



# PIERSON V. POST

## THE NEW LEARNING

*Daniel R. Ernst*

**P**IERSON V. POST, 3 Caines 175 (N.Y. 1805), one of the most commonly assigned cases in the first-year Property course, was a dispute over the ownership of a fox discovered at large “upon a certain wild and uninhabited, unpossessed and waste land, called the beach.” For a very long time, all that was known about the case, other than the report itself, was a vivid but antiquarian account published in the *Sag Harbor Express* of October 24, 1895, by the judge and local historian Henry Parsons Hedges (1817-1911). Hedges claimed to have met Jesse Pierson (1780-1840) and Lodowick Post (1777-1842). He judged them “specimens of physical power and high resolve that would have made them as champions formidable in modern or ancient times,” as well as “rich, resolute, [and] wilful.” According to Hedges, Jesse was walking home from his job as a schoolteacher “when he saw the fox fleeing from his pursuers and run into the hiding place,” which Hedges identified as “an old shoal well.” “In a moment, with a broken rail, he was at the well’s mouth and killed the fox, threw it over his shoulder, and was taking it home when Lodowick, with his hounds and partisans, met him and demanded the fox.” Jesse demurred. “It may be you was going to kill him, but you did not kill him,” he retorted. “I was going to kill him and did kill him.”

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Readers have never known just how far to credit Hedges's account. Our knowledge of the case improved significantly with the appearance of a spate of articles between 2002 and 2009. Here is a summary of "the new learning."

## THE ANTAGONISTS

Because of the youthfulness of the litigants and the great disparity between the expense of the litigation and the value of the fox, generations of property teachers have speculated whether animosity between the litigants' fathers, who must have paid the bills, was behind the case. Property teachers dating at least from the great James Casner and Barton Leach have suspected that the dispute had an ethnic dimension. It was a squabble between a "stubborn affronted Dutchman" and an "English-descended violator of the fox-hunter's code," they speculated, seemingly on the supposition that "Lodowick" was a Dutch name. In an article published in 2006, law professor Bethany Berger points out that the name was "as likely English or Scottish."<sup>1</sup> (One might add that if the Posts were Dutch, Hedges would have discovered the fact and woven it into his tale.) Now it appears that although a social conflict was at work, it was not ethnic but a clash between an established member of a traditional society and an ostentatious arriviste.

Jesse Pierson's family had deep roots in his community, Southampton, in what is now Suffolk County, New York. His father, David, fought in the Revolutionary War and, according to Hedges, was "of the best blood of England: so strong in Calvinist inclinations and proclivities that some called him a fatalist." Berger adds that David was elected thirteen times as the town's "fence viewer," "charged with ensuring that individuals maintained their portion of fence against straying animals and did not fence in land that was not their own," or as its commissioner of highways. His service confirms Hedges's claims for his stature in Southampton society.

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<sup>1</sup> A. James Casner & W. Barton Leach, *Cases on Property*, revised temporary edition (1948), quoted in Bethany Berger, "It's Not About the Fox: The Untold History of *Pierson v. Post*," *Duke Law Journal* 55 (2006): 1092 n. 11; *ibid.*, 1092 n. 10.

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The Piersons probably regarded the Posts as vulgar upstarts, who, with their fox hunting, aped the English gentry and trampled upon social conventions. Nathan Post had become wealthy not through peaceable, virtuous agriculture but war and commerce. The Posts' appearances in local histories, Angela Fernandez of the University of Toronto Faculty of Law reports, were "usually in association with a lucrative economic interest they were involved with such as whaling."<sup>2</sup> They lived in town, in what Hedges described as "a capacious dwelling," with well-decorated walls, wainscoting, and other touches "in what was then thought superior style." (It also had a whipping post for the Posts' slaves, which Hedges claimed to have seen.) Nathan had gained a financial stake as a privateer during the Revolutionary War and made still more money trading with the West Indies. A contemporary who tangled with him in a minor affair of town politics left a scathing description:

Capt. Post descended from parentage extremely low and poor; accordingly his education was rough and uncouth. Yet he possessed a strong desire to be thought a man of information and importance. This frequently led him to tell large, pompous stories, of which himself was ever the hero. He was a great swaggerer over those whom he found calculated to bear it; but to others he was supple, cringing, and mean.<sup>3</sup>

This contemporary was a quarrelsome man who invariably depicted his opponents in the worst possible terms. Perhaps Post's gravestone was a more reliable guide to his character. "He was a respectable Magistrate, a kind relation, a good Patriot, and an honest man," it proclaimed. Then again, perhaps even this testimony should be taken with a grain of salt. After all, *de mortuis nil nisi bonum*.

