# Introduction: A Famous Fox, a Surfacing Whale, and the Forgotten Slave

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Discoveries in history occur in lots of different ways. Every once in a while we come across some forgotten documents—a photograph of Lincoln at Gettysburg, a trial transcript,[1] other long-neglected court records,[2] or a family archives.[3] At other times we learn something new by just looking in old books while asking questions that we have not previously asked[4] (or approaching those questions with skepticism)[5] or by looking again and more deeply at published reports.[6]

Angela Fernandez's find is in the first category, a record long-thought lost. While this is not quite a lost Beatles recording, for law students and

1. See, e.g., Melton A. McLaurin, *Celia, A Slave* (New York: Avon Books, 1993).

2. See, e.g., Gautham Rao, "The Federal *Posse Comitatus* Doctrine: Slavery, Compulsion, and Statecraft in Mid-Nineteenth-Century America," *Law and History Review* 26 (2008): 1; Ariela Gross, "'Of Portuguese Origin': Litigating Identity and Citizenship among the 'Little Races' in Nineteenth-Century America," *Law and History Review* 25 (2007): 467.

3. Lindsay Robertston re-wrote the story of *Johnson v. McIntosh* through legal and business records rediscovered in a family's trunk. Lindsay Robertson, *Conquest by Law: How the Discovery of America Dispossessed Indigenous Peoples of their Lands* (Oxford: Oxford University Press, 2005).

4. Claire Priest, "Creating an American Property Law: Alienability and Its Limits in American History," *Harvard Law Review* 120 (2006): 385.

5. Annette Gordon-Reed, *Thomas Jefferson and Sally Hemings: An American Controversy,* 224 (Charlottesville: University Press of Virginia, 1997) (discussing "the corrosive nature of the enterprise of defense").

6. Susanna L. Blumenthal, "The Mind of a Moral Agent: Scottish Common Sense and the Problem of Responsibility in Nineteenth-Century American Law," *Law and History Review* 26 (2008): 99.

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property professors, it may be close. The appeal record is intriguing because each year tens of thousands of first year law students read *Pierson v. Post* in property class. It often provides the introduction to ideas about the acquisition of property. *Law and History Review* is proud to present Fernandez's article on the record, as well as commentary by three leading scholars of property.

Charles Donahue tells us that the record (more or less) confirms what we've already known; Stuart Banner focuses on the ways that *Pierson* has made its way, of late, into jurisprudence. James Krier, coming from the perspective of a property scholar rather than a legal historian, presents a bold challenge to legal history generally. Krier tells us that it really may not matter so much what the facts of the case are, for he—like many property professors who teach the case—uses it to introduce concepts of property ownership. He is concerned with the "thematic and conceptual richness of *Pierson* that make it such a remarkable introduction to the study of property." Krier's business is property, not legal history. In Krier's classroom, the surrounding facts do not matter so much as the theory. Krier points out a lot of lessons that can be wrung from *Pierson,* one of which is that judges should be cautious when importing instrumental reasoning into their decisions, especially when the numbers they plug into their calculations of utility may be incomplete or incorrect. This is also a theme that a lot of recent nineteenth-century legal history teaches us. The dangers of plugging in the wrong numbers to a utilitarian calculus are demonstrated well in the world of proslavery legal thought. Generations of jurists, politicians, and scholars ignored the interests of slaves and vastly erred in computing their society's best interest as well.

Other historical scholarship seems to have those lessons of modesty in interpretation of precedent. Samuel Alito's Note in the *Yale Law Journal* in 1974 serves a similar function, even if he may not have had that as a purpose.[7] Alito looked at the justices' notes in the released time cases (separation clause challenges to schools' giving released time to students to attend religious instruction) in the 1950s to demonstrate that the justices thought the cases should be construed more narrowly than they were being construed. Perhaps there is a key to understanding Alito in that Note, although we ought to be cautious about reading too much into the work of a student many decades before. There may also be a lesson in there for the rest of us: that we should be cautious of extending precedent.

What interests me about *Pierson* is not so much what's going on in it, but why we choose this case to have so much "fun." I stopped teaching it

7. Samuel A. Alito, "The 'Released Time' Cases Revisited: A Study of Group Decision-making by the Supreme Court," *Yale Law Journal* 83 (1974): 1202.

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years ago, when I shifted the introduction of my property course to address the question of property rights and civil rights and convey something of the ways that property exists when courts say it exists and in the amount they say it exists (as well as to critique that position). So where once foxes crossed the terrain of my class, I now start with slaves and Native Americans. And therein lies a pretty interesting story about the nature of property pedagogy. Why do some cases, like *Pierson v. Post*—and to a great but lesser extent *Johnson v. McIntosh*[8]—make it into the first year property curriculum, but other cases do not. I'm thinking here of Chief Justice Marshall's opinion in *The Antelope,*[9] which is a close parallel to *Johnson.* It deals with similar issues of time, precedent, and international agreement in defining property rights. However, instead of dealing with real property occupied by Native Americans, *The Antelope* deals with property in humans. The difference has to be more than that *Johnson v. McIntosh* has a series of excellent secondary studies,[10] for Judge Noonan published an important study of *The Antelope* as *Johnson* was being re-discovered by property professors.[11] *Johnson* seems to have entered the property curriculum first through the casebook by Charles Haar and Lance Liebman, then was popularized by Jesse Dukeminier's and James Krier's casebook.[12]

So the fox is a case that has captured a lot of attention. But if you have Professor Krier's focus on the rule of capture, there are the whale cases, like *Heppinstone v. Mammen,* which Carl Christensen is popularizing.[13] Perhaps we might start with a turkey, as well. For there is Zora Neale Hurston's *De Turkey and De Law,* in which two men shot a turkey simultaneously, then came to blows over who owned it. The resulting fight led to a trial for assault.

For generations, as students learn about *Pierson v. Post,* they will now turn to Fernandez's record to learn more about the context for that fox and those litigants, lawyers, and judges in orbit around it.

8. 21 U.S. (8 Wheat.) 543 (1823).

9. 23 U.S. (10 Wheat.) 66 (1825).

10. See, e.g., Robertson, *Conquest by Law;* Robert Williams, *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York: Oxford University Press, 1990); Stuart Banner, *How the Indians Lost Their Land: Law and Power on the Frontier* (Cambridge: Belknap Press of Harvard University Press, 2005).

11. John T. Noonan, *The Antelope: The Ordeal of the Recaptured Africans in the Administrations of James Monroe and John Quincy Adams* (Berkeley: University of California Press, 1977).

12. Charles M. Haar and Lance Liebman, *Property and Law* (Boston: Little, Brown, 1977), 3–32; Jesse Dukeminier, James E. Krier, Gregory S. Alexander, and Michael H. Schill, *Property,* 6th ed. (New York: Aspen Publishers, 2006).

13. 2 Hawaii 707 (1863).

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# The Lost Record of *Pierson v. Post,* the Famous Fox Case

ANGELA FERNANDEZ

## I. Introduction

*Pierson v. Post* is usually used in law school classrooms to introduce law students to the complexities of establishing possession in property law.[1] The published appellate-level opinion is widely available from commercial judgment database services and has been reproduced in countless law school casebooks, with a first-page pride of place given to the case in such collections since at least 1915.[2] In the words of one scholar, "[m]ost [property

1. *Pierson v. Post,* 3 Cai. R. 175 (1805).

2. See Edward H. Warren, *Select Cases and Authorities on the Law of Property* (Cambridge, [Mass.]: The Editor, 1915), 1–3. Earlier non-first page appearances include: William Sullivan Pattee, *Illustrative Cases in Personalty* (Philadelphia: T. & J. W. Johnson, 1893), 1:19–22 (in a section on animals *ferae naturae*) and John D. Lawson, *Select Cases in the Law of Personal Property: with Analysis and References to Other Cases* (Columbia, Mo.: E. W. Stephens, 1896), 164–67 (under "capturing wild animals").

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law] casebooks begin at the beginning by considering the original acquisition of property. Almost all books suggest possession is the root of title . . . A favorite place to start is the old case of *Pierson v. Post.*"[3] According to another, *Pierson v. Post* is "the perfect case for giving students a taste of what it means to 'think like a lawyer.'"[4] It is an "old chestnut" if ever there was one.[5] Indeed, it would be difficult to overstate the extent to which the case has been the subject of scholarly commentary.[6]

The legal issue in the case is the degree of physical proximity or control required to establish possession and legal ownership in wild animals. The facts are relatively simple. A hunter named Lodowick Post was chasing a fox with "dogs and hounds" on a beach in Long Island, when Jesse Pierson, knowing that Post was in pursuit of the fox, killed and carried it away. Post sued Pierson and a justice of the peace found for Post. Pierson "sued out a *certiorari,*" appealing the decision to the New York Supreme Court, which granted judgment in his favor. The primary source that has been used to understand the case is the published appellate report, included in the third of three volumes of reports prepared by New York's first reporter, George Caines, and listed in the August 1805 term of the

3. Joseph William Singer, "Starting Property," *Saint Louis University Law Journal* 46 (2002): 565, 566. See also, Andrew P. Morriss, "Review of Jesse Dukeminier and James E. Krier, *Property* (4th Edition 1998)," *Seattle University Law Review* 22 (1999): 997, 998–99 (discussing the treatment of *Pierson v. Post* in this popular property casebook and referring to its treatment as "typical of the high quality of the casebook's supplemental material").

4. Peter T. Wendel, "Using Property to Teach Students How to 'Think Like a Lawyer': Whetting Their Appetites and Attitudes," *St. Louis University Law Journal* 46 (2002): 733, 735–36.

5. See Barry Brown, "The Old Chestnut Explored: Thoughts about the Survival of Casner's *Cases and Text on Property* Long Past Its Prime," *Seattle University Law Review* 22 (1999): 947.

6. See, e.g., Richard A. Epstein, "Possession as the Root of Title," *Georgia Law Review* 13 (1979): 1221; Carol M. Rose, "Possession as the Origin of Property," *University of Chicago Law Review* 52 (1985): 73; 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), 39–63; Alan Watson, "Introduction to Law for Second Year Law Students," *Journal of Legal Education* 46 (1996): 430; James E. Krier, "Capture and Counteraction: Self-Help by Environmental Zealots," *University of Richmond Law Review* 30 (1996): 1039; Dhammika Dharmapala and Rohan Pitchford, "An Economic Analysis of 'Riding to Hounds': *Pierson v. Post* Revisited," *Journal of Law, Economics & Organization* 18 (2002): 39; Henry E. Smith, "The Language of Property: Form, Context, and Audience," *Stanford Law Review* 55 (2003): 1105. There are many more articles than this—pieces from the environmental law scholarship alone would constitute a small bibliography (these relate to "the rule of capture" and fugitive resources like oil and gas), as well as those relating to other animals like whales and wolves. There is also a noteworthy handful on baseballs and who owns them when they are hit into the stands.

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New York Supreme Court.[7] That report included the arguments of the lawyers on both sides, as well as a majority opinion written by Daniel Tompkins, and a dissent by Brockholst Livingston.

Pierson's lawyer, "Sanford," quoted some long Latin passages from the Roman jurist Justinian to support his argument that occupancy by seizure was the sole method of taking possession of a wild animal. He also referred to English authorities Blackstone, Fleta, and Bracton. The lawyer opposite, "Colden," relied on the natural law theorist Puffendorf and his commentator, Barbeyrac, to argue that occupancy need not involve "manucaption" (or bodily touch). Continued pursuit of an animal by the first pursuer, he argued, gives an exclusive right while the animal is followed.

The New York Supreme Court found for the interloper, Pierson. Tompkins's majority decision followed the authorities cited by counsel for Pierson (primarily Justinian), preferring these based on the policy that the best rule is a clear rule: he who seizes takes. Livingston's dissent argued that a declaration of intent to take (Post's visible hunt) combined with a reasonable prospect of success was all that possession of a wild animal required. This kind of possession, which need not involve manucaption, sufficed to exclude the rights of others, or alternately put, to found a legal claim against anyone interfering with that imminent capturing. What is most striking, however, about Livingston's opinion is its tongue-in-cheek style.[8] He responded to the majority's display of erudition in settling a squabble over a dead fox, for example, by observing that the matter "should have been submitted to the arbitration of sportsmen, without poring over Justinian, Fleta, Bracton, Pufendorf, Locke, Barbeyrac, or Blackstone."[9] The humor in the dissent probably helps explain why it was not included in many of the first casebook reproductions of the case.[10]

While the appellate decision in *Pierson v. Post* has amused and educated generations of law students, and been the subject of much academic commentary, what took place at the lower court level has remained shrouded in obscurity. Any documents relating to it were presumed lost. While conducting historical research on the published appellate decision, I had the good fortune to discover what would appear to be the judgment roll in the case, which sheds much light on what actually happened in the court below. The

7. George Caines, *New-York Term Reports: Or Cases Argued and Determined in the Supreme Court of that State* [1803–1805] (New York: Printed for Isaac Riley, 1806), 3:175–82.

8. See Andrea McDowell, "Legal Fictions in *Pierson v. Post,*" *Michigan Law Review* 105 (2007): 735 (exploring a variety of nonsensical features in Livingston's dissent). Professor McDowell's work on the dissent, which I first heard at the American Society for Legal History Conference in Austin, Texas, October 2004, is what piqued my interest in the case.

9. *Pierson v. Post,* 3 Cai. R. 180.

10. Examples include Pattee, Lawson, and Warren, cited above in note 2.

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original document with an accompanying transcription can be accessed by other scholars interested in the case through the *Law and History Review* website.[11] This introductory essay provides an account of the trail that led to the discovery of this record, a description of exactly what the record is (and is not), and a summary of the new information it provides.

## II. Account of Discovery

The discovery of the record followed a circuitous path, which began with my work on the question of whether James Kent, who was the chief justice of the New York Supreme Court in 1805 at the time *Pierson v. Post* was decided, had played a role in shaping the published appellate report in some way. Although Kent had not written in the case, I wondered, given the scholarly tone of the decision whether he had something to do with its unusual treatment and reporting. I knew Kent was a furious annotator and thought there might be clues as to his involvement among his books and papers. His copy of the case in *Caines Reports* turned out to be annotated in a way that mapped on to his later discussion in his *Commentaries,* demonstrating a later intense interest in the case.[12]

Among the many puzzling aspects of the case is why those involved—the parties, their lawyers, and the judges—poured such effort into a controversy with such a small monetary amount at stake. The traditional explanation for the persistence of the litigants had been enmity—specifically between their fathers.[13] However, one of the fathers was dead by 1805.[14] The lawyers were quite senior and established and one had to wonder why they were involved in what was essentially a neighborhood dispute, even if one, Nathan Sanford, was from the area.[15] There was also the profile of

11. Transcript of the Judgment Roll in *Pierson v. Post.* www.historycooperative.org/lhrindex.html. Quotes in the article with in-text citation to transcript, page numbers are to the diplomatic transcription located here.

