THE LAW OF PROPERTY

SUPPLEMENTAL READINGS

Class 04

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law outlines

Property

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CHAPTER 2
PERSONAL PROPERTY – ACQUISITION OF POSSSSION AND TITLE
I. RIGHTS OF POSSESSORS

A. Rights from possession generally:

Normally, one obtains title to goods by acquiring them from, and with the consent of, their prior owners (e.g., a purchase or gift transaction).

There are a few situations, however, in which one may obtain title, or its rough equivalent, by the mere fact of ***possessing*** the article.

The best examples of title from possession are: (1) ***wild animals***; (2) the ***finding*** of ***lost articles***; and (3) ***adverse possession***.

B. Wild Animals (*ferae naturae*):

Wild animals (often referred to in court decisions by their Latin name, *ferae naturae*) are normally not owned by anyone, of course.

Therefore, it is not surprising that the courts have held that once a person has ***gained possession*** of such an animal, he has rights in that animal superior to those of the rest of the world.

1. What constitutes "possession":

However, it is not always easy to tell when a person has obtained "possession" of a wild animal.

Obviously, the ***capture*** of such an animal is sufficient. But where less than outright capture has occurred, the line between possession and non-possession becomes blurry.

a. Chasing:

The mere fact that one has ***spotted*** and ***chased*** an animal is not sufficient to constitute possession.

Thus in the classic case of *Pierson v. Post*, 3 Cai. R 175 (Sup. Ct. N.Y. 1805), P found and chased a fox as part of a hunt; D then stepped in, killed the fox, and carried it away.

The court held that "mere pursuit" gave P no legal right to the fox, and that D thus had the right to interfere.

b. Business competition:

The courts are more likely to be sympathetic to the interfering defendant if he acts out of ***business competition*** with the plaintiff, rather than out of spite or malice.

Example:

P claims that after he set some decoys on his own pond to lure ducks in order to hunt them, D fired guns nearby to drive the ducks away.

Held, P is entitled to recovery, because D's act was a violent and malicious interference with P's livelihood.

But if the ducks had been lured away from P's pond by D's use of the same type of decoys for his own business purposes, P would *not* have been entitled to recover. (See *Keeble v. Hickeringill*, 103 Eng. Rep. 1127 (K.B. 1707))

2. Return to natural state:

If a wild animal is captured, and then escapes to ***return to its natural state***, the courts have generally held that the finder's ownership is ***extinguished***.

The animal then becomes the property of whoever recaptures him.

C. Finders of lost articles:

The saying "finders keepers, losers weepers" is ***not accurate***.

The finder of lost property holds it, at least for a certain time, ***in trust*** for the benefit of the true owner; thus he is a custodian, or "bailee" for the true owner.

What is important for our purposes here, however, is that the finder has rights ***superior to those of everyone except the true owner***.

Example:

P, a chimney sweep, finds a jewel, and carries it to the shop of D, a goldsmith. He asks D's apprentice to examine it and tell him what it is.

The apprentice takes out the stones, and refuses to return them.

P sues for the value of the stones.

Held, for P.

The finder of an object, although he does not by finding acquire absolute ownership, is entitled to possess it as against anyone but the true owner. (See *Armory v. Delamirie*, 1 Strange 505 (K.B. 1722))

1. Possession derived from trespass:

The rights of finders are an example of the broader principle that a possessor of personal property has rights superior to those of anyone except the true owner.

Thus even if the possessor has obtained his possession ***wrongfully***, he will be entitled to recover from a third person who interferes with that possession.

2. Measure of damages:

Most courts allow the possessor the right to recover the ***full value*** of the object from the third party who has taken it.

That is, the old common-law action of ***trover*** (which entitles the plaintiff to the object's value, and lets the defendant keep the object) is allowed.

3. Article lost by possessor:

As a corollary of the rule that a possessor has rights superior to those of everyone except the true owner, the courts hold that a possessor who ***loses*** the property after finding it or otherwise acquiring it may nonetheless recover it from the third person who subsequently finds or takes it.

4. Conflict with the owner of real estate:

When the person who finds the item is not the owner of the real estate on which it is found, a conflict between the ***finder*** and the ***real estate owner*** is likely to develop.

The courts have not devised very clear rules for resolving such conflicts.

a. Trespasser:

If the finder is a ***trespasser***, the owner of the real estate where the object is found will be preferred.

b. Other cases:

But if the finder is on the property with the owner's implied or express ***consent***, the cases are divided and confused.

In general, the English courts tend to award possession to the property owner, and the American courts tend to grant possession to the finder.

But these are by no means hard-and-fast rules, and the presence of other factors will often be dispositive.

c. "Lost" vs. "mislaid" property:

Courts have frequently distinguished between ***"lost"*** and ***"mislaid"*** property.

i. Mislaid:

An object has been ***"mislaid"*** rather than lost when it was ***intentionally put in a certain place***, and then forgotten by its owner.

Such mislaid objects are usually held to have been, in effect, placed in the ***"custody" of the landowner***; therefore, the ***finder does not obtain the right to possession***.

Example:

P, a customer in D's barbershop, finds a pocketbook that has been left there by some other customer.

Held, possession goes to D, because the owner (whoever it is) intentionally placed the pocketbook on D's table, and thus entrusted it to D's care.

Therefore, P is a finder of mislaid property (not lost property) and isn't entitled to possession. (See *McAvoy v. Medina*, 11 Allen 548 (Mass. 1866))

ii. "Lost property":

Conversely, property that has clearly *not* been intentionally deposited by the owner (i.e., is ***"lost"*** rather than "mislaid" property) is likely to be ***awarded to the finder.***

d. Statutory solutions:

Many states have enacted ***statutes*** governing the disposition of lost and mislaid property.

These statutes, sometimes called "estray" statutes, typically require the finder of lost or mislaid property to notify a designated government official who enters a description of the item in a registry.

These statutes have often rendered less significant the distinction between property found in a "public" place and that found in a "private" place.

D. Ownership of bodily tissues:

Does a person "own" her own organs, blood and other ***bodily tissues***?

To the extent that by "ownership" we mean the right to ***sell*** the object, the answer under present American law is mixed — some bodily tissues may be sold, for some purposes, but for the most part a person is not permitted to sell her organs or other tissues.

1. Transplant:

The question arises most commonly in the case of ***organ transplants***.

Here, American law is clear: a person may ***not*** sell his organ to be used in a transplant.

A federal statute, 42 U.S.C. §274(e), makes it "unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce" (as virtually any organ transfer would be found to do).

This ban applies even to direct donor-donee deals, so you commit a federal crime if you sell, say, your kidney directly to a donee who desperately needs it.

a. Policy determination:

In essence, Congress has made a policy determination that a person should not have the right to sell her organs for transplantation.

b. Other sales allowed:

But other types of tissue sales are implicitly allowed, both by the federal statute and by most states.

For instance, most states allow a person to sell his ***blood*** to a ***blood bank***.

2. Use of cells in research:

The other "hot topic" relating to ownership of bodily tissues is this: When a person's tissues are extracted as part of a medical procedure, does the patient continue to "own" the extracted materials, so as to control how they are used for ***scientific and commercial purposes***?

The main case to have considered the issue so far, ***Moore v. Regents of the University of California***, 793 P.2d 479 (Cal. 1990), has answered ***"no"*** to this question.

a. Facts:

The plaintiff in *Moore* was John Moore, who had been a leukemia patient at the UCLA Medical Center.

The defendants were the Center, and UCLA, which owns the Center. The defendants, in the course of treating P, removed his spleen with his consent.

They then used cells from P's spleen to establish a "cell line," which they patented.

The cell line turned out to have great medical and commercial value — products derived from the cell line are expected to have sales in the billions of dollars, and at the time of suit, UCLA had already earned hundreds of thousands of dollars in royalties.

P sued the Ds on a number of theories, including conversion — he asserted that by taking his spleen, without telling him that his cells had commercial value or that they would be used for commercial purposes, the Ds had converted P's "property."

b. Claim rejected:

A majority of the California Supreme Court ***rejected*** P's conversion claim.

The court held that once P's cells had been removed from his body, he simply ***did not retain any ownership interest in them***.

c. Dissents:

Two members of the court dissented from the majority's conclusion that P did not "own" his cells and thus could not recover in conversion.

One of them argued that P should be found to have had, at the time his spleen was removed, "at least … the right to do with his own tissue whatever the defendants did with it" (i.e., contract with researchers and drug companies to exploit its commercial potential), even if society properly prevents the sale of, say, organs for transplantation.

The majority's ruling simply unjustly enriched UCLA at P's expense, the dissenters said.

E. Adverse possession:

In every jurisdiction, there exist ***statutes of limitations***, which place limits upon the time within which the owner of real or personal property must bring a suit to recover possession, or for damages for the loss of possession.

After the statutory period (and any extensions of it) have passed, the actual possessor of the goods or real estate is immune from any suit by the rightful owner.

He is said to have gained title by ***adverse possession***.

The rules of adverse possession are discussed extensively later in this outline, in a real estate context.

Here we touch briefly upon several elements relating to adverse possession of personalty.

1. Same rules traditionally applied:

Traditionally, the ***same rules*** have been applied to adverse possession of personalty as to the adverse possession of real property.

Most importantly, the possession has been required to be ***adverse*** or "***hostile***" to the rights of the true owner, rather than being in subordination to his rights.

Example:

Suppose that a painting is stolen from Owner, and the thief sells it to an art dealer, who sells it to Possessor.

Possessor and his heirs hold the painting for 100 years, during which time none of them has the slightest reason to believe that the painting is stolen.

However, Possessor and his heirs keep the painting in the family vault during the entire time.

Under the traditional rule, Owner or his heirs could come along, even at the end of the 100-year period, and recover the painting, because the statute of limitations would never have run. (Possessor would never have been an "adverse possessor," since his possession was not "open" or "hostile" due to the fact that the painting was never displayed.)

This would be true even if Owner and his heirs never made reasonable efforts to find out what had become of the painting.

2. Modern trend:

But a number of modern courts have rejected this traditional rule, in favor of a "***discovery***" rule.

By this rule, the true owner's cause of action accrues "when she ***first knew***, or reasonably ***should have known*** through the exercise of due diligence, of the ***cause of action***, ***including the identity of the possessor***." (See *O'Keeffe v. Snyder*, 416 A.2d 862 (N.J. 1980))

a. Distinction:

Under the discovery rule, if the true owner, immediately after the loss, fails to use reasonable diligence to find the possessor, and the use of such diligence would have identified the possessor, ***the statute of limitations will begin to run immediately***, even if the possessor keeps the property hidden.

Conversely, even if the possessor displays the property openly, if the owners fails to learn that the possessor has it (and this failure is not due to the owner's lack of diligence), the statute of limitations will ***never*** start to run.

b. Rationale:

The principal reason for the modern use of the "discovery" rule for personal property is that, in contrast to the possession of real estate, "open and visible possession of personal property … may not be sufficient to put the original owner on actual or constructive notice of the identity of the possessor." (See *O'Keeffe supra)*.

For instance, if jewelry is stolen from a municipality in one county in New Jersey, it is unlikely that the owner would learn that someone is openly wearing that jewelry in another county or even in the same municipality.

3. Nature of title acquired:

Once the statutory period has passed, the possessor becomes, for all practical purposes, the ***owner*** of the property.

Thus not only can the true owner no longer sue to regain possession, but he is not entitled to use ***self-help*** to recover possession.

II. ACCESSION

A. Concept of accession generally:

It may happen that a person ***improves the property of another*** by mistake.

This is known as ***accession***.

Most situations of accession involve the use of ***labor*** to improve another's property, and it is on this sort of accession that we focus.