In any event, and as Hedges wrote, "If a contest should arise between these sons, and if the fathers should each advocate the cause of his son, it would be no ordinary conflict."

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<sup>2</sup> Angela Fernandez, "The Lost Record of *Pierson v. Post*, The Famous Fox Case," *Law and History Review* 27 (2009): 167.

<sup>3</sup> Stephen Burroughs, *Memoirs of Stephen Burroughs* (1811), 2: 41, quoted in Berger, "It's Not About the Fox," 1127.

## PROCEEDINGS IN THE JUSTICE'S COURT

The limited view of proceedings in the trial court from the published opinion has long frustrated teachers who like to have their first-year students consider how lawyers shape the raw facts of a dispute into a cause of action. We now have more insight into this process, because Fernandez discovered the “judgment roll” in the case and posted her transcription on the website of the *Law and History Review*.<sup>4</sup>

Pierson and Post had their altercation on December 10, 1802. Before the month was out – on December 30, in fact – their dispute was before John N. Fordham, a Justice of the Peace. We now know that Post claimed an injury of up to \$25, the maximum under the streamlined procedures of the Twenty-Five Dollar Act of 1801. Apparently Post hired a lawyer to write his complaint, for, as Charles Donahue has observed, it was too well-framed to have come from a lay pen.<sup>5</sup> At trial however, the litigants appeared “in their proper person” – that is, without representation by counsel.<sup>6</sup>

The judgment roll contains nothing like a verbatim transcript of the proceedings, but it does reveal a few more nuggets about the trial. It states that Fordham convened his court in a private residence, “the house of Hugh Gelston,” which was located in Southampton in *Suffolk County*.<sup>7</sup> In keeping with the Twenty-Five Dollar

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<sup>4</sup> A judgment roll is “the file of records comprising the pleadings in a case, and all the other proceedings up to the judgment, arranged in order.” *Black’s Law Dictionary* (1891). See Fernandez, “Lost Record”; [www.historycooperative.org/journals/lhr/27.1/](http://www.historycooperative.org/journals/lhr/27.1/).

<sup>5</sup> Charles Donahue, Jr., “Papyrology and 3 Caines 175,” *Law and History Review* 27 (2009): 180-81.

<sup>6</sup> Fernandez argues that the Twenty-Five Dollar Act banned lawyers from the proceedings at the time. A later version of the statute, 1808 N.Y. Laws 204, § 25, did include a ban, but the 1801 version of the law had no such provision. 1801 N.Y. Laws 165. 1810 N.Y. Laws 193 repealed the ban in the 1808 law. (Thanks to Fred Turner for spotting the repeal.)

<sup>7</sup> Historians of the case now agree that Tompkins simply erred in writing that the dispute came to his court on “a return to a certiorari directed to one of the justices of *Queens county*.”

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Act, the constable had summoned a panel of twelve veniremen, from which Fordham selected a jury of six by drawing names out of a box. Seven witnesses were summoned to testify.

Further, although we do not know exactly how Post argued his case, we do know that he alleged that Pierson acted “maliciously” – that is, for the purpose of harming Post, and not for some other reason, such as a desire to kill a verminous animal. The latter would seem to have been a good argument for Pierson, because “vermin” constitute a subcategory of animals *ferae naturae* that are always nuisances and incapable of being owned by anyone.<sup>8</sup> Moreover, as recently as 1791, Southampton had placed a temporary bounty on foxes, which were carrying off the chickens of the town.<sup>9</sup>

This allegation, the writ Post obtained (trespass on the case), and the facts of the underlying dispute would seem to point to a theory of intentional tort. As Donahue put it, “the point of Post’s suit against Pierson is not that Pierson took Post’s fox. The point is that Pierson interfered with the hunt.” Besides, if “the gist of the action were Post’s possession (and hence ownership) of the fox, the wrong form of action was used. It should have been trespass, not trespass on the case.”<sup>10</sup>

It happens that under the common law Post would face a possibly fatal obstacle if he framed his case as an intentional tort. If he had been hunting for commercial reasons – as the plaintiff did in the great case of *Keeble v. Hickeringill* (Q.B. 1707) – then he would have suffered a cognizable harm. But Post was hunting for recreational purposes, and the common law refused to protect “things of mere pleasure and delight” (such as recreation).<sup>11</sup> If Fordham knew his

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<sup>8</sup> Andrea McDowell, “Legal Fictions in *Pierson v. Post*,” *Michigan Law Review* 105 (2007): 746-48.

