Chapter 1

ESTABLISHING THE DISTINCTION BETWEEN MEUS AND TUUS

Section 1. OCCUPANCY, THE SOURCE OF "PROPERTY"?

A. THE CAPTURE OF WILD ANIMALS

PIERSON v. POST
Supreme Court of New York.
3 Caines 175 (1805)[1]

THIS was an action of trespass on the case commenced in a justice's court, by the present defendant against the now plaintiff.

The declaration stated that *Post*, being in possession of certain dogs and hounds under his command, 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," and whilst there hunting, chasing and pursuing the same with his dogs and hounds, and when in view thereof, *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. A verdict having been rendered for the plaintiff below, the defendant there sued out a *certiorari*,[2] and now assigned for error, that the declaration and the matters therein contained were not sufficient in law to maintain an action.

Sanford, for the now plaintiff. It is firmly settled that animals, *feræ naturæ*, [3] belong not to any one. If, then, *Post* had not acquired any property in the fox, when it was killed by *Pierson*, he had no right in it which could be the subject of injury. As, however, a property may be gained in such an animal, it will be necessary to advert to the facts set forth, to see whether they are such as could give a legal interest in the creature, that was the cause of the suit below. Finding, hunting, and pursuit, are all that the plaint enumerates. To create a title to an animal *feræ naturæ*, occupancy is indispensable. It is the only mode recognised by our system. 2 *Black. Com*. 403. The reason of the thing shows it to be so. For whatever is not appropriated by positive institutions, can be exclusively possessed by natural law alone. Occupancy is the sole method this code acknowledges. Authorities are not wanting to this effect. *Just*. lib. 2, tit. 1, s. 12. "*Feræ*

[1] [*I.e.*, 3 GEORGE CAINES, NEW-YORK TERM REPORTS: OR CASES ARGUED AND DETERMINED IN THE SUPREME COURT OF THAT STATE [1803–1805], at 175–82 (1806). For more on case reports and reporters, see, *infra*, Note on Reports, at S25. Ed.]

[2] [Although Pierson was the defendant in the court below, the case is styled *Pierson v. Post* because Pierson sued out the certiorari. Ed.]

[3] ["Of a wild nature," i.e., wild animals, as opposed to domestic animals. Ed.]

igitur bestiæ, *simul atque ab aliquo captæ fuerint jure gentium statim illius esse incipiunt*."[4] There must be a taking; and even that is not in all cases sufficient, for in the same section he observes, "*Quicquid autem [e]orum ceperis*, *eo usque tuum esse intelligitur*, *donec tua custodia coercetur; cum vero tuam evaserit custodiam*, *et in libertatem naturalem sese receperit*, *tuam esse desinit*, *et rursus occumpantis fit*."[5] It is added also that this natural liberty may be regained even if in sight of the pursuer, "*ita sit*, *ut difficilis sit ejus persecutio*."[6] In section 13, it is laid down, that even wounding will not give a right of property in an animal that is unreclaimed. For, notwithstanding the wound, "*multa accidere soleant ut eam non capias*," and "*non aliter tuam esse quam si eam ceperis*."[7] *Fleta*, b. 3, p. 175, and *Bracton*, b. 2, c. 1, p. 86, are in unison with the *Roman* lawgiver. It is manifest, then, from the record, that there was no title in *Post*, and the action, therefore, not maintainable.

Colden, contra. I admit with *Fleta*, that pursuit alone does not give a right of property in animals *feræ naturæ*, and I admit also that occupancy is to give a title to them. But then, what kind of occupancy? and here I shall contend it is not such as is derived from manucaption alone. In *Puffendorf's Law of Nature and of Nations*, b. 4, c. 4, s. 5, n. 6, by *Barbeyrac*, notice is taken of this principle of taking possession. It is there combatted, nay, disproved; and in b. 4, c. 6, s. 2, n. 2. *Ibid*. s. 7, n. 2, demonstrated that manucaption is only one of many means to declare the intention of exclusively appropriating that, which was before in a state of nature. Any continued act which does this, is equivalent to occupancy. Pursuit, therefore, by a person who starts a wild animal, gives an exclusive right whilst it is followed. It is all the possession the nature of the subject admits; it declares the intention of acquiring dominion, and is as much to be respected as manucaption itself. The contrary idea, requiring actual taking, proceeds, as Mr. *Barbeyrac* observes, in *Puffendorf*, b. 4, c. 6, s. 10, on a "false notion of possession."

Sanford, in reply. The only authority relied on is that of an annotator. On the question now before the court, we have taken our principles from the civil code, and nothing has been urged to impeach those quoted from the authors referred to.

TOMPKINS, J. This cause comes before us on a return to a certiorari directed to one of the justices of *Queens* county.

The question submitted by the counsel in this cause for our determination 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? The cause was argued with much ability by the counsel on both sides, and presents for our decision a novel and nice question. It is admitted that a fox is an animal *feræ naturæ*, and that property in such animals is acquired by occupancy only. These admissions narrow the discussion to the simple question of what acts amount to occupancy, applied to acquiring right to wild animals.

If we have recourse to the ancient writers upon general principles of law, the judgment below is obviously erroneous. *Justinian's Institutes*, lib. 2, tit. 1, s. 13, and *Fleta*, lib. 3, c. 2, p. 175, adopt the principle, that pursuit alone vests no property or right in the huntsman; and that even

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[4] [The quotation is from Section 12 of Book 2, Title 1, of Justinian's *Institutes*: "Wild beasts therefore, when they are seized by someone, by the law of nations they begin immediately to be his." Ed.]

[5] ["Whatsoever of them you might seize from that time forth it is understood to be yours while it is held in your custody; when it escapes your custody, and returns to its natural liberty, it ceases to be yours and becomes again his who seizes it." Ed.]

[6] ["This is so since following it is difficult." Ed.]

[7] ["Many things can happen, so that you don't seize it," and "it is not yours, unless you seize it." Ed.]

pursuit, accompanied with wounding, is equally ineffectual for that purpose, unless the animal be actually taken. The same principle is recognised by *Bracton*, lib. 2, c. 1, p. 8.

Puffendorf, lib. 4, c. 6, s. 2, and 10, defines occupancy of beasts *feræ naturæ*, to be the actual corporal possession of them, and Bynkershoek is cited as coinciding in this definition. It is indeed with hesitation that *Puffendorf* affirms that a wild beast mortally wounded, or greatly maimed, cannot be fairly intercepted by another, whilst the pursuit of the person inflicting the wound continues. The foregoing authorities are decisive to show that mere pursuit gave *Post* no legal right to the fox, but that he became the property of *Pierson*, who intercepted and killed him.

It therefore only remains to inquire whether there are any contrary principles, or authorities, to be found in other books, which ought to induce a different decision. Most of the cases which have occurred in England, relating to property in wild animals, have either been discussed and decided upon the principles of their positive statute regulations, or have arisen between the huntsman and the owner of the land upon which beasts *feræ naturæ* have been apprehended; the former claiming them by title of occupancy, and the latter *ratione soli*.[8] Little satisfactory aid can, therefore, be derived from the English reporters.

Barbeyrac, in his notes on *Puffendorf*, does not accede to the definition of occupancy by the latter, but, on the contrary, affirms, that actual bodily seizure is not, in all cases, necessary to constitute possession of wild animals. He does not, however, describe the acts which, according to his ideas, will amount to an appropriation of such animals to private use, so as to exclude the claims of all other persons, by title of occupancy, to the same animals; and he is far from averring that pursuit alone is sufficient for that purpose. To a certain extent, and as far as *Barbeyrac* appears to me to go, his objections to *Puffendorf's* definition of occupancy are reasonable and correct. That is to say, that actual bodily seizure is not indispensable to acquire right to, or possession of, wild beasts; but that, on the contrary, the mortal wounding of such beast, by one not abandoning his pursuit, may, with the utmost propriety, be deemed possession of him; since, thereby, the pursuer manifests an unequivocal intention of appropriating the animal to his individual use, has deprived him of his natural liberty, and brought him within his certain control. So also, encompassing and securing such animals with nets and toils, or otherwise intercepting them in such a manner as to deprive them of their natural liberty, and render escape impossible, may justly be deemed to give possession of them to those persons who, by their industry and labor, have used such means of apprehending them. *Barbeyrac* seems to have adopted, and had in view in his notes, the more accurate opinion of *Grotius*, with respect to occupancy. That celebrated author, (lib. 2, c. 8, s. 3, p. 309,) speaking of occupancy, proceeds thus: "*Requiritur autem corporalis quædam possessio ad dominium adipiscendum; atque ideo*, *vulnerasse non sufficit*."[9] But in the following section he explains and qualifies this definition of occupancy: "*Sed possessio illa potest non solis manibus*, *sed instrumentis*, *ut decipulis*, *ratibus*, *laqueis dum duo adsint; primum ut ipsa instrumenta sint in nostra potestate*, *deinde ut fera*, *ita inclusa sit*, *ut exire inde nequeat*."[10] This qualification embraces the full extent of *Barbeyrac's* objection to *Puffendorf's* definition, and allows as great a latitude to acquiring property by occupancy, as can reasonably be inferred from the words or ideas expressed by Barbeyrac in his notes. The case now under consideration is one of mere pursuit, and presents no circumstances or acts which can

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[8] [Literally, "by reason of the soil." *See* Note on Game Laws, *infra*, at S31, and note 1.

[9] ["Some corporeal possession is required for obtaining *dominium* (a technical term roughly translated "ownership'), and therefore wounding is not enough." Ed.]

[10] ["But that possession can be not only with the hands, but with instruments, such as snares, nets, traps, so long as two elements are present: first, that the instruments themselves be in our power; second, that the wild things be so encompassed that they cannot get out." Ed.]

bring it within the definition by occupancy by *Puffendorf*, or *Grotius*, or the ideas of *Barbeyrac* upon that subject.

The case cited from 11 *Mod*. 74–130,[11] I think clearly distinguishable from the present; inasmuch as there the action was for maliciously hindering and disturbing the plaintiff in the exercise and enjoyment of a private franchise; and in the report of the same case, 3 *Salk*. 9[,] *Holt*, Ch. J., states, that the ducks were in the plaintiff's decoy pond, and so in his possession, from which it is obvious the court laid much stress in their opinion upon the plaintiff's possession of the ducks, *ratione soli*.

We are the more readily inclined to confine possession or occupancy of beasts *feræ naturæ*, within the limits prescribed by the learned authors above cited, for the sake of certainty, and preserving peace and order in society. If the first seeing, starting, or pursuing such animals, without having so wounded, circumvented or ensnared them, so as to deprive them of their natural liberty, and subject them to the control of their pursuer, should afford the basis of actions against others for intercepting and killing them, it would prove a fertile source of quarrels and litigation.

However uncourteous or unkind the conduct of *Pierson* towards *Post*, in this instance, may have been, yet his act was productive of no injury or damage for which a legal remedy can be applied. We are of opinion the judgment below was erroneous, and ought to be reversed.

LIVINGSTON, J. My opinion differs from that of the court. Of six exceptions, taken to the proceedings below, all are abandoned except the third, which reduces the controversy to a single question.

Whether a person who, with his own hounds, starts and hunts a fox on waste and uninhabited ground, and is on the point of seizing his prey, acquires such an interest in the animal, as to have a right of action against another, who in view of the huntsman and his dogs in full pursuit, and with knowledge of the chase, shall kill and carry him away?

This is a knotty point, and should have been submitted to the arbitration of sportsmen, without poring over *Justinian*, *Fleta*, *Bracton*, *Puffendorf*, *Locke*, *Barbeyrac*, or *Blackstone*, all of whom have been cited; they would have had no difficulty in coming to a prompt and correct conclusion. In a court thus constituted, the skin and carcass of poor reynard would have been properly disposed of and a precedent set, interfering with no usage or custom which the experience of ages has sanctioned, and which must be so well known to every votary of *Diana*. But the parties have referred the question to our judgment, and we must dispose of it as well as we can, from the partial lights we possess, leaving to a higher tribunal, the correction of any mistake which we may be so unfortunate as to make. By the pleadings it is admitted that a fox is a "wild and noxious beast." Both parties have regarded him, as the law of nations does a pirate, "*hostem humani generis*,"[12] and although "*de mortuis nil nisi bonum*,"[13] be a maxim of our profession, the memory of the deceased has not been spared. His depredations on farmers and on barn yards, have not been forgotten; and to put him to death wherever found, is allowed to be meritorious, and of public benefit. Hence it follows, that our decision should have in view the greatest possible encouragement to the destruction of an animal, so cunning and ruthless in his career. But who would keep a pack of hounds; or what gentleman, at the sound of the horn, and at peep of day,

[11] [This is a somewhat cumbersome way of citing a case called *Keble v. Hickringill* that appears in *Style's Modern King's Bench Reports* on pp. 74–75, and again on pp. 130–32. *See Keeble v. Hickeringill*, *infra*, p. S23. Ed.]

[12] ["An enemy of human kind." Ed.]

