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THE STATE TRIALS AND CONTEMPT OF COURT.

Few of the many lawyers who have read Warren's celebrated *Ten Thousand a Year*—and no lawyer should leave unread this novel, the best of its class—can have passed over without notice the commendation of the *State Trials* given by the Attorney-General (probably Sir John Copley) to Aubrey when the latter was beginning the study of the law with a view of Call to the Bar: "the 'State Trials;' ay, by Jove, Aubrey, I read every word of them, speeches, examinations, cross-examinations of witnesses, reply, and summing up. That's where I first learned how to cross-examine a witness Consider: the counsel employed were, you know, generally first-rate men; and then you learn a great deal of constitutional law." This has been quoted many times—for example by Wallace in his excellent work, *The Reporters* (4th ed., Boston, 1882, p. 65) —and invariably with approval, so far as I know.

I cannot bring my mind wholly to agree with this commendation, at least for present day lawyers. In the later volumes of the series there are, indeed, many admirable reports of cases which were admirably conducted by all parties; but the earlier volumes are full of cases in which Judge and Crown Counsel vie with each other in the abuse and brow-beating of the unfortunate accused, their witnesses and counsel.

There is an occasional flash of rude humor. Lord Chief Justice Saunders in 1683, when Counsel challenges the Array, expostulates with him: "Gentlemen, I am sorry you should have so bad an opinion of me, as to be so little a lawyer not to know this is but a trifle, and nothing in it. Pray, gentlemen, do not put these things upon me." (8 St. Tr. 226). And when Mr. Thompson, Prisoner's Counsel, desires that the Challenge should be read, the Chief Justice says, plaintively:

'You would not have done this before another judge: you would not have done it, if Sir Matthew Hale had been here." (do. do., 227). Of course Counsel for the Crown had to join in, the impudent Jeffries (then a Serjeant) jeering "Here's a tale of a tub, indeed"; and the Attorney-General, Sir Robert Sawyer: "Very few but Mr. Thompson would offer it."

Jeffries in the same case later, when Thompson claimed that if the Challenge was insufficient in law the Crown should demur, continues his insolence: "Pray tell me, Robin Hood upon Greendale stood; and therefore you must demur to it": do. do., 234. And even Chief Justice Pemberton says of an argument that Counsel (for the prisoner of course) might as well throw his cap in the air.

But whatever is said of the Text, the Notes are a veritable treasure. My friend, the late Edward Porritt—*valde deflendus*—was wont to say of my own efforts that the Notes were more interesting and more valuable than the Text: however it may be with my little works, that is undoubtedly true of the State Trials. The Notes are a perfect mine of curious legal lore dealing with all kinds of questions arising in all ages of English history. It is a delight to read them. It cannot fairly be said that they will assist the practicing Barrister to make money but they furnish a pleasing relaxation—better to my mind than any fiction. I shall speak only of Contempt of Court.

In these modern days, it would be considered a Contempt of Court to state that a judge would pay attention to the desires of King or Queen. It was not always so. In 8 St. Tr., 41(n), we read of one John de Northampton getting into trouble in 18 Edward III (1344). The story reads: "This man was an attorney of the Court of King's Bench, (to which circumstance attention should be given in considering the case as an authority), and having written of the judges of that court, that they had independence enough, not to be swayed by royal commands, he was adjudged in so doing to have been guilty of a contempt of the court, was committed into custody and as it seems was obliged to find mainperners. Lord Coke thus relates the case, with some confusion of John and Robert. Mic. 18 E. 3, coram rege Rot. 151. Libellum.

