

PAKENHAM'S CASE*

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Writing of *Pakenham's Case* in 1881 Justice Holmes referred to it as a "case decided under Edward III., which has been discussed from the time of Fitzherbert and Coke down to Lord St. Leonards and Mr. Rawle, which is still law, and is said to remain still unexplained."¹ For this uncertainty the report of the case as given in the unauthoritative Year Book was largely responsible. This report is typical of its kind and period; the statement of facts is very brief, the pleadings are given in detail, and though these pleadings contain certain alleged facts asserted by counsel, we can not, of course, be any more sure of these facts than we can of the mere assertions of counsel today. Apparently not feeling as we do that "the law" is not what courts and counsels say, but what courts do, the medieval clerks or apprentices who were responsible for the variously compiled reports in the Year Books directed their attention primarily to the pleadings in a case; their interest in the facts and the judgment seems to have been quite secondary and incidental.² To such an extent is this true that the modern editor of a Year Book feels it necessary, whenever possible, to supplement the report with the record as found on the official and authoritative plea roll.³ The reporter responsible for the Year Book account of *Pakenham's Case* had

* The Latin record of the case as here given is taken from a photograph of roll Common Pleas 40/430, Membr. 60 (Hilary Term, 42 Edw. III). For this I am indebted to my colleague Professor Sydney K. Mitchell who, while working in the Public Record Office on the plea rolls of John and Henry III, very kindly took the time to search out this case of a later date.

¹ HOLMES, *THE COMMON LAW* (1881) 395. For the general literature on the subject see *ibid.* 395, n. 6; Clark, *The Doctrine of Privity of Estate in Connection with Real Covenants* (1922) 32 *YALE L. J.* 123, 138-140.

² There are various theories as to the origin and development of these privately compiled Year Books. See 2 *HOLDSWORTH, HISTORY OF ENGLISH LAW* (1923) 532-545 for a resumé of the theories.

³ It should not be forgotten that even in the heyday of Year Book influence these reports though regarded as instructive were not considered authoritative as the plea rolls always were. One could always go behind the report to the record. In the very year in which the last year book appeared, there was cited in the King's Bench a case from Y. B. 22 Edw. IV as proof that a particular kind of royal pardon was not good in certain circumstances. "And on account of that case the judges were doubtful, and sent by Baker, Attorney General, who went to the common pleas and asked the advise of the judges of the king's bench, who ordered the precedents (*i. e.*, the plea rolls) to be searched; and such pardon was allowed in the same year . . . and so the case is misreported (*i. e.*, in the Year Book) and contrary to the record; wherefore without further argument the aforesaid pardon was allowed also." *Bellenham's Case*, 1 *Dyer* 34a (1538).

more than the usual excuse for not giving the judgment, as the record in the plea rolls shows.⁴ The case was a hard one; at the first hearing the court was unable or unwilling to render judgment and gave the parties a day in the next law term.⁵ Adjournment followed adjournment, six in all. Seemingly no judgment was ever rendered.⁶ Possibly the case was settled by compromise.⁷

The record from the plea roll follows:

Bedfordia. Prior de Esseby in misericordia pro pluribus defaltis etc. Idem prior summonitus fuit ad respondendum Laurencio de Pabenhām chivaler de placito quod teneat ei conventionem factam inter Hugonem de Pabenhām proauum predicti Laurencii cuius heres ipse est et nuper Priorem et conuentum de Esseby de eo quod Prior et conuentus eiusdem loci facerent diuina celebrari ter in septimana in capella de Hynewyk iuxta tenorem cuiusdam indenture inde facte etc. Et unde idem Laurencius per Ricardum de Ffide attornatum suum dicit quod cum (here follows a vacant space of one third of a line) anno regni domini H. quondam regis Anglie proau domini regis nunc quartodécimo apud Kareltonam per quoddam scriptum indentatum conuenisset inter quendam Hugonem de Pabenhām proauum ipsius Laurencii cuius heres ipsius est videlicet filius cuiusdam Thome filii cuiusdam Johannis filii predicti Hugonis ex parte una et quendam tunc Priorem de Esseby predecessorem predicti nunc Prioris et conuentum suum qui tunc fuit ex altera videlicet quod predicti tunc Prior et conuentus ter in ebdomada videlicet die dominica feria quarta et feria sexta facerant diuina celebrari in predicta capella de Hynewyk imperpetuum predicto Hugoni et heredibus suis et eorum familie eo modo quo antiquitus fieri consueuerat ac conuentio tenta fuisset usque iam viginti annis proximis preteritis ante diem impetrationis breuis predicti scilicet vicesimo octauo die Januarii anno regni domini regis nunc quadragesimo . . . elapsis predictus nunc Prior conuentionem predictam hucusque tenere licet sepius requisitus contradixit et adhuc contradicit unde dicit quod deterioratus est et dampnum habet ad valenciam quadraginta librarum. Et unde producit sectam etc. Et profert hic in curia predictum scriptum indentatum quod premissa testatur etc.