[13] ["Concerning the dead, nothing but good (should be said)." Ed.]

would mount his steed, and for hours together, "*sub jove frigido*,"[14] or a vertical sun, pursue the windings of this wily quadruped, if just as night came on, and his strategems and strength were nearly exhausted, a saucy intruder, who had not shared in the honors or labors of the chase, were permitted to come in at the death, and bear away in triumph the object of pursuit? Whatever *Justinian* may have thought of the matter, it must be recollected that his code was compiled many hundred years ago, and it would be very hard indeed, at the distance of so many centuries, not to have a right to establish a rule for ourselves. In his day, we read of no order of men who made it a business, in the language of the declaration in this cause, "with hounds and dogs to find, start, pursue, hunt, and chase," these animals, and that, too, without any other motive than the preservation of Roman poultry; if this diversion had been then in fashion, the lawyers who composed his institutes, would have taken care not to pass it by, without suitable encouragement. If any thing, therefore, in the digests or pandects shall appear to militate against the defendant in error, who, on this occasion, was the fox hunter, we have only to say *tempora mutantur*;[15] and if men themselves change with the times, why should not laws also undergo an alteration?

It may be expected, however, by the learned counsel, that more particular notice be taken of their authorities. I have examined them all, and feel great difficulty in determining, whether to acquire dominion over a thing, before in common, it be sufficient that we barely see it, or know where it is, or wish for it, or make a declaration of our will respecting it; or whether, in the case of wild beasts, setting a trap, or lying in wait, or starting, or pursuing, be enough; or if an actual wounding, or killing, or bodily tact and occupation be necessary. Writers on general law, who have favored us with their speculations on these points, differ on them all; but, great as is the diversity of sentiment among them, some conclusion must be adopted on the question immediately before us. After mature deliberation, I embrace that of *Barbeyrac*, as the most rational, and least liable to objection. If at liberty, we might imitate the courtesy of a certain emperor, who, to avoid giving offence to the advocates of any of these different doctrines, adopted a middle course, and by ingenious distinctions, rendered it difficult to say (as often happens after a fierce and angry contest) to whom the palm of victory belonged. He ordained, that if a beast be followed with *large dogs and hounds*, he shall belong to the hunter, not to the chance occupant; and in like manner, if he be killed or wounded with a lance or sword; but if chased with *beagles only*, then he passed to the captor, not to the first pursuer. If slain with a dart, a sling, or a bow, he fell to the hunter, if still in chase, and not to him who might afterwards find and seize him.

Now, as we are without any municipal regulations of our own, and the pursuit here, for aught that appears on the case, being with dogs and hounds of imperial stature, we are at liberty to adopt one of the provisions just cited, which comports also with the learned conclusion of *Barbeyrac*, that property in animals *feræ naturæ*, may be acquired without bodily touch or manucaption, provided the pursuer be within reach, or have a reasonable prospect (which certainly existed here) of taking, what he has thus discovered[,] an intention of converting to his own use.

When we reflect also that the interest of our husbandmen, the most useful of men in any community, will be advanced by the destruction of a beast so pernicious and incorrigible, we cannot greatly err, in saying, that a pursuit like the present, through waste and unoccupied lands, and which must inevitably and speedily have terminated in corporal possession, or bodily *seisin*,[16] confers such a right to the object of it, as to make any one a wrongdoer, who shall interfere and shoulder the spoil. The *justice's* judgment ought therefore, in my opinion, to be affirmed.

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[14] ["Under a cold Juppiter (i.e., sun)." Ed.]

[15] ["Times change." Ed.]

[16] [What a strange word Almost stranger than the Latin. What does it mean? Is it used correctly? Get to know this word. It will return to plague you. Ed.]

Judgment of reversal.

Questions

1. What do all those strange words, both Latin and English, mean? Perhaps more than other first-year courses, property employs a large technical vocabulary. Effort spent on mastering that vocabulary at the beginning will repay itself handsomely as time goes on. Most law libraries are well endowed with both legal and non-legal dictionaries. You should learn where they are and how to use them. We advise you to go through this exercise on every case you read when you encounter terminology that you don't understand.

2. What happened after Pierson shot the fox? How did the case get into court? What court did it go to? What happened there? What happened next? How did the case reach the N.Y. Supreme Court? What happened there? *See* Notes 1–2 *infra*.

3. As the dissent notes, "some conclusion must be adopted on the question immediately before us." What conclusion did the majority reach and why did they reach it? (A statement of the conclusion usually accompanied by a minimum statement of the legal reason for the conclusion is frequently called a "holding.") This holding can then be used, with caution, to make predictions as to how a court will decide cases that are similar to, but not the same as, the one in questions. *See* Problems, *infra*.

3. Several authorities are mentioned, Justinian, Fleta, Bracton, Pufendorf, Bynkershoek, Grotius, Locke, Barbeyrac, and Blackstone. Who were they and what do they have to do with foxes on Long Island around 1805? *See* Notes 3–5 and Note on the Reception, *infra*, p. S24.

4. What holding does the dissent urge? How does it differ from that of the majority? Why does the dissent differ? What authorities does Justice Livingston use to support his position? *See* Notes 3–5 and Note on the Reception, *infra*, p. S24. Do you detect any attitude on Justice Livingston's part to the oft-stated description of law as a "learned" profession?

5. Why did the court decide as it did? In addition to the material already cited, see Note 6, *infra*.

Notes

1. *The* "*Facts*." A printed legal opinion hardly reads like a novel; yet material for a novel often lies in back of it. Both Pierson and Post were young at the time of the fox hunt. Pierson was born in 1780; Post, in 1777. The account of one historian provokes a strong suspicion that their fathers, Capt. David Pierson and Capt. Nathan Post, were primarily responsible for blowing the incident up into a lawsuit. The Piersons were among the first settlers in that part of Long Island; they came from Connecticut, were of English descent, and were quite strict Congregationalists. The Posts seem to have come later, probably from New York, were probably of Dutch descent, and were less strict in their religious views. Each side is said to have spent over a thousand pounds on the case, a very large sum at the time. *See* JAMES T. ADAMS, MEMORIALS OF OLD BRIDGEHAMPTON 166, 319, 334 (1962). Adams' account of the case also suggests that the crucial events may not have happened on a beach. *Id.* at 166. Is this "relevant" to the Supreme Court's decision in the principal case?

In *It's Not About the Fox: The Untold History of Pierson v. Post* (55 DUKE L.J. 1089 [2006]) Bethany R. Berger, reviews the evidence for who the parties were and what the dispute was really about.[1] The article provides a fascinating insight into life on the eastern end of Long Island in the

[1] After some years in which interest in *Pierson v. Post*, seemed to be waning, three young legal historians have just published articles on the topic. Bethany Berger's is treated here. The contributions of Angela Fernandez will treated at some length later in these notes. In *Legal Fictions in Pierson v. Post* (105

late eighteenth and early nineteenth centuries. It turns out that the "certain wild and uninhabited, unpossessed and waste land, called the beach," was actually, at least arguably, community land, which was hugely controversial, and, yes, there was no love lost between the Piersons and the Posts, though it is unlikely that the fathers of the protaganists were as important as the protagonists themselves. Also, it seems unlikely, at least in Berger's view, that the speculation that the Posts were of Dutch descent is correct, but class and wealth distinctions were involved. The Piersons almost certainly regarded Post's fox hunting as "putting on airs."

Why are these details omitted from the opinion? Are they important? "relevant"? Are all the details furnished by the court important? "relevant"?

Appellate courts rarely redetermine the facts found at the trial court level. This characteristic of appellate adjudication has led some commentators to conclude that the trial court's decision, in effect, determines the outcome of the case on appeal. The difficulties of the fact-finding process suggest that at times, perhaps frequently, the reasoning of the appellate courts is so far removed from the realities of what happened between the parties as to yield what is for them irrelevant decisions. For a full discussion of this problem, see J. FRANK, COURTS ON TRIAL (1963). In the case of *Pierson v. Post*, however, there is a further reason why the court did not review the facts in the case. In order to determine why this is the case you should try to define as precisely as possible the question that the court was called upon to decide.

2. *On Forms and Writs and Matters Procedural*. Forms constitute a great part of a lawyer's stock in trade. Forms may be found in a printed book or in a lawyer's files; they may be used in litigation or in a transaction like a contract or a conveyance, but always they have the characteristic of using something which has been used before. A close study of the forms used in any legal proceeding or transaction will pay rich dividends. Forms often reflect a great deal of doctrine as well as numerous clues about the development of that doctrine, matters that may be only dimly understood by persons using the forms. We will deal more with the use and misuse of forms later in the course. At this juncture let us consider some forms that were used in the principal case.[2]

a. *The "Declaration"*[3]

> Complaint of tespass on the case: whereas he, the said Lodowick Post, on the tenth 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 aforesaid was the possessor of certain dogs and hounds and the said dogs and hounds so being then and there in the possession and under the

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MICH. L. REV. 735 [2007]), Andrea McDowell reviews once more the doctrinal moves that the court made and comes to the conclusion (*semble*) that the majority did not do as bad a job as might be suggested (and as we will suggest in class). All three contributions are nicely reviewed with further references in Ernst, *Pierson v. Post: The New Learning* (http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1111&context=fwps_papers, last visited 8/10/09).

[2] For many years, it was assumed that the record in the case had been lost. It is possible, however, to reconstruct what was in it making use of the George Caines's (and the justices') cryptic summary. 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. *See* Fernandez, *The Lost Record of Pierson v. Post, the Famous Fox Case*, 27 LAW & HISTORY REV. 149 (2009). The transcript may be found at http://www.historycooperative.org/journals/lhr/27.1/tompkins.html (last visited 8/8/09). For what it adds to our knowledge of the case, see Donahue, *Papyrology and 3 Caines 175*, 27 LAW & HISTORY REV. 179–81 (2009).

[3] This is drawn from the transcript of the justice's return to the certiorari. I have have given it the name to which it is referred earlier in the record and modernized the punctuation, but have otherwise left it as transcribed.

command of him, the said Lodowick, did then and there upon a certain wild and uninhabited, unpossessed, and waste land called the Beach find and start one of those wild and noxious beasts called a Fox and the said Fox being so found as aforesaid by the said dogs and hounds was then and there upon the said wild and unpossessed and uninhabited and waste land called the Beach pursued, hunted, and chased by the said hounds and dogs and followed and pursued by the said Lodowick then and there having the said dogs and hounds under his command and direction as aforesaid. The said Jesse while the said Fox was then and there hunted, chased, and pursued as aforesaid the said Jesse well knowing that the said Fox was so hunted, chase, and pursued as aforesaid 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 on the same day and year last aforesaid at and upon the said wild and uninhabited, unpossessed, and waste land called the beach to wit at the town and County aforesaid maliciously kill the said Fox. The said Lodowick and the said dogs and hounds aforesaid then and there being in the view of the said Jesse and actually engaged in the chase, pursuit, and hunting of the said Fox as aforesaid. And the said Jesse did then and there maliciously take and carry away the said Fox whereby the said Lodowick saith that he is injured and hath sustained damage to twenty five dollars and therefore he brings suit, etc.[4]

In order to understand the form of this complaint, it is necessary to examine some English forms which, for various procedural reasons discussed *infra*, probably would not have been used at the time of *Pierson v. Post* in either England or the United States, but which are the ancestors of forms which would have been used at that time. The first is a writ of trespass *de bonis asportatis [d.b.a.]* adapted from 1 A. FITZHERBERT, THE NEW NATURA BREVIUM *86H (9th ed., 1794):

The King to the Sheriff of [wherever the defendant is likely to be found] greeting: If A. shall make you secure of prosecuting his claim, summon B. and make him give gages and safe pledges[5] that he be before our justices at Westminster on the morrow of All Souls' to show wherefore with force and arms at Trumpington he took and carried away the goods and chattels, to wit, a certain horse, of the aforesaid A. to the value of one hundred shillings and [did] other enormous things to the great damage of him the said A. and against our peace: and have here the names of the pledges and this writ. Witness, the king himself at Westminster [etc., as above].

The following is a writ of trespass on the case adapted from 1 A. FITZHERBERT, *supra*, at *94D:[6]

The King to the Sheriff of _____ greeting: If A. shall make you secure of prosecuting his claim, summon B. and make him give gages and safe pledges that he be before our justices at Westminster on the morrow of All Souls' to show wherefore he fixed a certain nail in one foot of a certain horse of A. at N. by which it became putrid so that the same horse for a long time could not work, and he the said A. during that time lost the benefit of his horse aforesaid, to the great damage of him the said A., as it is said: and have here [etc., as above]. . . .

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[4] This last phrase probably is a mistake for "and thereof he produces suit," a reference to a formality used in the English courts but which had long since ceased to have meaning in this period.

[5] A literal translation of the rather awkward Latin would read: "If A. shall make you secure of prosecuting his claim, put by gages and safe pledges B. that he be [etc.] . . . ." The meaning is clear: B. is to give property security ("gages") and his friends are to vouch ("safe pledges") that he will be at Westminster to answer the charge. *See* 2 F. POLLOCK & F. MAITLAND, HISTORY OF ENGLISH LAW 590–95 (2d ed. 1898); T. PLUCKNETT, CONCISE HISTORY OF THE COMMON LAW 383–86 (5th ed. 1956).

[6] *Cf.* The Farrier's Case, Y.B. Trin. 46 Edw. 3, f. 19, pl. 19 (1372).

Examine these writs carefully and try to see the differences both in form and substance between them. What words of legal formula are present in the trespass writ which are missing from that for trespass on the case? Can you see the difference between the two in terms of the wrong done to the plaintiff's possessory interest? Can you see the difference in terms of what the defendant did (or failed to do)? Can you see how the latter action might develop into a contract action?

At one time, a lawyer who used a writ of trespass when he should have used one of trespass on the case ran the risk of having his case dismissed. If the case were dismissed, at the very least, the client had to undergo the expense of starting all over again, and might lose the case entirely because of the passage of time or the absconding of the defendant. Today, with relaxed rules of pleading, such a result would not occur in most jurisdictions. Nonetheless, the distinction between trespass and trespass on the case continues to have substantial ramifications for the law of property, as we shall see when we get to Chapter 3. *See* Note on the Real Actions—Twentieth Century Style, *infra* p. S**Error! Bookmark not defined.**.