John de Northampton, an attorney of the King's Bench, wrote a letter to John Ferrers one of the king's counsel, that neither Sir Wm. Scott, chief justice, nor his fellows the kings justices, nor their clerks, any great thing would do by the commandment of our lord the king, nor of queen Philip, in that place, more then of any other

of the realm; which said John being called, confessed the said letter by him to be written with his own proper hand. "*Judicium Curiæ. Et quia praedictus Johannes cognovit dictum literam per se scriptam Roberto de Ferrers, qui est de concilio regis, quae litera continet in se nullam veritatem: praetextu cujus dominus rex erga curiam et justiciarios suos hic in casu habere posset indignationem, quod esset in scandalum justiciae et curiae. Ideo dictus Johannes committitur maresc' et postea invenit 6 manucaptores pro bono gestu,*"

I translate the judgment: "Judgment of the Court:
And inasmuch as the aforesaid John admits the said letter as written by him to Robert de Ferrers who is of the King's Council, which letter contains no truth: by reason of which our Lord the King may be indignant in the matter against the Court and his Judges which would be a scandal to justice and the Court. Therefore let the said John be committed to the Marshall and thereafter let him find six sureties for his good behaviour."
(Of course Robert de Ferrers was not a K.C. but a member of the King's Council).

It will be noted that Chief Justice Sir William Scott (of whom Lord Campbell can tell us nothing) and his fellows indignantly asserted that there was no word of truth in the statement that they would not do as the King or even the Queen told them.

Of course we read in Moor, 247: "Si un dit al Judge, Magistrate, "ou auter officer paroles que luy disable defaire son office ou fait auter contempt, il peut luy imprison." That is "if anyone says to a Judge, Magistrate or other officer words which disable him from performing his office or commits any other contempt, he may imprison him."

But it is not only disabling words which may constitute Contempt, but disabling from the performance of office by omission to furnish proper nourishment. For example, take this case, mentioned in 9 St. Tr. 188(n): "In N. Luttrell's MS. 'Brief Historical Relation, &c.,' in the library of All Soul's College, Oxford, the following account is given of a remarkable exercise upon this Goodenough of the power of commitment, as it seems, for contempt: 'The 4th September, 1682, the session began at Hick's-hall, for the county of Middlesex, when the jury found several bills; and upon complaint against Mr. Goodenough, the under-sheriff, for not providing a dinner for their worships, the justices committed him to prison denying bail.'" Anyone who has, like myself, lunched with the judge at the Old Bailey will know

that the Sheriffs nowadays do not run any risk of committing Contempt of Court in that regard—the lavish provision of food and drink is truly English.

Come we now to another species of contempt. In 1682, Benjamin Leach, a bricklayer was indicted at the Old Bailey for a misdemeanor, criminal libel, on Sir William Pritchard, Lord Mayor of London. He refused to enter any other plea than that the jury had not been properly impanelled and returned. In the note to this case: 9 St. Tr., 351 (n), we read:

"October, 1682. One Leach, a bricklayer, having spoke words at the last election of a lord mayor, that the two sheriffs were tools set up by the lord mayor; a bill of indictment was preferred against him to the grand jury at the Old Bailey, and they returned it Billa Vera; but the said Leach gave in a special plea, having council to argue the same; but Mr. Justice Levins and Mr. Recorder, who were then on the bench, would not meddle with the same, without the advice of the other judges; but the lord mayor and the alderman overruled the said plea, and fined him twenty marks, as 'nihil dicit.'" Narcissus Luttrell's "Brief Historical Relation of State Affairs." MS. in the library of All Souls' College, Oxford.

The offending bricklayer Leach fared badly—of course, what he and his cousel called a plea was in reality a Challenge to the Array which could be made only after Plea. The whole Bench ruled against the plea and as we read: 9 St. Tr., 358.

"Upon this Leach was pressed to plead Not Guilty: which he refused, saying several times. He would plead no other plea than what he had offered. Then the court gave him half an hour's time to advise with his counsel; who withdrew and advised accordingly, and returned with the same resolution not to alter his plea, and tendered his plea again to the court, who again rejected it; and because he would plead no other plea, he (being first asked, whether he would submit to the court and ask pardon; and refusing so to do, having as he apprehended done no wrong) was fined 20 marks, and committed to Newgate till he should pay the same; which was done that night, and Leach thereby discharged."