12. James Kent, *Commentaries on American Law,* vol. 2 (New York: O. Halsted, 1827). See Angela Fernandez, "*Pierson v. Post:* A Great Debate, James Kent, and the Project of Building a Learned Law for New York State," forthcoming in *Law and Social Inquiry* 34.2 (Spring 2009).

13. See H. P. Hedges, "Pierson vs. Post," *The Sag-Harbor Express,* Thursday, 24 October 1895, front-page, from which all quotes are taken. Hedges's account was reproduced in an abbreviated form in James Truslow Adams, *Memorials of Old Bridgehampton* (Port Washington, Long Island, N.Y.: Ira J. Friedman, 1962, original copyright, 1916), 166–67, as well as William Donaldson Halsey, *Sketches from Local History* (Southampton, N.Y.: Yankee Peddler Book Company, 1966), 131.

14. See Bethany Berger, "It's Not About the Fox: The Untold History of *Pierson v. Post,*" *Duke Law Journal* 55 (2006): 1089, 1135.

15. See ibid., 1134.

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the panel judges, particularly Tompkins, who wrote the majority decision. Tompkins was a former student of Kent's and he did not ordinarily write elaborate opinions. Indeed, one cannot find any other decision in the three volumes of *Caines Reports* written by any of the judges that has the tone and style of *Pierson v. Post.* Its Roman and civil law references, unusual in themselves, are made even more striking by the absence of a commercial context such as maritime law or insurance law that would ordinarily accompany the use of such sources in the period. Moreover, disposition of the case did not require the use of those sources.[16]

One of my colleagues asked whether the unusual features of the case might be accounted for by the idea that the participants were having some kind of moot court debate on a particularly thorny jurisprudential issue—one that was not *necessary* to solve for resolution of the case but that they *wanted* to treat in an elaborate way.[17] As I began to investigate Kent's interest—as evidenced by the annotations and his later treatment of the case in the *Commentaries*—and as I began to learn more about him, it seemed more and more plausible that he might have had that kind of interest in the case. John Langbein has written about Kent's commitment to the building of "learned law" for New York State and John Horton's biography on Kent emphasized his use of its courts to push for the things he cared about, including a "high" scholarly approach to the law.[18] If the appellate report was the product of a jurisprudential exercise, this would explain why prominent lawyers had agreed to take on a case of such little monetary value, why Tompkins had delivered a decision so unlike his other decisions (i.e., he was acting at the behest of his teacher Kent), why civilian sources were used when they were not required, and even why the dissent had a parodic, literary tone. Livingston's odd and otherwise perplexing dissent was essentially providing the obligatory counter-point

16. See Fernandez, "*Pierson v. Post:* A Great Debate."

17. This was at a presentation in January 2005 to the Legal History Group at the Faculty of Law, University of Toronto and the colleague was Stephen Waddams.

18. See John H. Langbein, "Chancellor Kent and the History of Legal Literature," *Columbia Law Review* 93 (1993): 547; John Theodore Horton, *James Kent: A Study in Conservatism, 1763–1847* (New York; London: D. Appleton-Century, 1939). See also Alan Watson, "Chancellor Kent's Use of Foreign Law," in *The Reception of Continental Ideas in the Common Law World, 1820–1920,* ed. Mathias Reimann (Berlin: Duncker & Humbolt, 1993), 45–62; David W. Raack, "'To Preserve the Best Fruits': The Legal Thought of Chancellor James Kent," *American Journal of Legal History* 33 (1989): 320; Carl F. Stychin, "The Commentaries of Chancellor James Kent and the Development of an American Common Law," *American Journal of Legal History* 37 (1993): 440; Gregory Alexander, *Commodity and Propriety: Competing Visions of Property in American Thought, 1776–1970* (Chicago & London: University of Chicago Press, 1997), 127–57; Daniel J. Hulsebosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664–1830* (Chapel Hill: University of North Carolina Press, 2005), 274–302.

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needed to round out the debate, as was customary in a moot court exercise, indulging at the same time his own penchant for wit.

Presenting this general line of inquiry to audiences prompted the question of whether the underlying dispute might have been manufactured to serve pedagogical and jurisprudential ends. Had the decision of the New York Supreme Court been a "collusive case"?[19] Had there ever been a fox at all? There were a few details in the report indicating that the case was indeed real. For instance, Livingston made reference in his dissent to the "six exceptions, taken to the proceedings below,"[20] which certainly suggested that there had been an underlying incident. Still I thought I had better attempt to locate more information in order to substantiate something not normally in need of proof, namely that there had indeed been a real case preceding an appellate report.

Thus, I have outlined the admittedly controversial thesis—Kent as the *éminence grise* of the case—that set me on the search for further information on *Pierson v. Post.* This is not in order to argue that thesis here but to explain how it motivated and made possible the search that resulted in a unique discovery. Having a theory that in its most extreme form can entertain the possibility that the case was a fiction is one way to be stimulated into hunting with persistence for verification of the underlying facts.

Tompkins stated in his opinion that the cause came before the New York Supreme Court "on a return to a *certiorari* directed to one of the justices of Queen's county."[21] The point of requesting the writ—"[a] written judicial order to perform a specified act"—was to enable the superior court, in this case the New York Supreme Court, to inspect the inferior court proceedings, here the proceedings before the justice of the peace, for irregularities.[22] One would expect from the use of the writ that a certified record of the case had been prepared and sent to the New York Supreme Court. Indeed, *certiorari* was defined as "the name of a writ issued from a superior court directed to one of inferior jurisdiction, commanding the latter to certify

19. See Lindsay G. Robertson, *Conquest by Law: How the Discovery of America Dispossessed Indigenous Peoples of Their Lands* (New York: Oxford University Press, 2005), 29–36, 74 (explaining how the taint of suspicious pleadings in *Fletcher v. Peck,* a collusive case made up for the purpose of obtaining a United States Supreme Court ruling, infected the course of *Johnson v. M'Intosh*).

20. *Pierson v. Post,* 3 Cai. R. 180.

21. Ibid., 177.

22. See *Black's Law Dictionary,* 6th ed. (St. Paul, Minn.: West, 1990), s.v. "writ" and "certiorari." See also James D. Folts, *"Duely and Constantly Kept": History of the Supreme Court of Judicature, 1691–1847, and an Inventory of its Records (Albany, Utica, and Geneva Offices), 1797–1847* (Albany: New York State Court of Appeals & the New York State Archives and Records Administration, 1991), 21 (the writ of *certiorari* was used "to remove judgments in justice's civil courts directly to the Supreme Court for review . . . A party

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to the former, the record in the particular case."[23] It was unclear just how hard legal scholars had searched for any such record. Those I spoke to presumed that any original documents had been lost or destroyed.

Since the reported case contained a reference to Queen's County, a natural place to begin the search was the Queen's County Clerk's Office in Jamaica, New York. That inquiry proved fruitless as did others that followed. Requests for 1805 documents usually met with polite discouragement. There were some suggestions in the history of the New York Supreme Court, "*Duely and Constantly Kept,"* on how to locate judgment rolls for its cases.[24] However, I knew that a search for this had already been done, at least in Albany.[25]

If the judgment roll itself could not be located, I reasoned that an indirect search might yield results, namely, seeking a contemporary account of the event.[26] I set out to see what newspapers were operating in Queen's County or Suffolk County (where the incident allegedly took place) and learned that at the relevant time there were no Queen's County newspapers and only two in Suffolk County. One of these was the *Suffolk Gazette* that ran from 1804 to 1811. If the fight over the fox happened in 1804 or 1805, it was possible that this newspaper contained some mention of it. The *Suffolk Gazette* was a typical early nineteenth-century weekly. Tucked away in the back of one of the 1805 issues was a notice dated Monday, September 16, 1805, with the following announcement: "The adjourned session of the Supreme Court will be holden at the Court-House in River-Head on Wednesday the 18th instant."[27] Riverhead is the seat of the Suffolk County Court on Long Island. What were the New York Supreme Court judges doing just outside New York City in September when the August Term of

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seeking review by *certiorari* was required to submit an affidavit stating the grounds for the writ. Based on the affidavit, the Supreme Court justice could allow the writ upon reasonable cause, 'either for error therein or some unfair practice of the justice'"). A PDF copy of this resource is available at http://www.courts.state.ny.us/history/pdf/Library/Research/Duely_and_Constantly_Kept.pdf (last visited November 6, 2007). Page numbers correspond to topics as they are listed in the table of contents in this electronic version.

23. John Bouvier, *A Law Dictionary Adapted to the Constitution and Laws of the United States of America, and of the Several States of the American Union, with References to the Civil Law and other Systems of Foreign Law* (Philadelphia: T. & J. W. Johnson, 1839; reprint, New York: The Lawbook Exchange, 1993), 1:163.

24. See, e.g., *"Duely and Constantly Kept,"* Appendix B, "Suggestions for Locating Case Papers," 54.

25. See McDowell, "Legal Fictions in *Pierson v. Post,*" 740 n.14.

26. This was again a suggestion from Stephen Waddams.

27. *Suffolk Gazette,* Monday, 9 September 1805, p. 3. The notices contained the following remark: "In the first page of this paper a mistake occurred in the date; instead of September 9, it should be September 16." However, notwithstanding this correction, the paper would be indexed in any collection under September 9.

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the court—the term that included the report in *Pierson v. Post*—was supposed to be an Albany Term? One would not expect to see them in New York City until the November Term.[28] Could this adjourned session have had anything to do with the case?

Although the archivist of the Suffolk County Clerk's office in Riverhead could not find anything on either Pierson or Post, the fathers, or the lawyers, she suggested other possible locations for Suffolk County Court records: the Queen's Library, Long Island Division and the New York City municipal archives. The former turned out to have no court records. The latter did not have the relevant records but mentioned the archivists at the office of the New York County Clerk, Division of Old Records in New York City. I knew from "*Duely and Constantly Kept"* that upstate records were located at the New York State Archives in Albany. However, records filed in the Supreme Court of Judicature's Clerk's Office in New York City were held by the New York County Clerk's Archives.[29] If the Court was active outside New York City in the fall of 1805, as the *Suffolk Gazette* announcement indicated, it was just possible that a judgment roll in the case had been filed in the New York City Clerk's office. This would explain why it could not be found in a search of the Albany archives.

I provided the archivist at the Division of Old Records with details of everything I knew about the case—the names of the parties, the names of the attorneys, what towns they had lived in, anything that might have been used for indexing purposes for records on the case. There are no comprehensive indices to the records of the New York Supreme Court and the organization of documents is done differently depending on the series, including some alphabetical arrangements by the name of the plaintiff's lawyer as well as some chronological arrangements.[30] I received an email two days later informing me that the office had located a law judgment for a proceeding in the New York Supreme Court sitting in New York City, a copy of which would be mailed to me.[31]

28. George Caines, *A Summary of the Practice of the Supreme Court of the State of New York* (New York: Isaac Riley, 1808), 1:2 ("February and August terms are held in Albany; May and November, in New-York"). Early American Imprints, Series II: Shaw-Shoemaker 1801–1819. Shaw & Shoemaker 14628. Record Number: 104404614FA58DE0; w274778. American Antiquarian Society and NewsBank, 2004. http://infoweb.newsbank.com (accessed October 10, 2007).

29. See *"Duely and Constantly Kept,"* 12.

30. See Michael Griffith, "[Review of] '*Duely and Constantly Kept': A History of the New York Supreme Court, 1691–1847, and An Inventory of Its Records (Albany, Utica, and Geneva Offices), 1797–1847 by James D. Folts,*" *The Public Historian* 14.3 (1992): 127–29, 129.

31. Law Judgment #1805 P-33.

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Staff at the Division of Old Records looked in their recently created database of the indexed records, using the defendant's name, i.e., Post.[32] The manual index cards were arranged alphabetically by plaintiff's name and it was impossible to search by defendant's name. So then why had previous searches using Pierson, the party who had initiated the proceeding at the New York Supreme Court, not turned up the record? The record spells the name as "Peirson," as opposed to "Pierson." Both spellings appear in local history sources, although "Peirson" appears to be the older version.[33] According to the assistant archivist who performed the search, this difference in spelling and the inability to search by defendant's name explains why earlier searches for the case had all been unsuccessful.[34]

The brown manila envelope arrived. It was evident that this document was nothing like the published report found in the law school casebooks. In addition to containing information about the inferior court proceedings, it contained what one might term the real disposition of *Pierson v. Post* by the New York State Supreme Court. It was the "low law" rather than the elaborate and scholarly "high law" we had come to know from the published report.[35] This was the judgment that recounted what happened before the justice of the peace and the jury's award there. It also dealt with all the issues the parties would have cared about, including whether the

32. The database, "Law Judgments, 1799–1910," is one of four databases based on the index cards at the Division of Old Records, 31 Chambers Street, Room 703 in Manhattan. Email to the author from Bruce Abrams, December 13, 2007. For a description of the database project and the other indexes it contains, see Bruce Abrams and Edward Luft, "Rough Guide to Index Databases of Historical Records in Office of New York County Clerk" [forthcoming in *Dorot: The Journal of the Jewish Genealogical Society*].

33. See Halsey, *Sketches from Local History,* 14 (noting that the spelling of the name of the first Town Clerk, Henry Peirson, was "[l]ater changed to Pierson"). See also 34 (where school records have Jesse spelled both ways, along with many other "Peirsons"). Another variation on Jesse's name in particular is "Jessee Pearson," used in the 1800 Suffolk County Census, available at http://www.rootsweb.com/~nysuffol/1800csh.html (last visited June 11, 2008). Yet another variation is "Person." See *Tracing the Past: Writings of Henry P. Hedges, 1817–1911, relating to the history of the East End,* ed. Tom Twomey (New York: Newmarket Press, 2000), 59.

34. Email to the author from Bruce Abrams, December 13, 2007. Mr. Abrams wrote further to me: "As far as I know, you are the first researcher to obtain copies of this case, at least in my 23 years here."