The origins of the distinction are a subject of considerable scholarly dispute. Trespass, most scholars believe, is quasi-criminal in its origins, and had developed by the mid-thirteenth century as a substitute for and an addition to a private form of criminal action known as an "appeal" which could be brought in the king's courts. Of course, our English legal ancestors recognized just as much as we do that a person can be wronged by another's acts in situations, like that of the farrier, *supra*, at note 6, in which criminal liability would be inappropriate. Historically, however, actions for this type of wrong, what today we would call non-intentional torts, were not heard in the king's courts but in the local courts. The king's courts only heard actions for wrongs which were sufficiently grave as to be regarded as against the king's peace (*contra pacem*), and such wrongs came to be described as those done with force and arms (*vi et armis*).

Sometime around the middle of the fourteenth century, the king's courts, whether as a logical extension of the writ of trespass to similar cases, or simply in an effort to take business away from the local courts, began to entertain actions, later known as "actions on the case," in which the offense to the king's peace was practically non-existent. The two actions, however, became distinct, because in trespass, but not in case, the defendant could be personally seized by the sheriff at the beginning of the action by a writ called a *capias ad respondendum*, and also in trespass, but not case, a judgment against the defendant resulted in his paying a fine to the Crown in addition to damages to the plaintiff. 1503 saw the extension by statute[7] of the *capias* to trespass on the case as well as trespass, and the fine to the Crown was abolished in 1694,[8] although in practice it had long since ceased to have any real meaning.

Because of the availability of the *capias* and its equivalents, the ancestors of the modern summons, lawyers at the time of *Pierson v. Post* would have used a summons type of form rather than an original writ to begin the action. The defendant would be notified about the substance of the cause of action in a piece of paper called a declaration, the ancestor of the modern complaint, which would be filed with the court after the defendant had made his appearance. In the principal case a summons form was used and what Caines calls the declaration was actually an oral complaint that Post made in the justice's court and which was later reduced to writing.

The distinction between trespass and case persisted, however, perhaps because of irrational conservatism, but perhaps, too, because the distinctions which had been drawn between the two writs were deemed to be of some substance. In fact, the distinction was extended and refined. Trespass became the action for acts of misfeasance, whether intentional, negligent, or non-

[7] 19 Hen. 7, c. 9.

[8] 5 & 6 W. & M., c. 12.

negligent, by the wrongdoer, which acts resulted in direct, forcible injury to the person of the plaintiff or to property in his possession. The action on the case lay where one of these elements was missing: where the wrongdoer did not act but failed to act when he had a duty to act, where the injury was indirect, or where the injury was to property of the plaintiff that was not in his possession or to an interest that could not be described as property. The action would not lie in all cases where one or more of the elements of trespass was missing, but if an action lay at all, it had to be an action on the case. (Which of the elements of trespass were missing in *The Farrier's Case*, *supra*, at note 6?) Which of the elements were missing in *Pierson*?

For a recent account of the history, see S. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 283–313 (2d ed. 1981), and authorities cited therein. For what the distinctions between the two actions eventually became, see J. KOFFLER & A. REPPY, COMMON LAW PLEADING 77–96 (1969).

b. *Certiorari*[9]

> The People of the State of New York by the grace of God free and independent to John N. Fordham Esquire, one of our Justices assigned to keep our peace in and for our County of Suffolk and also to hear and determine divers felonies, trespasses, and other misdemeanors done and committed in the said County of Suffolk Greeting: We being willing for certain causes to be certified of a certain plaint lately levied or affirmed in our Court before you without our writ against Jesse Peirson at the suit of Lodowick Post in a plea of trespass on the case as it is said and also of the process, order, proceedings, and judgment in the same Do Command you that the plaint aforesaid and also all the process, order, proceedings, and judgment aforesaid with all things whatever concerning the same as fully and entirely as the same remain before you by whatever name or names the parties in the same are or may be called before our Justices of our Supreme Court of Judicature at the City hall of the City of New York on the third Tuesday of April next distinctly and openly you certify and send together with this writ that our said Justices of our said Supreme Court of Judicature may thereupon cause to be done what of right and according to the laws and customs of our said State ought to be done. Witness Morgan Lewis Esquire, Chief Justice at the City hall of the City of Albany, the twenty ninth day of January in the twenty seventh year of our Independence and in the year of our Lord one thousand eight hundred and three.

The form of this writ is derived from the English writ of certiorari, with some interesting changes made that reflect the different political situation in New York in 1803.[10] The important thing about this writ for our purposes is that it is a prerogative writ. The court does not have to grant it; whether it does is a matter within its discretion. The best known example of certiorari proceedings today are those in the United States Supreme Court. There the nature of the writ has

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[9] For the source of the quotation that follows, see *supra*, note 2.

[10] Here is a form adapted from William Tidd's PRACTICAL FORMS 90–92 (1803), an Appendix to his treatise, PRACTICE OF THE COURT OF KING'S BENCH:

> George the Third, by the Grace of God of Great Britain, France, and Ireland, king, defender of the faith, and so forth, to [the judge or judges of the inferior court] greeting: We being willing for certain causes, to be certified [i.e., made certain, the Latin is certiorari] of the plaint levied in our court before you against C.D. at the suit of A.B. of a plea of trespass on the case, command you that you send to us at Westminster, on the Friday next after the feast of St. Michael the plaint aforesaid, with all things touching the same, as fully and entirely as it remains in our court before you, by whatsoever names the parties may be called, together with this writ, that we may further cause to be done thereupon, what of right we shall see fit to be done, Witness Lloyd Lord Kenyon [the Chief Justice of King's Bench] at Westminster the fifteenth day of September, the year of the reign of our Lord King George the Third since the Conquest, the fortieth.

become so ossified that the record of the inferior court is frequently sent up at the request of the petitioner's attorney prior to the time the Court grants (or denies) the petition for certiorari, and the writ itself almost never issues. *See* Sup. Ct. R. 21(1), 25(1); E. GRESSMAN, ET AL., SUPREME COURT PRACTICE 424–29 (9th ed. 2007) <not on line>.

c. *"Of six exceptions*, *taken to the proceedings below*, *all are abandoned except the third . . . ."*[11]

And the said Jesse Peirson having had hearing of the said return and of the process and proceedings mentioned therein immediately says that in the said plaint, process, proceedings, and record and also in the rendering and giving of the said judgment there is manifest error in this that is to say:

[1] That it appears in and by the said record here sent that the summons issued by the said John N. Fordham Esquire, the said Justice in the said action before him, was directed "to any of the Constables of the County of Suffolk where the said Jesse Peirson then resided," 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 and therefore in that there is manifest error.

[2] There is also manifest error in this that is to say that it appears in and by the said record here sent that the said Lodowick Post came into the Court of the People of the State of New York before the said Justice on the thirtieth day of December in the year of our Lord one thousand eight hundred and two and then and there affirmed his plaint against the said Jesse Peirson in the said action and prayed process against the said Jesse Peirson by summons and that thereupon the said Justice at the prayer of the said Lodowick Post issued a summons requiring the Constable to summon the said Jesse Peirson to appear before him, the said Justice, on Thursday the thirtieth day of December in the year last aforesaid at two oclock in the afternoon of the same day to answer to the Lodowick Post in the said action which said thirtieth day of December last mentioned was the same day on which the said plaint was affirmed and the said summons was issued, whereas 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 and therefore in that also there is manifest error.[12]

[3] There is also manifest error in this that is to say that the declaration, complaint, or demand of the said Lodowick Post against the said Jesse Peirson specified and set forth in the said record here sent upon which the said judgment was rendered and given and the matters contained therein 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 the said judgment thereupon rendered and given is vicious, erroneous, and void in law and therefore in that also there is great and manifest error.

[4] There is also manifest error in this that is to say that it appears by the Venire annexed to the said record here sent that the said Venire issued by the said Justice in the said action [?required] the Constable to whom it was directed to summon twelve good and lawful freeholders of the town of Southampton to be and appear before him the said justice and without specifying the purpose for which the said twelve freeholders were to appear before

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[11] For the source of the quotation that follows, see *supra*, note 2.

[12] [This looks like a serious error, but the return of the summons, which is given in the transcript, shows that the constable did approach Pierson, though he seems to have misspelled his name, within the time period specified in the statute and read the summons to him. Ed.]

him, the said Justice, whereas by law the said Venire ought to have commanded the Constable to whom it was directed to summon twelve good and lawful men being freeholders of the said town to be and appear before him, the said Justice, to make a jury for the trial of the action between the parties mentioned in the said Venire and therefore in that also there is manifest error.

[5] There is also manifest error in this that is to say that it appears in and by the said record here sent that the jury who tried the said cause between the said parties found a Verdict for the plaintiff with seventy five cents damages and it farther appears that the said jury did not find, award, or assess any costs whatever in the said action for or in favor of the said Lodowick Post and nevertheless it farther appears in and by the said record that the said Justice did adjudge, consider, and determine that the said Lodowick Post should recover against the said Jesse Peirson five dollars for his costs[13] and charges by him about his suit in that behalf expended, whereas by law no costs of increase or other costs whatever can be adjudged or awarded to the plaintiff in any such case unless the jury who try the cause find and assess costs for and in favor of the plaintiff separately and distinctly from the damages which they find and assess for and in favor of the plaintiff and therefore in that also there is manifest error.

[6] There is also error in this that is to say that it farther appears in and by the said record here sent that the judgment rendered and given in the said action by the said Justice was rendered and given for the said Lodowick Post against the said Jesse Peirson, whereas by the law of the land judgment ought to have been rendered and given in the said action for the said Jesse Peirson against the said Lodowick Post and therefore in that also there is great and manifest error.

And hereupon the 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, 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 and that the said Lodowick Post may rejoin to the said errors.

3. *More Roman Law*. Printed below is the entire passage on wild animals from Justinian's *Institutes*, extracts of which appear in the principal case. Does lifting the extracts out of context help either side when applied to the fact situation of the case? Assume for the moment that the court was going to decide the case solely on the basis of Roman law. Was the result logically compelled? Can you see arguments which Post's counsel might have made on the basis of Justinian?

Wild animals, birds, and fish, that is to say all the creatures which the land, the sea, and the sky produce, as soon as they are caught by any one become at once the property of their captor by the law of nations; for natural reason admits the title of the first occupant to that which previously had no owner. So far as the occupant's title is concerned, it is immaterial whether it is on his own land or on that of another that he catches wild animals or birds, though it is clear that if he goes on another man's land for the sake of hunting or fowling, the latter may forbid him entry if aware of his purpose. An animal thus caught by you is deemed your property so long as it is completely under your control; but so soon as it has escaped from your control, and recovered its natural liberty, it ceases to be yours, and belongs to the first person who subsequently catches it. It is deemed to have recovered its natural liberty when you have lost

[13] [The actual damages awarded were $.75 (yes, there's a decimal point in that, 75 cents). To get some sense of the modern equivalent multiply by twenty. Ed.]

> sight of it, or when, though it is still in your sight, it would be difficult to pursue it. It has been doubted whether a wild animal becomes your property immediately [when] you have wounded it so severely as to be able to catch it. Some have thought that it becomes yours at once, and remains so as long as you pursue it, though it ceases to be yours when you cease the pursuit, and becomes again the property of any one who catches it: others have been of opinion that it does not belong to you till you have actually caught it. And we confirm this latter view, for it may happen in many ways that you will not capture it. Bees again are naturally wild; hence if a swarm settles on your tree, it is no more considered yours, until you have hived it, than the birds which build their nests there, and consequently if it is hived by some one else, it becomes his property. So too any one may take the honey-combs which bees may chance to have made, though, of course, if you see some one coming on your land for this purpose, you have a right to forbid him entry before that purpose is effected. A swarm which has flown from your hive is considered to remain yours so long as it is in your sight and easy of pursuit: otherwise it belongs to the first person who catches it. Peafowl too and pigeons are naturally wild, and it is no valid objection that they are used to return to the same spots from which they fly away, for bees do this, and it is admitted that bees are wild by nature; and some people have deer so tame that they will go into the woods and yet habitually come back again, and still no one denies that they are naturally wild. With regard, however, to animals which have this habit of going away and coming back again, the rule has been established that they are deemed yours so long as they have the intent to return: for if they cease to have this intention they cease to be yours, and belong to the first person who takes them; and when they lose the habit they seem also to have lost the intention of returning. Fowls and geese are not naturally wild, as is shown by the fact that there are some kinds of fowls and geese which we call wild kinds. Hence if your geese or fowls are frightened and fly away, they are considered to continue yours wherever they may be, even though you have lost sight of them; and any one who keeps them intending thereby to make a profit is held guilty of theft.