I find it difficult to understand why Leech's conduct was not treated as a refusal to plead and considered equivalent to a plea of Guilty. One of the rules, (as is well-known), of the Common law was that while a prisoner arraigned for Petit Treason or any Felony except Petty Larceny on standing mute of malice was sentenced to the *Peine forte et dure*, if the charge was High Treason or Petty

Larceny, or Misdemeanour, and the prisoner stood mute of malice it was considered equivalent to a conviction. Blackstone: *Commentaries on the Laws of England,* vol. iv. pp. 324, 325.

The most horrible instance of the application of this rule that I have found was in 39 Henry 111, (1255). Certain Jews in London were charged with "ceremonial murder" of a Christian boy for their religious rites, then considered a Treason. The *De Antiquis Legibus Liber,* (Camden Society, London, (1846) at p. 23), gives us the following account:

Eodem anno in festo Cecilie, tunc temporis die Lune, ducti sunt ad Westmonasterium iiiixx et xij. Judei de Lincolnia, qui imprisonati fuerunt apud Turrim Londonarium pro morte cujusdam pueri masculi, quem debuerant necasse apud Lincolniam in despectu fidei Christiane; de quibus xviii., qui noluerunt ponere se super veredictum Christianorum sine Judeis, quando Rex fuit apud Lincolniam de morte illa, et tunc de illa indictati fuerunt coram Rege, eodem die fuerunt detracti et etiam post prandium, et deficiente die, de nocte suspensi. Alii vero lxxiiij reducti sunt apud Turrim."

I translate as literally as possible:

"In the same year on St. Cecilia's Day (i.e., November 22) at that time on Monday were brought to Westminster fourscore and twelve (92) Jews of Lincoln who were imprisoned in the Tower of London for the death of a certain lad whom they were charged with killing at Lincoln in contempt of the Christian faith; of whom eighteen, who refused to put themselves upon a jury of Christians without Jews when the King was in Lincoln, concerning this death and they were then indicted before the King, upon the same day were drawn (to the gallows) and even hanged at night after dinner and the light failing. The other seventy-four were brought to the Tower."

This might, but for the certainty that the treatment of the unhappy eighteeen Jews was not exceptional, be thought only part of the centuries of agony or, as Robert Browning puts it, "the torture, prolonged from age to age," meted out to Jews by Christians on "Holy Cross" days and other days,

> "By the Ghetto's plague, by the garb's disgrace,
> By the badge of shame, by the felon's place,
> By the branding tool, the bloody whip . . ."

But there were too many instances of the like treatment to Christians for us to harbour this thought. This, however, is aside from the subject of this paper.

If I shall succeed in inducing my brethren to include in their vacation reading the inimitable Notes to Howell's State Trials, I shall be glad.

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THE RULE IN SHELLEY'S CASE.—To the intense relief, no doubt, of countless English law students, the rule in Shelley's case is now (January 1, 1927) abolished. That rule, which was once explained by a distinguished silk, with somewhat hazy notions of his period of pupilage, as that which says that if you leave your property to one person the other fellow takes it, had a long and vigorous life and continued to be the bugbear of successive generations of students, not only in this country but in the United States, whose early lawyers imported it, like the other parts of the common law, when they settled in the colonies. In an exhaustive article on the subject in the January number of the *Michigan Law Review,* the writer, Mr. T. A. Lee, refers to a recent case in Kansas which, despite a statute generally supposed to have abolished the rule in Shelley's case as applied to wills, gave effect to the rule, and he concludes from an exhaustive examination of a large number of cases in the various States that the courts have properly construed the statutes supposed to have abolished the rule in Shelley's case as to wills, and that the Kansas decision is based upon a complete misconception of the rule. It seems odd to find the courts of the United States, where so much of the old learning on such topics has been jettisoned, still wrestling with this ancient and, in many respects, ridiculous rule.