1. Traditional rule:

The traditional rule was that the owner of the original materials had title to the finished product, unless that product was so different from the original materials that essentially a ***new species*** of object had been created.

If a wholly new product were created (e.g., wine made from another's grapes), the maker, not the owner of the materials, had title.

2. “Disproportionate value” test:

But most modern decisions have abandoned the “different species” test, and instead look at the extent to which the maker has ***added value*** to the other person's materials.

If the value added is ***wholly disproportionate*** to the value of the original materials, the maker gains title; otherwise, the owner of the original materials has title to the finished product.

a. Good Faith requirement:

Virtually all of the cases which have granted title to the person who improved another's property have imposed a requirement of ***good faith***.

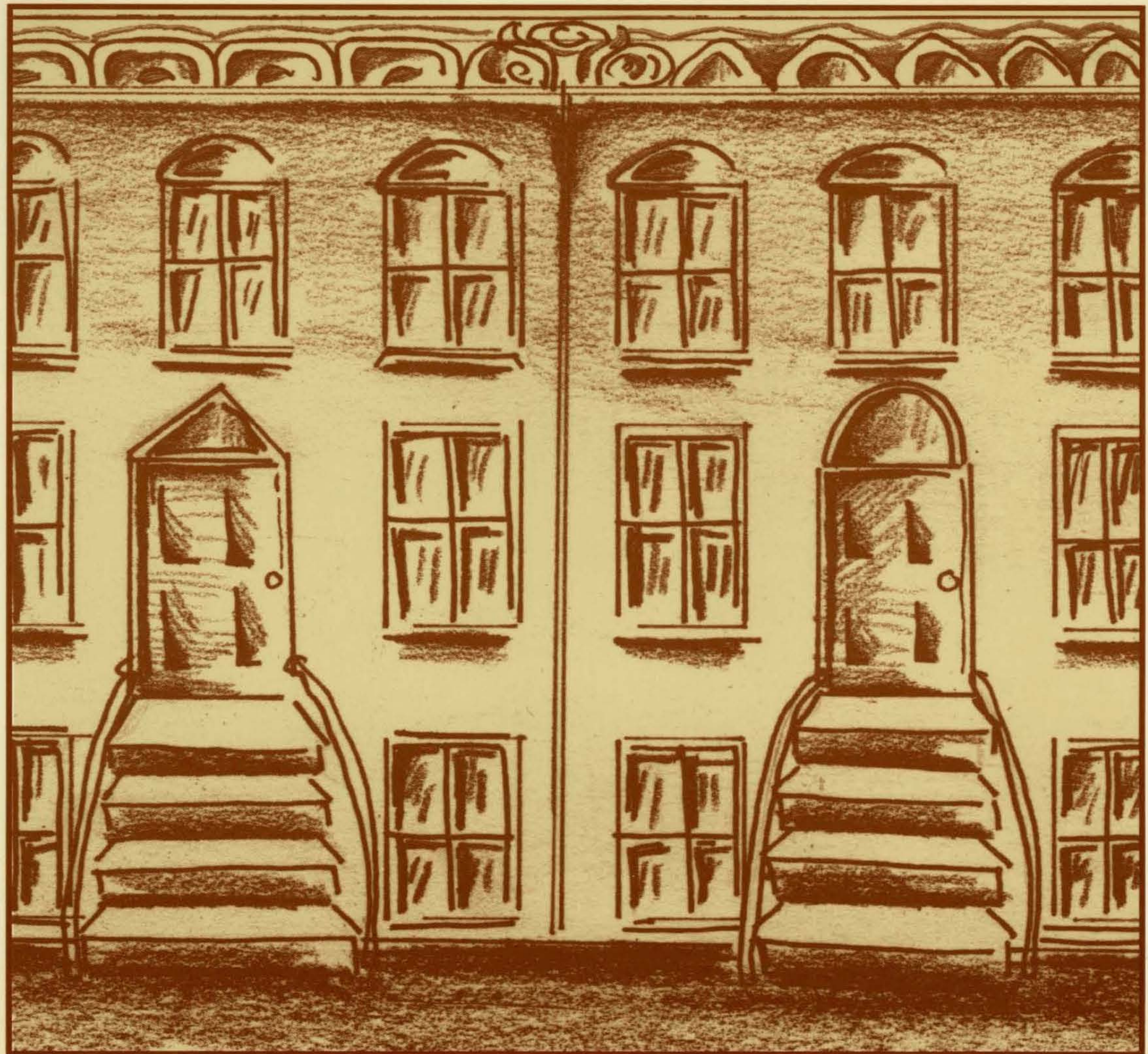
A ***willful trespasser*** upon another's property will probably not be entitled to recover, no matter how much he has increased the value of the materials by his labor.

EXAMPLES & EXPLANATIONS

Property

Second Edition

Barlow Burke and Joseph Snoe



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Personal Property and Possession

Introduction and Definitions

Personal property does not mean property that somebody owns, though a person may own personal property. In first-year Property classes, property falls into two categories: real property and personal property. ***Real Property*** or ***realty*** refers to land and improvements attached to the land. Buildings, fences, and dams, for example, are included with land as real property. ***Personal property*** or ***personalty*** is all property other than real property. Automobiles, books, tables, clothes, computers, and corporate stock are examples of personal property.

Other law school courses introduce the ***fixture***, which is personalty that has been permanently attached to real property, but that could be removed. A dishwasher installed into a kitchen cabinet is a fixture, for example. Fixtures' hybrid nature subjects them to rules applicable to personal property and sometimes to rules applicable to real property.

Property may change character. For example, trees and crops in the field are real property. When cut or harvested, the cut trees become personal property. Cut trees turned into lumber are personal property, but once incorporated into a building become real property.

Personal property may be tangible personal property or intangible personal property. ***Tangible personal property*** includes property of a physical nature. You can see it and touch it. Examples include automobiles, books, clothing, lumber, jewelry, paintings, furniture, and coins. Intangible personal property includes assets that cannot be touched or seen but that have value nonetheless. Examples include stock in corporations, bonds, patents, copyrights, notes or accounts receivable, goodwill, and contract rights. Intangible personal property often is represented by a writing — tangible property — but the asset itself — a patent, corporate stock, or a note receivable — is an intangible asset. Recently recognized intangible assets are the rights of

publicity and privacy that prohibit others from using a person's name, face, or other attribute of that person for commercial purposes without permission.

Possession, Relativity of Title, and First-in-Time

As discussed in Chapter 1, supra page 5 the word "property" has multiple connotations. It may be the thing itself; or it may define relationships and priorities, rights, and obligations among persons with respect to a thing. The study of the relationships among persons with respect to personal property is helpful in understanding three basic concepts: possession, relativity of title, and first-in-time.

Possession is the controlling or holding of personal property, with or without a claim of ownership. It has two elements: (1) an intent to possess on the part of the possessor, and (2) his or her actual controlling or holding of the property. As to the second element, control is key. Both the intent and the control elements must be present to acquire the rights of a possessor. Possession need not be actual possession. More on this later.

A court's definition of possession can vary according to the type of litigation in which it is used as well as the ends the judge sees it serving. Thus, for example, possession can be good against all except those with a better right, sufficient to permit a person to recover possession of an item of personal property, or sufficient to recover damages for its injury or destruction. A court will manipulate the two elements of possession according to the needs of the case.

Possession is basic to our law of personal property. Because proving ownership is so difficult and burdensome, we rely on possession as a surrogate for ownership and title. You probably own a wristwatch, for example, but how would you prove it if you were asked to do so?

Relativity of title is the idea that a person can have a relatively better title or right to possession than another, while simultaneously having a right inferior to yet another person. This doctrine is necessary because, in a common law system, few acquire a perfect title. That would require that the person acquiring title litigate its relative strength against all other persons who have, or might conceivably have, any right or interest. Thus, an attorney speaks of a relatively better right to possession, or of a superior title or right.

One way of prioritizing several individuals' rights is accomplished by a rule of ***first-in-time***, first-in-right, establishing a priority of rights based on the time of acquiring the right in question. Under such a rule, all other things being equal, the chronologically first possessor has the better title.

However, all things are not always equal. So a rule of priority based on time is not always the way the law arranges several rights in personalty.

Sometimes subsequent possessors prevail over prior possessors: A good faith purchaser and adverse possessor can acquire title superior to those who came into possession before they did. In contrast, persons taking their interests from a thief acquire no title to the thing: Title from a thief is a void title.

Actual Possession and the Fox Case

This chapter will discuss wild animal cases, using them as the prototypes for problems in other areas of property law. Hunters of wild game provide a seemingly endless number of situations in which one or the other elements is present — or missing. Whether a hunter has taken "possession" of an animal is the issue here.

The leading case in American law is Pierson v. Post, 3 Cai. Rptr. 175 (N.Y. Sup. Ct. 1805). Post was hunting on a beach. While he was in pursuit of a fox, Pierson intervened, shot the fox being chased by Post, and carried the animal off.

Post sued Pierson, and won in the lower or trial court. Pierson appealed. Post lost on appeal because he did not physically seize the animal before another (the original defendant and appellant Pierson) shot and carried it off. So the second element of possession (called ***occupancy*** in parts of this opinion) was not present. Without it, the plaintiff does not have a sufficient interest in the thing sued for to warrant the court's hearing his complaint.

Pierson involved a rule of possession formulated so that the first hunter to capture a fox wins. This is a rule of first-in-time, first-in-right. It is into this rule of priority in time, reworded for the situation of two or more claimants for the same thing, that the concept of possession fits — as in, first-to-possess, first-in-right.

However, the hunter's race for the fox is without a fixed starting line — that is, without a starting line that all the racers share. So we have Post, huffing and puffing over a distance longer than Pierson's, but Pierson wins. Put this way, the outcome hardly seems fair. Post expends considerably more effort and labor, and still he loses! Why? One answer is that there are no rules about the permissible gear that a hunter can use — more precisely, no restrictions on gear. One hunter can carry a high-powered rifle, another a pistol. Why is this? One answer might be that the courts think it a bad idea for the law to have such restrictions; they might be taken for an attempt to make one set of laws for the hunter rich enough to afford the rifle, and another for the hunter using the cheaper pistol. Another answer might be that the cheaper pistol can be more accurately used than the more expensive rifle — and the outcome of the hunt may change accordingly.

Yet another answer might be one of necessity — if the law is to devise a rule for a race without a common starting line, then the end of the race is all that matters because it is all the court has to work with. Add to that the

majority opinion's own justifications — wanting a rule that keeps the peace, damps down litigation, and is clear and easy to administer — and you have the justifications for the majority's decision.

Another version of the holding found in Pierson v. Post is in the opinion's discussion of several writers of legal treatises; that is, close pursuit after a ***mortal wounding*** gives a hunter a right to possession of the fox that is superior to another hunter's intervention. In the hypothetical opinion Hunter v. Montour in Chapter 1, Alex Hunter had the same argument in his favor, and it was no more successful for him than it was for Post. A "mortal wound" is one that, (1) on an objective basis, is likely to prove fatal to the animal — it will, given time, "deprive the fox of his natural liberty" — and (2) shows subjectively a "manifest intention" to seize the animal — that the pursuer intended to follow the hunt with a kill and is not just out for the enjoyment of the chase. Again, as with mere pursuit, intention alone will not do — or else Owen Owner would have won the hypothetical lawsuit whose opinion you read earlier. Instead, the intention must be manifest, or clearly shown by the wound. With this discussion of wounding, the court shows the two elements of possession coming together. In a sense, a mortal wounding is a constructive control of the animal.