J. INST. 2.1.12–.16 (5th ed. J. Moyle trans. 1913).

4. *The* "*Natural Law School*." Justinian's *Institutes* were published in Constantinople in 533 A.D.; Bracton and Fleta are treatises on English law (with considerable Roman law mixed in in curious ways) composed in the thirteenth century. Locke was an English political philosopher who wrote at the end of the seventeenth century and whose famous "labor theory" of property we shall examine *infra* p. S41. Blackstone was a writer on English law in the middle of the eighteenth century, whose statement of the "occupation theory" of property is reproduced *infra*, p. S36. The principal commentators on the Roman law, however, whose works are cited in the arguments and opinions in *Pierson v. Post* are Continental writers of the "Natural Law School" of the seventeenth and eighteenth centuries. Continental legal scholarship in the sixteenth century (particularly that of the French humanists) had shown that centuries of interpretation of Roman law texts had led to their being used in contexts and in ways far from that contemplated by the original Classical authors. Recognizing this fact, the writers of the Natural Law School sought to go behind the specifics of the Roman texts to see if it was possible to find in them a body of transcendent principles which would be valid for all times and all peoples. Not surprisingly they turned their attention to international law, and Hugo Grotius' *De jure belli et pacis*, first published in 1625, and quoted in Justice Tompkins' opinion, is one of the first and most influential products of the school. *See generally* R. TUCK, NATURAL RIGHTS THEORIES (1979). Justice Tompkins' quotations from Grotius are accurate so far as they go, but he fails to cite the passage which follows right after Grotius' remarks about the traps, snares and nets:

> This is the rule, if no Civil Law intervene: for jurists are much mistaken who think that it is so decidedly Natural Law that it cannot be changed. It is Natural Law, not simply, but in a certain state of things, that is, if it be not otherwise provided. But the peoples of Germany, when they wished to assign to their princes and kings some rights to sustain their dignity,

> wisely thought that they might best begin with those things which can be given without damage to any one; of which kind are the things which have not yet become the property of any; [and thence they gave them a right to the game]. And this too was what the Egyptians did. For there the king's proctor claimed things of that kind. The law might transfer the ownership of these things even before occupation, since the law alone is sufficient to produce ownership.

1 H. GROTIUS, DE JURE BELLI ET PACIS 398–99 (W. Whewell abr. trans., 1854) (bracketed passage in original). What do you think Justice Tompkins would have said if this passage had been called to his attention?

While Grotius' principal aim was the elucidation of the *jus gentium*, what today we call international law, Samuel Pufendorf's *De jure naturæ et gentium*, first published in 1672, had a grander scheme: to outline all the principles of both the law of nature and of nations in the form of a comprehensive code. Pufendorf's theory of the origins of property shows considerable influence of the English political philosopher Thomas Hobbes. For Pufendorf, as for Hobbes, there is no natural right to property which one has seized, but agreement or positive law establish that right. Jean Barbeyrac, who translated and annotated Pufendorf (1st ed. Amsterdam, 1706), strongly disagreed and argued, on the basis of Locke, that man has a natural right to those things which he acquires by his labor from the common stock of goods which nature has provided. The following passages, most of them quoted or referred to in *Pierson*, illustrate both the conflict between Pufendorf and Barbeyrac and the implications of that conflict for the law of wild animals:[14]

> [Pufendorf, 4.4.4] . . . [T]here is no precept of natural law to be discovered, by which men are enjoined to make such an appropriation of things, as that each man should be allotted his particular portion, divided from the shares of others, though the law of nature doth indeed sufficiently advise the introducing of separate assignments, as men should appoint, according to the use and exigencies of human society; yet [it does it] so as to refer it to their judgment, whether they would appropriate only some particular things, or whether they would possess some things without bringing them to a division and leave the rest as they found them, only forbidding any particular man to challenge them to himself alone. Hence too, the law of nature is supposed to approve and confirm all agreements made by men about the possession of things, provided they neither imply a contradiction, nor tend to the disturbance of society. Therefore the property of things flowed immediately from the compact of men, whether tacit or express. For although after the donation of God, nothing was wanting but for men to take possession; yet that one man's seizing on a thing should be understood to exclude the right of all others to the same thing [2] could not proceed but from mutual agreement. And though right reason moved and persuaded men to introduce distinct properties, yet this doth not hinder, but that they might derive their rise and original from human covenant.
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> [Barbeyrac, 2] Not at all. It is certain, on the contrary, that the immediate foundation of all particular right which any man has to a thing which was before common is the first possession. This is, also, the most ancient way of acquirement. For, indeed, when several things are given in general to a number of men which exist not at the same time and who neither can nor will possess all things in common, . . . the intention of the donor doubtless is that those who come first shall gain a particular right to those things that they have gotten, exclusive of the pretentions of all others, without any consent of theirs needful to be given. All

[14] In the following passage the spelling, capitalization and punctuation have been modernized. The original book, chapter and section numbers are given in square brackets so that the reader may trace the passages cited in *Pierson v. Post*. Barbeyrac's notes are interleaved, following the paragraph to which they refer, with the original numbers in square brackets.

possession, according to the will of the donor, hath in it an effectual virtue to make the first occupant appropriate to himself lawfully any thing before held in common, provided he takes no more than he needs, and leaves enough for others. This is [shown by "Mr. Locke"] . . . in his excellent Treatise of Civil Government, where amongst other things he has, with great accuracy and solidity, cleared up the manner how the property of goods is acquired. [Barbeyrac then paraphrases 2.27–2.28g Locke's *Second Treatise*, which are reproduced *infra*, p. S41.] . . . But it doth not hence follow that we may gather as many fruits, take as many beasts, or possess ourselves of as many acres of land or, in a word, appropriate to ourselves as many goods as we please. For the same law of nature, which hath given every one a particular right to those things, which, by his own industry, he has taken from that common stock, wherein they lay, the same law, I say, has set certain bounds to this right. . . . Wherefore, the property of goods, acquired by labour, must be regulated by the good usage which may be made of them for the necessity and convenience of life. . . .

[Pufendorf, 4.4.5] Th[i]s much being premised, it is manifest, that antecedently to any act or agreement of men, there was a communion of all things in the world; not such as we have before termed a positive, but a negative communion; that is, all things lay free to any that would use them, and did not belong to one more than to another. But since things could afford no service to men were we not allowed to lay hands at least on the fruits and products of them, and since this would be to no purpose if others might lawfully take from us what we had before actually marked out for our own use, hence we apprehend the first agreement that men made about this point to have been that what any person had seized out of the common store of things, or out of the fruits of them with design to apply to his private occasions, none else should rob him of. . . .

[Pufendorf next quotes the arguments to the same effect of Velthuysen[15] who affirmed:] "That there is in nature no more reason why men should desire a right from the first occupancy of things, [6] than from the first discovery of them with the eye. . . ."

[Barbeyrac, 6] The reason of it is very clear, and 'tis this: that he declares thereby an intention to set apart such a thing for his use, or to appropriate it to himself, as he may by virtue of his common right to use it, which without that, would become useless to any man. The mere sight of a thing cannot have the same effect, because we see many things without any design of taking them to ourselves only. But if, at the same time, we perceive a thing first and we discover any ways an intention of reserving it to ourselves, others should no more pretend to it than if we were actually seized of it. See what is said on c. vi. . . .

[Pufendorf, 4.6.2] We have sufficiently made it appear in our former remarks, that after men came to a resolution of quitting the primitive communion, upon the strength of a previous contract they assigned to each person his share out of the general stock, either by the authority of parents, or by universal consent, or by lot, or sometimes by the free choice and option of the party receiving. Now it was at the same time agreed, that whatever did not come under this grand division, should pass to the first occupant; that is, to him who, before others, took bodily possession of it, [2] with intention to keep it as his own. . . . After this division, he is said originally to acquire a thing lying void and without a possessor, who happens to be the most early occupant of it; i.e. he who lays hold of such a thing before others, or gets the start of them in putting in his claim to it. . . .

[Barbeyrac, 2] . . . [W]e may observe that taking possession actually (*occupatio*) is not always absolutely necessary to acquire a thing that belongs to nobody. It is only a means to let

[15] [Lambert van Velthuysen (Veldhuyzen) (1622–85), Dutch philosopher and theologian, translator of Hobbes. Ed.]

all others know that we have an intention to appropriate such a thing. Indeed, that which properly constitutes the right of the first occupier is that he makes known to others his design to seize upon a thing. If then he declares his will by some other act, as significative, or if others have openly renounced with respect to him the right which they had to any thing which belonged no more to him than to them, he may then acquire the original property without any actual possession. . . . We may, also, add, that he must be within reach of taking what he declares his design to seize on, otherwise the boundless covetousness of most men will render his right unprofitable to others, and be a foundation for perpetual disputes and quarrels. Another thing we must remark on is that the effect we ascribe here to a simple declaration of our intentions to appropriate any thing before common is only reduced to this; that it prevents those who might have the same design. For it was never pretended that this was sufficient to acquire a full right of property to the exclusion of every other claim. If being within reach of taking corporal possession of what we had a mind to we neglected to do it, we should give room to believe we did not value it and had altered our opinion. The desire of appropriation and the signs we give of it to exclude other concurrents tend in themselves to the enjoyment of that right which is imperfect without possession. Therefore, from the moment we neglect to procure this enjoyment, we renounce the right we began to acquire, and the others, with whom we were before-hand, recover theirs. . . .

[Pufendorf, 4.6.4] . . . Occupancy in general, or by the whole . . . confers on the community, as such, a dominion over all things contained within the tract which they thus possess, not only immoveable, but likewise moveable goods and animals; at least, it gives them such a right of taking the latter kind, as excludes all others from the same privilege. . . .

[Pufendorf, 4.6.5] Hence it is apparent, that it depends on the will of the sovereign, and not on any natural and necessary law, what right the private members of a state shall enjoy, as to the gathering of moveables not yet possessed, as hunting, hawking, fishing, and the like—nay, and as to the occupancy of desolate regions; which the supreme governors may hinder any of their subjects from entering upon. . . .

[Pufendorf, 4.6.6] . . . [I]n most places the privilege of hunting is left wholly to the governors of the commonwealths, who in some countries admit their principal subjects to be sharers with them. Only beasts of prey are almost everywhere allowed to be killed by all persons without distinction. . . .

[Pufendorf, 4.6.7] But such laws as these did not, strictly speaking, confer on princes the dominion over wild beasts, but only a right by virtue of which they alone should afterwards make them their property by seizing and possessing them. Which right, nevertheless, had this effect in common with dominion, that in case any other person had illegally taken the said beasts, they might be challenged at his hands. For it doth not seem reasonable to admit the opinion of some, who tell us, that even before actual occupancy, the law might fix the dominion of these things, nothing more being required towards the producing of dominion than a legal appointment. This much indeed the law of any country may effect, that a dominion already established over things shall pass from one subject to another, without any antecedent act of the parties. But the law alone is not sufficient to introduce originally a dominion over such things as have not yet been actually brought under the power of men. But there is required farther some corporal action; especially as to the possession of living creatures. . . . [Pufendorf goes on to argue that game taken contrary to the positive law belongs not to the taker but to the prince, the huntsman being regarded as acting for the prince.] [1]

[Barbeyrac, 1 (probably the note cited by Colden as 4.6.7, n. 2)] This fiction to which our author is obliged to have recourse, and which does not appear to be the least satisfactory, is sufficient almost to show that he reasons upon false principles. . . .

[Pufendorf, 4.6.9] It is the general opinion, that moving things cannot be made our own but by bodily seizure; and this we are to use in such manner, as to take them from the place where they were found [4] into our lordship or at least into our safe custody. Now this seizure is made not only with our hands, but with instruments; as suppose, snares, gins, traps, nets, weels, hooks, and the like; provided the instruments be, as they term it, in nostra potestate, under our power, that is, set in a place where we have a right of following the game, and not yet broken by the prey, but holding them fast, at least till such time as we might probably come up.

[Barbeyrac, 4] This is not always necessary, as is before proved. . . .

[Pufendorf, 4.6.10] It hath, likewise, been disputed, Whether by giving a beast a wound in hunting we presently make him our own? *Trebatius*[16] long since declared on the affirmative side; but then he supposeth us to pursue the beast, which if we omit to do, he says, "We lose our property, and the right passeth to the first occupant." Others are of the contrary opinion, maintaining that we can by no other means appropriate the beast but by actually taking him, because many casualties may hinder him from ever coming into our hands. The *Emperor Frederick*[17] made this distinction in the case: "If the Beast were followed with the larger dogs or hounds, then he was the property of the hunter, not of the chance-occupant; and in like manner, if he were wounded or killed with a lance or sword. But if he were followed with beagles only, then he passed to the occupant, not to the first pursuer. If he was slain with a dart, a sling, or a bow, he fell to the hunter, provided he was still in chase after him, and not to the person who afterwards found or seized him." We judge it may in general be affirmed, that if the beast be mortally wounded, or very greatly maimed, he cannot fairly be intercepted by another person whilst we are in pursuit of him, provided we had a right of passing through such a place: But the contrary is to be held, in case the wound were not mortal, nor such as would considerably retard the beast in his flight. [1] . . .

[Barbeyrac, 1] This distinction is not necessary. The author always reasons from a false notion of the nature of taking possession. The truth is, that 'till we cease pursuing the beast, and so leave it to the first occupant, it belongs to us as much as can be; so that no man can lawfully put in a claim to it.

S. PUFENDORF, THE LAW OF NATURE AND NATIONS §§ 4.4.4–.5 at 366–67, 4.6.2–.10 at 386–93 (with Barbeyrac's notes, B. Kennet trans., 5th ed., 1749) (this is probably the translation that was used by the participants in *Pierson*).

On the natural law school generally, see A. WATSON, THE MAKING OF THE CIVIL LAW 83–98 (1981).

