit more creased.*

*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.<sup>2</sup>*

*Pierson v.  
Post in the  
curriculum.*

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

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*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.*

2. Daytime dozing, regarded by some as a sign of laziness or senility, is really a basic human need, according to scientists who specialize in napping. Law students have known this for some time; seasoned ones are able to do it with their eyes open. See Peter Gorner, *ZZZonking Out*, TORONTO STAR, Jan. 27, 1992, at C1.

3. Intimidation and confusion have long been part and parcel of the educational process in American law schools. Exhibit #1, of course, is the legendary Professor Kingsfield in the film "The Paper Chase" (also in book form). See generally ROTH, *SLAYING THE LAW SCHOOL DRAGON* 3-5 (1980); KARL N. LLEWELLYN, *THE BRAMBLE BUSH* (1951) (neither of which was ever made into a movie). Over four decades ago there was a short-lived effort to minimize the confusion felt by first-year law students. Harry W. Jones, *Notes on the Teaching of Legal Methods*, 1 J. LEGAL EDUC. 13-17 (1948). Others observe a phenomenon of self-fulfilling prophecy—students expect to be intimidated, and so they are. See James R. Elkins, *Reflections on Humanistic Teaching*, 5 ALSA F. 5-19 (1981).



*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.<sup>4</sup>*

It was a Post and his hunting hounds left their estate at noon  
 beastly day. To fetch a fox (not deer, nor cocks, nor ferrets, geese or 'coon)—  
     All parties were on fire 'cause it was so beastly hot,  
     And burning with desire (yea, perspiring a lot)  
 To nab, grab, and captivate the fox (who too hoped soon).<sup>5</sup>

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4. Students are advised not to study outside of an air-conditioned environment. The debilitating effects of heat have long been recorded by both poet and scientist. Rudyard Kipling, for one, was as easy to wilt as Noel Coward:

*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.*

Rudyard Kipling, *The Young British Soldier*, in *SELECTED PROSE AND POETRY OF RUDYARD KIPLING* 45 (1928).

While studying frequently causes students to succumb to the MEGO Syndrome (as in Mine Eyes Glazeth Over), heat exhaustion or stroke can bring on fainting, delirium, convulsions, or coma. E.C. POULTON, *ENVIRONMENT AND HUMAN EFFICIENCY* 142-43 (1970).

Dogs in heat also do funny things.

5. Legal scholars have theorized that Post was probably frustrated long before the hunt by virtue of his first name Lodowick—the Scottish form of Louis and the traditional monicker given to seekers of the Loch Ness Monster [figment of author's imagination]. Both Pierson and Post were young at the time; the former was born in 1780, the latter in 1777. Their fathers—Capt. David Pierson and Capt. Nathan Post—apparently encouraged this litigation as part of a pre-existing family feud. See J. ADAMS, *MEMORIALS OF OLD BRIDGEHAMPTON* 166, 319, 334 (1962); CHARLES DONAHUE, *CASES AND MATERIALS ON PROPERTY: AN INTRODUCTION TO THE CONCEPT AND THE INSTITUTION* 6 (1st ed. 1974).

Your property professor may expect you to know that the legal term for captivate is "occupy." 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 (we trust the reader will appreciate) shall remain untranslated. *Pierson*, 3



*Mexicans choose to take siestas, Spaniards refuse to hold fiestas  
Til the heat of day is almost done.  
Some like tacos, some tortillas, some are tough as Pancho Villas,  
But only dogs and Englishmen go out in the mid-day sun.<sup>6</sup>*

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 chose to sleep (as if perchance to dream of cooler rounds).<sup>7</sup>

*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.<sup>8</sup>*

6. The heat of the Mexican sun has been known to sap even professional athletes. See Morley Myers, *Mexico's Hot Weather Troubles Cup Players*, UPI, May 31, 1986. But Mexicans aren't the only people who take siestas during the heat of high noon. See *supra* note 2 and accompanying verse.

7. Compare 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 4 at 80. In most law schools, and some countries, the difference between summer and fall is virtually indistinguishable. That's because law schools begin the academic year in mid-August, when in many places the heat is hottest. Compare England, where autumn (said Kipling) announces itself with "a whisper down the field," with, say, Israel, where "the fields lie sere, and crackle under the autumn sun. Pods split and seed scatter, waiting for a winter's rain to give them life. The pomegranates . . . begin to swell and ripen." D'vora Ben Shaul, *The Whisper of the Squill*, JERUSALEM POST, Sept. 19, 1990.

8. "Plainly he couldn't bear it any longer," wrote Kenneth MacKenzie in *Heat*—perhaps an allegory for a freshman facing his first law exams. 2 POETRY IN AUSTRALIA 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, out of his hope that heat would be arrested on its shore." *Id.* 4



1993]

The dastardly interloper.      Lo, though, quite suddenly this Pierson did appear,  
    So calm, so cool (he was no fool—he carried his own beer),  
    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.<sup>9</sup>

   Bankers wouldn't e'er dare 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.<sup>10</sup>

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!"  
    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.)<sup>11</sup>

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9. The worst insult you can give to a Briton is to call him an interloper—otherwise known as a "queue-jumper." Such an effrontery can lead to violence. See *Queue-Jumper Knifed Objector*, LONDON DAILY TELEGRAPH, Feb. 21, 1992; *Chinese Queue-Jumper Killed on Shezhan Exchange*, REUTERS, May 11, 1992; see also *infra* note 15. Both interloping and queue-jumping are similar to plagiarism, the worst crime that can be committed by a legal scholar. Don't do it.