<sup>9</sup> Berger, “It’s Not About the Fox,” 1130-31.

<sup>10</sup> Charles Donahue, Jr., “*Animalia Ferae Naturae*: Rome, Bologna, Leyden, Oxford, and Queen’s County, N.Y.,” in *Studies in Roman Law: In Memory of A. Arthur Schiller*, ed. Roger S. Bagnall and William V. Harris (Leiden: E. J. Brill, 1986), 48; Donahue, “Papyrology,” 181-82.

<sup>11</sup> A.W.B. Simpson, *Leading Cases in the Common Law* (Oxford, 1995), 64; see also McDowell, “Legal Fictions.” The rule has been overturned by statute. For exam-

law, Post might have lost his case.

Why wasn't this obstacle fatal to Post's suit? One very likely possibility was that in fact Fordham did not know his law. Although we know nothing about him, other than that he was a Southampton man, a legal commentator generally assumed that New York's JPs were "plain people, unacquainted with legal learning."<sup>12</sup> We have no reason to think that Fordham was an exception. Thus, Fernandez suggests that he and the jurors might well have been "inclined to look at what happened, take a more common sense approach, and give Post a remedy without worrying too much about what category of law to attach it to."<sup>13</sup>

On whatever theory, the jury found for Post and awarded him "seventy-five cents for his damages besides his costs." Those costs Fordham set at \$5 (about \$100 today), which was the maximum under the Twenty-Five Dollar Act. Seventy-five cents in 1802 is roughly the equivalent of \$15 today. A nice fox pelt was worth about \$1.

## THE APPEAL

If one puzzle was why litigants bothered to commence and appeal a suit when so little money was at stake, another is why the judges of the New York Supreme Court devoted so much attention and learning to the case. The judges had it before them for quite some time: the jury reached its verdict in Fordham's court on December 30, 1802, and the New York Supreme Court did not announce its decision until September 10, 1805. It reversed the judgment of the justice's court and awarded Pierson \$121.37 (about \$2,150 today) for his "costs and charges" in the appeal.

Fernandez puts the appeal in the context of a campaign by New York's elite lawyers to raise the sophistication of New York's bench

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ple, Virginia's "hunter harassment" statute reads: "It shall be unlawful to willfully and intentionally impede the lawful hunting or trapping of wild birds or wild animals." Va. Code Ann. § 29.1-521.1.

<sup>12</sup> Esek Cowen, *A Treatise on the Civil Jurisdiction of a Justice of the Peace, in the State of New York* (Albany: W. M. Gould, 1821), 302, quoted in Fernandez, "Lost Record," 159.

<sup>13</sup> Fernandez, "Lost Record," 169.

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and bar. Providing JPs with simple guides to the official “law in the books” was one way to do this, and in fact the state had an excellent “JP manual,” Samuel Brown’s *The Justice’s Directory, or, Points on Certiorari: Being a Digest of the Cases Reported by Johnson and Caines* (1813).<sup>14</sup> It could also be advanced through the aggressive review of the JPs’ judgments. Fernandez writes that by 1814 the New York Supreme Court was hearing nearly two hundred appeals from Justices’ Courts every year, even though many involved small monetary judgments. She posits that “a disciplinary process [was] at work.”<sup>15</sup>

Another target of the campaign to create “learned law for New York” was the legal profession itself. A display of learning could up the ante for legal argument, exclude the socially undistinguished from remunerative litigation in a kind of intellectual arms race, and affirm the well-educated lawyer’s own sense of the bar as a learned profession. The campaign had a broader, social dimension as well. As New York democratized, a new breed of politicians denounced judge-made common law as the last refuge of feudal privilege in republican America and demanded codification by the more popular legislature. The great paladin who marched out to face down this challenge was James Kent (1763-1847), who served as a justice (1798-1804) and chief justice of the New York Supreme Court (1804-1814) and as the state’s chancellor (1814-1823). Kent insisted that “a great proportion of the rules and maxims which constitute the immense code of the common law” was readily knowable from the reports.<sup>16</sup> Further legal treatises, including his own *Commentaries on American Law* (1826-1830), were surer guides to legal principles than whatever the lesser breed of lawyer-legislators could enact in a code. In short, as the legal historian John H. Langbein

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<sup>14</sup> On JP manuals, see John A. Conley, “Doing It by the Book: Justice of the Peace Manuals and English Law in Eighteenth-Century America,” *Journal of Legal History* 6 (1985): 257-98.