5. *What's Missing in Pierson*. The following material is largely derived from Donahue, *Noodt, Titius, and the Natural Law School: The Occupation of Wild Animals and the Intersection of Property and Tort*, in SATURA ROBERTO FEENSTRA 609–29 (J. Ankum, J. Spruit, & F. Wubbe, ed., 1985); cf. *id*., *Animalia Ferae Naturae: Rome, Bologna, Leyden, Oxford and Queen's County, N.Y.*, in STUDIES IN ROMAN LAW IN MEMORY OF A. ARTHUR SCHILLER 39–63 (R. Bagnall & J. Harris, ed., 1986).

a. Gottlieb Gerhard Titius, *Juris privati romano-germanici . . . libri duodecim* 3.5.14–15 (Leipzig, 1709) 331–2:

This also is to be observed: that occupation is required for acquiring ownership not simply but rather as a means of indicating to others the will of him who is to acquire; hence other

[16] [A Roman jurist of the period of the Republic. Ed.]

[17] [The twelfth-century Holy Roman Emperor Frederick I. Ed.]

acts, equally indicating the will of the same, are efficacious along with occupation. Thus wounding and pursuit also afford ownership of a wild animal (assuming that it is no one's) as well as occupation. [D.41.1.5.1.] The contrary opinion that prevailed among the Romans [J.I.2.1.13] is a matter of the positive law. . . . Further, occupation naturally has no prerogative over the other acts indicating intent, such as sight, casting a spear, or other similar things; hence if many concur in acquiring a thing, neither sight nor occupation nor casting a spear gives the ownership to one, but rather it is common to all, although others think otherwise; see Pufendorf, [4.6.8].

b. Christian Thomasius, *Institutionum jurisprudentiae divinae libri tres* 2.10.26, 32, 34 (1687) (ed. Halle, 1730) 185, 186:

[1] Use created things in such a way as not to destroy the good of your soul or your body. . . . [2] Use created things in such a way that you preserve equality with others; to wit, do not abuse them for pride; do not harm others by this use; serve others through them; keep faith given on that account. . . . [3] Let no one disturb another in his use of created things. . . .

c. Gerardus Noodt, *Probabilia juris* 2.6.1 (1678), in *Opera omnia* (Leyden, 1714) 54:

It was variously disputed by the ancients whether possession is acquired by intent alone, or by intent and body, not that they had doubts about the origin of possession or the rule, but they disagreed among themselves as to what ought to be observed in practice. There were those, I have convinced myself, who departed from the definition of the majority, as if utility commanded it, and when the holding was that possession is acquired not otherwise than by intent and body, they nonetheless pretended that both were present, as soon as the intent was apparent by a suitable sign together with the probable ability to seize the thing. Thus if a pebble or gem should be found by two people on the shore of the sea, but only by the sight of one and by the seizure also of the other, both fell into common ownership, so that he who first came into corporeal possession would not prevail unless he had previously indicated the affect.

d. Diodor von Tuldenus, *Commentarius in quattuor libros Institutionum* 2.18 (1622) (ed. Louvain, 1702):

The fact that it seemed wrong that someone should take from you the reward of industry had moved some to the contrary opinion. . . . But a better reason convinced Justinian, to wit, that hunting has to do with occupation: he is not regarded as having occupied who has not taken with his hands. Further, the laws ought to so provide that they not contain the seeds of perpetual litigation, which would happen if the wild animal were adjudged to him who so wounded that he could be captured; for this very thing, whether he could be captured, would be forever controverted. Nor could it be defined by a certain rule. Justinian therefore decided the controversy in this way so that his decision in one case not excite new controversies.

e. Johannes Voet, *Commentarius ad Pandectas* 41.1.2 (1698–1704) (ed. Paris, 1829) 4:85:

Occupation is the just apprehension of corporeal things that are common by the law of nations done with the intention of becoming owner whereby that which is to no one's is granted by natural reason to the first occupant.

f. *Id*. 41.1.7, 4:89:

Although it is still held now that a wild animal wounded by one person, and occupied by another does not become the property of him who wounds, but of him who occupies, . . . still anyone who comes on the scene and occupies a wild animal on the pursuit of which another is still bent ought to be fined, on the ground that he is carrying on a meddlesome form of hunting, the frequent cause of quarrels and of brawls.

g. Augustin Leyser, *Meditationes ad Pandectas* 41.1.439.3 (1727) (ed. Leipzig, 1744) 7:9:

> Occupation and acquisition of ownership is nothing other than reduction to one's power. He who declares that he will occupy a thing has not yet reduced it to [his] power. It is necessary that another act also be present. Will and thought alone even if expressed in words can have no effect, nor does he who fixes his spear on the gate subject the city to his right and power.

h. Johann Wolfgang Textor, *Synopsis iuris gentium* 8.15 (Basel, 1680) 62:

> [Three principles about occupation:] "(1) The object must belong to no one. (2) It must be susceptible of human ownership, and, without any breach of Natural Reason, it must be possible to exclude other men from the use of it. (3) The occupant must indicate by some adequate external sign or deed his intent to possess and to acquire."

i. Jean-Jacques Burlamaqui, *Principes du droit de la nature* 4.9.4 (1747) (Dupin ed., 1820) 3:182–3:

> What properly founds the right of the first occupant is that by seizing a thing that belongs to no one he lets it be known before all others his design to acquire the thing. If, however, one should manifest the intention to acquire a thing by some other act as significant as the taking of possession, as, for example, by the marks made on certain things, one can acquire property that way as well as by the taking of possession. Of course, he must be at the threshold of taking what he claims to have the intention of seizing. For it would be silly to pretend that an intention of uncertain effect would deprive other men of their rights. The boundless avarice of many men would thus render useless the right of others, which would be plainly contrary to God's intention and would give rise to continual disputes and quarrels.

j. Emer de Vattel, *Le droit des gens* 1.20.248–50 (London, 1758):

> All members of a community have an equal right to the use of its common property. But the members of the community, as a body, may make such regulations as they think fit concerning the manner of using it, provided such regulations do not violate the principle of equality in the enjoyment of it. . . .
>
> The right of the first comer (*jus praeventionis*) should be faithfully observed in the use of common property which can not be used by several persons at the same time. . . .
>
> For example, if I am actually drawing water from a common or public well, another who comes after me may not push me aside in order to draw water himself, but must wait till I have finished; for in thus drawing water I am acting on my right and may not be troubled in it by anyone; a second comer, who has an equal right, may not exercise it to the impairment of mine, and in stopping me by his arrival he would be claiming a greater right than mine and violating the law of equality. The same rule should be observed with respect to the use of such common property as is consumed in the using. It belongs to the first person who takes actual steps to put it to use; a second comer has no right to deprive him of it. I go to a public forest and begin to cut down a tree; you come upon the scene and want the same tree; you may not take it away from me, for that would be to assert a right superior to mine, and our rights are equal. This rule is similar to that prescribed by the Law of Nature for the use of the fruits of the earth before the introduction of private ownership.

6. *The Justices*. The court which decided *Pierson v. Post* contained two future United States Supreme Court justices, a future governor of New York, a man who was to become a powerful force in New York politics, and one whose name is permanently associated with American legal scholarship. The chief justice, James Kent (1763–1847), later became Chancellor of New York. (Kent replaced Morgan Lewis as chief justice after the certiorari was granted but before the decision was rendered.) In retirement Kent wrote *Kent's Commentaries*, one of the best known

books on American law in the pre-Civil War period. Kent was a conservative in politics, probably the most conservative member of the court at the time. Ambrose Spencer (1765–1848) was in the anti-Federalist camp at the time the case was decided. He later changed his views and was to become a powerful force in conservative politics in New York. Daniel Tompkins (1774–1825), the author of the majority opinion, later became Governor of New York and Vice President of the United States. He was associated with the anti-Federalists throughout his political career. Brockholst Livingston (1757–1823), the author of the dissent and probably the most learned member of the court with the possible exception of Kent, became a justice of the United States Supreme Court in 1807 and served until his death. On the Court Livingston seems to have abandoned the anti-Federalist views which he held before his appointment and largely followed the lead of Chief Justice Marshall. Smith Thompson (1768–1843), the final member of the *Pierson* majority, succeeded Livingston on the United States Supreme Court in 1824 and served until his death. Thompson, in contrast with Livingston, stuck to his anti-Federalist views when he became a member of the Court. One of his most notable opinions is his dissent in Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 50 (1831), in which he urged the Court to hold that the Cherokees were a sovereign state and hence had standing to sue Georgia in the federal courts. On Kent, Spencer and Tompkins, see 10 DICTIONARY OF AMERICAN BIOGRAPHY 343 (1933); 17 *id.* 443 (1935); 18 *id.* 583 (1936); for Livingston and Thompson, see 1 L. FRIEDMAN & F. ISRAEL, THE JUSTICES OF THE UNITED STATES SUPREME COURT 387–98, 475–92 (1969). To what extent can the views of the justices in *Pierson* be predicted from their politics at the time? To what extent can their subsequent views be predicted from their vote and/or opinions in *Pierson*?

Despite the fact that the positions taken by the justices in the principal case do not line up well with their known political views, the effort to find a "political," in the broad sense, explanation for the case continues. Angela Fernandez, who discovered the record of the case that we used in the preceding notes, has also discovered Chief Justice Kent's copy of the opinion with his handwritten notes. She argues that it was Kent who turned a case about a wrong into a case about the origins of property because he wanted American courts to take their place among the ranks of the intellectually respectable. *See* 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). For other views, associating the result with the personal politics of the court, see Ernst, *supra*, note 1.

Note on the Reception

In ordinary usage a reception is a party at which diplomats or wedding guests drink champagne and eat tea sandwiches. In legal parlance the word has a technical meaning and refers to one jurisdiction's accepting in whole or in part another jurisdiction's legal system. Perhaps the best known reception is thought to have occurred on the European continent in the sixteenth century when the Northern European countries (except for England) "received" Roman Law in addition to or in lieu of their own customary law. In American legal history the term refers to the process by which the American colonies and the states "received" the common law of England. *See generally* Seagle, *Reception*, in 13 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 153 (1934).

Except for the state of Louisiana (which, in deference to its French and Spanish heritages, has a civil law code based on the Code Napoléon), American states are common law jurisdictions. State legislatures, subject to constitutional limitations, may change the common law as they wish, and the state courts interpret the common law sometimes to the point of unrecognizability. But English common law is regarded as the basis of the legal system of the United States.

How this situation came about is a matter of some scholarly dispute. The classic theory is that of Paul Reinsch: *The English Common Law in the Early American Colonies*, in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 367 (1907). In the seventeenth century, according to Reinsch, the colonists attempted to get away from the English common law and to govern themselves according to their ideas of divine and natural law. Thus, they created, according to

Reinsch, a new law suited to local conditions. It was not until the latter part of the eighteenth century with the growing secularization of colonial life and the increase in commerce and of the number of English-trained lawyers that the common law was used extensively in the colonies. More recent scholars have called into question Reinsch's characterization of the earlier period. Some would argue that the customs of English local courts rather than the law of God was the body of law which was in fact being applied in colonial American practice. *See*, *e.g*, Goebel, *King's Law and Local Custom in Seventeenth Century New England*, 31 COLUM. L. REV. 416 (1931). Others point to the fact that some remarkably close approximations of the common law may be found in the earliest American statutes. *See*, *e.g*, G. HASKINS, LAW & AUTHORITY IN EARLY MASSACHUSETTS 180–82 (1960); *see also id.* at 163–88.

However the common law came to America, there is no doubt that a formal reception of it occurred after the Revolution—by constitutional provision in some states, statute in others, and judicial decision in still others. The period around the Revolution, however, was one of considerable ferment, some writers urging a return to natural law principles in lieu of the common law, some equating the common law with natural law, some urging the adoption of civil law, particularly French, principles. *See* Stein, *The Attraction of the Civil Law in Post-Revolutionary America*, 52 VA. L. REV. 403 (1966). To what extent are these debates reflected in *Pierson v. Post*? It has recently been suggested that the most important development in the years following the Revolution was not the reception of the common law but rather a change in attitude toward it. In the eighteenth century, so the argument runs, the common law was regarded as a set of immutable principles "discovered" by judges in their decisions, while in the early nineteenth century judges, under the influence of positive law thinking, began to see the common law as a malleable tool which could be used to achieve the policy goals of society. *See* M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860, ch. 1 (1977). To what extent is this change reflected in *Pierson v. Post*?

For whatever reason, those who argued for a radical change at the time of the Revolution lost out; the common law was received by the states. But just what they received has remained a question ever since. Consider the following provision from Michigan's current constitution:

> The common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended or repealed.

MICH. CONST. art. III, § 7 (2012).

What is the common law? How about a British decision of 1900 purporting to be declarative of what the common law always was? What about a similar New York case of the same date? The general rule has developed that decisions of other common law jurisdictions, at least after the state in question became a state, are persuasive but not binding authority. But how far back do you have to go before you reach a "received" common law decision? Date of statehood? 1789? 1776? Or to some even earlier time when the colonists "brought the common law with them from England"? Some states at the time of the Revolution forbade by statute the use in their courts of English decisions rendered after July 4, 1776 (*see* S. KIMBALL, HISTORICAL INTRODUCTION TO THE LEGAL SYSTEM 280–82 (1966)), and that date has been more or less established as the terminus ante quem for the binding authority of English cases. Further, reception statutes to the contrary notwithstanding, some courts felt they had the power to reject common law decisions which were not applicable to American life. For materials on this topic dealing with such problems as cattle trespass, mining and water rights, see *id.* 285–88, 326–56.

The reception of English statutes created even more of a problem. Some reception statutes specified that only general (not local) statutes "in aid of the common law" adopted prior to 1607 (why that date?) were received. This provision, of course, has its own interpretation problems.