Et Prior per Willelmum de Bramide attornatum suum venit et defendit vim et iniuriam quando etc. Et petit quod predictus Laurencius declaret qualiter ipse est consanguineus et heres predicti Hugonis etc.

Et Laurencius dicit quod ipse est filius cuiusdam Thome filii cuiusdam Johannis filii predicti Hugonis proauu etc.

⁴ The case is reported in Y. B. 42 EDW. III, f. 3, pl. 14 (1368). Translations will be found in 2 GRAY, CASES ON PROPERTY (1905) 357-359; 2 BIGELOW, CASES ON PROPERTY (1919) 427.

⁵ Easter term did not begin till April 26th in 1368, Easter falling on April 9th.

⁶ Professor Mitchell examined the rolls for the dates mentioned at the end of the account, but could not find any record of a settlement of the case.

⁷ On the compromising of law suits in medieval England see Woodbine, *The Origins of the Action of Trespass* (1924) 33 YALE L. J. 799, 803-806.

Et Prior dicit quod ubi predictus Laurencius facit se consanguineus et heres predicti Hugonis proavi sui per descensum predictum dicit quod predictus Johannes filius Hugonis proavus (*sic*) habuit duas uxores videlicet Katerinam et Elizabetham (the last three words are in different ink in a space left for them) et de prima exiuit Johannes de quo exiuit quidam Jacobus de quo exiuit quidam Johannes (these last five words are interlined) de quo exiuit quedam Margeria que adhuc superstes est infra etatem et in custodia cuiusdam Johannis de Beverlay ex concessione domini regis (the last four words are interlined) que est heres sanguine predicto Hugoni unde petit iudicium si predictus Laurencius breue predictum in hoc casu versus eum manutenere possit etc.

Et Laurencius dicit quod predictum manerium de Hynewyke ad quam (*sic*) cantaria predicta pertinere deberet talliatum fuit prefato Johanni filio Hugonis et Elizabethhe uxori sue et heredibus de corporibus suis exeuntis et sic ipse Laurencius est tenens inde in tallia cui et nulli alii ista accio in hoc casu dari potest unde petit iudicium et dampna sibi adiudicari etc.

Et prior dicit quod ex quo predictus Laurencius non dedit predictam Margeriam fore heredem sanguine predicto Hugoni cui et nulli alii ista accio competere potest petit iudicium si idem Laurencius breue predictum versus eum manutenere possit etc.

Et Laurencius dicit ut prius ex quo predictus Prior non dedit ipsum Laurencium fore de sanguine predicti Hugonis nec quin ipse Laurencius est seistus de manerio predicto cui pro se et familia sua ibidem cantaria predicta in forma predicta fieri tenetur petit iudicium et dampna sibi adiudicari. Et quia curia hic nondum auisatur ad iudicium inde reddendum datus est eis dies hic a die Pasche in XV dies per justiciarios de audiendo inde iudicio suo etc. (This seems to have been the end of the record originally.) Ad quem diem veniunt partes etc. et super hoc dies datus est eis die hic in octabis Sancti Michaelis etc. de audiendo inde iudicio suo etc. Ad quem diem veniunt partes etc. Et super hoc dies datus est eis hic in octabis Sancti Hillarii etc. ad audiendum inde iudicium suum etc. Ad quem diem veniunt partes etc. Et super hoc datus est eis dies hic a die Pasche in XV dies ad audiendum inde iudicium suum etc. Ad quem diem veniunt partes etc. Et super hoc datus est eis dies hic a die Sancte Trinitatis in XV dies per justiciarios ad audiendum inde iudicium suum etc. Ad quem diem veniunt partes etc. Et super hoc datus est eis dies hic a die Sancti Michaelis in XV dies etc. ad audiendum inde iudicium suum etc.

