BROWSING IN THE ENGLISH REPORTS

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To those who regard the law as a source of historical data, or to those who find their literary appetites somewhat jaded by the repetitiveness of modern day scribes, I can recommend an evening or two with the *English Reports* as holding out infinite promise of reward.

Many illustrations are to be found of the imaginativeness of the punishments meted out in earlier times. In *The King* v. *Dangerfield*[1] the defendant, having been convicted of publishing a libel against the then Duke of York, received the following sentence:

> That he should pay a fine of 500£; that he should stand twice in the pillory, and go about the hall with a paper in his hat signifying his crime; that on Thursday next he should be whipped from Aldgate to Newgate, and on Saturday following, from Newgate to Tyburn.

The manner in which women may be cured, at least temporarily, of their notorious verbosity is reported in *The Queen* v. *Foxby*[2], where a woman was convicted upon an indictment for being a common scold. The reporter's note is as follows: "The punishment of a scold is ducking; and Holt, Chief Justice, when the exception was first made, said, 'that it was better ducking in a Trinity than in a Michaelmas term". At page 965 the proceedings on a Writ of Error are reported. On this occasion Chief Justice Holt remarked, "that ducking would rather harden than cure her; and if she were once ducked, she would scold all the days of her life."

Lest it be thought that children of today are more prone to delinquent acts than the children of another age, one may find the case of *William York*[3] instructive. It is an account of the trial of a boy of 10 years of age who was convicted for the murder of a girl of five, and who received a sentence of death. The unanimous decision of the court went partly as follows:

> There are many crimes of the most heinous nature, such as in the present case, the murder of young children, poisoning parents or masters, burning houses, etc. which children are very capable of committing; and which they may in some circumstances be under strong temptations to commit; and therefore, though the taking away the life of a boy of ten years may savor of cruelty, yet as the example of this boy's punishment may be a means of deterring other children from like offences; and as the sparing this boy, merely on account of his age will probably have a quite contrary tendency, in justice to the publick, the law ought to take its course; unless there remaineth any doubt touching his guilt.

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1. (1685) 87 E.R. 43; 3 Mod. 68.
2. 87 E.R. 776; 6 Mod. 12.
3. (1748) 168 E.R. 35; Fost. 70.

Actually, the Chief Justice granted several reprieves, following which the accused "had the benefit of His Majesty's pardon, upon condition of his entering immediately into the sea-service."

While criticism is sometimes heard of the inadequacy of conditions in our court houses, the following account may perhaps prompt a second look at the allegations.[4]

> At the Old Bailey sessions in April, 1750, one Mr. Clarke was brought to his trial; and it being a case of great expectation, the Court and all the passages to it were extremely crowded; the weather, too, was hotter than is usual at that time of year.
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> Many people who were in Court at this time, were sensibly affected with a very noisome smell; and it appeared soon afterwards, upon an enquiry ordered by the Court of aldermen, that the whole prison of Newgate, and all the passages leading thence into the Court were in a very filthy condition, and had long been so.
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> What made the circumstances to be at all attended to was, that within a week, or ten days at most, after the session, many people, who were present at Mr. Clarke's trial, were seized of a fever of the malignant kind; and few who were seized recovered.
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> The symptoms were much alike in all the patients; and in less than six weeks' time the distemper entirely ceased.
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> It was remarked by some, and I mention it because the same remark hath formerly been made upon a like occasion, that women were very little affected; I did not hear of more than one woman who took the fever in Court, though doubtless many women were there.
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> It ought to be remembered, that, at the time this disaster happened, there was no sickness in the gaol more than was common in such places. This circumstance, which distinguisheth this from most of the cases of like kind which we have heard of, suggesteth a very proper caution; not to presume too far upon the health of the gaol, barely because the gaol-fever is not among the prisoners. For without doubt, if the points of cleanliness and free air have been greatly neglected, the putrid effluvia which the prisoners bring with them in their cloaths, etc., especially where too many are brought into a crowded court together, may have fatal effects on people who are accustomed to breathe better air; though the poor wretches, who are in some measure habituated to the fumes of a prison, may not always be sensible of any great inconvenience from them.

The Lord Mayor, a justice of the Common Pleas, a baron of the Exchequer, an alderman, a gentleman of the Bar, two or three students, one of the under-sheriffs, an officer of the Lord Chief Justice, several of the jury, and about forty other persons are reported to have died as a result of this incident.

In *Land* v. *North*[5], counsel were interrupted by the following incident:

> At this moment the whole Court, which happened to be very much crowded, became an entire scene of confusion, everyone arising at an instant and looking upwards. Terror was strongly expressed in every man's countenance. Mr. Justice Willes got out by the private door on his side of the court. Lord Mansfield, Mr. Justice Ashurst and Mr. Justice Buller left the court with great precipitation by the usual entrance and retired into the Lord Chancellor's private room. The Bar, the bystanders, all present to the number of near 200 (except about 8 or 10) rushed out of court with the utmost precipitation. The barristers pressed towards the curtain, which being down, very much impeded their escape. Entangled with this and their gowns, the greatest part of them fell, with those from other parts of the court, one over another on the steps into the hall. Some thought the roof had given way, some that there was an earthquake—all ignorant of the real cause.

4. *Abraham Evans*, (1750) 168 E.R. 37; Fost. 74.
5. (1785) 99 E.R. 877; 4 Doug. 273.