(What is a "general" statute? What is "in aid of the common law"?) Further, other reception statutes were considerably less precise, and some judges were willing, in the absence of a specific reception of English statutes or even in the presence of a specific repeal of English statutes, to say that some English statutes were so much a part of the common law that the reception of the common law itself included these statutes. *See* ELIZABETH G. BROWN, BRITISH STATUTES IN AMERICAN LAW, 1776–1836, at 30–39 (1964); *see generally id.* While the general outlines of this problem were worked out over time, there remains considerable variation among the states as to what are "received statutes." Is there a problem of the reception of statutes in *Pierson v. Post*? How is it resolved?

Problems

1. Suppose Post had caught the fox, killed it, skinned it, and had left it on the beach to go round up his hounds. Returning, he discovers Pierson has walked off with the fox skin and refuses to return it. Post sues Pierson. What result? Why? Does your analysis of this problem tell you something about the distinction between "possession" and "occupancy"? About why wild animals are *res nullius* (things which belong to no one)? *See* Bartlett v. Budd, 2 F.Cas. 966 (No. 1075) (D. Mass. 1868); 2 W. BLACKSTONE, COMMENTARIES *389–90, *403.

2. Suppose Post had caught the fox in his hand and was about to put it in a cage when the fox turned, bit him on the hand and got away, Post in pursuit. Pierson appears on the scene and the same events follow as described in the principal case. Same result? Why or why not? *See* Mullett v. Bradley, 24 Misc. 695, 53 N.Y.S. 781 (Sup. Ct. 1898). *Cf.* Koop v. United States, 296 F.2d 53 (8th Cir.1961); *R. Brown*, *Personal Property* § 2 (W. Raushenbush ed. 1975); 2 W. BLACKSTONE, COMMENTARIES *391–94.

3. In Problem (2), above, suppose Post had the fox in the cage and Pierson came along and opened the door of the cage and let it out. Same result as in the principal case? Why or why not? *Cf.* Haywood v. State, 41 Ark. 479 (1883) (theft of a mockingbird from a cage); State v. House, 65 N.C. 315, 6 Am. R. 744 (1871) (theft of an otter from a trap).

Sollers v. Sollers, 77 Md. 148, 26 A. 188 (1893), holds that fish which have been captured and then placed in an inlet with a fence which blocks their access to a main stream may still be captured by another. Can you distinguish?

4. Assume the same operative facts as in the principal case except that the animal being pursued is (a) a lamb strayed from Post's flock, (b) a deer, or (c) bees swarming from Post's hive. Can you think of ways to distinguish these situations from the principal case? Do you think Justice Tompkins would accept your distinctions? Justice Livingston? Why or why not? On straying animals, see Oakley v. State, 152 Tex. Crim. 361, 214 S.W.2d 298 (1948) (a cow); Tim Kinney & Co. v. First National Bank, 10 Wyo. 115, 67 P. 471 (1902) (sheep); *cf.* Helsel v. Fletcher, 98 Okla. 285, 225 P. 514 (1924) (a cat); Herries v. Bell, 220 Mass. 243, 107 N.E. 944 (1915) (a dog). Because of their habit of swarming and their disregard of property lines, bees have been productive of much litigation. *See* Rexroth v. Coon, 15 R.I. 35, 23 A. 37 (1885); Goff v. Kilts, 15 Wend. 550 (N.Y. Sup. Ct. 1836); Gillet v. Mason, 7 Johns. 16 (N.Y. Sup. Ct. 1810); 2 W. BLACKSTONE, COMMENTARIES *392–93; Annot., 39 A.L.R. 352 (1925). In 1916, a New York court cited Justinian, Pufendorf, Bracton, Blackstone, etc., to support its position that the qualified property in *animalia feræ naturæ* (bees) continues in the possessor even if the bees go onto another's land, so long as the original possessor keeps them in sight or has the power to pursue them. Brown v. Eckes, 35 N.Y. Crim. 150, 160 N.Y.S. 489 (Yonkers City Ct. 1916).

5. *See generally* R. BROWN, PERSONAL PROPERTY § 2 (W. Raushenbush ed. 1975) <the online editions are all older than this one>; 2 W. BLACKSTONE, COMMENTARIES *389–95, *403, *410–19; 2 J. KENT COMMENTARIES *348–50; Annot., Ann. Cas. 1917B, at 949; E. Arnold, *Law of Possession Governing the Acquisition of Animals Feræ Naturæ*, 55 AM. L. REV. 393 (1921).

KEEBLE v. HICKERINGILL

King's Bench.

11 East 574; 103 Eng. Rep. 1127; *sub nom.* Keeble v. Hickeringall, Cas.t.Holt 14, 17, 19; 90 Eng. Rep. 906, 907, 908; *sub nom.* Keble v. Hickringill, 11 Mod. 74, 88 Eng. Rep. 898; 11 Mod. 130, 88 Eng.Rep. 945; *sub nom.* Keeble v. Hickeringhall, 3 Salk. 9, 91 Eng. Rep. 659 (1707).

ACTION upon the case. Plaintiff declares that he was, 8th November in the second year of the queen, lawfully possessed of a close of land called *Minott's Meadow*, *et de quodam vivario*,[1] *vocato* a decoy pond, to which divers wildfowl used to resort and come; and the plaintiff had at his own costs and charges prepared and procured divers decoy-ducks, nets, machines, and other engines for the decoying and taking of the wildfowl, and enjoyed the benefit in taking them; the defendant, knowing which, and intending to damnify the plaintiff in his vivary, and to fright and drive away the wildfowl used to resort thither, and deprive him of his profit, did, on the 8th of November resort to the head of the said pond and vivary, and did discharge the said gun several times that was then charged with the gunpowder against the said decoy pond, whereby the wildfowl was frighted away, and did forsake the said pond [for four months]. Upon not guilty pleaded a verdict was found for the plaintiff and 20 pounds damages.

[The defendant made a motion in King's Bench for arrest of judgment on the ground that the declaration was insufficient in law. The case was argued twice; the arguments of counsel were varied. Two important additional facts were brought out apparently as having been proven below or at least as not inconsistent with the declaration: (1) Hickeringill also had a decoy on his ground, and (2) he was on his own ground when he fired the gun. Hickeringill's counsel argued, among other things, that the plaintiff had no "property possessory" in the ducks and "admitting the plaintiff had a property possessory, yet [he] has but a right of taking them upon his own ground, . . . and the defendant may certainly shoot them upon his own ground: and it is not said that the defendant came on the plaintiff's ground to shoot; nor is it found that he did; therefore it shall be intended that he shot upon his own ground; and it is not found that he shot at the defendant's [sic] ducks, and it is of common right for every man to shoot on his own ground, and even at this day every freeholder qualified may do it, and the defendant is so qualified."

[On the basis of Lord Holt's questions from the bench, it seems as if he were prepared to hold that the fact that the wildfowl were "in the plaintiff's decoy pond, and so in his possession, . . . [was] sufficient without showing that he had any property in them." Upon reargument, however, counsel for the defendant pointed out that the declaration did not state that the birds ever settled in the pond, but simply "that they used to resort and come" to it. It is perhaps for this reason that Lord Holt developed the theory announced in the opinion:]

HOLT, C.J. I am of opinion that this action doth lie. It seems to be new in its instance, but is not new in the reason or principle of it. For, 1st, this using or making a decoy is lawful. 2dly, This employment of his ground to that use is profitable to the plaintiff, as is the skill and management of that employment. As to the first, Every man that hath a property may employ it for his pleasure and profit, as for alluring and procuring decoy ducks to come to his pond. To learn the trade of seducing other ducks to come there in order to be taken is not prohibited either by the law of the land or the moral law; but it is as lawful to use art to seduce them, to catch them, and destroy them for the use of mankind, as to kill and destroy wildfowl or tame cattle. Then when a man useth his art or his skill to take them, to sell and dispose of for his profit this is his trade; and he that hinders another in his trade or livelihood is liable to an action for so hindering him. Why otherwise are scandalous words spoken of a man in his profession actionable, when without his

[1] *Inst.* 100. Vivarium is a word of large extent, and ex vi termini signifieth a place in land or water where living things are kept.

profession they are not so? Though they do not affect any damage, yet are they mischievous in themselves; and therefore in their own nature productive of damage; and therefore an action lies against him. Such are all words that are spoken of a man to disparage him in his trade, that may bring damage to him; though they do not charge him with any crime that may make him obnoxious to punishment; to say a merchant is broken, or that he is failing, or is not able to pay his debts. 1 Roll. 60, 1; all the cases there put. How much more, when the defendant doth an actual and real damage to another when he is in the very act of receiving profit by his employment.

Now, there are two sorts of acts for doing damage to a man's employment, for which an action lies; the one is in respect of a man's privilege; the other is in respect of his property. In that of a man's franchise or privilege whereby he hath a fair, market, or ferry, if another shall use the like liberty, though out of his limits, he shall be liable to an action; though by grant from the king. But therein is the difference to be taken between a liberty in which the public hath a benefit, and that wherein the public is not concerned. 22 H. 6, 14, 15. The other is where a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood; there an action lies in all cases. But if a man doth him damage by using the same employment; as if Mr. Hickeringill had set up another decoy on his own ground near the plaintiff's, and that had spoiled the custom of the plaintiff, no action would lie because he had as much liberty to make and use a decoy as the plaintiff. This is like the case of 11 H. 4. 47. One schoolmaster sets up a new school to the damage of an ancient school, and thereby the scholars are allured from the old school to come to his new. (The action there was held not to lie.) But suppose Mr. Hickeringill should lie in the way with his guns, and fright the boys from going to school, and their parents would not let them go thither; sure that schoolmaster might have an action for the loss of his scholars. 29 E. 3. 18. A man hath a market, to which he hath toll for horses sold: a man is bringing his horse to market to sell: a stranger hinders and obstructs him from going thither to the market: an action lies because it imports damage. Action upon the case lies against one that shall by threats fright away his tenant at will.[2] 9 H. 7. 8. 21 H. 6.31. 9 H. 7.7. 14 Ed. 4.7. Vide Rastal. 622. 2 Cro. 423. Trespass was brought for beating his servant, whereby he was hindered from taking his toll; the obstruction is a damage, though not the loss of his service.

There was an objection that did occur to me, though I do not remember it to be made at the bar; which is, that it is not mentioned in the declaration what number or nature of wildfowl were frightened away by the defendant's shooting. . . . Now considering the nature of the case, it is not possible to declare of the number, that were frighted away; because the plaintiff had not possession of them, to count them. Where a man brings trespass for taking his goods, he must declare of the quantity, because he, by having had the possession, may know what he had, and therefore must know what he lost. . . . Secondly, says Mr. Solicitor,[3] here is not the nature of the wildfowl stated; for wildfowl are of several sorts; ducks, teal, mallard, and indeed all birds that are wild are wildfowl. [Lord Holt's answer to this is that the term "wildfowl" is a technical one known in treatises, cases and statutes.] . . .

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[2] Upon the same principle it was held, that an action lay against the master of a vessel for purposely firing a cannon at some negroes at *Calabar* on the coast of *Africa*, and thereby deterring them from trading with the plaintiff. Tarlton & al. v. M'Gawley, Peake's Ca. 205.

[3] [This is a strange use of this word, for even by Lord Holt's time the term "solicitor" was coming to have its modern English meaning of a lawyer who represented a person out of court but did not speak for him in the central royal courts, the latter function being confined to barristers. Lord Holt apparently is using the word in its older sense meaning simply a person who urges, prompts or instigates. *See* 6 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 448–49 (2d ed. 1937); *see generally id.* 431–81; H. COHEN, HISTORY OF THE ENGLISH BAR AND ATTORNATUS TO 1450, at 126–43, 277–341 (1929). There may also be a hint of opprobrium in Holt's usage. Ed.]

And when we do know that of long time in the kingdom these artificial contrivances of decoy ponds and decoy ducks have been used for enticing into those ponds wildfowl, in order to be taken for the profit of the owner of the pond, who is at the expense of servants, engines, and other management, whereby the markets of the nation may be furnished; there is great reason to give encouragement thereunto; that the people who are so instrumental by their skill and industry so to furnish the markets should reap the benefit and have their action. But in short, that which is the true reason, is, that this action is not brought to recover damage for the loss of the fowl, but for the disturbance.

Notes and Questions

1. Lord Holt's English is a lot closer to Shakespeare's than it is to ours, so getting through this opinion may be tough going. I have added some paragraphing to help out; the original is all one paragraph. If you take is slowly, you ought to be able to get it.

2. How does the holding of *Keeble* differ from *Pierson*? Why does it so differ?

3. *Keeble* is cited in *Pierson* as "11 *Mod* 74–130," *supra*, p. S8. Is Justice Tompkins' distinction persuasive? Can you distinguish the cases? For some suggestions as to why Justice Tompkins perceived *Keeble* as he did, see the following note.

4. At first glance it would seem that if Post had been able to persuade the court in *Pierson*, he may have had an automatically winning case. It's not quite that simple, however. It has been argued that *Keeble* would not apply to situations where the hunting was being done for sport. *See* Simpson, *The Timeless Principles of the Common Law*: Keeble v. Hickeringill *(1707)*, in *id.*, LEADING CASES IN THE COMMON LAW 64 (1995). (The Simpson article also contains a wonderful description of what an elaborate contraption a "decoy pond" was. One should not be thinking of the plastic decoys favored by duck hunters in the U.S.) For an argument distinguishing *Keeble* on policy grounds, see Krier, *Capture and Counteraction: Self-Help by Environmental Zealots*, 30 U. RICH. L. REV. 1045–52 (1996).