The Pierson v. Post holding accepts as public policy that killing foxes is a socially useful enterprise. The dissenting judge in *Pierson* elaborates on this idea by saying that killing foxes saves chickens or, more precisely, protects the activities of chicken farmers. Look for public policy reasons to adopt a rule of law in controversies you study in Property and other courses.

The underlying ideas of both the majority and the dissenting opinions are not far apart, except that dissent would define possession in order to protect Post's pursuit of the fox. For both the majority and the dissent, the underlying rationale for the case drives their definition of "possession." Both the majority's rule of capture and the dissent's rule of pursuit are means to the same end — as are the ideas of "possession" and its kin, "constructive possession."

Constructive Possession

Constructive possession denotes possession that has the same effect in law as actual possession, although it is not actual possession in fact.[1] The dissent in *Pierson* argued in effect that Post's pursuit put him in constructive possession of the fox, in that it gave him a right to possession than was not yet actual possession. In the context of natural resources law, constructive

1. The word "constructive" means "established by construing the facts of a case so that the facts give rise to an inference of [whatever — here, possession]." Attorneys also speak of constructive bailments, conversion, delivery, fraud, and larceny; and that is just a limited sample of constructive legal concepts, limited to the course on real property. You will encounter the same word in other courses as well.

possession has also proven useful: The owners of land with unextracted oil, gas, or other minerals lying beneath its surface might not be in actual possession of those minerals, but they are often said to be in prior constructive possession of them. Hence, the legal maxim is that whoever owns the surface also owns to the depths of the earth.

The *Pierson* opinion says that prior cases involving hunters were decided under some type of regulation or statute, or involved litigation between hunters and the owners of private land on which the hunter captured the wild animal and in which the landowner usually prevailed. These factors are all potentially limiting facts in this case.

An English version of *Pierson* is the case of Young v. Hichens, 115 Eng. Rep. 228 (Queen's Bench, 1844). The plaintiff, from his boat, had enclosed a very large quantity of mackerel worth £2000 sterling in his net 140 fathoms long, drawn in a semicircle completely around the fish, with the exception of a space five to seven fathoms wide. Before the plaintiff could completely encircle the fish using a second net, the defendant's boat rowed through the gap, enclosed the fish, and captured them.

The court gave judgment for the defendant, except that the defendant had to pay a nominal amount for damage to the plaintiff's net: The court held that the plaintiff had not yet taken actual possession; neither did the plaintiff have constructive possession, because "all but reducing to possession" is not the same as possession. Were it otherwise, the plaintiff would be able to allege that he had a property interest sufficient to protect the fish in an action of conversion or trespass.

Custom

In the Hunter v. Montour opinion you read in the first chapter, the hunt began on unposted lands. The traditional rule in many regions of this country is that when a landowner has not otherwise notified hunters with "no hunting" signs, hunters are free to roam unimproved lands in search of game: by ***custom***, sometimes by statute, unposted land becomes fair game, and entry upon it is not a trespass to land.

Pierson may also have been decided in a way that most hunters in the locale might have found offensive. Judge Livingston suggests by dissenting that Post's hotfooted pursuit may have given him possession of the animal pursued according to the custom of local hunters. Used in this way, the custom of the locale is another basis for awarding possession. The majority of the court chose to ignore this basis. For example, the custom might be that the first hunter to put a bullet into an animal has the right to pursue it and reduce it to possession. Or, the custom might be that the hunter eventually taking possession of an animal must split the animal with the first shooter, so that the possessor and the shooter share the spoils. However,

whatever the form of the custom, unless the first wound produced is a mortal wounding, it will typically not be seen by other hunters, who (assuming they recognize the custom) then will not know whether to observe it.

Customs are market or locale specific. For example, among hunters pursuing wild animals with a bow and arrow, the custom like the ones described may be somewhat more workable — an animal with an arrow sticking out of its body may be assumed to be an animal that is being pursued. In addition, in the whaling industry the use of harpoons makes the custom still easier to observe.

One court, Ghen v. Rich, discussing a segment of the nineteenth-century whaling industry, suggested that the custom of any group or industry should be recognized only under certain circumstances, to wit:

- when its application is limited to the industry and limited to those working in it,
- when the custom is recognized by the whole industry (or fishery in *Ghen*),
- when the custom "requires in the first taker the only act of appropriation that is possible" (the type of whale discussed in *Ghen*, once harpooned and dead, immediately sinks to the ocean bottom),
- when the custom is necessary to the survival of the industry, and
- when the custom "works well in practice."

Although custom dictated the result in *Ghen*, not many customs are likely to survive all these tests. In this sense, when setting out so many tests, the *Ghen* opinion really represents a triumph of the common law over custom in our legal system. Why is the court so suspicious of custom? A first answer might be that the custom of the industry will be formulated for the benefit of the industry, not for society as a whole. Second, although of benefit to an industry, a custom might be dangerous to those employed in it and the courts should consider that as well. Third, the custom can be wasteful of the resource; some of the whales in the Cape Cod finback fishery "floated out to sea and" were "never recovered." Finally, a custom can lead to overinvestment in technology — the bomb-lance here. A bigger bomb-lance, with a rope attached to a bigger boat, could have meant immediate capture of the whale, but at what cost? The rule of capture taken from Pierson v. Post might lead to both waste and overinvestment.

In *Ghen*, the custom along Cape Cod's whaling areas required specially made equipment. Whaling ships elsewhere, using a harpoon with a rope attached to strike the whale, required a different custom. In Herman Melville's novel *Moby-Dick*, in chapter 89 describes various rules in the industry. Those other customs, untested in court, were not given the force of law; no custom should be imposed on wider regions or for a longer time than its use coincides with the law's needs.

The Doctrine of Custom Giving Access

Custom has not just been used in cases involving the creation of property by capture; it has also been used to create a common law right of access to certain types of real property. When, for example, a beach has been considered accessible to persons in a locale, their access may be said to arise by custom. A custom giving rise to access must be long-continued, uninterrupted, and reasonably asserted as a right. It is an inheritance from English common law, used to permit a local population to cut peat from a certain bog, use a certain spring for drinking water, or harvest timber for firewood in a certain forest, although the customary right to take away a substance will be more limited than the landowner's right to do so. Limitations for domestic or personal uses were often customary, and assertions of the custom in excess of that were regarded as unreasonable.

Blackstone said that the access must be so long continued "that the mind of man runs not to the contrary." In the United States, the custom must typically have been exercised from the beginning of the state's existence within the Union, and uninterrupted thereafter. However long, this is known as the doctrine's antiquity requirement. See State ex rel. Haman v. Fox, 594 P.2d 1093 (Idaho 1979) (finding 60 years insufficient). The state was created subject to the preexisting custom, and so the persons benefitting from the custom have a right prior to any power of the state. As the examples from England have indicated, the custom must also be certain and reasonable as to place, subject matter, and persons benefitting from it.

Natural Resources and Other Concerns

First to possess, first in right, and rules of capture have proven useful to attorneys in at least two other contexts — in the law of natural resources and in water law. As to natural resources, a surface owner also owns the minerals underneath, such as coal or gold. Two minerals — oil and gas — are found in "pools" and flow through the ground to points of low pressure, much as water does. The first driller to tap and produce oil or natural gas from a pool underlying the lands of several owners has acquired possession of the resource brought to the surface, even though it may drain the pool under the other's lands. Whereas lateral drilling is a trespass, drilling straight down from one's surface is not, no matter that it is conducted close to a surface boundary line. Because this first-in-time rule resulted in inefficient overproduction of oil and gas, today state statutes and regulations allocate common pools of an oil or gas resource. Actions against lateral drillers, trespass, and conversion are permitted.

Water Law

The second use of a rule of first-in-time, first-in-right, in the context of natural resources concerns water. Water rights can be divided into rights to surface water (lakes, rivers, and streams) and those to underground or groundwater.

(a) Surface Waters

First-in-time applies to the acquisition of ***surface water***, but the application of the rule differs in different parts of the country. Roughly divided, the eastern states are known as ***riparian states***. Each person with land abutting a flowing surface water may take water from the river or stream for ***reasonable use***. Many riparian states limit the use of the water to benefit the land abutting the surface water. In times of scarcity, a riparian landowner cannot use the water to benefit his nonriparian lands.

Because water is more scarce in western states, water is allocated based on ***prior appropriation***. While initially developed by custom and common law, most prior appropriation laws are controlled by statute today. Under a prior appropriation system, the first person to make beneficial use of water gains a vested right to continue that use. The easiest way to prove first-in-time benefit is to file with the local water agency. The first person to file has the first priority, the second person to file has the second priority, and so on. In cases of drought, persons with lower priorities may be prohibited from using any water until those whose claims have higher priority have satisfied their needs.

(b) Groundwater

Groundwater (subsurface water) can be classified into two categories. Groundwater that flows in a channel is called an underground stream. The rules on use of water from underground streams generally follow the same first-in-time rules applied to surface water.

The second type of groundwater is water not in a channel. These are known as ***percolating waters***. As with oil and natural gas, the owner of the property had an absolute right to withdraw percolating water and use it as he willed, either on the land or elsewhere. The absolute rule has been supplanted by a ***reasonable use doctrine***, also known as the American rule. Under the reasonable use doctrine, the water must be used solely on the overlying land if use elsewhere would cause hardship to other landowners with access to the common underground pool of water.

Some states follow a rule that dispenses with first-in-time and allocates the water equally to all owners of land overlying the common pool. The

equal sharing is based on land acreage owned, not a per owner equality. This is known as the ***correlative rights doctrine***.

The Restatement Second of Property § 858 combines these approaches and allows a person to withdraw and use percolating groundwater unless the withdrawal unreasonably harms neighboring lands by lowering the water table or decreasing the water pressure; exceeds the landowner's reasonable share of the water; or reduces the level of surface lakes, harming users of the lakes.

As water becomes more scarce, state and local laws will become more technical and sophisticated. We only introduce water rights in this book. Your school may offer an upper division–level course in this area of growing importance.

Actionable Interference

Keeble v. Hickeringill, 103 Eng. Rep. 1127, 11 Mod. 74 (Queen's Bench 1707), involved a decoy pond for ducks. Plaintiff Keeble brought an action against the defendant for discharging guns with the object of frightening the ducks away from the plaintiff's pond. The jury found for the plaintiff and awarded him £20 sterling. On appeal, defendant argued that there was no cause of action to redress the actions of which the plaintiff complained since the plaintiff did not own the ducks. Rejecting this argument, the appellate court held that the plaintiff had a cause of action. The court stated that "the true reason [for this holding] is that this action is not brought to recover damage for loss of the fowl, but for the disturbance" of the plaintiff's taking possession of them.

The opinion of Judge Holt in 103 Eng. Rep. makes three points. First, the plaintiff is a tradesman, using the decoy pond in a lawful manner for his business; second, the defendant, even as a competitor of the plaintiff, was acting illegally; and third, the general welfare is best served by promoting the social goal of providing ducks for English dinner tables. The first two points are related and do not depend necessarily on who owns land or who owns the ducks. The issue for lawyers reading the case is whether the earlier ones are preconditions (e.g., having a trade to protect, or being a competing tradesman) for a plaintiff's bringing and winning this action. If so, they discuss factors limiting the pool of future plaintiffs in these actions. If, however, the third paragraph is the dispositive one, then it makes no difference whether the plaintiff is a tradesman. Whether the three points are equally crucial to the holding, or whether the last point is "where the judge is going" and so controls all others, depends on whether you take a formalistic or a functional approach to the law of this case. An attorney must learn to treat the case both ways, both as a way of defining possession and as a method of achieving some greater social good.