35. The use of "high" and "low" in this context is a variation on, but not the same as, that used by Douglas Hay and Paul Craven in their work on master and servant law. See "Introduction" to *Masters, Servants, and Magistrates in Britain and the Empire, 1562–1955,* ed. Douglas Hay and Paul Craven (Chapel Hill: University of North Carolina Press, 2004), 1–58. I use it to refer both to justice of the peace proceedings, as well as appellate treatment devoid of elaborate, scholarly reasoning, or indeed, in the case of this record, any reasoning at all.

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jury's finding would be set aside on appeal and the amount of, and party responsible for, the costs.

The marked disjuncture between this document and the published report seemed to support the suspicion that the treatment of the case by the New York Supreme Court revealed a pursuit of other agendas. There was nothing to confirm or refute Kent's involvement in the case, although the document did lay to rest any speculation as to the dispute between Pierson and Post being fictional. The new document contains a tremendous amount of new information about the case, including names, places, dates, and amounts of money at issue, that was never provided in the published report of the appellate decision.

We finally learn the date of the incident and obtain confirmation of the names of the lawyers. The information regarding amounts of damages claimed and awarded is completely new and important to understanding what was economically at issue in the case. We now know that Post claimed up to $25 in his suit, the jury awarded him ¢75, and the justice of the peace calculated the costs he was owed at $5. Pierson sued out on a *certiorari,* alleging various errors before the justice of the peace, the grounds of which we now know. He won—although it is still unclear on what grounds—and was awarded the amount of $121.37.

## III. What the Record Is and Is Not

The name at the top of the record is not Kent's but Morgan Lewis's (see Transcript, p. 1), Kent's predecessor as chief justice, who witnessed the roll entry for the May term of the New York Supreme Court in 1803 for which it appears to have been initially intended. "Sanford," the name of Pierson's lawyer, appears in large letters on the last page of the record (see Transcript, p. 20). Two other names are at the top of the record—Fairlie and Bloodgood—who were clerks of the New York Supreme Court. James Fairlie was the clerk in the New York Office and Francis Bloodgood was with the Albany Office.[36]

The handwriting in the record is all the same with the exception of the odd addition, the disposition, and the signature on the final page.[37] So, for

36. See *"Duely and Constantly Kept,"* Appendix E, "Supreme Court Clerks (1797–1847)," listing clerks, offices, and years of service, 59. See also Caines, *A Summary of the Practice of the Supreme Court of the State of New York,* 3 (listing Fairlie and Bloodgood as clerks on the court on a sample writ).

37. The handwriting deviates in the sideways marginal text stating the disposition, "Judgment signed the 10th day of September . . . " (Transcript, p. 19). This is in the same hand as at least one other place in the text where an addition to the document has been made (see ↓↑* at Transcript, p. 7).

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instance, the signatures of Lewis, the justice of the peace who tried the case, John N. Fordham, and the constable in the case appear to be all in the same hand, showing that the various documents in the record are not originals. Where the record includes an "L.S.," this stands for where the real seal on the original document was located (*locus sigilli*), not the seal itself (see, e.g., Transcript, pp. 2, 8, 9). Added to these, again in the same hand, we have the grounds for appeal and the final disposition in the case. What we have, in other words, is a copy of the original documents attesting to what went on in the lower court proceedings that contains the orders and oaths the New York Supreme Court would have required in order to decide whether or not to reverse for error and its disposition reversing the jury's decision.

It is important to note that the document is not a transcription of all of the proceedings that occurred before the justice of the peace, which would have included things like the testimony of witnesses—it turns out there were seven—and presumably arguments by the parties.[38] I do not know whether the testimony of these witnesses was recorded. Livingston referred in his dissent to pleadings that referred to the fox as a "wild and noxious beast."[39] However, written pleadings were not required in the court of a justice of the peace.[40] The rationale for this was that "suitors of the court, and indeed the justices themselves, are presumed . . . to be plain people, unacquainted with legal learning, pursuing a right in matters of a small concern."[41] Since the point of these courts was to "dispense with that legal formality, which would render professional abilities necessary," it would be counter-productive to require formal written pleadings.[42] Also, the court of a justice of the peace did not constitute a court of record. This meant that it did not have its own seal or clerk and, unless the case was worth more than $25, there was no transcript created to send to the county clerk.[43] We will see that Post claimed a loss up to $25.

What does the record contain? There is Pierson's writ of *certiorari* commanding a certified copy of the record (Transcript, pp. 1–2), Fordham's response, setting out what he did in the case (Transcript, pp. 2–8), the orders

38. Hedges referred in his account to Post's "companions," who were hunting with him. Perhaps these were the witnesses. See Hedges, *Sag Harbor Express.*

39. *Pierson v. Post,* 3 Cai. R. 180.

40. See 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), 320. The Making of Modern Law. Gale. 2007. Thomson Gale. 08 November 2007 http://galenet.galegroup.com/servlet/MOML?af=RN&ae=F105917386&srchtp=a&ste=14. Document number F105917386. Thanks to Donald Roper for his direction to this source.

41. Ibid., 302.

42. Ibid.

43. *"Duely and Constantly Kept,"* Appendix C, "Inferior Courts of Law," 55.

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authorizing a constable to summon Jesse Pierson as well as a jury, along with attestations of those orders by the constable in the case, Constable Harris (Transcript, pp. 8–9), a list of the jurors summoned (Transcript, p. 10), a list of costs in the case (Transcript, p. 10), Pierson's grounds for his new suit (Transcript, pp. 11–14), and, finally, the New York Supreme Court's holding the case over from term to term and eventually disposing of it (Transcript, pp. 14–19). The judgment ordered that the proceedings below be "reversed[,] revoked[,] annulled[,] entirely set aside[,] and altogether held for nothing" and Pierson was awarded his costs (Transcript, p. 19). The disposition was signed by Daniel Tompkins, September 10, 1805 in what looks like an original hand (see Transcript, p. 19).

Our record would appear to be the judgment roll for *Pierson v. Post.* The judgment roll in a case was the document prepared by the attorney, after the costs had been determined, that contained the complete case record, including the judgment award.[44] If Pierson's lawyer, Nathan Sanford, prepared this sheaf of documents, that would explain the prominence of his name on the slip included at the back of the record (see Transcript, p. 20). That would make it his handwriting that predominates throughout.[45] Traditionally, "[t]he roll was signed and dated in the margin of the last page, usually by a Supreme Court clerk, occasionally by one of the justices."[46] The signing in this case was by Justice Tompkins and it takes substantially the same visual form as other judgment rolls, specifically the sideways signature in the margin (see Transcript, p. 19).[47] Finally, the entry at the beginning of the record matches exactly what George Caines provided in his book on New York Supreme Court practice as a sample for attorneys to copy when making up a roll or entry, down to identical indentation.[48] It is also a match with what Caines provided in his book of

44. Ibid., 18.

45. More generic descriptions of a judgment roll identify it as the document filed by the clerk of the court. See, e.g., *Black's Law Dictionary,* s.v. "Roll" ("*Judgment roll.* Such is required to be filed in certain states by the clerk when he enters judgment. It normally contains the summons, pleadings, admissions, and each judgment and each order involving the merits or necessarily affecting the final judgment"). This roll might have been prepared by Sanford with some spots filed by the New York City clerk, James Fairlie. Francis Bloodgood was the clerk in the Albany office. The text in the record that is in a different handwriting at a few select places (see ↓↑ at Transcript, pp. 4, 7) would then likely be Fairlie's.

46. *"Duely and Constantly Kept,"* 18.

47. Compare with image of 1818 judgment roll, ibid.

48. See Caines, *A Summary of the Practice of the Supreme Court of the State of New York,* 147 (indented across from the name of the court: "Pleas before the Justices of the People of the State of New York, of the Supreme Court of Judicature of the same people at the City-Hall of the City of New York, of November term, in the year of our Lord one

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forms when providing examples of what to use for the roll when entering judgment.[49]

## IV. Description of New Information the Record Contains

In the published report in *Caines Reports,* Justice Tompkins stated that "[t]his cause comes before us on a return to a *certiorari* directed to one of the justices of Queen's county."[50] Scholars have taken this to be a reference to a justice of the peace of Queen's County on Long Island.[51] However, the newly discovered record shows that this was an error in Tompkins's decision (or Caines's reporting of it). The justice of the peace who heard the case was from Suffolk County, not Queen's County. Both counties are on Long Island; however, it was Suffolk County where the events took place.

The name of the justice of the peace was John N. Fordham. Fordham, like the two litigants, lived in Southampton.[52] The record contains a copy of his narrative of the proceedings before him "on the thirtieth day of December in the year of our Lord one thousand eight hundred and two[,] at the town of Southampton[,] in the County of Suffolk" (Transcript, p. 2), originally given under his "hand and seal" (Transcript, p. 8). Use of Fordham's own

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thousand eight hundred and seven. Witness, James Kent, Esquire, Chief Justice. Fairlie and Bloodgood").

Compare with Transcript, p. 1 ("Pleas before the Justices of the People of the State of New York of the Supreme Court *of Judicature of* the same People at the City hall of the City of New York of the term of May in the year of our Lord one thousand eight hundred and three. Witness Morgan Lewis Esquire Chief Justice. Fairlie and Bloodgood").

49. George Caines, *Practical forms of the Supreme Court taken from Tidd's Appendix of the forms of the Court of King's bench, in personal actions, and adapted to the Supreme Court of the state of New-York* (New York: Alsop, Brannon and Alsop, 1808), 41–42, 53–54. Early American Imprints, Series II: Shaw-Shoemaker 1801–1819. Shaw & Shoemaker 14627. Record Number: 104404614BD07D88; w274777. American Antiquarian Society and Newsbank, 2004. http://infoweb.newsbank.com (accessed October 10, 2007).

50. *Pierson v. Post,* 3 Cai. R. 177.

51. See, e.g., Donahue, "*Animalia Ferae Naturae:* Rome, Bologna, Leyden, Oxford, and Queen's County, N.Y."; Berger, "It's Not About the Fox" 1134. Both lawyers in the case had connections to Flushing, Queen's. Cadwallader David Colden was from Flushing (see *note Transcript, p. 14). Nathan Sanford built a "marble-adorned mansion" there. See Berger, "It's Not About the Fox," 1134 n.260. However, this appeared to be later in life. See Donald M. Roper, "The Elite of the New York Bar as Seen from the Bench: James Kent's Necrologies," *The New York Historical Society Quarterly* 56 (1972): 199, 230 (James Kent wrote that Sanford "spent his last years in building a most extravagantly expensive but inconvenient House").

52. See 1800 Suffolk County Census.

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seal would have been required by the fact that his court was not a court of record with its own seal.[53] The date given in that narrative, December 30, 1802, puts the first round of legal fighting quite a long time before the reported case in 1805. We now also finally have the date of the incident: December 10, 1802 (Transcript, p. 4).

Calling the jury was apparently at Post's request: Fordham writes, Post "did demand of me[,] the said John N. Fordham[,] that the said action should be tried by a jury" (Transcript, p. 5). The statute under which Post brought his suit, the Twenty-Five Dollar Act, allowed either the plaintiff or defendant to request trial by jury.[54]

Fordham recounts how he directed Constable Thomas Harris—another resident of Southampton[55]—"to summon twelve good and lawful men being freeholders of the town of Southampton [ . . . ] who should in no wise be of kin either to the said Lodowick Post Plaintiff or to the said Jesse Peirson Defendant nor interested in the said cause" (Transcript, pp. 5–6).[56] The record contains a copy of Fordham's sealed order to effect the summons (Transcript, p. 9). It also includes Constable Harris's endorsed compliance that he summoned the twelve men named, and the price he charged—37.5¢ (Transcript, p. 9). This is listed as "Constable taking jury" in the list of costs in the case (Transcript, p. 10).

The twelve men summoned were: Stephen Satterley, John F. Havens, William R. Halsey, John Norris, Thomas Beebe, Silas Havens, Theophilus Cook, Charles Douglass, Isaac Jessup, James Sayre, Abraham Tapping, and Lacheus Payne (Transcript, p. 10).[57] They constituted the "panel" from

53. *"Duely and Constantly Kept,"* Appendix C, "Inferior Courts of Law," 55.

54. Fordham referred to the statute as "an Act of the Legislature of the State of New York entitled an Act for the more speedy recovery of debts to the value of twenty-five dollars passed the seventh day of April one thousand eight hundred and one" (Transcript, p. 3). The statute was published as *An Act for the more Speedy Recovery of Debts, to the Value of Twenty-Five Dollars, passed 7th April, 1801* (Albany: Printed by Charles R. and George Webster, 1802). Early American Imprints, Series II: Shaw-Shoemaker 1801–1819. Shaw & Shoemaker 2770. Record Number: 104404E10019A280; w283058. American Antiquarian Society and NewsBank, 2004. http://infoweb.newsbank.com (accessed December 9, 2007). S. 12 of the Twenty-Five Dollar Act sets out that either party can request trial by jury and describes the process to be followed. Fordham follows much of the language in this section in the account he provides.

55. See Suffolk County Census ("Thomas L. Harris").

56. See s. 12, Twenty-Five Dollar Act (setting out that the venire should "summon twelve good and lawful men, being freeholders . . . who shall be in no wise of kin to the plaintiff or defendant, nor interested in such suit").

57. Of these twelve, nine seem to be listed in the 1800 Suffolk County Census: John F. Havens (listed there as "Jonathan Havens"), William R. Halsey (there are two "William Halsey" listed), John Norris, Thomas Beebe (spelled there "Beebee"), Silas Havens, Theophilus Cook, Charles Douglass, Isaac Jessup, and James Sayre.

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which the following six were chosen: Douglass, Satterley, Sayr, Silas Havens, Pain, and John F. Havens (Transcript, p. 10).[58] How was this done?

Fordham's account tells us that the names of the twelve persons summoned by virtue of the "Venire," or call, "were severally written on several and distinct pieces of paper as nearly of one size as could be." They were delivered to him by Constable Harris and "rolled up by him"—it not being clear whether this was by Fordham or Harris—"all as nearly as could be in one and the same manner and put together into a box." Next, "the said John N. Fordham did draw out six of the said papers one after another." This process was set out in the Twenty-Five Dollar Act, which specified that it was the constable who rolled up the ballots, "all as near as may be, in one and the same manner, and put [them] together in a box, or some convenient thing."[59] Those persons named "who being respectively called did appear and were not challenged and being approved by me[,] the said Justice[,] as indifferent were the jury to try the said cause and were severally sworn well and truly to try the matter in [in?]difference between [the parties] . . . and a true verdict to give according to evidence" (Transcript, pp. 6–7).