Note on Reports

Any system of law which depends on decided cases as a principal source of law needs, in order to become at all sophisticated, some way of recording and reporting the decisions of the cases. The lawyers who were involved in administering the English common law responded early to this need for a system of reporting cases. (Indeed, it has been suggested that the existence of a system of reported common law cases, along with a centralized judiciary and a professional bar, constitute the chief reasons why England did not adopt a civil law system during the "reception" of Roman law which is sometimes thought to have taken place in Europe during the Renaissance.) Like so many other things about our legal system, the reporting of cases developed over a long period of time. At different times it was done for different purposes and with differing degrees of accuracy. The earliest reports are to be found in hand-written books, called "Year Books" which begin toward the end of the thirteenth century. Printed Year Books begin in the late fifteenth century and run until 1535. During the sixteenth and seventeenth centuries, most of the Year Books were printed in volumes, called, because of their heavy gothic type, the "black letter editions," and some Year Books are available today only in those editions. Others have been edited and published in modern editions by the Rolls Series, the Selden Society, and the Ames Foundation. For example, the case cited in the principal case as "11 H. 4. 47" (more fully today "Y.B.Hil. 11 Hen. 4, f. 47, pl. 19 (1410)") is a Year Book case to be found in the black letter Year Book of the eleventh year of the reign of Henry IV (1409–10) on page 47 (the nineteenth plea of Hilary term), first printed by Richard Tottel in 1553. *See generally* 2 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 525–56 (4th ed. 1936); T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 268–73 (5th ed. 1956).

Whether or not the Year Book reporters had an official status is a matter of some controversy. What is clear, however, is that after the Year Books ceased to be published, the reporting of English cases became a function of private members of the English bar.[1] The judges continued to deliver their opinions, as they had in the Middle Ages, orally in open court. Arguments of counsel, too, were an exclusively oral affair. The reporters, or persons working for them, sat in court and took it all down in shorthand as best they could. The *Keeble* case is one among many cases which were subject to multiple and conflicting reports. According to J.W. Wallace, a nineteenth century reporter of the United States Supreme Court, who made an extensive study of the matter, none of the reporters of the *Keeble* case prior to East is reliable. See J. WALLACE, THE REPORTERS 387–88, 398–400 (4th ed. 1882). For this reason the version given here relies principally on East, which is said to have been taken from Lord Holt's manuscript. 11 East was not published until 1815, over one hundred years after the decision was rendered and, significantly, after the decision in *Pierson v. Post*, a fact which may have been of some relevance to both the advocacy and the decision in the latter case.

This somewhat haphazard system of individual reporting of decisions continued in England to the end of the eighteenth century, when courts and lawyers began to realize that something more reliable was necessary. Courts in both England and America[2] began to take a hand in making reports more official. In America the courts came to employ a reporter of decisions whose reports would be the official ones for that court. George Caines, for example, the reporter of *Pierson v. Post*, was the first official New York reporter. F. AUMANN, THE CHANGING AMERICAN LEGAL SYSTEM 76 (1940). Traditionally, the early decisions of the Supreme Court through volume ninety of the U.S. Reports are referred to by the names of the early reporters of decisions: Dallas, Cranch, Wheaton, Peters, Howard, Black and Wallace. While the name of the reporter of decisions is still to be found on the title page of most reports, the proliferation of reported decisions and the confusion of multiple citations to different reporter's names has led to the practice of numbering American reports consecutively by jurisdiction, e.g., 95 U.S., 57 N.Y., etc. The availability of the unofficial reports of the West Publishing Company, which are published on a regional basis (e.g., N.E., N.W., etc.), has led some states to discontinue their official reporter series. Most of the larger states, however, still issue official reports. *See generally* Surrency, *Law Reports in the United States*, 25 AM. J. LEGAL HIST. 48 (1981).

While the problem of determining the official text of any decision has been considerably reduced, there is always the possibility of a variance between the official and unofficial version. The problem is perhaps most serious not with reported court decisions but with statutes. In the case of statutes, a single word or piece of punctuation is frequently critical. In many jurisdictions the official Code is not complete or not up-to-date. For statutes not in the official Code the uncodified statutes-at-large or session laws contain the only official text. The moral is simple: when in doubt, check. Even if not in doubt, use the official text for any point which depends on one or two key words.

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[1] *Black's Law Dictionary* has the most comprehensive tables of what the abbreviations of the various reports stand for, e.g., 11 Mod. 30 means that the case is to be found in volume eleven of Style's *Modern King's Bench Reports* at page 30. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (19th ed. 2010), published by the editors of the Harvard Law Review and subscribed to by the editors of the Columbia and University of Pennsylvania Law Reviews and the Yale Law Journal, contains a more or less generally followed set of abbreviations for American reports.

[2] Reporting of American decisions did not begin until late in the eighteenth century, a fact which paradoxically increased the authority of English common law decisions. *See* F. AUMANN, *supra*, 71–77.

Note on the Private Law of Wild Animals Today

By and large the common law jurisdictions have followed the directions suggested in *Pierson*. The cases cited in the Problems, *supra*, p. S26, are typical. There are occasional deviations. In Liesner v. Wanie, 156 Wis. 16, 145 N.W. 374 (1914), the court affirmed a directed verdict for a plaintiff-hunter who had mortally wounded a wolf against a defendant who delivered the final shot and seized the animal. It purported to rest its opinion on "the law of the chase by common-law principles, differing from the more ancient civil law which postponed the point of vested interest to that of actual taking." *Id.* at 20, 145 N.W. at 376.[1] Some courts have also refused to follow the doctrine of Justinian as it applies to wild animals which escape from captivity. E.A. Stephens & Co. v. Albers, 81 Colo. 488, 256 P. 15 (1927), involved a silver fox named "McKenzie Duncan," a second-generation captive who escaped and was shot while prowling near a chicken house. His pelt was sold to the defendant whom the original owner sued for the return of the pelt or its value. The court held for the original owner:

> We are loath to believe that a man may capture a grizzly bear in the environs of New York or Chicago, or a seal in a millpond in Massachusetts, or an elephant in a cornfield in Iowa, or a silver fox on a ranch in Morgan County, Colo. and snap his fingers in the face of its former owner whose title had been acquired by a considerable expenditure of time, labor, and money; or that the rule which requires that where one of two persons must suffer the loss falls upon him whose carelessness caused it, has any application here. If the owner was negligent in permitting the escape the dealer was even more reckless in making the purchase.

81 Colo. at 497, 256 P. at 18. Conti v. ASPCA, 77 Misc. 2d 61, 353 N.Y.S.2d 288 (N.Y. Civ. Ct. 1974) (concerning a parrot named "Chester"), is to the same effect.

In some settings control over access is an effective substitute for ownership of wild animals. Does it make any difference whether fish in a pond owned by *A* are themselves owned by *A* so long as *A*'s ownership of the pond permits *A* to exclude *B* and all other members of the public from fishing in it? See Dycus v. Sillers, 557 So. 2d 486, 502 (Miss. 1990) ("a case about a fishin' hole"):

> . . . [N]ot all waters nor all fish swimming therein are public. . . . Easiest are the now familiar catfish ponds, wholly man-made, which dot the Delta and into which fingerlings are placed, fed, raised and harvested, at all times privately owned . . . . Where a lake or pond is wholly man-made or "artificial", the record title holders own the waters and all life within them . . . whether the lake or pond has been built for commercial, drainage, recreational or aesthetic reasons. By the same token, our law protects from interference a record titleholder's interest in small, completely landlocked natural . . . lakes.

In *Dycus* the court concluded that the fishing hole in question (which covered 92 acres) fell within the category of "natural landlocked" bodies of water even though Corps of Engineers dredging had opened a channel allowing boats to pass from an adjacent lake. This supported the plaintiff's action to enjoin the defendant's fishing. In such a situation is the ownership of the fish an issue? Would it be an issue if the plaintiff's action were for the value of fish taken from their fishing hole? *See Commonwealth v. Agway*, 210 Pa. Super. 150, 232 A.2d 69 (1967).

Land ownership also figured in an early Minnesota duck shooting case. In Lamprey v. Danz, 86 Minn. 317, 90 N.W. 578 (1902) the defendant was enjoined from "shooting ducks or any other

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[1] Never underestimate the power of a treatise writer. The sole authority cited for this proposition in *Liesner* is a similar statement in J. INGHAM, WILD ANIMALS 5–6 (1900). Ingham's authority for the proposition? A Québec case (Charlebois v. Raymond, 12 Low. Can. Jr. 55 (Cir. Ct. 1868)) which states that the French law of the chase differs from the Roman and *Pierson v. Post*! Can we cross *Liesner* off as a mistake, then, or is something more going on? *See* Note on Game Laws, *infra*, at S31.

game on or over the land of the plaintiff" on the basis of the landowner's "exclusive right of hunting and fishing on his land, and the waters covering it." (Emphasis added.) How different is this from the situation and legal theory of *Keeble*?

The most important recent developments concerning the law of wild animals, however, have not concerned suits between individuals but rather regulation of hunting and conservation by the state.

B. PUBLIC REGULATION OF THE CAPTURE OF WILD ANIMALS

COMMONWEALTH v. AGWAY, INC.
Superior Court of Pennsylvania.
210 Pa. Super. 150, 232 A.2d 69 (1967).

[Omitted from these Materials.]

Note on Game Laws

The King's Prerogative and the Ratione Soli. The court in *Pierson v. Post*, you will recall, commented on general lack of English authority on the naked question of how possession in wild animals is acquired. The authorities cited involved questions of private franchise, statute or title *ratione soli*.[1] All these questions may be viewed as being dependent upon the notion of the king's prerogative: "Whereby a right may accrue to the crown itself, or to such as claim under the title of the crown, as by the king's grant, or by prescription, which supposes an ancient grant." 2 W. BLACKSTONE, COMMENTARIES *408. One species of prerogative property is "the property of such animals *feræ naturæ*, as are known by the denomination of game, with the right of pursuing, taking, and destroying them: which is vested in the king alone, and from him derived to such of his subjects as have received the grants of a chase, a park, a free warren, or free fishery." 2 W. BLACKSTONE, COMMENTARIES *410–11. (The fact that the owner of a chase or warren had the privilege of pursuing onto anyone's property animals started within the warren may be the source of the curious statements about the common law in *Liesner v. Wanie*, *supra*, p. S31. *See* 7 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 491–95 (2d ed. 1937).)

Thus, private franchises to take game are seen as grants of a portion of the king's prerogative rights. By the same token the king (and later the king in his parliament) can make regulations in the form of game laws for the hunting of his animals since he must give permission to hunt them in the first place. It is not so clear that title *ratione soli* is based upon the king's prerogative. Blackstone seems to think that it is, basing his views on the notion that royal grant is the source

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[1] Although we have encountered the concept of title to wild animals *ratione soli* before, a definition at this point might be helpful. Here is how the RESTATEMENT OF PROPERTY § 450 comment *g*, at 2906 (1944) puts it:

> Subject to such paramount authority as may be asserted by the state, [the owner of land] not only has [the] power to prevent appropriation by others, but an attempt at appropriation by others may be rendered ineffective by his right to claim the benefit of the attempt. Thus, if B, a trespasser, shoots wild game upon land possessed by A, A may claim the game or recover damages for its conversion.

This restates what many courts in fact hold, but the following case may be more consistent with the underlying rationale of the wild animal cases which we have developed above: *B*'s marsh buggies exploring for oil and gas inadvertently trespassed upon *A*'s marsh causing the death of several hundred muskrats. *A*, who was in the business of trapping muskrats, sued to recover the value of those killed. The court held that *A* could not recover for the muskrats killed since they were not his property, but that he was entitled to recover damages for the loss to future harvests. Harrison v. Petroleum Surveys, 80 So. 2d 153 (La. App. 1955).

of all land titles. Other authors have criticized Blackstone's exclusive reliance on the prerogative as the source of English wild animal law, preferring to see title *ratione soli* as a form of "natural right" by the land owner. See 2 W. BLACKSTONE, COMMENTARIES *419, at 878–79 & nn. 23–28 (W. Lewis ed. 1898); 1 W. HOLDSWORTH, *supra*, at 101 n. 7 (7th ed. 1956). See also *id.* 101–02; 7 *id.* 490–95 (2d ed. 1937).

The matter was not completely settled in England until after the passage of the Game Laws (various dates from the fourteenth to the eighteenth centuries), a series of criminal statutes which had the effect of transferring much of the king's ancient prerogatives in game to the large landowners. See 1 W. HOLDSWORTH, *supra*, at 107–08. The first unequivocal statement of title *ratione soli* does not come until Blades v. Higgs, 11 H.L. Cas. 621, 11 Eng. Rep. 1474 (1865). For a modern account of the whole story with a strong point of view, see 7 W. HOLDSWORTH, *supra*, at 488–95 (2d ed.1937) and authorities cited therein. *See also* P. MUNSCHE, GENTLEMEN AND POACHERS (1981). The queen's prerogative in wild animals (except swans and royal fish) and all franchises of forest, free chase, park and free warren were abolished in England by the Wild Creatures and Forest Laws Act, 1971, c. 47.]