Compare *Keeble* with Pierson v. Post. Post's hunt in Pierson v. Post was ostensibly for sport, while the plaintiff in *Keeble* had improved the pond for his particular purposes and was hunting ducks there as his trade or business. The court recognizes that certain types of activity in competition with another business are acceptable while others are not, even though the end result of each may be to cause one competitor to be no longer able to conduct his business profitably (or at all). The stark example given by the court is that one person may (and is even encouraged to) set up a new school to compete with an established school, even if the new school recruits faculty and students such that the old school must close. In contrast, the court deems it impermissible (in fact, do not ever advise anyone to do this) to "lie in the way with his guns, and fright the boys from going to school, and their parents would not let them go thither."[2]

In contrast to Post, who was hunting on "wild lands," Keeble was in possession of Minott's Meadow, where his pond was. Thus, Keeble was in possession ratione soli — a term meaning that the owner of land has sufficient possession of the wild animals on the land to start a hunt for them, as well as the right to pursue them while on that land. Possession ratione soli is a specific instance of constructive possession — again, not actual possession, but a type of possession treated as if it were actual possession. In other words, a legal fiction. This is the rationale for the case as reported in 11 Mod. 74, a case report available and cited by the majority in *Pierson*, and on the basis of which the majority distinguished the *Keeble* case. Why would a judge treat a situation as if it were enough like another situation that both should be handled in the same way by the law? In this instance, the judge might wish to deter poaching and to discourage the trespasses of hunters on private land.

The Eng. Rptr. opinion concludes that "decoy ponds and decoy ducks have been used . . . whereby the markets of the nation may be furnished." Whether the case involves ducks or venison, the opinions in both *Keeble* and *Pierson* define "possession" in such a way as to get each type of animal to market. To do that, constructive possession suffices for the plaintiff in *Keeble*, while actual possession is required in *Pierson*.

Misappropriation

Taking possession of an already existing object of personalty is not the only way to acquire the thing as property. A person might invent or create a thing, and be entitled to obtain a patent or copyright under federal law, or a right

2. Your law school offers several upper division courses, such as Business Organizations, Antitrust, and Securities Regulations, that explore the differences between fair and unfair competition and business conduct. We recommend such courses.

to sue to prevent its misappropriation generally. See ***International News Service v. Associated Press***, 248 U.S. 215 (1918) (holding that as between two competing news services, the systematic misappropriation of "hot news" stories by one competitor (the INS) was sufficient to justify an injunction against the INS until the commercial value of the stories dissipated). The opinion's ***doctrine of misappropriation*** has been used and discussed in many judicial opinions. See National Basketball Ass'n, Inc. v. Motorola, Inc., 105 F.3d 841 (2d Cir. 1997) (discussing and confirming the doctrine, for a "sports score" reporting service). So when a plaintiff has by substantial investment created an intangible thing of value not protected by patent, copyright, or other intellectual property law, and the defendant appropriates the intangible at little cost so that the plaintiff is injured and plaintiff's continued use of the intangible is jeopardized, an action for misappropriation will lie. Some courts are hostile to the doctrine because copying many things results in useful competition and lower prices, and often respects the limits of existing patent and copyright statutes. See Cheney Brothers v. Doris Silk Co., 35 F.2d 279 (2d Cir. 1929) (refusing to use misappropriation doctrine against dress-design copiers).

EXAMPLES

Post–*Pierson* Problems

1. Assume the facts of Pierson v. Post: Post chasing the fox on horseback and with hounds leading the way.
   - (a) Suppose further that the record at the trial in Pierson v. Post proved that Post's hunt was interrupted by nightfall, and he camped and slept while his dogs continued to pursue the fox overnight. Post resumed the hunt in the morning, and thereafter the facts of *Pierson* are the same as reported in the opinion. Pierson happened by as Post closed in on the fox, and Pierson killed the fox before Post did. Would this proof change the outcome of the case?
   - (b) Suppose that the record at the trial in Pierson v. Post proved that Pierson saw Post running after the fox, and just as Post closed in on the animal, Pierson muttered, "That no-good Post can't have that fox," and that, just after saying that, Pierson shot the fox and carried it off right under Post's nose. Would this proof change the outcome of the case?
   - (c) Suppose Pierson captured and caged the fox. A week later the fox escaped the cage. The next day Post killed the fox. Pierson sues for damages. What result?
   - (d) Suppose Pierson captured and caged the fox. Under cover of darkness, Post then entered Pierson's land and took the fox from the cage. Pierson discovered what happened and sued Post to recover the fox. What result?

(e) What types of pursuit — short of actually resulting in possession — do you think might give rise to a judicial finding of possession?

Custom-Made Law

2. (a) Ghen is a whaler pursuing a finback whale off Cape Cod. He shoots a bomb-lance and hits the whale, which instantly dies of the wound. The whale (as whales do when dying) sinks and two days later is discovered on a beach by Ellis, who sells it to Rich. Who owns the whale? See Ghen v. Rich, 8 F. 159 (D. Mass. 1881).

   (b) Why wouldn't the *Ghen* court decide its case just on the basis of the law as stated in *Pierson*? (And why wasn't *Pierson* decided according to the custom of hunters, as Judge Livingston suggested in his dissent in Pierson v. Post?)

   (c) The *Ghen* opinion states: "Neither the respondent (Rich) nor Ellis knew the whale had been killed by [Ghen], but they knew or might have known, if they had wished, that it had been shot and killed with a bomb-lance, by some person engaged in this species of business." What do you think might have been the effect of this trial court finding in *Ghen* on a case like *Pierson*?

Ownership of Fish in a Creek

3. A manufacturing company discharges chemicals from its plant into a nearby creek, causing a fish kill. The state attorney general's office sues the company for the value of the fish, alleging a property interest in the fish. In this suit, what result and why?

Oil Depletion

4. Who has possession of the empty underground space left after mining or after the extraction of oil or gas from a cavity in the earth? If oil or gas was injected into the cavity, would the surface owner have a trespass action against the injecting party?

Running Interference

5. Today, almost all states have enacted hunter harassment statutes, making it at least a misdemeanor to interfere intentionally with lawful hunting, and including in the definition of "interference" actions that are intended to affect the natural behavior of a hunted wild animal. What is the likely effect of such a statute on the outcome in *Pierson*?

policy by interfering. That is, the interference by an outside party might be of such a nature as to render his activity illegal, tainting his acts from the start and so focusing the court's attention on the actions of the inter-meddler, rather than the rights of the plaintiff claiming possession.

As indicated in dicta in Pierson v. Post, use of traps or nets or wounding such that escape is highly improbable might constitute constructive possession, which results in possession being in the owner of the traps or nets, or whoever did the wounding.

Custom-Made Law

2. (a) Ghen inflicted a mortal wound and so arguably has constructive possession of the whale at that point, even though he did not actually seize the whale. See Ghen v. Rich, 8 F. 159 (D. Mass. 1881) (reaching this result on another ground). The trial judge in *Ghen* reported: "The usage on Cape Cod, for many years, has been that the person who kills a whale in the manner and under the circumstances described, owns it. . . ." The custom of the industry as quoted is the ground on which *Ghen* was decided.

   (b) The court could have followed Pierson v. Post, but the holding would have upset an entire industry that had operated successfully under the custom of awarding the whale to the person whose iron holds the whale, with a finder receiving a salvage (a reward). The judge limited the custom-as-law holding to cases where the custom had been recognized and acquiesced in for many years, and that undoing the custom may destroy the industry. It also helped that the finder received a salvage for finding the whale and notifying the whaler.

   Why wasn't Pierson v. Post decided by custom? The dissent in *Pierson* wanted to do just that. One argument may be that the custom should be limited to issues unique to an industry, and Pierson and Post were not professional fox hunters. It may be that this custom was not essential to the survival of fox-hunting businesses, even if there was one at the time, or that fox hunting was not critical to the economy of the region. It may be that no one presented evidence as to what the custom was in the area. It may be that, as the majority stressed, the first to kill (or take actual possession) is easier to apply in practice. The custom of hunters, moreover, may not be in the best interests of the wider society — farmers, families, and so on.

   (c) The judges in *Pierson*, relying on *Ghen,* might have said that while in pursuit Post was in constructive possession of the fox for purposes of protecting his right to hunt that fox. If so, the court would have

ruled in favor of Post this time. More likely, the majority in *Pierson* would have distinguished *Ghen* on the grounds that in *Ghen* the plaintiff killed the whale. Mere pursuit of a whale conferred no benefit. Pierson's majority opinion, in dicta (or nonbinding aspects of the opinion), said that intercepting an animal (fox or whale) so as to deprive it of its natural liberty and make its escape impossible may be considered possession. Using this logic, harpooning and killing a whale is much like "intercepting" it, but not sighting and chasing it.

Ownership of Fish in a Creek

3. A state government may have sufficient "possession" of wild animals to regulate the hunting of them. Geer v. Conn., 161 U.S. 519 (1896). Yet this possession is for regulatory rather than hunting purposes, and so may be insufficient to justify the state's bringing an action based on its ownership of the fish. Commonwealth v. Agway, Inc., 232 A.2d 69 (Pa. Super. Ct. 1967). The state might be authorized by statute to do so, and this case shows the need for statutes governing water pollution and protection of wild animals, fish, and fowl.

Oil Depletion

4. The surface owner regains "possession" of the mined-out space after the minerals have been extracted. It may be a trespass, therefore, when already captured oil or gas is pumped back into the cavity for storage. Another thought, following the rule of wild animals, is that the oil has returned to its natural state (given its "natural liberty" again, if you will), and thus is owned by the first landowner to pump it back out. In that case, the injecting party does not have sufficient possession of it to commit a trespass with it — or, put another way, the surface owner could claim ownership by drilling for the oil himself. Compare Hammonds v. Central Kentucky Natural Gas Co., 75 S.W.2d 204, 206 (Ky. 1934) (holding that the injecting party does not have possession after the injection), with Texas American Energy Corp. v. Citizens Fidelity Bk. & Tr. Co., 736 S.W.2d 25 (Ky. 1987) (overruling *Hammonds*). *Hammonds* is not the law in the major oil-producing states.

Running Interference

5. As between two outcomes, both seem reasonable here. First, the purpose behind these statutes may be to resolve disputes between hunters and nonhunters (environmentalists and animal rights advocates), so that disputes between two hunters, such as is presented in Pierson v. Post, would

be unaffected and the outcome the same as under the common law. Second, and more broadly, Post would win if the effect of such a statute was to extend the unlawful interference policy in *Keeble* to the facts of *Pierson*. Pierson's actions may reasonably be argued to have influenced the behavior of the hunted animal, and so the statutory definition of interference is met and the statute applies. The policy behind these harassment statutes further argues that the "interference" cause of action recognized in *Keeble* should be extended to the facts of *Pierson* and that the factual distinctions between the two cases — e.g., between sportsmen and commercial hunters — should be ignored today. Viewed in the light of the policy and provisions of these statutes, the plaintiffs in both cases should be seen as having a "possession" sufficient to bring their actions.

CONCISE HORNBOOKS

PRINCIPLES OF

Property Law

SIXTH EDITION

HERBERT HOVENKAMP
SHELDON F. KURTZ

THOMPSON
WEST

Chapter 1

PERSONAL PROPERTY: RIGHTS OF SOME POSSESSORS

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1.2 Wild Animals and the Rule of Capture.
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SUMMARY

§ 1.1 Introductory Principles

1. A legal determination that a person owns personal property is difficult to make because proof of ownership of personal property often is not evidenced by a writing. As a result, the law places great weight on the observable fact of possession.

2. To say that a person has "possession" of personal property is to state either an observable fact or a legal conclusion or both. A person can be deemed to have possession of property as a legal conclusion even though she does not have actual possession of the property as an observable fact. In such case the person is said to have "constructive possession."