According to Fordham, after the jury was sworn "they did sit together and hear the several proofs and allegations of the said parties which were delivered in public in their presence" (Transcript, p. 7). The list of costs in the case included the swearing of the jurors at 12.5¢ and their "Feas" at 75¢ (Transcript, p. 10).[60] Fordham then administered the oath to each of the witnesses, who numbered seven (their attendance costing 87.5¢), five of whom were served subpoenas (which cost a total of 96¢).[61] This list of costs also tells us that the jurors who attended and were not sworn came in at 37.5¢.[62] There was a charge of 19¢ for the venire itself, in addition to the fee the constable charged to use it to summon the twelve perspective jurors, another 37.5¢.[63] There are also prices listed for the

58. Irregular spelling of names left as is.

59. S. 12, Twenty-Five Dollar Act.

60. The Twenty-Five Dollar Act set out swearing of the jury at 12.5¢. It also set out the charge of each juror's fee at 12.5¢, to make a total charged here of 75¢ for 6 jurors. See s. 21, Twenty-Five Dollar Act.

61. Under s. 21 of the Twenty-Five Dollar Act, each oath cost 6¢, each subpoena 6¢, each witness attending and sworn 12.5¢, and each subpoena sent to a witness 12.5¢. Subpoenas for five witnesses would therefore be 30¢ and service of these would be 62.5¢, for a total of 92.5¢. Fordham seemed to overcharge then by 3.5¢. Seven witness oaths would cost 42¢ and witness fees would be 87.5¢, what Fordham charged.

62. This charge then should have been 36¢ not 37.5¢, since jurors who attended and were not sworn cost 6¢ each under the statute. See s. 21, Twenty-Five Dollar Act.

63. Both of these charges were set out under s. 21 of the Twenty-Five Dollar Act.

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summons sent to Pierson and the constable's charge for serving it (see Transcript, p. 10).[64]

In other words, there was a charge for everything. So, for instance, Fordham administered the following oath to Constable Harris:

> You do swear in the presence of Almighty God that you will to the utmost of your ability keep every person sworn on this inquest together in some private and convenient place without meat or drink except water[.] [Y]ou will not suffer any person to speak to them nor speak to them yourself unless by order of the Justice [or] unless it be to ask them whether they have agreed on their verdict (Transcript, p. 7).

It cost 6¢ (Transcript, p. 10). Unlike the other costs listed above, this charge for swearing the constable was not provided for in s. 21 of the Twenty-Five Dollar Act.[65] Fordham calculated the costs as amounting to $5.04, ordering Pierson to pay $5.

New York followed "the English rule" on costs at this time, namely that costs followed the merits of the action, meaning that the winner was awarded costs and the loser paid.[66] According to Esek Cowen, who wrote a book on the civil jurisdiction of justices of the peace in New York State, under the Twenty-Five Dollar Act, "if the plaintiff be found indebted to the defendant, or the defendant to the plaintiff, judgment is to follow in favour of the successful party for the debt or damages and costs."[67] The statute is clear that "the whole costs to be recovered or allowed in any action, shall not exceed the sum of five dollars."[68] This is presumably why Fordham rounded down the amount he calculated by 4¢ to $5 (see Transcript, p. 10).

All of the jury-related proceedings—summoning the panel of twelve, choosing the six jurors, swearing them, hearing the evidence from the parties and witnesses—took place on the same day, December 30, 1802, "at the house of Hugh Gelston" (Transcript, pp. 3, 6, 8, 9) where Fordham made his

64. The summons was charged at 9.5¢ when the statute put it at 9¢. The constable serving the summons was supposed to cost 12.5¢, 6¢ for each additional mile the constable was required to travel. If the cost here was 69¢, then presumably Pierson lived at a distance of 9.4 miles. See s. 21, Twenty-Five Dollar Act.

65. Of the other items listed, the other one not authorized by this section of the statute is a charge for swearing evidence at 42¢. When added to the swearing the constable 6¢, this, plus the overcharges for other items set out above, totaled 53.5¢.

66. See Caines, *A Summary of the Practice of the Supreme Court of the State of New York,* 5.

67. Cowen, *A Treatise on the Civil Jurisdiction of a Justice of the Peace,* 639. I am unable to find this specifically set out in the 1801 version of the act. Cowen might be referring to a later version of the statute, or, as he cites a case to support the proposition, it might be that this case read the general proposition into the more specific language of s. 11, the provision Cowen identified.

68. S. 21, Twenty-Five Dollar Act.

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court.[69] There are a number of things to notice here. First, lay justice was quick. Less than a month elapsed between the incident (December 10, 1802) and the determination of the case (December 30, 1802). Second, it happened at a relatively low cost—$5, which by one measure would be about $100 today.[70] Third, the proceedings before the justice of the peace were conducted in what would seem to be a private home. The "Court" of a justice of the peace in nineteenth-century New York was an informal place. However, it is worth noting that the Twenty-Five Dollar Act precluded justices of the peace who were inn or tavern keepers, or living in a house in which a tavern was kept, from trying cases under the act.[71]

What happened before the justice of the peace? According to Fordham, Lodowick Post and Jesse Pierson appeared before him "in their proper person" on December 30 (Transcript, p. 4). To appear by proper person meant *not* to appear by way of attorney. In fact, appearance by way of attorney before a justice of the peace was not permitted at this time, and if it happened, even by way of consent of the parties, it constituted reversible error.[72] Given that the record states that the parties appeared "in their proper person," we can assume that they did not have lawyers at this stage, or at least those lawyers did not appear with them.

Fordham's narrative states that Post was in possession and had under his command certain dogs and hounds who found and started a fox on the Beach and were chasing it, when Jesse, "with intention to injure him[,] the said Lodowick[,] and to prevent the said hounds and dogs from catching and taking the said Fox and with intention to hinder the said Lodowick from having the said Fox did . . . *maliciously* kill the said Fox" (Transcript, pp. 4–5). Post and the dogs and hounds chasing the fox were "in the view

69. Hugh Gelston is also in the 1800 Suffolk County Census. The record refers to "Hugh Gelston [?Junr?], "which I take to be "Junior," although he is not listed in this way in the census.

70. Lawrence H. Officer and Samuel H. Williamson, "Purchasing Power of Money in the United States from 1774 to 2006" (MeasuringWorth.Com, 2007), using the calculators for measuring the worth of money over time, available at http://measuringworth.com/calculators/ppowerus/.

71. S. 20, Twenty-Five Dollar Act.

72. See *Smith v. Goodrich,* 5 Johns. R. 353 (1810), cited for the proposition in Samuel R. Brown, *The Justices' directory, or points on Certiorari, being a digest of the cases reported by Johnson and Caines by a Gentleman of the Bar* (Ballston Spa [New York]: John Howe, 1813), 11. The Making of Modern Law. 2008. Gale. Gale, Cengage Learning. 30 April 2008 http://galenet.galegroup.com/servlet/MOML?af=RN&ae=F105002513&srchtp=a&ste=14 Gale Document Number F105002513. I have not been able to determine when attorneys began to be allowed to appear in courts of justices of the peace in New York. However, they are certainly there by the time that Cowen writes his book in 1821. See *A Treatise on the Civil Jurisdiction of a Justice of the Peace,* 291 ("All persons of full age may, if they choose, appear in this court by attorney").

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of the said Jesse . . . [who] did then and there *maliciously* take and carry away the said Fox" (Transcript, p. 5).[73] Post claimed that he was "injured and hath sustained damage to twenty-five dollars [ . . . ] to which the said Jesse Peirson then and there pleaded not guilty" (Transcript, p. 5). Defendants in trover, trespass-on-the-case, and trespass were supposed to plead using the language of "not guilty."[74]

The facts of the reported New York Supreme Court decision stated that "Pierson, well knowing the fox was so hunted and pursued, did, in the sight of Post, to prevent his catching the same, kill, and carry it off."[75] The intent here may or may not have been to injure Post or to be malicious (a characterization not used in the published report), as Pierson might have other motives for ridding the area of foxes. The local judge and amateur historian who developed an interest in the case in the late nineteenth century, H. P. Hedges, repeated that Jesse "saw the fox fleeing from his pursuers and run into the hiding place [an old shoal well] as a refuge. In a moment, with a broken rail, he was at the well's mouth and killed the fox."[76] When Post confronted Pierson, according to Hedges, Pierson said "it may be you was going to kill him, but you did not kill him. I was going to kill him and did kill him."[77]

As the son of a farming family, Pierson—himself a schoolteacher—might well have clubbed the fox on the principle that made sense to all farmers that foxes were vermin to be killed wherever and whenever encountered. This was the New England yeomen view of foxes as vermin, not the valuable object of a recreational pursuit considered to be decadent and luxurious by "Puritan" lights.[78] Long Island and other parts of New York such as Westchester County were settled by New Englanders.[79] Hedges described Jesse's father, David Pierson, as being "of the best blood of England: so strong in Calvinist inclinations and proclivities that some called him a fatalist."[80] He was a Revolutionary war hero, with a prominent place in the local history of South-

73. Emphasis added to these quotes.

74. See Cowen, *A Treatise on the Civil Jurisdiction of a Justice of the Peace,* 426.

75. *Pierson v. Post,* 3 Cai. R. 175.

76. Hedges, *Sag Harbor Express.*

77. Ibid.

78. McDowell, "Legal Fictions in *Pierson v. Post,*" 739 (hunting to hounds "was practiced only south of New England[,] up to and including New York City and Eastern Long Island. New Englanders disapproved of the elaborate form of the sport"), 744 ("New Englanders . . . disapproved of hunting for sport as wasteful and self-indulgent"), 763–64 (on foxhunting in Westchester, Long Island, and Manhattan and New Englanders resistance to doing it in style).

79. See Patricia U. Bonomi, *A Factious People: Politics and Society in Colonial New York* (New York and London: Columbia University Press, 1971), 22–24.

80. Hedges, *Sag Harbor Express.*

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ampton.[81] The old shoal well where Hedges reported that the fox hid when Pierson killed it was "near Peter's pond, not far from the ocean shore, and some mile or less east of Sagg Street."[82] An 1800 map of the area indicates that this was not far from Jesse's house, as well as many other Piersons who owned properties along this end of that street just west of the incident.[83]

Nathan and Lodowick Post are less visible in local histories and when they are mentioned it is usually in association with a lucrative economic interest they were involved with such as whaling.[84] Their house was situated in town, on the "Main Road."[85] Hedges wrote that Nathan Post had made enough money in the West India trade to "build a capacious dwelling, decorate its walls, wainscot its rooms, and finish his house in what was then thought superior style."[86] In other words, the Posts were wealthy and wanted to show it. Lodowick's foxhunt would have been another example of this very non-Calvinist demeanor. As Bethany Berger has explained, it also represented a move away from a view of land as a source of thrifty agricultural use to a recreational one, with the Posts themselves representing a different way of acquiring status in the community and inhabiting it.[87]

Where New Englanders laid old fish heads out for foxes at night and shot them in multiple numbers by moonlight—foxhunting as "pest control"—New Yorkers were more inclined to see them as the object of valuable recreational sport.[88] The eastern part of Long Island, particularly the Hamptons (Southampton, and East Hampton), had long been involved in a push and pull between Connecticut (across the water) and New York (by way of land attachment).[89] Two very different views of foxes, foxhunting—"hunting in style versus hunting to kill"—mapped onto the two regions and their respective cultures, creating a "boundary, of sorts," as Andrea McDowell has put it.[90] It was probably this that lay behind the original dispute and the sense that both parties no doubt had that they were in the right.

81. See, e.g., Halsey, *Sketches from Local History,* 74 (describing David Pierson's role as captain of a company of soldiers from Southampton known as "the Minute Men of Bridgehampton"). See also Berger, "It's Not About the Fox," 1123–25 (tracing prominence of the Pierson family in the town's history).

82. Hedges, *Sag Harbor Express.*

83. See "Map Extending from Water Mill to Wainscott About the Year 1800, Compiled by William Donaldson Halsey [and] Drawn by George H. Baldwin, 1924[,] Bridgehampton N.Y.," in Halsey, *Sketches from Local History,* Appendix.

84. See, e.g., ibid., 109.

85. See "Map Extending from Water Mill to Wainscott About the Year 1800," ibid., Appendix.

86. Hedges, *Sag Harbor Express.*

87. See Berger, "It's Not About the Fox," 1125–33.

88. See McDowell, "Legal Fictions in *Pierson v. Post,*" 764–65, 762.

89. See Halsey, *Sketches from Local History,* 9–12.

90. McDowell, "Legal Fictions in *Pierson v. Post,*" 765.

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It might be that in pleading not guilty, Pierson was not denying that he knew that Post was in pursuit of the fox. What he was denying was the intent to injure Post and the maliciousness spoken about here. The language of malice—assuming that this comes from Post and not Fordham—might indicate the degree of anger Post had about what happened.[91] However, in Pierson's eyes, he might have seen himself as simply ridding the area near his family's farmland of "one of those wild and noxious beasts" (Transcript, p. 4). As Livingston put it, picking up on this phrase, which he identified as having its source in the pleadings, and adding his own embellishment: the fox was "a 'wild and noxious beast' [whose] depredations on farmers and on barn yards, have not been forgotten . . . to put him to death wherever found, is allowed to be meritorious, and of public benefit."[92] Pierson might have assumed that he had the right to kill the fox, even if he knew that there was a hunter in pursuit. Such hunting was about the sport and, after all, in such sport the fox might well get away.

Scholars have long puzzled over why the lawyers and judges in the case at the New York Supreme Court treated what looked to be a tort-like claim (the interference with Post's hunt) as a property law point (who owned the fox). "It is all very strange," Charles Donahue wrote, "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."[93] Andrea McDowell argued that "the harm Post suffered was malicious interference with the hunt, but that he had to shoe-horn the facts into a property claim because of common law constraints. There are signs that Post originally sued in tort."[94]

Trespass on the case or "case," the form of action used here, was "the general remedy when no other action fit the circumstances of the plaintiff's injury."[95] There was and is no tort of wrongful or malicious interference

91. If Cowen is a good indicator, malice did not seem to have been a standard pleading form. When it is used (outside the context of malicious prosecution) it appears as a qualifier of behavior in an ordinary action. For instance, a "willful and malicious" trespass could have consequences in terms of the execution of a judgment. See Cowen, *A Treatise on the Civil Jurisdiction of a Justice of the Peace,* 654–55.

92. *Pierson v. Post,* 3 Cai. R. 180.

93. Donahue, "*Animalia Ferae Naturae*: Rome, Bologna, Leyden, Oxford, and Queen's County, N.Y.," 47–48. See also Charles Donahue, Jr., "Noodt, Titius, and the Natural Law School: The Occupation of Wild Animals and the Intersection of Property and Tort," in *Satura Roberto Feenstra,* ed. J. A. Ankum, J. E. Spruit, and F. B. J. Wubbe (Fribourg: Presses Universitaires Fribourg Suisse, 1985), 609–29, 611.