State "Ownership" of Wild Animals and the Constitution. In the United States no king's prerogative exists. We do, however, have game laws, the doctrine of title *ratione soli* and even private franchises. What justification is there is this country for these things? The legislatures of the various states have assumed property rights in the state as justification for making laws regarding wild animals. The New York legislature, for example, first mentioned this principle explicitly in the Act of April 15, 1912, ch. 318, 175, 1912 N.Y. LAWS 585. The statute remains essentially the same today: "The state of New York owns all fish, game, wildlife, shellfish, crustacea and protected insects in the state, except those legally acquired and held in private ownership. Any person who kills, takes or possesses such fish, game, wildlife, shellfish, crustacea or protected insects thereby consents that title thereto shall remain in the state for the purpose of regulating and controlling their use and disposition." N.Y. ENVIRONMENTAL CONSERV. LAW § 11–0105 (McKinney 2012).

In Geer v. Connecticut, 161 U.S. 519 (1895), cited in the principal case, the Supreme Court was confronted with a challenge to a Connecticut law which, in effect, forbade taking out of the state game killed in the state. The law, it was argued, was beyond the state's competence to pass since it constituted an interference with interstate commerce. The majority opinion sustains the state's right to regulate on the basis both of the king's prerogative and of the civil law concept that res nullius belonged in common to all the citizens of the state. The Court continued, "Whilst the fundamental principles upon which the common property in game rests have undergone no change, the development of free institutions has led to the recognition of the fact that the power or control lodged in the State, resulting from this common ownership, is to be exercised, like all other powers of government, as a trust for the benefit of the people, and not as a prerogative for the advantage of the government, as distinct from the people, or for the benefit of private individuals as distinguished from the public good." 161 U.S. at 529. *See generally* Sax, *The Public Trust Doctrine in Natural Resource Law*: *Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970). Justice Field dissented principally on the ground that the statute interfered with the property rights of individuals; Justice Harlan on the interstate commerce ground. All three opinions are well worth reading as a study in varying judicial philosophies.

Some of the ramifications of the ownership theory can be seen in the following: (1) In a state with a statute like the New York statute quoted above can the owner of a large tract of uncultivated land sue a trespasser for the mussels which he has taken from the bed of a stream which runs through the tract? *See* Gratz v. McKee, 258 F. 335 (8th Cir.1919), *rev'd on rehearing*, 270 F. 713 (1920), *aff'd as to judgment*, 260 U.S. 127 (1922). (2) Suppose that *A* seizes game in violation of the game laws of his state. Does he own the game? Does it make any difference if he

is claiming against (a) a game warden found to have taken the game in performance of his duty (Jones v. Metcalf, 96 Vt. 327, 119 A. 430 (1923)); (b) a fellow hunter (Dapson v. Daly, 257 Mass. 195, 153 N.E. 454 (1926) (alternative holding)); (c) a trespasser on *A*'s land (James v. Wood, 82 Me. 173, 19 A. 160 (1889)). If *A* moves the animal or its skin to another state, does he violate 18 U.S.C. § 2314 (1976) which prohibits interstate shipment of goods "stolen, converted or taken by fraud"? See United States v. Plott, 345 F. Supp. 1229 (S.D.N.Y. 1972). Don't make up your mind completely on these cases until you have read the next section of the book. (3) Suppose that *A*, still in violation of the game laws, takes fish from a pond located on private land with the permission of the owner or shoots game on an enclosed "private" preserve. Has he stolen the state's animals? *Compare* Koop v. United States, 296 F.2d 53 (8th Cir.1961), *with* Washburn v. State, 90 Okl.Crim. 306, 213 P.2d 870 (1950) (fishing without a license on a completely landlocked lake). *See also* Annot., 15 A.L.R.2d 754 (1951). (4) Suppose the State of New York forbids the sale of alligator shoes because the alligator is an endangered species. Alligators are not native to New York. Is the statute constitutional? *See* A.E. Nettleton Co. v. Diamond, 27 N.Y.2d 182, 315 N.Y.S.2d 625, 264 N.E.2d 118 (1970). *Cf.* Andrus v. Allard, 444 U.S. 51 (1979) (upholding the ban on sale of eagle feathers in the Federal Eagle Protection Act). (5) Suppose substantial amounts of plaintiff's crops are harvested by geese drawn to a neighboring state wildlife refuge. Can he recover from the state on the theory that they own the animals? *See* Sickman v. United States, 184 F.2d 616 (7th Cir.1950), *cert. denied*, 341 U.S. 939 (1951). On some other theory? *Cf.* Andrews v. Andrews, 242 N.C. 382, 88 S.E.2d 88 (1955).

As indicated in the principal case, Supreme Court cases after *Geer* expressed some doubt that state ownership of game justifies state game laws and preferred to justify such laws on the basis of the "police power," the general power of the state to regulate in the interests of the health, safety and welfare of its people. In Hughes v. Oklahoma, 441 U.S. 322 (1979), *noted in* 60 Or. L. Rev. 413 (1981), the Court expressly overruled *Geer* and held that Oklahoma could not consistent with the commerce clause forbid the export out of the state of minnows raised in the wild in state waters. While the Court noted that "[t]he overruling of *Geer* does not leave the States powerless to protect and conserve wild animal life within their borders" (*id*. at 338), it did not deal with the question of the source of that power nor with the implications of the overruling of *Geer* for the public trust doctrine so powerfully put in that case. The Court also left intact its holding in Baldwin v. Montana Fish & Game Com'n, 436 U.S. 371 (1978), which had rejected equal protection and privileges and immunities clause challenges to Montana's hunting license fees which blatantly discriminate between in-state and out-of-state residents. Could *Hughes* be used to argue for the unconstitutionality of PA. STAT. tit. 30, § 2506, *supra*, p. S**Error! Bookmark not defined.**? Arguing the case for Pennsylvania how would you reply?

Game Law Administration. If the constitutional and theoretical bases of game laws remain to be worked out, so too, on a more mundane level, does their administration. Consider New York as a paradigm:

The basic colonial statute on the topic was the "Act for the more Effectual preservation of Deer and other Game and ye Destruction of Wolves Wild Catts and other Vermin" of Sept. 18, 1708, ch. 172, reprinted in 1 THE COLONIAL LAW OF NEW YORK 618–20 (1894). It established seasons for the hunting of deer and certain game birds and authorized the payment of bounties for the taking of wolves, wildcats and "other vermin," including foxes. (Why did Justice Livingston not cite this statute in support of his opinion in *Pierson v. Post*?) The statute only applied to counties on Long Island. Throughout the colonial period statutes were passed regulating the taking of game, particularly deer, and the 1708 act was amended as late as 1772. See ch. 1558, in 5 *id.* 399–400. But the colonial laws were scattered, and their enforcement sporadic. See T. LUND, AMERICAN WILDLIFE LAW 29–31 (1980); see also *id.* 24–34. It seems fair to say that until the middle of the 19th century New York left matters pretty much to individual initiative and the common law.

In 1844 the New York legislature reversed *Pierson v. Post* so far as deer hunting in Suffolk and Queens counties was concerned and vested property rights in any person who started the animal "with dogs or otherwise" and was in fresh pursuit of it. The statute also established a hunting season and made other hunting regulations. Act of April 1, 1844, ch. 109, 1844 N.Y. Laws 94. Five years later the New York legislature repealed this law and all other game laws in favor of a statute which gave authority to county boards of supervisors to make laws for the protection of game. Act of April 3, 1849, ch. 194, § 4, para. 13, 1849 N.Y. Laws 295. The pursuit law was never re-enacted, but in 1859 the legislature again passed a statute for the protection of wild animals which contained provisions creating a hunting season, regulating the sale of deer skin and venison, and regulating fishing for certain species of fish. Although it was not a very comprehensive law, it nevertheless indicated that the legislature was again interested in taking upon itself the task of regulating wildlife. Act of April 19, 1859, ch. 511, 1859 N.Y. Laws 1185. Then in the Act of June 7, 1895, ch. 974, § 302, 1895 N.Y. Laws 935, the power of the local bodies to regulate was completely repealed.

The precursor to the modern Fish and Wildlife Law was passed in 1900. By this time the game laws were most comprehensive and had become so complex in scope and application that a Forest, Fish, and Game Commission was created. The Commission had the power to control fish stocking and to enforce fish, game, and forest laws. The Conservation Department was created by the Act of July 12, 1911, ch. 647, 1911 N.Y. Laws 1496, and included, among others, a Division of Fish and Game. This division was given authority to make rules and regulations giving protection beyond the statute upon petition. Act of March 5, 1928, ch. 242, 1928 N.Y. Laws 485. All the divisions of the Department were given power to make rules and regulations to secure enforcement of the provisions of the Conservation laws. Today although the Conservation Department has been abolished and its duties transferred to the Department of Environmental Conservation, that department continues to exercise administrative power and other powers such as granting additional protection to certain animals, issuing and revoking hunting and fishing licenses, establishing restricted areas where hunting and fishing is prohibited, etc. N.Y. ENVIRONMENTAL CONSERV. LAW §§ 11–0305, 11–0311, 11–0321 (McKinney 2012).

The New York development from common law to statutory law to administrative law is typical of many areas of American law. For an excellent discussion of this same process in the context of industrial accidents with a full treatment of its legal process ramifications, see C. AUERBACH, L. GARRISON, W. HURST & S. MERMIN, THE LEGAL PROCESS (1961).

There has been some tendency in recent years for the locus of regulation of wildlife to shift from the states to the federal government. While the shift is not nearly so complete as it is in many other areas of law, federal law and federal administration now play a significant role when the wildlife in question is on federal land (the federal government still owns vast tracts of land, particularly in the West), or outside the United States, or when it is affected by a federal project, such as building a dam. Some of this legislation is preservationist in nature, e.g., Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1543 (1988), which was at issue in the famous "snail darter case," TVA v. Hill, 437 U.S. 153 (1978), or the Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361–1407 (1988), which was an outgrowth of the "Save the Whale" campaign. Some of this legislation is more developmental in nature, conservation for the purpose of ensuring commercial exploitation, *e.g.*, Fishery Conservation and Management Act of 1976, 16 U.S.C. §§ 1801–1882 (1988). The conflict in policy remains to be worked out. *See* Child & Haley, *The Marine Mammal Protection Act and the Fishery Conservation and Management Act: The Need for Balance*, 56 WASH. L. REV. 397 (1981). *See also* Tilleman, *It's a Crime: Public Interest Laws (Fish and Game Statutes) Ignore Mens Rea Offenses—Towards a New Classification Scheme*, 16 AM. J. CRIM. LAW 279 (1989); Amestoy, *Wildlife Habitat Protection Through State-Wide Land Use Regulation*, 14 HARV. ENV. L. REV. 45 (1990); Coggins & Ward, *The Law of Wildlife Management on Federal Public Lands*, 60 OR. L. REV. 59 (1981).

The increasing interest in problems of wildlife conservation has produced a considerable literature. Bibliographies may be found in Coggins & Smith, *The Emerging Law of Wildlife*: *A Narrative Bibliography*, 6 Environmental L. 583 (1975) and in M. BEAN, *supra*, p. S**Error! Bookmark not defined.**, at 470–78. More recent still are [U.S.] COUNCIL ON ENVIRONMENTAL QUALITY, WILDLIFE AND AMERICA (H. Brokaw ed. 1978) (an excellent collection of essays) and T. LUND, *supra*.

C. CLASSICAL THEORIES OF PROPERTY

1.The "Occupation Theory" of Property.

We have already seen one statement of the "occupation theory" of property in the extracts from Pufendorf and a criticism of it by Barbeyrac who relied on the "labor theory" of John Locke, *supra*, p. S18. The following is perhaps the most famous statement of the occupation theory by an English writer, though it shows some influence from the labor theory. It is followed by an equally famous criticism of it by Sir Henry Maine, one of the first "social scientists" who applied himself to law.

2 W. BLACKSTONE, COMMENTARIES
*2–5, *14–15 (W. Lewis ed. 1898)[1]

In the beginning of the world, we are informed by holy writ, the all-bountiful Creator gave to man "dominion over all the earth, and over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth." This is the only true and solid foundation of man's dominion over external things, whatever airy metaphysical notions may have been stated by fanciful writers upon this subject. The earth, therefore, and all things therein, are the general property of all mankind, exclusive of other beings, from the immediate gift of the Creator. And, while the earth continued bare of inhabitants, it is reasonable to suppose that all was in common among them, and that every one took from the public stock to his own use such things as his immediate necessities required. . . .

. . . Not that this communion of goods seems ever to have been applicable, even in the earliest stages, to aught but the substance of the thing; nor could it be extended to the use of it. For, by the law of nature and reason, he, who first began to use it, acquired therein a kind of transient property, that lasted so long as he was using it, and no longer: or, to speak with greater precision, the right of possession continued for the same time only that the act of possession lasted. Thus the ground was in common, and no part of it was the permanent property of any man in particular; yet whoever was in the occupation of any determined spot of it, for rest, for shade, or the like, acquired for the time a sort of ownership, from which it would have been unjust, and contrary to the law of nature, to have driven him by force: but the instant that he quitted the use or occupation of it, another might seize it, without injustice. . . .

But when mankind increased in number, craft, and ambition, it became necessary to entertain conceptions of more permanent dominions; and to appropriate to individuals not the immediate use only, but the very substance of the thing to be used. Otherwise innumerable tumults must have arisen, and the good order of the world be continually broken and disturbed, while a variety of persons were striving who should get the first occupation of the same thing, or disputing which of them had actually gained it. As human life also grew more and more refined, abundance of conveniences were devised to render it more easy, commodious, and agreeable; as, habitations for shelter and safety, and raiment for warmth and decency. But no man would be at the trouble to provide either, so long as he had only an usufructuary property in them, which was to cease the

[1] First edition 1765–1769.