<sup>15</sup> Fernandez, “Lost Record,” 171.

<sup>16</sup> Kent quoted in Angela Fernandez, “*Pierson v. Post*: A Great Debate, James Kent, and the Project of Building a Learned Law for New York State,” *Law and Social Inquiry* 34 (2009): 326.

writes, “Kent made his career stand for the learned law.”<sup>17</sup>

Fernandez notes that in colonial New York, as elsewhere in the common-law world, elite lawyers tried to raise the level of learning in the legal profession with “moots,” arguments of hypothetical cases before a select audience, often of law students. New York’s judges, she speculates, may have had a similarly didactic aim in *Pierson v. Post*. To be learned, in their estimation, a lawyer ought to have devoted hours of his apprenticeship to reading Justinian and the great natural law jurists of the European continent on the origins of property. When the case bobbed up from Fordham’s court, they seized it as an occasion to “create a more refined legal profession and a body of sophisticated law for New York State.”<sup>18</sup>

For *Pierson v. Post* to serve the judges’ purpose, it would have to turn on fundamental principles of law rather than some failure to comply with a trivial provision of the Twenty-Five Dollars Act or the overlooking of a well-established precedent. Fernandez’s discovery of the judgment roll has now revealed that the judges might have disposed of the case on narrow grounds and instead chose to make it turn on the acquisition of property.

We knew from Livingston’s dissent that Pierson’s lawyer, Nathan Sanborn, listed six errors in the proceedings before the JP and that he ultimately abandoned all except the third. The judgment roll preserves Sanborn’s original list. As Sanborn had it, the JP court committed “manifest error” in the following ways:

1. Fordham’s order to the constable to summon Pierson was directed to either of the two constables of the town of Southampton when it should have named a single person;

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<sup>17</sup> John H. Langbein, “Chancellor Kent and the History of Legal Literature,” *Columbia Law Review* 93 (1993): 594. See also Daniel J. Hulsebosch, “An Empire of Law: Chancellor Kent and the Revolution in Books in the Early Republic,” *Alabama Law Review* 60 (2009): 377-424; Daniel J. Hulsebosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664-1830* (Chapel Hill, N.C. 2003), 277-95; A.W.B. Simpson, “The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature,” *University of Chicago Law Review* 48 (1981): 632-79.

<sup>18</sup> Fernandez, “Great Debate,” 330.



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2. Pierson was summoned on the same day as the trial, without the minimum six days' notice required under the Twenty-Five Dollar Act;
3. Post's complaint was "not sufficient in law for the said Lodowick Post to have[,] maintain[,] or support his said action";
4. The jury summons did not specify the reason for which the jurors were to appear;
5. Fordham "found" the court costs when the jury ought to have found them; and
6. "By the law of the land judgment ought to have been rendered and given" for Pierson, not Post.

Note two things about this list. First, the first, second, fourth, and fifth errors are all procedural. Of these, only the second seems very serious, and it is mitigated by Fernandez's discovery of a partially illegible document suggesting that Pierson did in fact have notice of the suit, only orally rather than in writing. Fernandez writes of the fifth error that Fordham surely itemized and totaled up the court costs but that this was not inconsistent with the jury having "found" them once he did.

Even if the Supreme Court judges were not intent on a display of learning they might have rejected these arguments. As Donahue writes, they are "the kind of picky points that might well be dismissed on the ground of harmless error, or, to put it more colloquially, 'we've got to cut the JP's some slack.'" This attitude would also have been consistent with the position Samuel Brown took in his JP manual: "The sound rule of construction, in respect to the courts of justices of the peace, is to be liberal in reviewing their proceedings, as far as respects regularity and form."<sup>19</sup>

Second, neither the third error, upon which Sanborn ultimately took his stand, nor the sixth (which seemingly duplicates the third) identified the particular legal theory Post had advanced. As far as they go, they were consistent with either a tort or a property theory

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<sup>19</sup> Donahue, "Papyrology," 183; Brown, *Justices' Directory*, 42, in Fernandez, "Lost Record," 174.

of the case. Even so, Fernandez thinks that the tort theory would have failed (because of the recreational nature of Post's hunting). It would also have failed to advance the judges' goal of making a convincing display of their legal learning, because it only required the affirmation of a well-recognized principle of the common law.