Bedford. The Prior of Esseby is in mercy for many defaults etc. Said Prior was summoned to answer Laurence de Pabenhams, knight, of a plea that he keep with him the agreement made between Hugh de Pabenhams, greatgrandfather of said Laurence whose heir he is, and the late Prior and convent of Esseby to the effect that the Prior and convent of said place should cause divine services to be celebrated three times a week in the chapel of Hynewyk according to the tenor of a certain indenture made thereof etc. And whereof said Laurence by Richard de Fifide his attorney says that when . . . in the fourteenth year of the reign of king Henry formerly king of England, greatgrandfather of the present king, at Karelton, by a certain indented writing it

had been agreed between a certain Hugh de Pabenham, great-grandfather of said Laurence whose heir he is, to wit, the son of one Thomas son of John son of the aforesaid Hugh, on the one part, and a certain the then Prior of Esseby predecessor of the said present Prior and his convent that then was on the other, to wit that said then Prior and convent three times a week, namely on Sunday and on the fourth day and on the sixth day, should cause divine services to be celebrated in the aforesaid chapel of Hynewyk perpetually for the aforesaid Hugh and his heirs and their household (*familiae*) in the way in which of old it had used to be done, and that agreement had been kept for the twenty years immediately preceding the day of the suing out of the aforesaid writ, to wit the twenty-eighth day of January in the fortieth year of the reign of the present king, the aforesaid Prior who now is refused to hold further to that agreement, though often requested to do so, and he still refuses, wherefore he says that he [Laurence] has suffered loss and damage to the value of forty pounds. And thereof he produces suit etc. And here in court he makes profert of aforesaid indented writing which bears witness to the truth of his allegations.

The Prior by William de Bramide his attorney comes and denies the force and injury when etc. And he prays that Laurence should show how he is kinsman and heir of Hugh.

Laurence says that he is the son of one Thomas who was the son of one John who was the son of said Hugh the greatgrandfather.

And the Prior says that where Laurence makes himself out to be kinsman and heir of his greatgrandfather Hugh through the aforesaid descent, that said John the son of Hugh the greatgrandfather had two wives, to wit Katherine and Elizabeth, and of the first was born John who was father of one James of whom one Margery was the daughter, said Margery being yet alive and under age and in the wardship of John of Beverley by grant of the king, and she is heir by blood of the aforesaid Hugh, wherefore he prays judgment if said Laurence can maintain said writ against him in this case.

And Laurence says that said manor of Hynewyke to which said chanting should belong was entailed (*talliatum*) to the aforementioned John son of Hugh and to Elizabeth his wife and to the heirs of their bodies begotten, and so he Laurence is tenant thereof in tail, and to him and to none other this action can be given in this case; wherefore he prays judgment and asks that damages be awarded him.

And the Prior says that whereas said Laurence does not deny that Margery would be heir by blood of said Hugh, to whom and to none other this action can belong, he prays judgment if Laurence can maintain said writ against him.

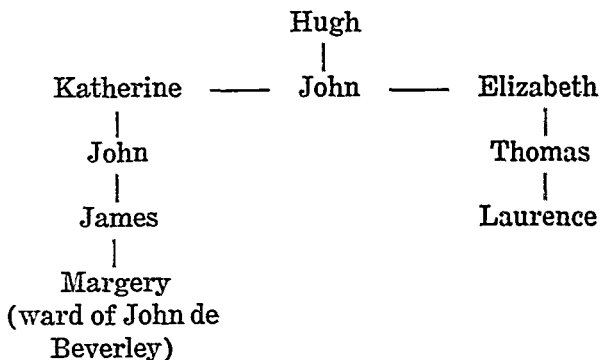
Laurence says as before that, as the Prior does not deny that he Laurence is of the blood of said Hugh nor that he Laurence is seised of said manor, for which [whom?] on behalf of himself and of his household, the Prior is held to furnish there said chanting in the aforesaid manner, he prays judgment and his damages.

And because the court is not yet prepared to render judgment a day is given them by the justices for hearing their judgment on the quindene of Easter. At which day the parties come etc.,

and a day is given them for hearing their judgment on the octave of Michaelmas. At which day the parties come etc., and a day is given them for hearing their judgment on the octave of St. Hilary. At which day the parties come etc., and a day is given them for hearing their judgment on the quindene of Easter. At which day the parties come etc., and a day is given them by the justices for hearing their judgment on the quindene of Holy Trinity. At which day the parties come etc., and a day is given them for hearing their judgment on the quindene of Michaelmas.