3. To say that a person has "title" to or "owns" personal property is to state a legal conclusion. A person can be deemed to have title to property as a legal conclusion even though he or she does not have actual possession of the property as an observed fact. Conversely, to conclude that a person is entitled to possession of personal property does not necessarily mean that the person has title to or owns the property.

4. Title, as all property rights, is a relative concept. A person may have "title" to property as against one person (A) but not another person (B).

5. If it is determined that a person is entitled to the legal possession of personal property, that person has the right to:

a. Continue the possession against everyone except those persons, if any, who have a better right to the property;

b. Recover possession of the property if it is wrongfully taken; and

c. Recover damages to the property from a wrongdoer.

6. To constitute possession, there must be:

a. a certain amount of actual control over the property; and

b. an intent to possess the property and exclude others.

§ 1.2 Wild Animals and the Rule of Capture

Title to wild animals is initially acquired by taking possession of the wild animal.

a. The mere chasing of an animal, although in hot pursuit, does not give the pursuer a right to possession against another who captures it by intervening.

b. If an animal is mortally wounded, or caught in a trap so that its capture is certain, the hunter acquires a right to possession and title which may not be defeated by another's intervention.

c. Title acquired by possession can be lost if the wild animal escapes and returns to its natural habitat.

§ 1.3 Finders

1. A finder is a person who rightfully acquires possession of the property of another that has been lost, misplaced, abandoned, or hidden so as to be classified as treasure trove.

2. Lost property consists of personal property whose possession has been parted with casually, involuntarily, or unconsciously.

3. Misplaced property refers to personal property which has been intentionally placed somewhere and then unintentionally left or forgotten.

4. Abandoned property consists of property that is no longer in the possession of the prior possessor who has intentionally relinquished, given up, or released the property.

5. Treasure trove consists of coin or money concealed in the earth or another private place, with the owner presently unknown.

6. Rights of a Finder at Common Law:

a. A finder of lost property acquires title to the property as against all but the true owner. The rights of the true owner, of course, are superior to the rights of the finder. Since the

concept of title is relative, for this purpose a true owner could include a prior possessor.

b. The prevailing rule is that if a person finds personal property on the land of another, the finder is entitled to the personal property unless the finder is a trespasser.

c. The finder is in a relationship with the true owner similar to that of bailor-bailee. Therefore, a finder can be guilty of conversion if the finder appropriates the property to his own use, or if he is reasonably able to discover the true owner and fails to do so.

d. The finder of misplaced property is not entitled to retain the possession of the property as against the owner of the land on which the property was found. Rather, the owner of the "locus in quo" is deemed to be the bailee of the goods for the true owner.

e. The finder of abandoned property generally is entitled not only to possession but also to ownership as against all others. In the case of abandoned shipwrecks within the territorial waters of a state, however, there is a conflict of authority—some states holding that such property belongs to the state, and the others holding that it belongs to the finder.

f. In England, treasure trove escheated to the crown. In the United States, it is treated as lost property and belongs to the finder.

7. Many states have enacted statutes which give the finder greater rights to found property than the finder had at common law. While these statutes differ widely, generally they eliminate the distinction between lost, misplaced and abandoned property and treasure trove, and award the found property to the finder in most cases. Frequently the statutes require the finder to deposit the found property with local authorities, post a notice attempting to advise the true owner the property has been found, and award ownership to the finder if the true owner does not claim the property after some period of time.

§ 1.4 Human Embryos

1. At common law, a person generally had no property right in the body or remains of himself or another and, as such, a person had no right to gift or bequeath his body. Actions for damages to one's body typically were managed through the tort system rather than the property law system. Thus, tort law rather than trespass law controlled the right to damages for either the intentional or negligent infliction of damages to a person's body.

2. Surviving family members had a limited right to direct how a decedent's body should be disposed of at death.

3. Under the National Organ Transplant Act, it is illegal to sell human organs such as kidneys, hearts and livers.

4. Under the Uniform Anatomical Gift Act which has been adopted throughout the United States, a person or the person's family following the person's death may donate his body for research purposes and gift organs for purposes of transplantation.

5. Human embryos that are in storage could be regarded either as property in the traditional sense, human life, or even quasi-property. The courts to date have tended to characterize human embryos as quasi-property.

§ 1.5 Human Likeness

1. Many states have adopted a so-called "right of publicity."

2. The "right of publicity" protects persons against the unauthorized use of their likeness or voice, typically for a commercial advantage.

3. This common-law right of publicity can be in addition to rights provided by statute.

PROBLEMS, DISCUSSION AND ANALYSIS

§ 1.2 Wild Animals and the Rule of Capture

PROBLEM 1.1: A was engaged in hunting a fox with his dogs and hounds on state-owned land. While in hot pursuit of the fox but before A could capture it, B killed it and kept it for himself. A sued B for the value of the fox? What result?[1]

Applicable Law: Title to wild animals can be acquired by reducing them to possession. Possession requires both an intent and a certain amount of physical control over the animal. Pursuit of the animal is not sufficient to constitute possession unless the animal is either mortally wounded or so spent that actual occupation is inevitable. Thus, a hunter in pursuit of a fox has no claim against a third person who interferes, shoots the fox, and actually captures it.

Answer and Analysis

B should win. Wild animals in a state of nature, like abandoned property, are owned by no one. The first person who takes possession or occupancy of them becomes the owner of that property. The

1. Pierson v. Post, 3 Caines 175 (N.Y.1805). See also, Ghen v. Rich, 8 F. 159 (D.Mass.1881) (fisherman gains property right in hunted whale through customary method of killing rather than by rule of capture).

mere chase of a wild animal will not give possessory rights to the hunter. However, actual possession or occupancy of the wild animal is not necessary to obtain title. It is sufficient if the animal be mortally wounded so that actual possession by the hunter is inevitable or that the animal be caught in a trap or net of the owner. Once this occurs the hunter has a property interest which cannot be wrongfully divested by another. Here, A was merely in pursuit of the fox and had not wounded it. Therefore, A's possession was not certain and B, even though perhaps acting in an unsportsmanlike manner, did not wrongfully obtain possession and, ultimately, title to the fox. While is could be argued that A should prevail if A had a reasonable likelihood of capturing the fox, the prevailing case law is to the contrary. The more stringent rule of capture is designed to assure greater certainty in establishing property rights by eliminating quarrels and litigation in which dubious claims of entitlement are made based on claimed facts of possession that, unlike actual possession, are difficult to prove.

The general proposition that title to personalty is established through possession is extremely useful because of the difficulties, administrative and otherwise, that would arise if proof of title by a writing, as typically the case for real property, were otherwise required. It is also consistent with the needs of modern commerce in which billions of transactions occur without written proof of title.

If A had been hunting on A's land but the facts were otherwise the same, A would prevail against B. Otherwise, B would be rewarded for B's wrongful trespass on A's land.

If A had captured the wild animal and B had wrongfully taken the animal from A's possession, or if the animal escaped and B, who later captured the animal, had reason to know the animal belonged to another, then, notwithstanding the general rule that an escaped wild animal that returns to the state of nature belongs to the next possessor, A could sue B and recover the animal or its value.

Note: Scarce Resources and the Rule of Capture

The rule of capture was originally applied to wild animals because they were "fugitive"—i.e., they moved about and ignored private property lines—and they were not owned by anyone, unless the sovereign itself. But in the nineteenth century the rule was expanded to include "fugitive" minerals, such as oil and natural gas. These minerals, like wild animals, move about but under the ground and without regard for property lines. Under the rule of capture, the property owner who drilled for and obtained, say, oil was entitled to keep it even if the oil flowed out from under the property of one or more nearby property owners.

But the rule of capture proved not to work very well for scarce resources, such as oil and gas. The cost of pumping the oil and gas was much less than its market value. Furthermore, if A's neighbor was pumping oil, that meant that A was facing "drainage"—that is, the oil was likely flowing out from under A's land, as well as the land of other neighbors, toward the working oil well. A would be obliged to drill a well too, and pump as rapidly as possible. Anything A did not get for herself today might go to someone else tomorrow.

It is easy to see that the rule of capture had a role in serious problems of overproduction of oil that plagued the industry in the United States around the turn of the century. Today, the rule of capture is seldom applied to fugitive minerals. Rather, their removal is subject to extensive state and federal regulation.

§ 1.3 Finders

PROBLEM 1.2: A found a diamond ring on a public street and takes it to a local jewelry store to be appraised. An employee of the store owner removed the diamond from the setting while pretending to weigh it. The employee then refused to return the diamond to A. A sues the store owner to recover the value of the diamond. May A recover?[2]

Applicable Law: The finder of lost property has the right to possess the property against all the world but the true owner. Thus, if a third party wrongfully converts the property, the finder may recover the property if it is still in the possession of the wrongdoer, or the finder may recover the full value of the property from the wrongdoer.

Answer and Analysis

As a general rule, a finder has good title against all the world but the true owner. As to the true owner (who could be a prior possessor), a finder is in a position, similar to that of a bailee, with all the rights and duties of a bailee. While a finder does not attain absolute ownership of the lost property, the finder does have the right of ownership against all other persons but the true owner. Thus, if the finder subsequently loses the found property, the finder may reclaim it from a subsequent finder.

Here, the finder of the diamond ring was entitled to its possession as against all the world but the true owner. Therefore, the finder has a superior claim as against another who wrongfully takes the diamond from the finder. An employer (store owner in this case) is responsible for the wrongful acts of its employees committed during the course of the employment. The store owner,

2. Cf. Armory v. Delamire, King's Bench, 1 Strange 505 (1722).

therefore, is liable to A for the full value of the diamond taken from the ring.

Suppose, after A recovers, O, the true owner, of the diamond ring sues the store owner to recover the value of the diamond. If the wrongdoer is liable to O, then effectively the wrongdoer pays twice, once to the finder and once to O. To avoid the wrongdoer having to pay twice, a court could hold that the wrongdoer, having paid the finder, has a defense as against the true owner and that the true owner should recover from the finder.[3] This rule would penalize the true owner if the finder, who had been paid by the store owner, could not be found.

On the other hand, suppose O sues the store owner to recover possession of the diamond. Here again, if the store owner is liable, the store owner pays twice. But, if O wants the diamond rather than money damages, shouldn't O be permitted to sue the wrongdoer since pursuing the finder will not get O what O wants?

PROBLEM 1.3: A, a young child, picked up a stocking stuffed with soft material that was knotted at both ends. A and A's friends began playing with it. The stocking passed from friend to friend until, as one child was striking another with it, the stocking burst and a large amount of money fell out. A claims the money. Is A entitled to it?

Applicable Law: Physical control alone is not sufficient to constitute possession or a finding. Possession and finding both require a certain amount of intent, a conscious desire to control the object, to possess it, and to exclude others. Thus, if one child found a stuffed stocking and joined with friends in using it as a plaything until it burst open revealing a roll of money, all of the friends formulated the intent to possess the money at the same time. Since they had mutual control, they all were entitled to the money as co-finders.

Answer and Analysis

A is not entitled to the money exclusively. All of the friends are entitled to a *pro rata* share. A did not have exclusive possession and must share the money with the other children. A finder, subject to certain exceptions noted in the following problems, is entitled to possession as against all but the true owner who, in this case, is unknown. To become a finder, however, one must acquire possession. This requires more than physical control. Possession consists of physical control of property coupled with an intent to assume dominion over it. At the time of discovery, A lacked an intent to

3. Cf., Berger v. 34th Street Garage Inc., 274 App.Div. 414, 84 N.Y.S.2d 348 (1st Dept. 1948).

take dominion over the stocking and its contents. A merely wanted to use it as a plaything with her friends. The other children had similar ideas. None of the children desired or attempted to exercise possession or exclusive control over the stocking until the money was discovered. When the stocking burst, all the children formulated the intent to possess the money at the same time, and since they were all collectively in physical control, they became co-finders. Other rationales, such as that A did take possession of the stocking but that she acquiesced in the co-possession of the friends, are possible.