The panic, however, was as short as it was ridiculous. In a few minutes as many as could returned, and in about a quarter of an hour, the Court was resumed, without anyone having received material injury. Lord Mansfield then addressing himself to Mr. Wood and the Bar in general told them, that if they had any wits left, they might go on. A maid servant belonging to an officer of the House of Commons had accidentally thrown a little dirty water on the skylight of the Court, and a few drops coming through an aperture had, falling on the heads of two or three, caused all this strange confusion.

Tyssen v. *Clarke*[6] contains the story of an enterprising courthouse doorman:

> And now, upon the motion of Mr. Justice Blackstone, order was made by the rest of the judges, that the galleries of the court be open for the admission of students of the several inns of court.
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> The doorkeeper not immediately appearing, and it being apprehended that he meant to take advantage of the public curiosity, by extorting fees for admittance, Mr. Justice Blackstone said, he remembered when a gentleman, a counsel, had given a quarter guinea for admittance, the Court was about to commit the officer: but he added, I believe, on his asking pardon, and desiring to restore the money, at the intercession of the gentleman, the Court did not commit him.

A note from the report of *Somerset* v. *Stewart*[7] indicates that judges of an earlier time may not have been adverse to mixing business and pleasure on occasion:

> Lord Mansfield observes, the case alluded to was upon a petition in Lincoln's Inn Hall after dinner; probably, therefore, might not, as he believes the contrary is not usual at that hour, be taken with much accuracy.

The perils attached to membership in the judiciary in years past are vividly illustrated by a couple of episodes from the career of Lord Mansfield. In *R.* v. *John Wilkes*[8] he drew attention to threats that had been made against him:

> It is fit to take some notice of the various terrors hung out; the numerous crowds which have attended and now attend in and about the hall, out of all reach of hearing what passes in Court; and the tumults which, in other places, have shamefully insulted all order and government. Audacious addresses in print dictate to us, from those they call the people, the judgment to be given now, and afterwards upon the conviction. Reasons of policy are urged, from danger to the kingdom, by commotions and general confusion.
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> Give me leave to take the opportunity of this great and respectable audience, to let the whole world know, all such attempts are vain. . . . I pass over many anonymous letters I have received. Those in print are public; and some of them have been brought judiciously before the Court. Whoever the writers are, they take the wrong way. I will do my duty, unawed. What am I to fear? That *mendax infamia* from the press, which daily coins false facts and false motives? The lies of calumny carry no terror to me. I trust, my temper of mind, and the color and conduct of my life, have given me a suit of armour against these arrows. . . . I will not do that which my conscience tells me is wrong, upon this occasion; to gain the huzzas of thousands,

6. (1774) 98 E.R. 766; Lofft. 496.
7. (1772) E.R. 499, at 503; Lofft. 1, at 8.
8. (1770) 98 E.R. 327; 4 Burr. 2527.

> or the daily praise of all the papers which come from the press: I will not avoid doing what I think is right; though it should draw upon the whole artillery of libels; all that falsehood and malice can invent, or the credulity of a deluded populace can swallow . . . the threats go further than abuse: personal violence is pronounced. I do not believe; it is not the genius of the worst men of this country, in the worst of times. But I have set my mind at rest . . . once for all let it be understood, "that no endeavours of this kind will influence any man who at present sits here" . . . no libels, no threats, nothing that has happened, nothing that can happen, will weigh a feather against allowing the defendant, upon this and every other question, not only the whole advantage he is entitled to from substantial law and justice; but every benefit from the most critical nicety of form, which any other defendant could claim under the like objection.

That these were not imaginary dangers is made clear by the following passage:[9]

> In the night between Tuesday the 6th and Wednesday the 7th of June, Lord Mansfield's house in Bloomsbury Square was attacked by a party of the rioters, who, on the Friday and Tuesday, to the amount of many thousands, had surrounded the avenues to the two houses of parliament, under pretence of attending Lord George Gordon, when he presented the petition from the Protestant Association. On the Tuesday evening the prison of Newgate had been thrown open, all the combustible parts reduced to ashes, and the felons let loose upon the public. It was after this attempt to destroy the means of securing the victims of criminal justice, that the rioters assaulted the residence of the Chief Magistrate of the first Criminal Court in the kingdom; nor were they dispersed till they had burned all the furniture, pictures, books, manuscripts, deeds and, in short, everything which fire could consume in his lordship's house; so that nothing remained but the walls; which were seen the next morning almost red hot, from the violence of the flames, presenting a melancholy and awful rim to the eyes of the passengers.

Although Lord Mansfield remained on the bench during the trial of some of the rioters, he refrained from giving an opinion.

Possibly one of the most scandalous incidents of the 1770's was a sort of parlor game wherein the members of the nobility wagered upon the sex of one Monsieur Le Chevalier D'Eon. It is recorded that many thousands of pounds were placed. The game came before the courts in the case of *Da Costa* v. *Jones*.[10] In this case one wagerer sued to obtain payment of the bet, and introduced evidence in support of his view of D'Eon's sex. However, Lord Mansfield refused to entertain the action. On the same day the court disposed similarly of the case of *Roebuck et al* v. *Hammerton*[11] which involved another wager in the form of a policy of insurance on the same subject. History records that the matter really went unresolved until the death of the subject "gentleman". However, even then there were conflicting reports from those in attendance upon the body after his death.

If the foregoing has not been sufficient to whet your appetite for the *English Reports*, I would suggest that in all probability it is my selection of cases which is at fault, and would urge you to select any volume at random and decide for yourself.

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9. *Hodges* v. *Middleton*, (1780) 99 E.R. 276, at 278; 2 Doug. 431, at 435.
10. (1778) 98 E.R. 1331; 2 Cowp. 729.
11. (1778) 98 E.R. 1335; 2 Cowp. 736.