94. McDowell, "Legal Fictions in *Pierson v. Post,*" 738. See also 770–72, discussing malicious interference and the *Keeble v. Hickeringill* case.

95. *"Duely and Constantly Kept,"* Appendix A, "Forms of Action, at Common Law," 50.

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with a hunt and so Post could not have claimed this. As Brian Simpson noted in his study of a case cited in the reported appellate decision, *Keeble v. Hickeringill,* "there was an old dogma in the common law that it took no account of things of mere pleasure and delight."[96] The New York Supreme Court was not likely to recognize such a new tort. However, a jury might well be 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, property or tort. This was indeed what happened in the case.

The jury "found for the Plaintiff seventy-five cents for his damages besides his costs" (Transcript, p. 8). This did not give Post anything close to $25. And, indeed, 75¢ would seem to be the very definition of a "nominal" award. The jury's own "Feas" cost as much and administering oaths to the witnesses and serving them with subpoenas each cost more (see Transcript, p. 10). It was, however, the technical win, which in turn triggered the award of costs in the amount of $5—over six times the amount of the damage award itself—that, practically speaking, made Post the winner of his suit. Indeed, the low amount of this award might well have been what motivated Fordham to take the tally of costs up to the maximum amount he was allowed to award. However, 75¢ might not have been merely a nominal award. It is also possible that it was the amount that represented what the jury really did think Post lost by way of his injury, since the market value of a fox pelt would have been approximately $1.[97] It is somewhat odd to give that amount to Post, considering that, had his "dogs and hounds" continued in pursuit of the fox and reached it before Jesse Pierson did, they would have eaten it.[98] In any event, it was one way of measuring what was lost.

As for Post, he might not have thought that what he lost was worth $25. Framing the claim "to" twenty-five dollars (see, e.g., Transcript, p. 5) placed it within the ambit of the Twenty-Five Dollar Act and a justice of the peace—a jurisdiction that could not exceed $25 at this time.[99] A jury trial, given all the charges for summoning and swearing jurors and

96. See A. W. B. Simpson, "The Timeless Principles of the Common Law: *Keeble v. Hickeringill* (1707)," in *Leading Cases in the Common Law* (Oxford: Oxford University Press, 1995), 45–75, 64.

97. McDowell, "Legal Fictions in *Pierson v. Post,*" 763.

98. Ibid., 738.

99. The jurisdiction was expanded to $50 in matters litigated and $100 upon confession in 1818. See Cowen, Preface to *A Treatise on the Civil Jurisdiction of a Justice of the Peace,* iii. The two primary jurisdictional divisions in the work were the Twenty-Five Dollar Act and the Fifty-Dollar Act.

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witnesses, was "a potentially costly gamble."[100] However, Post must have had reason to believe that the justice of the peace and jury would be sympathetic to his case. Framing the suit up to $25 gave him a chance at the maximum amount of money that could be awarded to him by the jury under the statute. The jury, not very sympathetic to his plight, was off-set to some extent by the justice of the peace, who awarded the maximum amount of costs he could under the statute.

Cowen wrote in his book that the court of a justice of the peace "[a]t one time took cognizance of various matters to the value of £100; but in 1782, it was limited to 25 dollars."[101] Such a limitation of jurisdiction should probably be understood as one moment in the push and pull between lay justice and professional justice in this period.

In eighteenth-century Virginia, for instance, one study has argued that the classic country-court interests were well represented by the clash between the gentry/planter justices and lawyers.[102] The latter wanted more formal procedure, precedent, and proper form.[103] They also wanted more able judges, i.e., more professionalized and drawn from the ranks of lawyers, who would embrace what was antithetical to the country justices, namely that law was a precise scientific enterprise.[104] Reforms involved abolishing the customarily hereditary office of the justice of the peace, offering compensation for the job, and instituting procedural reform.[105] Lawyers like Thomas Jefferson, George Wythe, and St. George Tucker had to figure out how to reconcile elite initiatives like university legal education or an American edition of Blackstone with Republican ends and how to convince the skeptical that this was not simply replacing one magistracy with another.[106]

100. William M. Offutt Jr., *Of "Good Laws" and "Good Men": Law and Society in the Delaware Valley, 1680–1710* (Chicago: University of Illinois Press, 1995), 123 ("The fee structure made this contest before a jury a potentially costly gamble. Summoning and swearing jurors, calling and recording witnesses, and recording the verdict were additional costs not usually present in an uncontested or even a contested bench proceeding").

101. Cowen, Preface to *A Treatise on the Civil Jurisdiction of a Justice of the Peace,* iii.

102. See A. G. Roeber, *Faithful Magistrates and Republican Lawyers: Creators of Virginian Legal Culture, 1680–1810* (Chapel Hill: University of North Carolina Press, 1981), 33–34.

103. Ibid., 57.

104. Ibid., 113.

105. Ibid., 168, 190, 176.

106. See ibid., 235 (referring to Jefferson's famous defense of an "aristocracy of talent," which did not go unnoticed or uncontested—"The replacement of familial oligarchies with cerebral and professional cabals struck many Virginians as thoroughly suspect"); 236–37 (on Tucker's edition of *Blackstone's Commentaries*); 239 (Jefferson and his mentor Wythe on education); 255 ("What had such a 'professional' and elitist argument to do with republicanism?"); 257 ("a system of law [that] naturally promoted the interests of an elite profession of lawyers . . . had to justify itself within the Country tradition of Virginia's past").

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It goes beyond the scope of this introduction to flesh out what was happening in relationship to that general movement in New York at this time and whether the decrease in the amount of the justice of the peace jurisdiction should be understood in terms of the struggle and ultimate triumph of professional over lay justice.[107] It is worth noting, however, that by 1814, there were nearly two hundred cases a year appealed directly to the New York Supreme Court from the decisions of justices of the peace, many of them involving relatively small sums of money.[108] Cowen wrote of the New York Supreme Court in 1821, "I have observed, for a few years past . . . that a considerable share, and in several instances, I think, a majority of the causes which have occupied the large calendar of that court . . . are brought there by certiorari from a justice's court."[109] In other words, there seemed to be a disciplinary process at work.

"Local justices had to be on their guard with . . . lawyers, for they could be reprimanded for high-handed behavior . . . and a writ of *certiorari* could remove the proceedings from a county decision to a higher court."[110] As one eighteenth-century English description of a justice of the peace put it:

> [The justice of the peace] finds himself surrounded with numbers of pettifogging attorneys and solicitors, who watch his steps, and if there happens the least flaw in the method of drawing up and managing the proceedings, he finds himself obliged to attend a *certiorari* in the King's Bench.[111]

As if to demonstrate the process of supervision, Fordham was told to "certify and send together with this writ" "all the process[,] order[,] proceedings[,] and judgment" relating to the case so that these could be examined by the justices of the Supreme Court in New York City. We "Do Command you," as the document puts it (Transcript, p. 1).

In other words, Fordham was required to respond, and he did so with an account of what he did in the case (Transcript, pp. 2–8). "A justice cannot move to quash a certiorari directed to him. He must obey it at his peril; and return what is legally required of him, and take no notice of what he is not bound by law to return."[112] Cowen reiterated the point in his work, writing

107. On lay justice generally, see John P. Dawson, *A History of Lay Judges* (Cambridge: Harvard University Press, 1960).

108. *"Duely and Constantly Kept,"* 20.

109. Cowen, Preface to *A Treatise on the Civil Jurisdiction of a Justice of the Peace,* v.

110. Roeber, *Faithful Magistrates and Republican Lawyers,* 18.

111. Quoted in ibid.

112. *Van Patten v. Ouderkirk,* 2 John. Cases 108 (1800), cited for the proposition in Brown, *The Justices' directory, or points on Certiorari,* 41. Also quoted and cited in Cowen, *A Treatise on the Civil Jurisdiction of a Justice of the Peace,* 683.

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"[o]n receiving the writ of *certiorari,* it becomes the immediate duty of the justice to set about making his return."[113] The request was witnessed on January 29, 1803 (Transcript, p. 2) and Fordham's document was dated April 26, 1803 (Transcript, p. 8). It is unclear whether that was enough time for the case to make the May Term 1803 for which it was intended.

Sanford's strategy was to allege that multiple errors were made by the justice of the peace. It was this appeal and, technically speaking, Pierson's new action (he is described in the published report as "the now plaintiff") that gave rise to the elaborate opinion. We knew from Livingston's judgment that there were multiple grounds of appeal. He wrote in the opening lines of his dissent that "of the six exceptions, taken to the proceedings below, all are abandoned except the third, which reduces the controversy to a single question."[114] That single question, according to Livingston, was who owned the fox. Until now we had no indication of what those other "exceptions" were. In the new record, we have the six exceptions as presented by Pierson's lawyer, Sanford (see Transcript, pp. 11–14). The exceptions were all claims of "manifest error," some greater than others, which I list and explain here.

The *first* claim of manifest error was that Fordham's order to Constable Harris was directed generally to "*either of* the Constables of the town of Southampton" (Transcript, p. 8, emphasis added) and not to Harris specifically—"whereas by law every summons in actions before Justices of the peace ought to be directed to some Constable or other proper officer of the City or town where the defendant dwells or can be found" (Transcript, p. 11).[115] Cowen used the phrase "*any* constable of the said county" in the sample summons in his book, as did parts of the Twenty-Five Dollar Act.[116] Fordham simply stated in his account that he "did issue a summons directed to any of the Constables of the County of Suffolk where the said Jesse Peirson then resided" (Transcript, p. 3).

The *second* "exception" was that Pierson was not allowed the time required by law before being summoned to respond to Post's complaint on December 30, 1802, Pierson being required to appear "at two oclock in the afternoon of the same day to answer" (Transcript, p. 11):

113. Cowen, *A Treatise on the Civil Jurisdiction of a Justice of the Peace,* 680. Cowen sets out a sample return and explains various other obligations of the justice of the peace, e.g., to return and affix the affidavit of the party requesting the writ. See 681–84.

114. *Pierson v. Post,* 3 Cai. R. 180.

115. See s. 2, Twenty-Five Dollar Act (the summons or warrant shall be "directed to some constable or other proper officer of the city or town where the defendant dwells, or can be found").

116. See Cowen, *A Treatise on the Civil Jurisdiction of a Justice of the Peace,* 248 (emphasis added); s. 12, Twenty-Five Dollar Act.

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> [W]hereas by law every summons in actions before Justices of the peace ought to be made returnable not less than six nor more than twelve days from the time of issuing such summons and every such summons ought by law to be served at least six days before the time of appearance mentioned therein (Transcript, p. 12).[117]

If the allegation were true, it would constitute serious error. Fordham's order for Pierson to appear on December 30 was given under Fordham's hand on December 22 (see Transcript, pp. 8–9). Constable Harris's endorsement that the summons was legally served contains some difficult-to-read handwriting. It appears to say that Pierson was served by reading the summons within the hearing of someone named "Jesey Parson" (Transcript, p. 9).[118] The Twenty-Five Dollar Act did not authorize service to someone other than the defendant or a family member.[119] In any case, Fordham acknowledges elsewhere that Pierson was not "duly and personally served" until December 30 (Transcript, p. 3). This was a clear violation of the length of time required between service and appearance.

The *third* ground for appeal was the one taken up in the New York Supreme Court's reported case, namely that Post's claim was "not sufficient in law to maintain an action."[120] This meant that even if all the facts alleged in Post's claim were true—to wit, that Pierson knowingly (and even maliciously with intent to injure) interfered with Post's hunt—this was not enough to maintain or support an action against Pierson. This might be due to the tort law point that the common law did not protect recreational pursuits with a tort of wrongful interference with a hunt, or the property law point that pursuit of a wild animal was not enough when compared against someone who (albeit rudely) seizes and takes. The plea did not give the substance of the argument; it simply stated the procedural point that

> the matters contained therein [i.e., Post's "declaration[,] complaint[,] or demand"] are not sufficient in law for the said Lodowick Post to have[,] maintain[,] or support his said action against the said Jesse Peirson and therefore

117. Cowen, *A Treatise on the Civil Jurisdiction of a Justice of the Peace,* 252 ("The defendant must be summoned at a time and place to be expressed in the summons, not less than six, nor more than twelve days, from the time of issuing the summons"). See s. 2, Twenty-Five Dollar Act.

118. This might well be yet another variation on the spelling of "Jesse Pierson." See note 33.

119. As Cowen explained, a summons could be served by reading it to the defendant, and if he required it by delivering him a copy. It could also be served by leaving a copy at the defendant's house in the presence of a family member, who would be informed of its contents. See *A Treatise on the Civil Jurisdiction of a Justice of the Peace,* 271. See also, s. 3, Twenty-Five Dollar Act.

120. *Pierson v. Post,* 3 Cai. R. 175.

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> the said judgment thereupon rendered and given is vicious[,] erroneous[,] and void in law (Transcript, p. 12).

This was not simply manifest error, Sanford claimed, but "great and manifest error" (Transcript, p. 12).

The *fourth* complaint challenged the jury summons for not "specifying the purpose for which the said twelve freeholders were to appear" (Transcript, pp. 12–13). A sample summons for jurors includes this information, excluded in what Fordham wrote here (see Transcript, p. 9).[121]

The *fifth* objection was to Fordham awarding costs in the case rather than the jury, who, according to Sanford, "did not find[,] award[,] or assess any costs whatever in the said action for or in favor of the said Lodowick Post" (Transcript, p. 13). Sanford claimed here that "by law no costs . . . whatever can be adjudged or awarded . . . unless the jury who try the case find and assess costs for the plaintiff separately and distinctly from the damages which they find and assess for in favor of the plaintiff" (Transcript, p. 13). Now Fordham seems to have contended that the jury did make a finding for costs, writing for instance at one point in the document that "they [the jury] found for the Plaintiff seventy-five cents for his damages *besides his costs*" (Transcript, p. 8, emphasis added). However, it does seem that it was Fordham and not the jury who tallied the costs. Moreover, Fordham overcharged on some items and charging for items not listed in the statute to the tune of an additional 53.5¢.[122] "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, and strict in holding them to the exact limits of jurisdiction prescribed to them by statute."[123] Deviating from the amounts as listed in the statute and charging for amounts not listed were probably not authorized departures.