PROBLEM 1.4: F, a prominent archaeologist, went on O's land, but without O's permission, to search for ancient lost artifacts. F dug up a valuable mask from O's land which F then sought to sell to the X Museum, subject to F having good title to the mask. F then instituted a suit against O to establish that as between them F has the better title. Who wins?

Applicable Law: Unless the trespass is trivial, a trespassing finder does not have good title against the owner of the locus in quo. Otherwise, the law favoring finders against all but the true owner would reward trespassers and perhaps even encourage trespassing.

Answer and Analysis

O wins. Because A was a trespasser when entering O's land and finding the mask, F's claim is inferior to that of O who prevails against the trespassing finder.[4] O's claim can be based on the theory that O, the owner of the land on which goods were embedded, owns the land and all that is part of the land.[5] If the law were otherwise, persons would be encouraged to trespass on the land of others.

F cannot prevail by alleging that he was motivated to trespass upon O's land in order to do historical research for a charitable institution. Even such a possibly worthwhile motive does not excuse F's unlawful act. F should have asked O for permission to enter O's land.

PROBLEM 1.5: A went into a barber shop owned by B to get a haircut. On the table next to the chair in which A sat A found a wallet containing $500 in cash. B claimed that B was entitled

4. Favorite v. Miller, 176 Conn. 310, 407 A.2d 974 (1978).

5. See also, Goodard v. Winchell, 86 Iowa 71, 52 N.W. 1124 (1892) (An meteorite weighing 60 pounds, which falls from the sky and is imbedded in the soil to a depth of three feet, is the property of the owner of the land on which it falls, rather than of the first person who finds it and digs it up).

to the money in the wallet even though A found the wallet. If B sues A to recover the money, can B win?[6]

Applicable Law: If a finder finds lost property on the land of another and the land is not generally open to the public, as between the owner of the land and the finder, the owner of the land prevails. Otherwise, the finder would be rewarded for trespassing on another's land. However, at common law if the finder finds lost property on land that is open to the public, such as a commercial establishment, the finder is entitled to the property as against the owner of the land unless the property is mislaid.

Answer and Analysis

A person loses property when the person parts with its possession involuntarily. Typically, in the case of lost property the possessor is unaware that he is parting with possession. Mislaid property, on the other hand, is property which has been intentionally placed somewhere and then its whereabouts forgotten. Here, the wallet found on the table beside the chair appears to have been placed there intentionally, in all likelihood by a customer who was previously in the shop to get a haircut. Thus, the money is classified as mislaid property and not as lost or abandoned property.

As a general proposition the finder of lost property has the right to retain possession as against everybody except the true owner. If the true owner never materializes, the finder keeps the property effectively as a reward for his efforts in taking possession of the property and caring for it. Absent this reward, the finder might not take the time to retrieve the property and care for it. This result generally is viewed as the best way to assure that the property will be reunited with its owner.

Generally, in the case of mislaid property, the owner of the locus in quo where the property is found is entitled to retain possession as against the finder. The rationale for this holding is that the owner of the mislaid property is likely to remember where he placed it and return for it. If a casual finder were entitled to keep it, so the argument goes, it would be more difficult for the owner to recover it. Alternatively, the owner of the locus in quo is likely to still be there when the owner of the mislaid property remembers where he placed it, and thus there is a greater likelihood that the property will be returned to its true owner.

This rationale favoring the owner of the locus in quo against the finder of mislaid property, however, is suspect. The apparent purpose of the rule is to protect the true owner. However, if finders believe that the rule unjustifiably rewards the owner of the locus in

6. McAvoy v. Medina, 93 Mass. 548, 11 Allen (Mass.) 548 (1866).

quo in the event the true owner never materializes, then to avoid that result, finders who are otherwise willing to recognize their claim as subservient to the true owner might be unwilling to tell the owner of the locus in quo that they found the mislaid property. This makes it more difficult for true owners to recover the property.

Furthermore, the characterization of found property as either lost or mislaid is dubious and thus suspect as a device to sort out the competing claims of the finder and the owner of the locus in quo. The characterization depends on the intent of the prior possessor and ascertaining that intent merely from the location of the property is highly suspect. For example, if the wallet had been found under the chair, it arguably was lost rather than mislaid because most people do not intentionally place their wallets under a chair. On the other hand, if the true owner's intent governs the characterization of property as either lost or mislaid, is it not possible that the true owner placed the wallet on the table, that another customer knocked it onto the floor and that a third customer unknowingly kicked it under the chair? If so, the property should be viewed more as mislaid rather than lost.

Many state statutes eliminate the distinction between lost and mislaid property and award possession to the finder who complies with the statute's notification requirements. During a defined period the true owner may appear and claim the mislaid property, but after the statutory period has passed, it belongs to the finder.

PROBLEM 1.6: A was employed as a room cleaner by B hotel to clean guest rooms. While cleaning one guest room, A discovered $800 in cash concealed under the lining of a bureau drawer. A delivered the money to B's manager who attempted without success to find the owner. A claims to be entitled to the cash as against A's employer. Is A correct?[7]

Applicable Law: Certain employees, such as hotel room cleaners, are usually obligated as a part of their employment duties to deliver found articles to their employer. Accordingly, the possession of articles found during and within the scope of one's employment is generally awarded to the employer and not to the finder.

Answer and Analysis

A is not entitled to the money. B could prevail on the theory that the property was mislaid and therefore as between the finder and the owner of the locus in quo the owner wins.

7. Jackson v. Steinberg, 186 Or. 129, 200 P.2d 376 (1948).

Alternatively, the finder in this case is a hotel employee whose general duties include the obligation to deliver to the employer all articles left in the hotel rooms by its guests. The finding occurred in the course of this employment and the finder has a duty to surrender the money to the hotel. Thus, B could also argue that it has a better right to possess the found money than the finder, A, without regard to the characterization of the property as lost or mislaid.

Suppose A was employed by the hotel in a job which did not include, expressly or impliedly by virtue of the job description, a requirement of delivering found property to the employer. Would the result change? Probably not. There are at least two arguments to suggest B would be entitled to the money. First, A, as an employee, is an agent of B and thus acts for the benefit of B when finding the money. Second, if A's finding of the money is outside of the scope of A's employment, then A's possession on the property when finding the property might be viewed as a trespass. In this case, A loses under the general rule that the owner of the locus in quo prevails against a trespasser.

PROBLEM 1.7: A and B, ages eight and ten respectively, were employed by C to clean out C's henhouse. C's home and henhouse had changed hands frequently. A and B found a tin can full of gold buried in a corner of the henhouse in such a condition to suggest that it had been buried there for quite some time. C took the coins from the boys claiming them as hers because they were found in her henhouse. A and B file suit. May A and B recover the coins?[8]

Applicable Law: Treasure trove refers to gold and silver coins, bar, plate, or other valuable objects intentionally hidden or secreted, usually in the earth, but the concept is frequently applied to valuables wherever hidden. The owner is usually unknown and not likely to appear. Under the English common law treasure trove belonged to the Crown, but in the United States it belongs to the finder.

Answer and Analysis

Yes. At early common law lost articles found concealed in the earth or other private places were called treasure trove. Treasure trove usually consisted of coins or money intentionally hidden for safety and with the owner being either dead or unknown at the time of discovery. This is contrasted with lost property which is defined as chattels found on the surface of the earth the possession of which the owner had casually and involuntarily parted. Treasure

8. Danielson v. Roberts, 44 Or. 108, 74 P. 913 (1904).

trove belonged to the Crown in England, but in the United States treasure trove merged with the law of lost property.

The general rule of lost property gives the finder the right to retain it against all persons except the true owner. If the true owner never claims it, as is most likely in the case of treasure trove, then the property becomes that of the finder. Under the doctrine of treasure trove, A and B are entitled to recover possession of the coins. The claim of A and B is fortified by the fact that they are not trespassers, although in some instances even technical trespassers have been allowed to retain treasure trove. Further, the master-servant relationship should not diminish the value of the finders' claim since they were only hired to clean the henhouse. It can hardly be expected that turning in discovered articles, as in the case of the hotel cleaning personnel, would be in the normal course of their employment.

Of course, there is a contrary argument. First, one might imply an obligation on the part of the hired servant to turn over found property to the master. Alternatively, one might characterize A and B as trespassers or wrongdoers with respect to their finding and retention of the gold. Here the argument would be that A and B were hired for a specific purpose—to clean the hen house—and that their presence on C's premises was limited solely to that purpose. Thus, to the extent they do things inconsistent with that purpose, they act outside of the scope of the permission granted to them and, as such, are wrongdoers. To further illustrate, suppose O invites F to her home for dinner and while F is sitting on the sofa puts her hand behind a cushion and finds a ring. Should F be entitled to retain the ring as against O who claims to be entitled to the ring because it was found in O's home. Arguably no on the grounds that F was invited to O's home to eat dinner not find lost property. Admittedly, however, this might be a close question.

> **PROBLEM 1.8:** A trespassed on the land of O and cut ninety-three pine logs without the consent of the owner. A hauled these logs, marked with his initials to a mill, where B converted them to his own use. A now sues B for their market value. What result?[9]
>
> **Applicable Law:** A possessor, even a wrongful possessor or thief, has the right to possession as against all but the true owner and is entitled to recover either the thing or its value from a converter.

Answer and Analysis

A should recover. It is a generally recognized rule that possession is a protected property right. Thus, a possessor, whether a

9. Anderson v. Gouldberg, 51 Minn. 294, 53 N.W. 636 (1892).

finder, a bailee, or a person who takes possession of previously unowned property or even a converter who had stolen the goods, may recover for their damage, conversion or theft while in her possession. As between a possessor and a wrongdoer, possession is a sufficient title, and only someone with a superior title may contest the possessor's right. The rationale behind the rule is the protection of property and the discouragement of breaches of the peace. B's conduct is wrongful and should be discouraged, not encouraged. B should not be allowed to raise the issue of lack of title in the possessor as this would dilute the law's protection whenever goods were not in the immediate possession of their owner. The defendant can only raise the issue of title when the defendant has a superior title to that of the possessor or can connect herself to someone with a superior title. Here A was clearly the possessor of the logs, and although A acquired possession wrongfully, B is not able to raise the issue of A's lack of title. Therefore A should recover.

The rule that possession is good title against all but the true owner also resolves an administrative difficulty associated with the proof of the ownership of personal property. Since the fact of possession may be provable, rights in property not otherwise evidenced by a writing can be established if possession is the basis for establishing the title.

This example highlights the concept of the relatively of title. Here A's title based on possession is superior to that of B who wrongfully converted the goods to his own use. But, if O had sued A to recover the logs A wrongfully took from O's land, O, as the prior possessor, would prevail as against A who, as against O, was a trespasser.

PROBLEM 1.9: A owned a house which she had never occupied. The house was requisitioned for military use, and B, an enlisted man who was stationed in the house, found a brooch on the top of a window frame behind the blackout curtains and in a crevice. The brooch was unpackaged and covered with cobwebs. The owner of the brooch was not found, and it was turned over to A who sold it and kept the money. B now sues A for the value of the brooch. May B recover?[10]

Applicable Law: This problem can be used to summarize briefly the classification of found property, i.e., lost, mislaid, abandoned, and treasure trove, and gives the basic rules relating to the rights of the finder. A finder of lost articles on the land of another who is not a trespasser is entitled to possession of the article found as against everybody but the true owner of the article, including the owner of the land who never had been in possession of the land.