If the judges were determined to have a learned discussion of "the classic issue of how one establishes possession and ownership of wild animals," the two lawyers in the appeal were quite capable of playing their roles, for they were as able as any in the state.<sup>20</sup> Nathan Sanford was appointed a U.S. Commissioner of Bankruptcy in 1802. The following year he became U.S. Attorney for New York. He would hold that post until 1815 and serve in the U.S. Senate from 1815 to 1821 and again from 1825 to 1831. He succeeded Kent as chancellor, serving between his senatorial terms. Post's lawyer, Cadwallader David Colden, was classically educated in New York and London and practiced law in New York City and Poughkeepsie. He became U.S. Attorney for New York in 1798 and mayor of New York City in 1819. He served in the U.S. House of Representatives from 1821 to 1823.<sup>21</sup>

The authors of the majority and dissenting opinions were also well-trained, but their disagreement may well have been a matter of "personal politics," to use Berger's phrase. Berger notes that Daniel Tompkins and Henry Brockholst Livingston were both members of New York's political elite. Tompkins served as governor of New York (1807-1817) and Vice President of the United States (1817-1825). Livingston had been elected to the state assembly in 1786 and was appointed to the U.S. Supreme Court in 1807. Both opposed the Federalists and backed Thomas Jefferson in the fierce presidential election of 1800.

Yet the two men had different social origins, which might well have influenced how they regarded fox hunting or deference to local elites. Livingston was the scion of one of New York's richest

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<sup>20</sup> Fernandez, "Great Debate," 302-03.

<sup>21</sup> *Biographical Directory of the American Congress, 1774-1949* (Washington, D.C., 1950), 1777, 1000.

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families, the owners of 500,000 acres on which lived “thousands of tenant farmers in an American version of English manorial society.” This quasi-feudal arrangement persisted until the “Anti-Rent Wars” of the 1840s.<sup>22</sup> Tompkins’s parents, in contrast, lived as tenants on a great manorial estate, and although they moved before Tompkins’s birth, his modest social origins were part of his political persona. During his gubernatorial campaign he described himself as “a ‘humble farm boy,’” who had “‘not a drop of aristocratical or oligarchical blood’” in his veins.<sup>23</sup>

No one has yet turned up any explanation by Livingston or Tompkins of their intentions in writing their opinions. Berger ventures, though, that Livingston might have been speaking for his fellow aristocrats when he took up the perspective of the “gentleman” in an encounter with “a saucy intruder.” I would add that his “reasonable pursuit” standard would give a great deal of discretion to the landowning jurors of the JP courts. Berger also writes that although Tompkins’s opinion was not as revealing of class bias – he delivered no tirade against fox hunting as an aristocratic pastime – he evidently put vindicating the person who “actually got the job done” above defending “the norms of the leisure pursuits of the gentleman.”

Finally, what about the dog that didn’t bark? If Kent was so invested in the campaign for a learned law, why did he not write an opinion? In 1805 he was chief justice, and on many other occasions he welcomed the chance to flaunt his erudition. One possibility is that Kent had not been present when the decision was argued or announced. Fernandez ventures another (without, it must be said, much to back her up). As a law student, Tompkins had heard Kent deliver a series of law lectures in 1794-1795, but on the bench he rarely emulated his master by writing lengthy opinions. In fact, he rarely wrote at all. Before *Pierson v. Post*, Fernandez notes, his opin-

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<sup>22</sup> Berger, “It’s Not About the Fox,” 1138. The leading book on the Anti-Rent wars is Charles W. McCurdy, *The Anti-Rent Era in New York Law and Politics, 1839-1865* (Chapel Hill, N.C., 2001).

<sup>23</sup> Quoted in Berger, “It’s Not About the Fox,” 1139.

ions appeared in reports of only eleven of 258 cases. Three of those “opinions” consisted of a single line announcing his agreement with his brethren. His opinion in *Pierson v. Post* was twice as long as any he had written before.<sup>24</sup>

Fernandez speculates that Kent, in effect, pushed his former student Tompkins to the front of the class and made him recite his lesson. “How else was the process of ‘upgrading’ the legal community going to proceed without providing more junior members of the bar and bench with such opportunities?” she writes. If this was Kent’s aim, Fernandez thinks he must have been disappointed in his pupil, for Tompkins “robotically” followed Sanborn’s argument and did not produce his own, fresh analysis.<sup>25</sup>

## FINAL JUDGMENT

The last word on *Pierson v. Post* must go to its first historian. “Through this case the actors yet live,” wrote Hedges in 1895. “They speak, although dead, with a record and a judgment that far outlasts all other monument to their memory. Pierson and Post, Peace to their Ashes!”



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<sup>24</sup> Fernandez, “Great Debate,” 308-09.

<sup>25</sup> *Ibid.*, 328-29, 326.