Finally, the *sixth* issue was the general claim that "by the law of the land judgment ought to have been rendered and given" for Pierson rather than Post, error also described as both "great" and "manifest" (Transcript, p. 14). The relevant "law of the land" again could have been the tort or property law point.

Sanford ended his list with the following "prayer":

> [T]he said Jesse Peirson prays that the said judgment for the errors above specified and assigned and also for many other errors apparent in the said plaint[,] process[,] proceedings[,] record[,] and judgment may be reversed[,]

121. See Cowen, *A Treatise on the Civil Jurisdiction of a Justice of the Peace,* 530.

122. See above, notes 60, 61, and 64.

123. *Jones and Crawford v. Reed,* 1 Johns. Cas 20 (1799), partially quoted in Brown, *The Justices' directory, or points on Certiorari,* 42.

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> annulled[,] revoked[,] set aside[,] and altogether held for nothing and that he[,] the said Jesse Peirson[,] may be restored to all the things which he has lost by reason of the said judgment (Transcript, p. 14).

Post's lawyer—given here by his full name, Cadwallader D. Colden (Transcript, p. 14)—acceded in the request to have the New York Supreme Court examine the case.

The New York Supreme Court, for its part, was in no hurry to do this. The case was initially intended for the May Term 1803 in New York City and, indeed, the roll should have been made by Sanford at this time.[124] However, the case was not decided then. Nor was it decided in the August Term 1803 (Albany), November Term 1803 (New York City), February Term 1804 (Albany), May Term 1804 (New York City), August Term 1804 (Albany), November Term 1804 (New York City), February Term 1805 (Albany), May Term 1805 (New York City) (see Transcript, pp. 15–19). The record includes over four pages consisting of variations on the following refrain:

> And because the Court of the People of the State of New York now here is not yet advised of giving their Judgment of and upon the premises [a] day therefore is given to the said parties until [*new date*] before the Justices of the People of the State of New York of the Supreme Court of Judicature of the same People at the City hall of the City of [*either New York or Albany*] to hear their judgment of and upon the same premises for that the Court of the People of [the] State of New York now here are not yet advised thereof[.] On which day before the Justices of the People of the State of New York of the Supreme Court of Judicature of the same People at the City hall of the City of [*either New York or Albany*] come the said parties by their said Attornies[.]

The case is held over from term to term for at least eight terms or *two years,* a period of time represented in the record by the ritualistic repetition of the above passage with the new date and place where the court sat at such date. This ritual repetition seems to have been a way to effect the continuance of a case on the roll.[125]

The last listed term appears to be May 1805 in New York City; however, somewhat confusingly, Albany is also named there (see Transcript, pp. 18–19). The August Term in 1804 includes the same straddling of both locations (see Transcript, pp. 16–17). Was August some kind of mixed term? If it was, this would help explain what members of the court were doing in the New York City area into September.

124. See Caines, *A Summary of the Practice of the Supreme Court of the State of New York,* 147 n.3 (a note next to the term in the introductory heading of a roll entry stating that this is to be "[t]he term in which you make up your roll").

125. See, e.g., Caines, *Practical forms of the Supreme Court,* 18–19, 51.

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Then there is the final disposition of the case. Having "diligently inspected and examined" the record of the proceedings before the justice of the peace and his judgment, as well as having given "mature deliberation" to these matters, the record states that "it seems to the Court of the People of the State of New York now here that there is manifest error in the said record and proceedings and also in the rendering and giving of the said judgment." Therefore "the said record and proceedings [must] be reversed[,] revoked[,] annulled[,] entirely set aside[,] and altogether held for nothing." Jesse Pierson was to be "restored to all things which he the said Jesse Peirson has lost by reason of the said judgment," including a recovery against Lodowick Post for "One hundred & twenty one dollars & thirty seven cents for his costs and charges [ . . . ] about the prosecution of the writ of certiorari" (Transcript, p. 19).

This amount is far from a rumor that the parties had to pay the exorbitantly high figure of £1000 on each side.[126] However, $121.37 is also a far cry from the $5 costs of the jury trial in 1802. In 2006 dollars, the bill for the jury trial would have been $97.02, whereas Post ultimately had to pay the equivalent of $2,153.89, about twenty-two times as much just over a few years later.[127]

The final disposition does not specify which of the "manifest errors" was chosen as the basis for the reversal order. We know that the published appellate report focused on the third exception about the facts not amounting to a claim in law, specifically that "the declaration and the matters therein contained were not sufficient in law to maintain an action."[128] Given what the record now reveals, we should consider the possibility that the judges viewed this as a case riddled with so much procedural error that it more or less went without saying that the reversal would be ordered. That would give a new understanding to the opening words of Livingston's dissent that "[o]f the six exceptions, taken to the proceedings below, all are abandoned except the third, which reduces the controversy to a single question."[129] It is as if Livingston is reminding his colleagues that the case was not supposed to be decided on the grounds of procedural error, implying that perhaps he suspected the majority's choice on the third question and the

126. See, e.g., Hedges, *Sag Harbor Express* ("It was said the costs amounted to a thousand pounds [on] each side; at that day an enormous sum and justifying the facetions [sic] epigram of one of my name and kin, 'Law is costive'"). If this rumored amount included the lawyers' fees, £1000 might not have been such a wild exaggeration.

127. *Pierson v. Post,* 3 Cai. R. 175.

128. Officer and Williamson, "Purchasing Power of Money in the United States from 1774 to 2006."

129. *Pierson v. Post,* 3 Cai. R. 180.

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finding for Pierson rather than Post was being influenced to some extent by the procedural problems in the proceedings below.

Complaints about the wording in the order to the constable and incomplete form for the juror summons seem insufficient grounds for rendering the lower proceedings null and void, as might also some straying in the calculation of costs—the first, fourth, and fifth complaints. However, the second objection relating to improper service and, if it was improper, the failure to obey the six-day notice period between summons and appearance seems serious. If the judges did think this, then it would make sense that they would continue to hold the case over until they had the time to deal with it in the way that was of interest to them.

Recall here that the *Suffolk Gazette* announced an adjourned session of the Supreme Court in the Riverhead Courthouse on Wednesday, September 18. We know that Tomkins signed the judgment on September 10. It might be that the oral argument and decision on the third point, which we have recorded in the published report, did not occur until *after the fact* in this adjourned session on Wednesday, September 18. In other words, the disposition on September 10 had really decided the case, and the reported case was embellishment on one particularly "nice and novel question,"[130] good for debate and settling an important "high" property law point. Riverhead was in Suffolk County, where all of these events took place. This is the region where the parties were from, the justice of the peace proceedings, including the jury trial, had occurred, and where the lawyer driving the appeal, Nathan Sanford grew up and owned a house.[131] It might be a coincidence that the court was there at that time holding what would appear to be an unusual session, but it is difficult to think so.[132]

There were many ordinary reversals on *certiorari* from courts of justices of the peace in New York throughout this period. One "gentleman of the bar," Samuel Brown, produced a small fifty-or-so-page digest of the principles of *certiorari* reversals as found in cases reported by both Johnson

130. Ibid., 177.

131. See, e.g., Halsey, *Sketches from Local History,* 184–85 (for a sketch of Sanford, calling him "the most distinguished and eminent man ever born in the limits of the town of Southampton, Long Island"); "Map Extending from Water Mill to Wainscott About the Year 1800," in Halsey, *Sketches from Local History,* Appendix (house of Nathan "Sandford" located in Scuttle Hole north of Bridgehampton).

132. I have been unable to ascertain what was happening in the Riverhead courthouse on either September 10 or September 18, 1805. Riverhead is not among the locations for which there are minute books in the Albany archives (email to the author from New York State Archives, Reference Services, August 13, 2008). Minute books for sessions of the New York Supreme Court held by the Suffolk County Clerk's Office do not begin until the late 1840s (email to the author from Sharon Pullen, August 15, 2008).

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and Caines in 1813.[133] These cases are short, direct, and to the point, devoid of any scholarly pretension and unlikely to have been the product of great debate. *Pierson v. Post* was not destined to be one of those ordinary cases. I think it was being saved over for a special purpose, as someone saw its potential to be another kind of case. The new record shows us the "low law" that might well deserve to be thought of as the real case. It is certainly very different from the one we thought we knew.

133. Brown, *The Justices' directory, or points on Certiorari.*

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# Papyrology and 3 Caines 175

CHARLES DONAHUE, JR.

Those who work with the papyri or stone inscriptions from the ancient world frequently are faced with incomplete texts. Papyrologists or epigraphers will attempt to fill in the missing parts of the text, relying on their knowledge of what similar documents say. Sometimes a later find will provide a missing piece. Experience with such finds has been that an expert reconstruction normally will get the basic sense of the document right, but rarely gets the exact wording right when anything more than a few letters needs to be filled in.

I have been teaching *Pierson v. Post* to first-year property students for forty years. Since I use the case to introduce law students to what the litigation process is all about, I have—despite the fact that I assumed that the record had been lost—filled in details about the litigation process in the case on the basis of George Caines's (and the justices') cryptic summary. Indeed, one of the points of the exercise is how much one can learn about the litigation process from such cryptic summaries.

We need no longer guess. With amazing assiduity—and, it must be admitted, some good luck—Angela Fernandez has found the record, transcribed it, and published it. We are, of course, all in her debt. While we are congratulating Professor Fernandez, let us take this opportunity to see how well this particular papyrologist/epigrapher did at filling in the gaps.

As Caines has it: "This was an action of trespass on the case commenced in a justice's court, by the present defendant against the now plaintiff. . . . A verdict having been rendered for the plaintiff below, the defendant there sued out a certiorari . . . ."[1] The majority opinion of Tompkins, J., confirms: "This cause comes before us on a return to a certiorari directed to one of the justices of Queens county."[2] The record confirms that the action was indeed one of trespass on the case, that it was commenced in a court of a

1. *Pierson v. Post,* 3 Caines 175 (N.Y. Sup. Ct. 1805).
2. Ibid. at 177.

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justice of the peace, that the justice empanelled a jury which decided for the plaintiff ("verdict" cannot mean anything else), and that the Supreme Court issued a writ of certiorari to bring the case before it. Indeed, the wording of the writ is almost the same (with the regal references transformed) as the sample English writ printed in Donahue, Kauper, and Martin's property casebook.[3] The only thing that is puzzling is why does Tompkins say that the justice was one of Queens county, when we know from the record that the justice was of Suffolk county and that the events took place there?

We have known since 1916 that the events in question took place in the Hamptons,[4] which are located on the eastern end of Long Island, firmly in what is now Suffolk County. Occasionally, a student familiar with New York geography will ask why a JP for Queens county heard the case. My answer (fortunately never printed) was that the county boundaries have changed since 1805. They have, but not that much. What is now Nassau county was part of Queens county until the 1890s, but the Hamptons have been in Suffolk county since the New York counties were first formed in 1683.[5] Now that we have the record, we can firmly assert that Tompkins got it wrong. Anyone familiar with the hash that case reports frequently make of the legally irrelevant facts that appear in the record of the case should have known better. Indeed, one might use this slip to illustrate Jerome Frank's point that the "facts" in appellate cases are frequently unrecognizable to the parties to the case.[6]

My "take" on this case has long been that Post's lawyer, Colden (whom we suspected, and now know, was Cadwallader David Colden, a future mayor of New York and U.S. congressman)[7] botched the job for his client Lodowick Post. In order to make this point one must go back to the events that may or may not have taken place on a beach. Whether one wishes to dramatize the events by riding to the hounds on a chair on top of a desk, making use of a stuffed fox (a gift of a former property class) is, I suppose, a matter of taste. (It is frequently the only thing that the students remember about the property course.) The point, however, is that Post was very angry, and he (and perhaps his father, who was still alive in 1802)[8]

3. Charles Donahue, Thomas Kauper, and Peter Martin, *Cases and Materials on Property,* 3rd ed. (St. Paul: West Publishing, 1993), 8.

4. James Truslow Adams, *Memorials of Old Bridgehampton* (Bridgehampton, 1916; repr., Port Washington, N.Y.: I. J. Friedman, 1962), 166, 319, 364 (relying on an account by H. P. Hedges, published in 1895 in a local newspaper).

5. http://en.wikipedia.org/wiki/Nassau_County,_New_York; http://en.wikipedia.org/wiki/Suffolk_County,_New_York; (last visited 4/11/08).

6. Jerome Frank, *Courts on Trial: Myth and Reality in American Justice* (Princeton: Princeton University Press, 1949; repr. 1973), 74–77.

7. http://en.wikipedia.org/wiki/Cadwallader_D._Colden (last visited, 4/11/08).

8. He died in October, 1803. See Bethany Berger, "It's Not About the Fox: The Untold History of *Pierson v. Post,*" *Duke Law Journa*l 55 (2006): 1135. Professor Berger has con-

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went to see a lawyer. Now how do I know this? Because even in 1802 only a lawyer could have produced the following piece of English prose: "did upon a certain wild and uninhabited, unpossessed and waste land, called the beach, find and start one of those noxious beasts called a fox."[9]

The record confirms, quite dramatically, that Post's plaint was professionally drafted.[10] The problem is that the record gives no evidence that Post was represented by counsel at this point; indeed, in this period counsel could not appear on behalf of clients before a justice of the peace.[11] While it is possible, as Professor Fernandez tentatively suggests,[12] that Justice Fordham converted Post's more informal oral complaint into the language we find here, I think it unlikely. The elaboration of the plaint has all the hallmarks of a document carefully drafted by a lawyer who was firmly on Post's side. Counsel could not appear before justices of the peace, but the rule did not require—indeed it is hard to imagine how it could have required—that litigants before the justices of the peace not consult counsel before they went to court. I suspect that Post appeared in the justice's court carrying his counsel's plaint with him.

Now why is this important? Because the theory of the action as brought before the justice, as many writers have pointed out, is emphatically not what was eventually argued before the Supreme Court.[13] The gist of the complaint was not that Pierson took Post's fox; the gist of the complaint was that Pierson maliciously interfered with the hunt. Whether such behavior would have been actionable under English common law in this period is controversial. The closest case that has been found is *Keeble v. Hickeringill,*[14] and it has been argued that *Keeble* would not apply to situations where the hunting was being done for sport.[15] Be that as it may be,

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vinced me that my speculation that the Posts were "probably of Dutch descent" is almost certainly wrong. What divided the Piersons and the Posts was much more complicated than that, but it "was not about the fox."

9. 3 Caines, at 175.

10. It is perhaps not quite technically a "declaration," as Caines calls it (a document that normally implies a preceding bill of Middlesex and/or *latitat*), but it is close enough.