10. There seems to be little substance to the theory that the reason tennis players Ilie Nastase, Jimmy Connors, and John McEnroe are regarded as boors by the British is that they wilt when they play in the heat of Wimbledon. Various polls suggest that Nastase, Connors, and McEnroe are boors even when they play the Iceland Open in December.

11. A fine example of early English protocol, not seen much more except in the United States Congress. It is high irony indeed that the manners-conscious British have raised the parliamentary heckle to an art form, while the traditionally brash Americans insist on propriety and decorum among their lawmakers (at least in public). Thus Senator Claghorn might be moved to declare that his "distinguished colleague from South Carolina is a liar and a cheat." See L. DESCHLER, *JEFFERSON'S MANUAL AND RULES OF THE HOUSE OF*



*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.*<sup>12</sup>

Trespass on  
the case.

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.  
So Post filed suit in trespass on the case (an awkward tool,  
Though what else can one do without a precedential rule  
In contract, or property, or even one in tort)?<sup>13</sup>

*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.*<sup>14</sup>

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12. And here's a fine example of the padded footnote (for the benefit of students who didn't recognize the hot air in previous notes):

Weather affects the human mind in various ways. *See, e.g., supra* notes 2, 4, 6 & 8. 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. PETERSON, 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 J. MT. SINAI HOSP. 719 (1942); Ward and Rastall, *Prognosis in 'Myxoedematous Madness,'* 113 BRIT. J. PSYCHIATRY 149-51 (1967).

13. Be the first in your class to impress your professor with a definition of trespass on the case: it's "a form 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." BLACKS LAW DICTIONARY 1347 (5th ed. 1979).

14. For some reason the words "English" and "eccentric" have always gone together like fish and chips. Students plugging "English w/10 eccentric or eccentricity" into the LEXIS/NEXIS database will discover over 1000 entries—compared to just six for Swedes, 26 for Mexicans, 66 for Spaniards, and 143 for Japanese. If you really want to have fun with LEXIS/NEXIS, get into the "Asses" Library and look up your friends' (or professors')



1993]

O, the tides  
of Justice!

Post won upon the trial but on appeal did worse.  
Each barrister was learned and articulately terse.  
The judges pulled their periwigs and cited legal lore  
From Puffendorf to Bynkershock to Barbeyrac and more:  
"Pursuit's not enough for title; therefore, we reverse."<sup>15</sup>

*In Japan the favorite dish is actually cold raw fish,  
Boiled snake's a delicacy in Cancun;  
Grown men have been known to quiver  
at the sight of Jews' chopped liver—  
But only dogs and Englishmen go out in the mid-day sun.*<sup>16</sup>

personal holdings via the public tax records. You may first want to read the agreement you signed.

15. Is this as good as *L.A. Law*, or what? Imagine McKenzie, Brackman & Gang taking on the learned barristers for Pierson and Post. Mr. Sanford, for Pierson (citing numerous Latin authorities): "There must be a taking . . . even wounding will not give a right of property." *Pierson*, 3 Cai. R. at 176-77. Mr. Colden, for Post (citing Puffendorf & Bynkerschock. Yes, those are their real names. Keep reading.): "Pursuit . . . gives an exclusive right." *Id.* at 176.

Samuel Puffendorf (1632-1694) was the world's first professor of international law and an expert on Korean boat jurisprudence. He was also the founder of the naturalist school of legal philosophy, which held that the sole source of international law came from the law of nature as interpreted by Middle-aged monks observing the mating habits of heat-crazed monkeys. Cornelius van Bynkerschock (1673-1743) was a prominent Dutch jurist and the leading exponent of the opposing theory that the basis of international law was founded only in the common consent of nations, by virtue of either treaties or custom or superior air power. GERHARD VON GLAHN, *LAW AMONG NATIONS* 43-44 (2d ed. 1970).

See also *Pierson*, 3 Cai. R. at 179; cf. Sollers v. Sollers, 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 taken by another fisherman (especially if he screamed at the top of his lungs, "Sorry, Charlie!").

16. Perhaps Englishmen venture out into the afternoon heat precisely because there is no such thing as a British delicacy which might keep them indoors at lunchtime—unless you count marmite with clotted curds and kidney pudding. British food has been likened to everything from basic fuel to the worst nightmare of a dyspeptic chef. See, e.g., Peter Greenberg, *Traveling in Style*, L.A. TIMES, Mar. 19, 1989, S2 (Magazine), at 79 (noting the "centuries-old tradition of bad British cuisine"); Calvin ben David, JERUSALEM POST, Sept. 28, 1990 ("Works of Shakespeare films are as rare to British cinema as good food is to British cuisine.").



A noble  
dissent.

"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?"  
(Just mad dogs and Englishmen's the answer that he meant.)<sup>17</sup>

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17. Judge 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?*



*Lasson*

1993]

*So, O students of the law with all these rules crammed down your craw  
Consider all that sweat as if it's none  
Compared to all the time and toil, tribulations, trials most royal  
Of those dogs and Englishmen gone out in the mid-day sun.<sup>18</sup>*

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18. Two blessings for freshmen law students faced with having either to  
(1) recite *Pierson v. Post* in class:

We've all had professors who themselves could be called mad dogs in heat.  
*Illegitimus non carborundum* (free translation: *Don't let the bastards get you  
down, or No sweat!*)

or (2) explain the law on an exam:

*Blessed be he, who, having nothing to say, refrains from giving us wordy  
evidence of the fact.*





"If it please the Court, may I point out that I requested  
to approach the Bench before learned counsel requested  
to approach the Bench."

\* RODNEY R. JONES, ET AL., DISORDERLY CONDUCT 62 (1987) (Illustration by Lee Lorenz).