Comparing the report with the record on the roll we find several mistakes in the short statement of facts which the Year Book gives us. The name is Pabenham and not Pakenham; the ancestor's name is Hugh and not J.; that ancestor was great-grandfather, and not grandfather, of the plaintiff; the services were to be sung three times a week, instead of only once a week; the name of the manor was not K. In so far as they affect the points involved in the pleadings these mistakes are immaterial, but they are typical of the carelessness and general untrustworthiness of the Year Books, in this sort of particulars at least.⁸

Statements attributed to counsel in the report and having to do with the facts of the case can to some degree be checked up by the record. Belknap (for defendant) says that the plaintiff is not living on the manor. This may have been true, as Laurence in the record says only that he is seised of the manor, not that he is living there. Cavendish's reply that the plaintiff is tenant of the manor, if understood in the light of Laurence's claim that he is tenant in tail, does not contradict Belknap's statement that plaintiff is not living on the manor. Belknap's statement that the plaintiff had a brother who was older than himself and heir to his ancestor is easily corrected by the record, which gives the lines of descent as follows:



⁸ Even a cursory examination of the report and the record in any of the modern editions of the Year Books in which the editor has given the plea roll record will verify this statement. When, as frequently happens, there are several quite different manuscript versions of the report, the discrepancies between them are often more numerous than the discrepancies

What Cavendish has to say as to the manner in which the manor came into the hands of the plaintiff is not in keeping with the facts as given in the record. The question brought out by the pleadings in the report—as to whether the plaintiff is able to bring the action because of the existence of an heir nearer to the original covenantee—is also the main question raised by the pleadings as recorded in the record, though the two accounts do not agree as to the identity and relationship of that nearer heir. That there had been long continued performance of the agreement on the part of the Prior and convent is a point brought out in both the record and the report.⁹ The record proves what the pleadings in the report suggest—that assigns were not mentioned in the covenant.¹⁰ The plea roll shows, also, as Belknap's reiterations likewise indicate, that the principal contention of the defence was that Laurence had brought this action as heir of the covenantee and that he was not heir.¹¹

As to the point of the services being attached to the manor—this is brought out in the record as well as in the report. In answer to the Prior's contention that the plaintiff cannot maintain the writ because not he but Margery is heir of Hugh, Laurence says that the manor, to which the service "pertinere deberet" was entailed etc. Whether we translate "pertinere" by *belong* or *relate* or *pertain* or *concern* or *apply to* does not matter; the idea behind the words is that of something belonging to, of being attached or annexed to, the manor. Again, in the closing reply of the plaintiff he says that defendant cannot deny that "ipse Laurencius est seisitus de manerio cui pro se et familia sua ibidem cantaria predicta in forma predicta fieri tenetur." "Cui" may refer to "ipse Laurencius," but it seems more reasonable, in view of the "pro se" which follows it, to take it as referring to "manerio," and to have Laurence say that he is seised of the manor *for which* the Prior must furnish the services.

The use of the word "ibidem" at this same place presents another difficulty. Meaning at least *there*, and perhaps (as in classical Latin) *in that very place*, it is difficult to tell whether it is meant to go with what immediately precedes or with what follows. Even if Belknap was correct (as the apparent lack of

between the roll and any one of the reports. If the Year Book for 42 Edward III is ever edited according to modern standards we shall in all probability get other reporters' versions, better, perhaps, or worse, but at any rate different from that which we now have in the old black letter type which has for so long been the subject of controversy.

⁹ On the matter of prescriptive right in this case see HOLMES, *op. cit. supra* note 1, at 398, and the remarks of Thorpe, C. J. to Belknap (with the latter's reply) as given in the report.

¹⁰ See Co. Litt. *385.

¹¹ Cf. (Thorpe à Belknap): "et lou vous dits, que il n'est pas heire, il est privy de sank, et poit estre heire."

contradiction would tend to prove) in saying that Laurence was not living on the manor, it might still be possible for a "familia" of his to be "ibidem." We have, however, taken the word as being meant to go with what follows, as denoting the place in which the singing was to be done.

In leaving this record it may not be amiss to call attention to the formal denial made by the defendant to the allegations of the plaintiff. The Prior denies "vim et iniuriam" [tort and force] as in an action of trespass. The history of the use of this phrase as the regular words of denial, not only in trespass but in actions for the recovery of damages generally, has already been given in these pages.¹²

¹² Woodbine, *The Origins of The Action of Trespass* (1925) 34 YALE L. J. 343, 366-367.