10. Hannah v. Peel, 1 K.B. 509 (1945).

Answer and Analysis

Yes, although the problem is attended by some difficulty. According to the traditional approach, the found property is first categorized as lost, mislaid, abandoned or treasure trove. Taking up the various categories in reverse order, the item is clearly not treasure trove. First, it is a single item of jewelry and the circumstances of finding preclude any inference that it was carefully secreted or hidden there. The item was not wrapped or enclosed in a container but instead it was uncovered and unprotected from dirt and filth. Although it is not necessary under some authorities that treasure trove be buried in the ground, it is necessary that it be intentionally hidden or secreted.

The brooch was not abandoned. The value of the item and its location refute any likelihood of abandonment. If a person were to abandon such a piece of jewelry, the person would likely throw it in the trash, not in a crevice on top of a window frame.

The two probable categories are those of mislaid or lost property and the two seem almost equally plausible. Someone wearing the pin could have been adjusting the curtains, cleaning the windows or performing some other chore at some distant time in the past. The pin could have fallen off a wearer's clothing without her noticing it, in which case it would be lost—the possession being casually and involuntarily parted. On the other hand, she could have voluntarily removed the pin and placed it on the frame until her task was completed, and then gone off and forgotten about it—in which case it would be mislaid property. Under the traditional rules, A would be entitled to the jewelry and the proceeds of the sale if it were mislaid, but if it were lost, then B would be entitled to the property.

Under the particular circumstances of this case where the owner of the pin is very unlikely to reclaim it, where the owner of the house had never lived there and knew nothing about it, where the finder is an honest serviceman whose conduct should be rewarded and encouraged, the better solution is to classify the jewelry as lost property and let B recover.

Once the item is classified as lost property, it is fairly easy to resolve the dispute—recite the general rule that the finder of lost property acquires rights superior to all except the true owner, and then assert that the place of finding makes no difference. Nevertheless, a few other matters and cases should be considered. Frequently when property is found imbedded in the soil, the owner of the locus in quo is preferred over the finder. In this case, it cannot be said that the pin became a part of the soil or even appurtenant to the house. It was found on a ledge in the building, not embedded in the soil. Similarly, the cases dealing with findings by employees should have no bearing. Although B was there as a special type of

employee of the government, B had no duties as to finding and surrendering items such as this in the usual course of his employment. Thus, B is not precluded from keeping the item as a result of the employee status. Additionally, B should not be precluded from keeping the item as a trespasser as his presence on the premises was lawful and B was not a trespasser.

Finally, although a possessor or owner of land may be regarded as in possession of everything attached to or under the land, that person is not necessarily in possession of everything lying unattached on its surface.[11] Further, A was not in possession at the time of finding, and in fact had never been in possession of this land. Thus, B is entitled to recover the value of the brooch.

PROBLEM 1.10: In the summer of 1622, a fleet of Spanish galleons, heavily laden with bullion exploited from the mines of the New World, set sail for Spain. As the fleet entered the straits of Florida, it was met by a hurricane which drove it into the reef-laced waters off the Florida Keys. A number of vessels went down, including the richest galleon in the fleet, Nuestra Senora de Atocha. Five hundred and fifty persons perished, and cargo with a contemporary value of perhaps $250,000,000 was lost. A later hurricane shattered the Atocha and buried her beneath the sands.

For well over three centuries the wreck of the Atocha lay undisturbed beneath the wide shoal west of the Marquesas Keys. Then in 1971, after an arduous search aided by survivors' accounts of the 1622 wrecks, and an expenditure of more than $2,000,000, P, a salvage corporation, located the Atocha.

P retrieved gold, silver, artifacts, and armament valued at $6,000,000. P's costs have included four lives, among them, the son and daughter-in-law of P's president and leader of the expedition.

P filed suit to retain possession and confirm title in itself to the wrecked and abandoned vessel. The United States government also claimed title. Who has the superior title, P or the United States government?[12]

Applicable Law: Under the law of finders the title to the wreck of a vessel which rests on the continental shelf outside the territorial waters of the United States, where such vessel has been abandoned, vests in the person who reduces that

11. There is some authority for the proposition that personal property found on the real property of another belongs to the finder if it is on the surface, but to the owner of the real property if it is "embedded." Chance v. Certain Artifacts Salvaged from the Nashville, 606 F.Supp. 801 (S.D.Ga.1984).

12. Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel, 569 F.2d 330 (5th Cir.1978).

property to his or her possession. Where the wreck or abandoned property, however, rests within the territorial waters of a state, there is a conflict. Some jurisdictions hold that the property belongs to the sovereign state if it has not been reclaimed within a year and a day of its abandonment. Other jurisdictions follow the law of finders and allow the finder to keep it. Federal law may preempt state law on this question.

Answer and Analysis

Under finder's law, the vessel and its cargo belong to the finder rather than to the Government. Insofar as sovereignty claims are concerned, however, there is a conflict of authority, and when the treasure or abandoned ship is found in territorial waters, depending upon state law, it is sometimes awarded to the state. In some cases, ownership may be regulated by a federal statute that preempts conflicting state law.

The Atocha was clearly an abandoned vessel and the court applied the law of finders. The claim of the United States was based on either or both of the following: (1) the Antiquities Act;[13] or (2) the right of the United States, as heir to the sovereign prerogative asserted by the Crown of England, to goods abandoned at sea and found by its citizens. The *Treasure Salvors'* court concluded that the Antiquities Act applies by its terms only to lands owned or controlled by the government of the United States, and since the wreck rested on the continental shelf beyond the territorial waters of the United States, that Act did not apply.

The right of sovereignty refers to the right of the sovereign under ancient Roman and early English law to wrecked and derelict property on the seas. Originally, the right was absolute, even to the exclusion of the original owner. However, by the time of Edward I, the rule had been softened so that the owner could reclaim such property within a year and a day of its abandonment. Thereafter, it belonged absolutely to the Crown. Thus, under such a rule of sovereignty, the wrecked vessel and its proceeds belong to the United States government since it was found beyond the territorial waters and after a year and one day of its abandonment. However, since there was no specific act of Congress declaring the right of the United States to such finds, the court decided to follow what it termed the American view and applied the law of finders. Therefore, the company which discovered the wreck and salvaged it was entitled to its contents and the proceeds thereof.

13. 16 U.S.C.A. § 431–433. The act is primarily concerned with designation of historic landmarks and related activity. The law of salvage was also discussed at length in *Treasure Salvors* case, supra.

There is some authority to the contrary. For example, in *State of Florida v. Massachusetts Company*,[14] the "finder" salvage company discovered and removed from time to time various parts of a sunken and abandoned battleship within the territorial waters of the State of Florida. The court held that the State of Florida, which had adopted the English common law, in effect had succeeded to the sovereign rights of the Crown of England, and that the battleship and its contents belonged to the State rather than to the finder.

PROBLEM 1.11: F was employed by the L corporation to service airplanes. L was retained by O, the owner of a single engine plane, to service a plane. In the course of servicing the plane F found $18,000 in cash hidden in one of the plane's wings 30 years ago. F, L and O are all residents of State B the laws of which provide that "lost property shall become the absolute property of the finder if the true owner does not claim the property within 1 year after the property is found" One year after F finds the cash, F, L and O each claim to be entitled to the cash? Who wins.

Applicable Law: At common law the competing rights of F, L and O could be determined by the characterization of the property as lost or mislaid or by whether F was a trespasser or an employee. The common law applies absent a superceding statute that governs the rights of the parties. Here, State B has a statute that purports to give the finder of lost property title to the property if the true owner does not claim the property within one year after it is found. If the statute applies F prevails. But the statute may not apply.

Answer and Analysis

F wins if the statute awarding title to lost property to the finder applies. On the face of the statute, the finder is only entitled to "lost property." Two questions arise: (1) Did the legislature, in enacting the statute, intend the phrase "lost property" to encompass both lost and mislaid property or only lost property? If the latter, is the property characterized as lost or mislaid property and if it is mislaid property, is the finder still entitled to the property?

If a legislature intended to abolish the common law distinctions between lost and mislaid property, a well drafted statute would have defined "lost property" to include both lost property and mislaid property. In the absence of such, there is an ambiguity regarding legislative intent, and courts are divided on whether the

14. 95 So.2d 902 (Fla.1956), cert. denied 355 U.S. 881, 78 S.Ct. 147, 2 L.Ed.2d 112 (1957).

legislature intended to include mislaid property as well as lost property within the statutory phrase "lost property." Most courts hold that absent an express rejection of the distinction between the two, the phrase "lost property" is limited to "lost property" and does not include "mislaid property."[15] Under that rule, F would prevail under the statute only if the cash were characterized as lost property. However, the placement of the cash in the wing of the airplane suggests that the property was mislaid and not lost because money could not have casually dropped in an airplane wing but could only have been intentionally placed there. As mislaid property, the money would go to the owner of the "locus in quo." While the "locus in quo" ordinarily is land, it is not necessarily limited to land and it can include the owner of other personal property in which the mislaid property is found. Under this rationale, O is entitled to the money.

§ 1.4 *Human Embryos*

PROBLEM 1.12: H and W were married to each other. After repeatedly failing to conceive a child by coitus they consulted a fertility clinic and ultimately agreed to participate in an assisted reproduction program. H's sperm was injected into W's eggs and the resulting embryos were stored pending implantation into W's uterus. Prior to implantation H and W agreed to divorce. W now claims that she is entitled to the embryos and seeks to have them implanted in her. H objects and claims that the embryos are his property? Who is right?

Applicable Law: Human embryos are neither persons nor property but share some characteristics of each in that they are not yet human life but have the potential to become human life if implanted and carried to term. As such, rights to stored embryos cannot be determined under a family law standard such as best interest of the child or under a property law standard relating to either prior possession or acquisition of property rights through time and effort which would permit them to be equitably apportioned upon divorce in the same manner as real property or stocks and bonds might be.

Answer and Analysis

In the first reported case involving a dispute over embryos, a married couple brought an action to recover the possession of their embryos in the possession of a fertility clinic which refused to transfer the embryos to another clinic at the couple's request. The court, in *York v. Jones*[16] appeared to treat the embryos as property

15. See Benjamin v. Lindner Aviation, Inc., 534 N.W.2d 400 (1995).

16. 717 F.Supp. 421 (E.D. Va. 1989). But see, Moore v. Regents of University

by finding the couple had a cause of action in conversion. However the characterization of embryos as property was expressly rejected in the later case of *Davis v. Davis*[17] on which the fact of this problem are based.

In *Davis* the court refused to characterize the embryos as either persons or property. However, they were entitled to "special respect" because they had the potential to become human life. Then, the court held that the embryos should be allocated in accordance to the terms of any contract the spouses signed before or after the embryos were created.[18] Absent such a contract, the embryos should be allocated taking into account the relative interests of the spouses "in using or not using the ... embryos."[19] The court then adopted the rule that the interest of the spouse wishing to avoid procreation should trump the interest of the other spouse so long as the other spouse has a reasonable chance of parenting a child without the use of the embryo or does not wish to have a child. If the other spouse would need the embryo to have a child, then that spouse's wishes controls.

In *Davis,* the court observed that the parties were free to contract between themselves for the disposition of the embryos in the case of divorce. However, in a recent Massachusetts case[20] that court held such a contract void as a matter of public policy, at least where it was executed five years before the couple divorced. In doing so, the court indicated the importance of respecting a person's right to be, or not to be, a parent. Such respect did not warrant giving effect to a contract which would have awarded embryos to the wife who wanted to implant them to have a child when the contract was executed long before the parties even contemplated a divorce.

