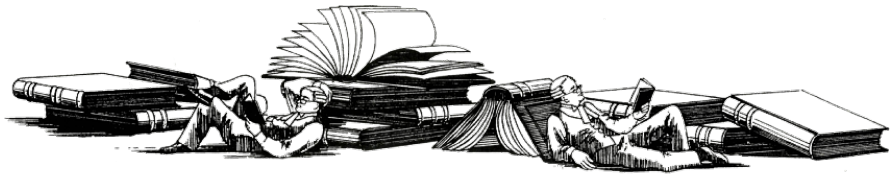

NOTES ON THE STYLE OF THE LAW

Happy Foxing Day

by

ELIJAH Z GRANET

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foxing day — vulpine law — foxes — nineteenth century — fox law — fox

§ 1 Introduction

EVERY year, on the twenty-sixth day of December, this publication takes a moment to celebrate the wonderful world of fox law, in honour of a beloved pillar of the legal community who was so tragically beaten to death by a despised sinkhole of the aforesaid community some years ago. Let us now rejoice in the bizarre world of vulpine jurisprudence! This year, I present three odd nineteenth century cases in which foxes had an unexpected legal presence.

§ 2 Son of a…

In *R v Allen*,[1] the Court of Common Pleas' Tindal LCJ was presented with the unusual question of if, in the criminal law, a dogs, foxes, and otters were close enough. The defendant had been indicted on a charge of attempting bestiality with 'a certain animal called a

1 (1844) 1 Carrington & Kirwan 495; 174 ER 908, Assizes

bitch'. Under the strict pleading rules then applicable to the indictment (considered, in part, necessary to allow for clear pleas of the prosecutory bar of *autrefois acquit*), his counsel, one Mr Huddleston, challenged the word 'bitch' in the indictment as too vague. It could refer to 'female dog, or it may be a bitch fox, a bitch otter, or the bitch of some other animal'.[2] Tindal CJ was unconvinced. The word 'bitch' was 'quite sufficient' and the resulting description of an animal also 'sufficient'.[3] The defendant was subsequently found guilty. The report goes into no further detail as to the reasoning, but it is a sign that while dogs (genus *Canis*) and the common fox (genus *Vulpes*) may be taxonomically distinct (and otters, being mustelids, even more so), they are joined in, as far as this case is concerned, an unexpected way: by their bitchiness.

§ 3 *Statutory interpretation, fox style*

With a heavy heart, I must acknowledge that the law is often unkind to foxes. One fascinating instance of this dislike of Britain's quadrupedal scarlet rogues was shown by the Court of King's Bench the case of *Budge v Parsons*.[4] There, Budge had been convicted of an offence under the Cruelty to Animals Act 1849,[5] s 2 for torturing a cock.[6] In his defence, Budge pleaded that a cock was not an animal, because the statute used the word 'animal' and, in s 29, defined animal as follows:

> The word 'animal' shall be taken to mean any horse, mare, gelding, bull, ox, cow, heifer, steer, calf, mule, ass, sheep, lamb, hog, pig, sow, goat, dog, cat, or any other domestic animal.

As these were all quadrupedal, the principle of *ejusdem generis* would indicate Parliament did not mean that bipedal animals, like chickens, were subject to the Act's protections.This prompted sceptical interventions from both Wightman and Mellor JJ who noted that Parliament's intent appeared to be to prevent wanton cruelty to any animal.[7] By contrast, counsel arguing in support of the conviction pointed out that s 3 of the Act followed 'cock' with 'or other kind of animal', indicating that cocks were animals.[8]

In his judgment, Wightman J, *inter alia*, based his case for affirming the conviction on the statute's use of the word 'domestic' in s 29 to interpret s 2. The use of 'domestic' could only have, His Lordship concluded, been indicative of the fact Parliament wanted to avoid

2 *ibid*, 496; 909
3 *ibid*
4 (1863) 3 Best & Smith 382; 122 ER 145, KB
5 12 & 13 Vict, c 92
6 I am grateful at this juncture that this publication enjoys readers of immense maturity who will not in the slightest be amused by the idea of 'cock torture', which is a horrific thing when done to an animal and, due to my readers' immense moral rectitude and the stiffness of their collective upper lips, raises no other sophomoric or crude connotations.
7 *ibid*, 385; 146
8 *ibid*

the conclusion that s 2 applied to foxes. This would have led to the, presumably absurd, conclusion that 'persons pursuing the ordinary sports of the field would have been liable to a penalty' for ill-treatment of foxes.[9] Thus, with the agreement of Crompton & Mellor JJ, the conviction was upheld. Thus, in this case, statutory interpretation hinged on the presumption that the fox had no rights. This case demonstrates that anti-fox prejudice is so ingrained into English law that the judicial robes might as well be wives' kimonos. Unfortunately,

§ 4 A duty not to kill foxes

The case law over how and in what circumstances one might kill a fox is, due to its constitutional significance, at least passingly familiar to any law student in Britain.[10] However, a far, far, far less well-known case in the Court of Exchequer in 1867 dealt with the converse: the obligation not to kill foxes. In *Foulger v Newcomb*,[11] the plaintiff, a gamekeeper, had brought an action for slander over the defendant's statement that he, the plaintiff, killed foxes. This was slanderous not due to special regard for animal welfare, but rather because a specific occupational duty of the plaintiff in gamekeeping was considered to have a (which were to be kept for hunting) and it was understood that no one who did so would be employed in that profession.[12] The defendant pleaded demurrer on the basis that there was no special damage as required in a slander action (save if one of the exceptions to the rule applied), because it was known that foxes were vermin and thus there was no actionable imputation over the killing of the hated red beasts.[13]

Channell B found that the declaration of the plaintiff showed a good cause of action. This was because there was in the allegation of fox-killing an imputation of misconduct in a profession, namely gamekeeping, which was an accepted exception to the rules on special damage. Further, the meaning of the words imputing misconduct would prejudice the gamekeeper in his vocation, which, not being illegal, was entitled to the protection of the law. His Lordship considered it would not be appropriate to take judicial notice that all gamekeepers were under a duty not to trap foxes, but, because the plaintiff had pleaded that the defendant and anyone else who knew his employment would be aware of the specific duty in this particular case, the hearers of the defendant's alleged slander would be able to understand the defamatory meaning.[14] Thus, the counts were good and the action could proceed, showing that, despite the law's frequent hostility to our vulpine friends, there are occasions on which the courts will be receptive to the idea of *not* killing them!

9 *ibid*, 386f; 147f
10 See *R (Jackson) v Attorney General* [2006] 1 AC 262, HL
11 (1867) LR 2 Ex 327
12 *ibid*, 328
13 *ibid*, 329
14 *ibid*, 331–332

§ 5 Conclusion

Foxing Day is always a bittersweet milestone in the calendar. We mourn and we celebrate. Yet, ultimately, even as we grieve the foxes we have lost, we must take solace in the promise of more foxes yet to come. Let us look to the forthcoming year of law and hope to make it yet foxier. Until next time, happy Foxing Day!

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