11. Angela Fernandez, "The Lost Record of *Pierson v. Post,*" *Law and History Review* 27 (2009): 165.

12. Ibid., 168.

13. Ibid, 167.

14. *Keeble v. Hickeringill,* 11 East 574, 103 Eng.Rep. 1127 (K.B. 1707). 11 East was not published until 1815, and previous reports are unreliable. This fact may have affected both the advocacy and the result in *Pierson.* The majority opinion, relying on older reports, distinguishes *Keeble* on grounds that are not viable if we rely on East's report (which is said to have been taken from Holt's own manuscript). 3 Caines, at 179.

15. See A. W. B. Simpson, "The Timeless Principles of the Common Law: *Keeble v. Hickeringill* (1707)," in *Leading Cases in the Common Law* (Oxford: Clarendon Press, 1995), 64. For an argument distinguishing *Keeble* on policy grounds, see James E. Krier,

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grounding the complaint on malicious interference with the hunt stood a much better chance of producing a winning case for Post than grounding it on Post's ownership of the fox. Indeed, 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.

Now who was the lawyer who saw this possibly winning line of argument for Post? We don't know. By the time our record was compiled, Colden was representing Post. But it seems unlikely that Colden was representing Post from the beginning. Colden was a fancy New York City lawyer. We now know, however, that there were local lawyers on the eastern end of Long Island in this period. Nathan Sanford, Pierson's lawyer, was one of them.

How did it come about that the case got argued about an issue that, it would seem, the plaintiff's lawyer had carefully avoided when the case was tried in the justice's court? Professor Fernandez sees the hand of soon-to-be Chief Justice Kent. She may be right. Kent's notes on the case, which Professor Fernandez has brought to light elsewhere, certainly show that later he had considerable interest in the case.[16] My own view, formed by playing out the scenario before numerous classes, focuses more on the lawyers. I remain of the view that we should focus on the lawyers, though I'm perfectly willing to admit that the court would have had to go along with it, and it is certainly possible that Kent played more of a role than either the record or the report suggests.

My scenario begins with a casual remark at the beginning of Livingston, J.'s dissenting opinion: "Of six exceptions, taken to the proceedings below, all are abandoned except the third . . . ."[17] We can, perhaps, imagine a hearing, probably quite informal and conducted by only one of the justices (this may be where Kent got into the picture). The purpose of the hearing was to limit the issues on which argument would be heard. I had imagined a bill of errors that contained five picky and technical errors, and one, in modern terms, that "the complaint did not state a cause of action on which relief can be granted." (This one we now know was the third assigned error.) The justice batted Sanford down on five of his issues: "You really don't expect us, Mr. Sanford, do you, to reverse this case because the *venire* did not contain the word 'men' when it did contain the word

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"Capture and Counteraction: Self-Help by Environmental Zealots," *University of Richmond Law Review* 30 (1996): 1045–52.

16. Angela Fernandez, "The Pushy Pedagogy of *Pierson v. Post* and the Fading Federalism of James Kent," http://ssrn.com/abstract=984163 (last visited, 4/11/08).

17. 3 Caines, at 180.

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'freeholders'?"[18] And Sanford, rather sheepishly, said: "Well, I suppose not." The justice then said to Colden: "Do you agree, Mr. Colden, that that issue should be eliminated from the case?" And Colden, looking like the cat that ate the canary, said "Yes, I do, your honor." And so it goes through five errors, each one batted down by the justice, Sanford agreeing to drop it, and Colden, of course, raising no objection. "Don't you agree, Mr. Sanford, that the real issue in this case is whether the declaration states a cause of action on which relief can be granted?" "Yes, I do, your honor." "Do you agree, Mr. Colden?" "Yes, I do, your honor." Now comes the key moment: "Do you agree, Mr. Sanford, that the real issue in this case is 'whether Lodowick Post, by the pursuit with his hounds in the manner alleged in his declaration, acquired such a right to, or property in, the fox as will sustain an action against Pierson for killing and taking him away?'"[19] "Yes, I do, your honor." "Do you agree, Mr. Colden?" That's where Colden made his mistake. Having said "Yes, I do, your honor" six times, this time he should have said: "No, I don't, your honor. Our view of the case is that Mr. Sanford's client committed an actionable wrong when he maliciously interfered with the hunt, and we must assume that the jury found malicious interference, because it found for my client on this complaint." (And we now know that the original plaint specifically charged malice.)

Now, of course, the record does not contain a transcript of this hearing. That's not the kind of thing that such records contain. What it does contain is the six assignments of error. One of them, the sixth, is even more general than the third and may be assumed to be incorporated in it. Three of them, Professor Fernandez agrees, 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."[20] One of them, however, seems serious. It does not look as if Pierson was served until the day of the trial, and that's a statutory violation. Someone, however, was served, or at least had the summons read in his presence, in a timely fashion. Professor Fernandez's transcript of the endorsement of the summons has the constable saying that he served "the within-named Jesey Larson."[21] Now, there's no "Jesey Larson" who is "within-named." The person named in the summons is "Jesse Peirson" (the way the defendant's name is spelled throughout

18. This is drawn from the fourth assignment of error in the record. Transcript, pp. 12–13. The one that I had imagined was that the justice held court in his living room rather than in a courthouse. The record shows that the justice did hold court in someone's living room (not his own), but Sanford did not assign this as error.

19. 3 Caines, at 177.

20. Fernandez, "The Lost Record of *Pierson v. Post,*" 177.

21. Transcript, p. 9.

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the record). One can certainly imagine this being called harmless error, particularly if Thomas Harris, the constable, was willing to swear that he did serve Pierson on 22 December, eight days before the trial, or if Pierson was unwilling to swear that he was not so served.

Now why was Sanford willing to give up five of the six assigned errors? Could it be because he had done his homework and knew that he had a winning case if it were argued on the question whether Post had a property interest in the fox? Certainly, by the time that he came to argue the case, as Caines's summary of his argument shows,[22] he had an impressive array of authorities on his side. The country lawyer from the east end of Long Island did a pretty good job for his client.[23]

22. 3 Caines, at 175–76.

23. Sanford was no country bumpkin. He became the U.S. District Attorney for New York in 1803. Berger, "It's Not About the Fox," at 1134. But, in a way, they were all country bumpkins. If Charles Donahue, "Noodt, Titius, and the Natural Law School," in *Satura Roberto Feenstra,* ed. J. A. (Hans) Ankum et al. (Fribourg: Éditions universitaires, 1985), 609, has it right, the eighteenth-century natural-law writers all sided with Barbeyrac (and Locke), and, hence, with Post. As a piece of natural-law jurisprudence, *Pierson v. Post* is more than a hundred years out of date.

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# 21st Century Fox: *Pierson v. Post,* Then and Now

STUART BANNER

Most court opinions are like actors: the older they get, the less people pay attention to them. For instance, the case immediately after *Pierson v. Post* in volume 3 of *Caines's Reports* is called *Hollingsworth v. Napier.*[1] It was an important case in its day, much more important than *Pierson v. Post,* because it involved a recurring question of commercial law: what rights, if any, did a seller retain in goods stored in a public warehouse after he had delivered a bill of sale to the buyer? *Hollingsworth* went on to be cited in forty court opinions distributed fairly evenly through the 1870s, but then its career was over. It was cited twice in the 1880s, once in 1892, and never again.

*Pierson v. Post* has had the opposite trajectory. In 1892, when *Hollingsworth* was cited for the fortieth and last time, *Pierson* had only six citations to its credit. By the mid-1970s, after 170 years in print, it had only three more, for a total of nine, the last of which had been in 1926. Since 1977, however, it has been cited in twenty-one more cases. It has been mentioned in more than three hundred law review articles since 1990 (poor old *Hollingsworth v. Napier* has appeared in only one), and the most thorough examinations of the case have all been published within the last few years.[2] Angela Fernandez's perseverance has yielded a fascinating account of the trial in *Pierson v. Post.* With the same amount of sleuthing one could probably write a similar story of the trial in *Hollingsworth v. Napier,* but

1. *Hollingsworth v. Napier,* 3 Caines 182 (1805).

2. Apart from Angela Fernandez's article in this volume, these include Angela Fernandez, "The Pushy Pedagogy of *Pierson v. Post* and the Fading Federalism of James Kent," http://ssrn.com/abstract=984163; Andrea McDowell, "Legal Fictions in *Pierson v. Post,*" *Michigan Law Review* 105 (2007): 735–77; Bethany R. Berger, "It's Not About the Fox: The Untold History of *Pierson v. Post,*" *Duke Law Journal* 55 (2006): 1089–1143; and Dhammika Dharmapala and Rohan Pitchford, "An Economic Analysis of 'Riding to Hounds': *Pierson v. Post* Revisited," *Journal of Law, Economics and Organization* 18 (2002): 39–66.

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of course no one would want to read it. These days it's foxes that sell, not bales of cotton at the quarantine ground.

The publication of "The Record of *Pierson v. Post*" is a good occasion to think about the case's strange career. Why this burst of interest in such an old case? What did *Pierson v. Post* mean to contemporaries, and what does it mean today?

The early citations to *Pierson v. Post* demonstrate that nineteenth-century lawyers understood it as a case about capturing animals. How could one establish ownership of a beehive: by marking the tree with one's initials or by cutting down the hive and taking it home? (Taking it home, as in *Pierson v. Post.*) Who owned a deer: the hunter who wounded it or the man who came upon it the next day, six miles away? (The latter, as in *Pierson v. Post.*) Did a whale belong to the ship that harpooned it or the ship that caught it after it escaped the first harpoon? (The first ship, despite *Pierson v. Post,* because that was the custom of whalers.)[3] In the nineteenth century hunting was a big part of life and the law governing hunting was mostly common law. Not many disputes over animals were litigated long enough to make it into the case reporters, but when they did, *Pierson v. Post* was the leading authority.

*Pierson v. Post* is still used this way, but not very often. The last time was in 1996, when the Court of Appeals for the Ninth Circuit cited it in the course of explaining that fish are owned by the person who catches them. As hunting has faded in importance, and probably more importantly as the legal world has become more statutory, courts don't have many occasions to invoke *Pierson v. Post* to decide who owns an animal. As one judge explained in 1999, in rejecting a litigant's claim to own the raccoon she caught, "that common law doctrine is supplanted by the Rhode Island statute that explicitly bans ownership of a wild raccoon unless DEM [the state's Department of Environmental Management] issues a license."[4] In its original meaning, as a case about animals, *Pierson v. Post* is almost dead.

But it had long since acquired a second meaning. *Pierson v. Post*'s first appearance in a Property casebook seems to have come in 1893, when William Pattee, the dean at the University of Minnesota, included it in his *Illustrative Cases in Personalty.* Pattee was still thinking of it as a case about animals (it appears under the heading "Animals Ferae Naturae" to illustrate what Pattee called the "acts necessary to subject wild animals to the control of man so he will possess in them a special property"). John Lawson of the University of Missouri likewise intended it to represent the principle of "Capturing wild animals" in his 1896 *Select Cases in the Law of Personal Property*. But *Pierson v. Post* would soon jump to a higher level of abstrac-

3. *Gillet v. Mason,* 7 Johns. 16 (1810); *Buster v. Newkirk,* 20 Johns. 75 (1822); *Swift v. Gifford,* 23 F. Cas. 558 (D. Mass. 1872).

4. *Alliance Against IFQs v. Brown,* 84 F.3d 343, 344 (9th Cir. 1996); *Bilida v. McCleod,* 41 F. Supp. 2d 142, 151 (D.R.I. 1999).

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tion. In 1915, the Harvard professor Edward Warren included it as the very first case in his Property casebook, under the heading "Taking Possession of Chattels." At the University of Chicago, Harry Bigelow followed suit in 1917, including *Pierson v. Post* as an example of the acquisition of ownership by the "mere taking of possession."[5] And of course Property casebooks for the rest of the century would do the same. *Pierson v. Post* was no longer just about animals. Now it was a case about the initial acquisition of previously unowned property. It was understood to have something to teach students about *all* kinds of property, not merely about animals.

This shift in meaning was doubtless caused, at least in part, by the changing self-conception of the people who taught Property courses. When such people were primarily practicing lawyers or ex-lawyers without theoretical pretensions, it was good enough to classify the cases according to the sort of property they involved. John Lawson's casebook had separate sections for cases about manure, cases about ice, cases about emblements (crops planted by tenant farmers), cases about cats, cases about dogs, and so on. But that sort of haphazard arrangement would hardly do for full-time law professors seeking to organize their subject in a more intellectually satisfying way. A casebook proceeding on first principles would need sections about how property is acquired, how it is possessed, how it is transferred, and the like, but it would not make fine distinctions between manure and ice or dogs and cats. For historical reasons, real property and personal property might still need separate treatment (although even that divide would get smaller over time), but otherwise all property would be treated the same.

In a casebook section on methods of acquiring property, most of the methods would involve the acquisition of property already owned by someone else. But a casebook would have to say *something* about how all that property was acquired in the first place. Presumably someone, at some time in the past, had become the first owner of any given asset simply by being the first to take possession of it. The trouble was that there just weren't very many cases addressing the issue, because almost everything was already owned. "In the beginning of the law of property," one 1919 treatise explained, "occupancy was the most common method of acquiring property rights, for then none of the possible objects of ownership had been appropriated, but now this is an uncommon method of acquiring property as most things are already appropriated by some one."[6] The great

5. W. S. Pattee, *Illustrative Cases in Personalty* (Philadelphia: T. & J.W. Johnson & Co., 1893–94), 1:19; John D. Lawson, *Select Cases in the Law of Personal Property* (Columbia, Mo.: E. W. Stephens, 1896), 164; Edward H. Warren, *Select Cases and Other Authorities on the Law of Property* (Cambridge: Edward H. Warren, 1915), 1; Harry A. Bigelow, *Personal Property* (St. Paul: West Publishing Co., 1917), 1:141.

6. *Library of American Law and Practice* (Chicago: American Technical Society, 1919), 3:34.

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attraction of *Pierson v. Post* was that it was one of the rare cases discussing the subject. The case had other virtues as well. The facts were easy to understand. There was a dissent, so the student could see both sides of the issue. The opinions were more learned and more entertaining than average. From the perspective of a Property teacher or a casebook editor, *Pierson v. Post* was a dream come true.

Generations of law students were thus taught that *Pierson v. Post* was the most important case about the initial acquisition of property. As they became lawyers, judges, and law professors, they used that knowledge in an enormous range of circumstances. Judges cited *Pierson v. Post* in cases about water, baseballs, currency, and the America's Cup yacht race.[7] Law professors invoked *Pierson v. Post* in articles about antiquities, genetic material, trademarks, and flood insurance.[8] Everyone remembered the fox, but the fox hardly mattered any more. The important thing was an abstract principle about the nature of Property with a capital P.

This understanding of *Pierson v. Post* is still going strong. But in recent years we have seen the emergence of a third meaning, and Angela Fernandez's recovery of the trial record is a good example. These days, *Pierson v. Post* is most important, not as a constituent of the actual working legal system, but as a rite of passage during the first year of law school. The case is so famous in that role that it has become an object of study in its own right, independent of whatever legal significance it might be thought to have. That is, even if one thinks that *Pierson v. Post* should *not* stand for any proposition about how property is initially acquired, one can still be interested in the case itself, simply because it is one of the few cases that everyone in the profession knows.

As an icon of legal education rather than a working precedent, the important thing about *Pierson v. Post* is no longer the abstract legal principle for which it might or might not stand. The important thing is the story of the fox. Thanks to Angela Fernandez, we now know much more about that story than we once did.

7. *City of San Marcos v. Texas Commission on Environmental Quality,* 128 S.W.3d 264, 270 (Tex. App. 2004); *Popov v. Hayashi,* 2002 WL 31833731 (Cal. Super. 2002); *In re Seizure of $82,000 More or Less,* 119 F. Supp. 2d 1013, 1019 (W.D. Mo. 2000); *Mercury Bay Boating Club Inc. v. San Diego Yacht Club,* 545 N.Y.S.2d 693, 704 (App. Div. 1989).

8. Peter T. Wendel, "Protecting Newly Discovered Antiquities: Thinking Outside the 'Fee Simple' Box," *Fordham Law Review* 76 (2007): 1035; Radhika Rao, "Genes and Spleens: Property, Contract, or Privacy Rights in the Human Body?" *Journal of Law, Medicine and Ethics* 35 (2007): 376; Mark P. McKenna, "The Normative Foundations of Trademark Law," *Notre Dame Law Review* 82 (2007): 1875; Adam F. Scales, "A Nation of Policyholders: Governmental and Market Failure in Flood Insurance," *Mississippi College Law Review* 26 (2006): 37.

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# Facts, Information, and the Newly Discovered Record in *Pierson v. Post*

JAMES E. KRIER

Unlike Professors Fernandez, Banner, and Donahue, I am not a legal historian; like them, however, I am much interested in the comings and goings of the famous old case about the fox. It figures significantly in my course on property and in my co-authored book on the subject. The background of the case is noted in the book and will be updated in the next edition to take account of Fernandez's discovery of the hitherto lost judgment roll in the case.[1] Her find yields many facts, but, in my judgment, virtually no information. Facts are necessary to information, but not sufficient. A fact without purpose is useless; coupled with purpose, it becomes information. The information itself might be trivial, as it is in trivia games. Suppose you are playing a game, a trivia game, where stating the right fact wins you points. Suppose the name of William Blackstone's tailor was Jonas Maybird, and this is a fact you happen to know. Suppose you are asked, What was the name of William Blackstone's tailor? You answer correctly and win points. Outside the game, the name of Blackstone's tailor is just a fact; inside the game, it is information. Change the game to a scholarly one concerned with illuminating Blackstone's *Commentaries on the Laws of England,* and we are back to the name of Blackstone's tailor being just a worthless fact. For purposes of understanding Blackstone, I presume that

1. For my treatment of *Pierson* and related matters, see Jesse Dukeminier, James E. Krier, Gregory S. Alexander, and Michael H. Schill, *Property,* 6th ed. (New York: Aspen Publishers, 2006), 17–23, 28–35, 45–50. My update to take account of the record in the case will also note a few other articles discussing the background of *Pierson* that appeared too late to be included in the present edition, including two mentioned by Fernandez. See Andrea McDowell, "Legal Fictions in *Pierson v. Post,*" *Michigan Law Review* 105 (2007): 735; Bethany Berger, "It's Not About the Fox: The Untold History of *Pierson v. Post,*" *Duke Law Journal* 55 (2006): 1089.

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to know the name of his tailor is to know a fact that carries no information; it has no purpose in the enterprise. Change the game again, to a study of famous tailors in eighteenth-century England, and then once again the Maybird-Blackstone connection is not just a fact, but a piece of information. So it all depends on the game.

As I said, my game is not legal history. In my game, the aim is to study, teach, and critique the law of property, the institution of property—its doctrines, its functions, its justifications. For these purposes, the *Pierson* record is unilluminating.

Why, then, will I update my book by noting the Fernandez account? Because, as she says, the case is a famous old chestnut; because, as Banner says, it has become "an icon of legal education," and studying it is "a rite of passage during the first year of law school."[2] Students come across many such iconic cases as they travel along. Enterprising authors have built collections around the cases, accounts that supplement them with all sorts of background material. My colleague Brian Simpson, a legal historian, put together such a collection some dozen years ago (though he ignored *Pierson*).[3] Since then, others have joined in. Foundation Press publishes a Law Stories Series designed, says its website, to "bring landmark cases to life." There are to date at least twenty little volumes in the series, ranging over a wide variety of subjects—not just the common law subjects like property (the volume on property also ignores *Pierson*), contracts, and torts, but also tax law, corporate law, civil procedure, labor law, antitrust, employment discrimination, evidence, environmental law, immigration law, and so on.

Simpson has suggested what I take to be the spirit behind all this industry, namely "that we can obtain greater enjoyment and instruction from the study of cases if we discover more about them than is provided by law reports."[4] I agree with that sentiment and hence refer to background material in any number of instances as I teach my property course; some of the material is the product of original research, but most is based on published work. I know from my own experience, and from reports by other teachers, that students enjoy this material—much of which, I should add, amounts to little more than what newspapers call human interest stories. Much of it would be trivia, had it not a pedagogical purpose. It lightens the students' days and, I like to think, also ends up enlightening their understanding, if not always directly, then at least indirectly by provoking closer attention to whatever case happens to be up for consideration.

Banner writes that "the important thing about *Pierson v. Post* is no longer the abstract legal principle for which it might or might not stand. The

2. Stuart Banner, "21st Century Fox," *Law and History Review* 27 (Spring 2009): 188.

3. See A. W. Brian Simpson, *Leading Cases in the Common Law* (Oxford: Clarendon Press,1995).

4. Ibid., at vii.

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important thing is the story of the fox."[5] I hope he doesn't mean what he seems to say. Filling out the story of the fox, at least as it has been done thus far, has the pedagogical virtues I mentioned above, but little more. Little if any of the supplemental material published to date touches upon the thematic and conceptual richness of *Pierson* that make it such a remarkable introduction to the study of property.

Such as what? Here are some examples, all of which I explore as I consider the case with my students.

(1) The case is about the great issue of first possession as the means of becoming an owner, a matter considered by such notables as Hobbes and Locke and Hume and Blackstone in the seventeenth and eighteenth centuries.[6] Their treatments all began by supposing a state of nature populated by ungoverned humans, each of whom was free to take from the common stock of resources—flora, fauna, land, water. What was taken became the individual property of whomever first removed it from the commons. This, it is widely believed, describes the actual genesis of property among humans. So how better to start a course on property than with a case like *Pierson*?

(2) And this especially because the holding of the case continues to be of enormous importance for reasons unmentioned by Fernandez, Banner, and Donahue. The majority decided that a wild animal goes to the hunter who actually kills, mortally wounds, or catches it, as opposed to the hunter first in hot pursuit. Today we call this principle the rule of capture, which courts went on to extend beyond wild animals (animals *ferae naturae*) to other resources *ferae naturae*—such common-pool resources as groundwater, oil, and gas, all of which, just like foxes and other wild animals, roam about in their natural state. Judges reasoned that these too should be subject to the rule of capture. Is not oil under the ground just like a fox on the ground? Well, not exactly, but never mind. The analogy was drawn, with little thought about consequences. Thus began a body of law that promoted wasteful exploitation of many resources and continues to do so now (in the case, for example, of ocean fisheries). *Pierson,* in short, is sadly modern in its implications. It can be said without exaggeration to underlie (pun intended) the Persian Gulf War.[7]

5. Banner, "21st Century Fox," 188.

6. The works of Hobbes, Locke, and Hume appear in many editions produced by many publishers, so the most useful mode of reference is to chapters, sections, and the like, most of which are brief. See Thomas Hobbes, *Leviathan,* chs. 13–18 (1651); John Locke, *Two Treatises of Government,* Book 2 §§ 4–6, 17–21, 27, 28, 30, and 211 (1690); David Hume, *A Treatise of Human Nature,* Book 3, Part 2, § 2 (1740); William Blackstone, *Commentaries on the Laws of England* (1765–1769), 2:3–8.

7. See, e.g., Thomas C. Hayes, "Confrontation in the Gulf: The Oilfield Lying Below the Iraq-Kuwait Dispute," *New York Times,* Sept. 3, 1990, § 1, at 7, discussing the Rumaila

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(3) The majority in *Pierson* chose the rule of capture, as described above. The dissenting judge favored an approach whereby the first to pursue should prevail, provided there was a reasonable prospect of capture.[8] Notice that both positions are subsumed under the more general principle of first-in-time commonly offered up as a way to resolve disputes over property. The general principle, we can see, is too general, because it neglects the issue of first *what* in time. So which should it be—capture, or chase? The majority opted for the first alternative on both formalistic and instrumental grounds. The formalist urge led it to follow the view of classic jurisprudential commentators (much mocked by the dissent),[9] and instrumental reasons supported that choice. The majority wanted a clear and certain rule, and here capture served best: it's easier to determine who first caught a fox than to determine, as the dissenting judge would have it, who first pursued it with a reasonable prospect of capture. The dissent, in contrast, took a strictly instrumental approach; the judge reasoned that the end in question was to promote the killing of foxes, which were regarded back then as noxious

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pool, a huge oil formation beneath Iraq and Kuwait. Most of the oil underlies Iraq, but in the 1980s the bulk of it was withdrawn by Kuwait. "Kuwait's wells could eventually, in theory, bring up oil from the entire Rumaila pool." Iraq saw this as theft.

8. Both Fernandez and Donahue suggest that *Pierson* might more properly have been decided according to a tort theory of interference with capture rather than the property theory developed in the case; the result then, they think, might well have been different. See Angela Fernandez, "The Lost Record of *Pierson v. Post," Law and History Review* 27 (Spring 2009): 168, and Charles Donahue, Jr., "Papyrology and 3 Caines 175," ibid., 181. As Donahue notes in his discussion, the majority opinion in *Pierson* in fact mentioned (but distinguished) the most directly relevant case on interference, namely *Keeble v. Hickeringill,* 11 East 574, 103 Eng. Rep. 1127 (K. B. 1707). The case is referred to in *Pierson* only by a citation to 11 Mod. 74–130, and 3 Salk. 9, without the names of the parties. Both of the early accounts cited in *Pierson* are considered unreliable.

My own opinion is that if interference had been the theory applied, still the *Pierson* case *should have been* resolved exactly as it was. (Whether it actually would have been resolved in the same manner is, of course, hardly clear.) From an instrumental point of view—where the end in mind is to have rules that promote constructive competition in the production of goods—both *Pierson* and *Keeble* reached the right result. For an explanation and defense of that view, see James E. Krier, "Capture and Counteraction: Self-Help by Environmental Zealots," *University of Richmond Law Review* 30 (1997): 1039.

9. Rather than making fun of the majority's method, the dissenting judge might have studied the classics for himself. John Locke, for example, argued from his labor theory of property that on facts like those in *Pierson,* a wild animal should rightly go to the person who invested labor in pursuit, notwithstanding capture had not yet been achieved. See Locke, *Two Treatises of Government,* Book 2 § 30 ("the hare that anyone is hunting, is thought his who pursues her during the chase. For being a beast that is still looked upon as common, . . . whoever has employed so much labor about any of that kind, as to find and pursue her, has thereby removed her from the state of nature, wherein she was common, and hath begun a property"). This was exactly the result advocated in the dissenting opinion.

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beasts and a menace to chickens. Judicial formalism was the standard practice when *Pierson* was decided, whereas transparent instrumentalism was rare. Today that pattern is reversed, but both approaches still figure regularly in legal arguments and decisions, so there is value in exposing students to the comparative advantages of each.

(4) The rule of capture is just that—a firm fixed rule. The approach of the dissent is what we would today call a standard, as opposed to a rule. (An example of a rule is a stop sign posted on a roadway; an example of a standard is a sign that says "drive carefully when roads are wet.") The majority's rule has the virtue of certainty, but the vice of inflexibility; the dissent's standard is just the opposite. How do we trade off, then, between rules and standards, certainty and flexibility? The issue comes up in ever so many contexts (and is the subject of a large literature of which students should at least be aware).

(5) Relatedly, the dissenting judge believed his standard would better serve the instrumental end (getting rid of foxes) than would the majority's firm rule. There is ample reason to suppose that he was wrong: countless empirical studies show that the rule of capture is a ruthlessly effective way to deplete resources. The lesson in any event is that while it's sensible for judges to reason from instrumental ends to the means by which to achieve them, it's important that judges know what they're talking about when it comes to the impact of various alternative legal rules on human behavior. Once students are sensitized to the point, they find evidence in many cases that judges are fully capable of extraordinarily dubious conclusions in this respect.

(6) The dissent suggested that the best way to deal with the dispute in *Pierson* would be to let fox hunters decide it in light of their own customs. The role of custom in law-making comes up often in property and other courses. It tends to appeal to the fresh student mind, until the professor suggests to his students that perhaps, then, the professor's customs should resolve all disputes that arise about when the class will meet for make-ups, whether students must participate, how they are to be graded, and so on. Why should the particular custom of any individual or group play a role in deciding a contest between the party who relies on custom (fox hunters, say), on the one hand, and everybody else on the other (say the population at large, or the population of conservationists, or the population of people who are members of the ASPCA)? The short answer is, it shouldn't generally, although in some contexts (mainly where competitive markets are at work) there is no problem.

I imagine that legal historians could provide me with information that bears on some of these themes. So far, however, at least as to *Pierson v. Post,* I find many facts in the historical accounts, but little information. So,

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too, for the newly discovered record; for me it yields virtually nothing.[10] Professors Fernandez and Donahue, on the other hand, find in it much that suits their aims, and rightly so. Facts are facts (we hope!). Information is in the eye of the beholder.

10. One bit dug up by Fernandez did catch my attention. The costs of the famous fox litigation, adjusted to the present, came to only some $2,260. Now that's interesting, but also depressing. Nowadays, justice comes more dear.

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