§ 1.5 Human Likeness

PROBLEM 1.13: Teen Idol was a famous rock-and-roll singer known not only for singing songs with seductive lyrics but also wearing flamboyant costumes that accentuated her physique. Over a ten-year period she cultivated her image by carefully selected endorsements of commercial products and through well-timed releases of her albums. By the time she was 30 she was simply known worldwide as "Teen." A major automobile

of California, 51 Cal.3d 120, 271 Cal. Rptr. 146, 793 P.2d 479 (1990) (patient has no property right in removed cancerous spleen).

17. 842 S.W.2d 588 (Tenn.1992).

18. For example, in Kass v. Kass, 91 N.Y.2d 554, 673 N.Y.S.2d 350, 696 N.E.2d 174 (1998) the court found that the divorcing couple had agreed that in the event of their divorce the embryos be used for research and such agreement controlled the embryos' disposition.

19. Id. at 604.

20. A.Z. v. B.Z., 431 Mass. 150, 725 N.E.2d 1051 (2000).

manufacturer began marketing a new car through advertisements placed on television and in magazines targeted at young buyers. These ads show the car being driven by a cartoonish character closely resembling Teen in dress and appearance singing a jingle in Teen's familiar vocal style. Teen sued to enjoin the use of the ad and for damages claiming that she had a property right in her likeness that the automobile company had misappropriated.

Applicable Law: In addition to statutes that may address this problem, courts in recent years have adopted as a new property right the so-called right of publicity—effectively a property right a person has in the person's likeness.

Answer and Analysis

Many stars in the sports and entertainment world have sought to capitalize on their likeness, voice, or mannerisms or upon the fictional character they have created. It is not uncommon for others, recognizing the financial worth of that likeness, to attempt, without permission, to copy it or to create alternative characters based upon it. While some protection might arguably be extended to protecting one's likeness under federal or state statutes, the focus of the courts has been on the recognition of a so-called common-law "right of publicity." This right recognizes that a "celebrity's identity can be valuable in the promotion of products, and the celebrity has an interest that may be protected from the unauthorized commercial exploitation of that identity."[21] The right of publicity is a valuable property right that, according to some courts, is freely transferable and survives the death of the celebrity.[22] Where the right is recognized the celebrity must establish that the defendant appropriated the celebrity's identity for the defendant's advantage, "commercial or otherwise" and without consent. Furthermore, the celebrity must establish injury.[23]

However, to recognize a right of publicity does not mean that every appropriation of a likeness is actionable. The courts have not yet worked out all of the nuances of this right. For example, does the right apply to political commentary where arguably the right of publicity butts up against the First Amendment's protection of

21. Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 835 (6th Cir. 1983).

22. Factors Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215 (2d Cir. 1978).

23. See, White v. Samsung Electronics America, Inc., 971 F.2d 1395 (9th Cir. 1992).

political speech? Does the fact that the right is descendible mean that the heirs of John Wilkes Booth could enjoin a handgun manufacture from using his image to promote its products?[24]

24. Cf. Maritote v. Desilu Productions, Inc., 345 F.2d 418, cert. denied, 382 U.S. 883, 86 S.Ct. 176, 15 L.Ed.2d 124 (1965) ("denying heirs of Al Capone a right to recover for an appropriation of this famous mobster's image.")

UNDERSTANDING PROPERTY LAW

FOURTH EDITION

JOHN G. SPRANKLING

Chapter 3
Property Rights in Wild Animals

§3.01 The Origin of Property Rights

Property courses often begin with a surprising topic—ownership of wild animals. In a sense, the topic seems almost irrelevant. Modern disputes about who owns a particular squirrel or fish, for example, are uncommon. And it is simply too expensive to litigate the rare dispute that does arise. So why study the topic?

The law governing ownership of wild animals helps answer a key question—how do property rights originate?[1] Today, virtually everything around us is owned by someone. But because wild animals in nature are considered unowned, they occupy a unique niche in property law.

The legal principles governing acquisition of title to wild animals shed light on the policies that influenced the development of American property law. More directly, the principles governing ownership of wild animals were ultimately extended by analogy to the ownership of other resources.

§3.02 The Capture Rule In General

[A] Basic Rule

As a general principle, no one owns wild animals—in Latin, *ferae naturae*—in their natural habitat.[2] Under the common law "capture rule," property rights in wild birds, fish, and other animals are obtained only through physical possession.

The first person to capture or kill a wild animal acquires title to it.[3]

For example, suppose that F finds and pursues a deer, only to have it escape; F has no rights to the deer. If G now traps the deer in a net, he "owns" the deer. But even G's ownership rights are limited. If the deer escapes from the net, G loses his rights and another hunter may acquire title through capture.

Understandably, this rule does not apply to domesticated or tame animals (*domitae naturae*). Suppose that F's cow strays onto G's land, where G captures it. Because the cow is considered a domestic animal, the capture is irrelevant.

The rules concerning domestic animals are grounded in policies quite different from those relevant to wild animals. F still owns the cow, absent adverse possession by G.[4]

[B] Pierson v. Post

[1] Facts

The landmark case illustrating the capture rule—and much more—is *Pierson v. Post*.[5] It is still celebrated as one of the most famous decisions in American law.

The facts of the case are deceptively simple. One day in the early 1800s, Post was hunting in the New York wilderness with his dogs. On a patch of "unpossessed" land, he found and pursued a fox. Pierson, fully aware that Post was chasing the fox, killed it himself to prevent Post from catching it. Although not clear from the case, this incident sparked or worsened a feud between the Post and Pierson families. The ensuing litigation was more about offended honor than the monetary value of the fox carcass.

Post sued Pierson for the value of the fox, claiming trespass on the case. Post won at the trial level, and Pierson appealed to the New York Supreme Court.

Both parties agreed that property rights in wild animals were obtained only by "occupancy," that is, by first possession. Thus, as the court phrased it, the issue was "what acts amount to occupancy" of a wild animal?[6]

Pierson maintained that only killing or other *actual capture* of the animal constituted possession. Post argued for what might be called a *probable capture* standard: a pursuing hunter with a reasonable chance of success has sufficient "possession" to create ownership. No prior English or American decision had addressed the issue.

[2] Majority Opinion

The majority adopted the actual capture test in a somewhat mechanical opinion. Writing for the court, Justice Tompkins examined ancient treatises on Roman, European, and English law to locate an applicable rule.

Finding that these authorities uniformly endorsed the actual capture standard, he concluded that the fox "became the property of Pierson, who intercepted and killed him."[7]

To a lesser degree, Tompkins also relied on public policy factors. He suggested that the actual capture standard rewarded successful hunters, ensured certainty in property rights, and minimized quarrels.

[3] *Dissent*

In his sometimes facetious dissent, Justice Livingston criticized the majority's blind application of ancient rules to the fundamentally different conditions prevailing in the United States: "[I]f men themselves change with the times, why should not laws also undergo an alteration?"[8]

He observed that the fox was a "noxious beast," akin to a pirate, that caused damage to farmers. Viewing the law as an instrument of social change, he argued that the court should select the standard that provided "the greatest possible encouragement"[9] for the destruction of foxes.

He reasoned that the better rule required only continued pursuit together with a "reasonable prospect ... of taking" the fox (i.e., a probable capture standard).

[4] **Pierson** ***in Context***

Pierson is important at several levels. It established the actual capture rule as the American standard for acquiring title to wild animals. As a prominent decision in a legal system with little case law, it also provided a bridge for extending the capture rule by analogy to other natural resources—including water, oil, natural gas and, most recently, baseballs.[10]

More fundamentally, *Pierson* symbolizes the struggle between two theories of jurisprudence— formalism and instrumentalism. The majority opinion reflects the older, formalistic approach to judging; the judge mechanically derives the appropriate rule from existing authorities, however remote.

The dissent represents the then-emerging view of the American judiciary that the law should serve as an instrument of social change. The dissent's insistence that law must "change with the times" still resonates today.

[C] Defining "Capture"

[1] *The Actual Capture Standard*

Pierson recognizes that a hunter who actually kills or captures a wild animal, and immediately takes possession of it, acquires title. It also suggests that the mortal wounding of an animal "by one not abandoning his pursuit"[11] may constitute capture.[12]

Later decisions have somewhat relaxed the *Pierson* standard.

For example, if F sets a trap that catches a wild muskrat in his absence, the muskrat still belongs to F. Similarly, if G begins chopping down a tree housing a wild bee hive, he has acquired sufficient title to the hive to prevail over H, a stranger who drives him away.[13]

[2] Two Fish Stories

A well-known pair of decisions involving ownership of fish illustrates the capture standard. In *State v. Shaw*,[14] a long funnel-shaped net directed fish into a holding net about 28 feet square; the narrow end of the funnel entering the holding net was less than 3 feet wide.

Although fish could both enter and exit the holding net through this opening, under normal conditions few, if any, fish actually escaped. Finding that it was "practically ... impossible" for fish to escape, the *Shaw* court held that the net owners had captured the fish.

Conversely, in *Young v. Hichens*,[15] the court held that plaintiff did not possess a school of fish that was virtually surrounded by his net. The lengthy net was drawn around the fish in almost a complete circle, leaving a gap of only about 40 feet. Before plaintiff's employees could close the gap with a second net, defendant's boat sailed through the gap into the circle and captured the fish.

Lord Denman concluded that even though it was "almost certain" plaintiff *would have* obtained possession but for defendant's intervention, it was "quite certain" that plaintiff *did not* actually obtain possession.[16]

Both decisions turn on the likelihood that fish might escape from the net.

In *Shaw*, the facts established that fish rarely escaped from the trap. But the net circle in *Young* was incomplete, creating a small risk that fish could escape before the gap was plugged.

[3] Role of Custom

Custom may also help define capture, as reflected in a series of decisions concerning property rights in whales, notably *Ghen v. Rich*.[17] There, Ghen shot a bomb lance into a fin-back whale off the Cape Cod coast, killing it instantly. The whale immediately sank below the surface of the ocean.

Three days later a beachcomber found the carcass stranded on a beach 17 miles away, and sold it to Rich who extracted its valuable oil.

Pierson might suggest that Ghen had no rights in the whale. Although he killed it, he failed to take immediate possession of the carcass and in fact left the area, thus arguably "abandoning his pursuit."

The custom in the Cape Cod region, however, was that a whale killed in this manner belonged to the fisherman, while the finder of the carcass received a small reward for his help. Judicial acceptance of this custom was critical to the survival of the local whaling industry.[18]

The court awarded the value of the whale to Ghen under the custom, noting that if a fisherman does "all that it is possible to do to make the animal his own, that would seem to be sufficient."[19]

[D] Release or Escape After Capture

In general, ownership rights end when a wild animal escapes or is released into the wild.[20]

Suppose K captures a wild rabbit; one week later, the rabbit escapes back into the forest, where it is instantly killed by L. L owns the rabbit. Once K's property rights lapsed, the rabbit was again unowned and subject to capture by another. If the law were otherwise, hunters like L might be deterred from hunting at all. How could they distinguish an "owned" rabbit from an "unowned" rabbit?

But suppose a wild animal escapes onto land that is far from its native habitat. If O's giraffe flees into the Colorado mountains, for example, P cannot acquire title by capturing it. The exotic nature of the animal effectively puts P on notice that it is already owned by another.[21] O's investment in the giraffe is protected.

An interesting problem arises when a captured wild animal is tamed and then released back into nature. For example, suppose that K allows his captured rabbit to roam the forest during the daytime, knowing that it will faithfully return each night. L cannot shoot the rabbit.

A captured animal that has the habit of occasionally returning to its captor (*animus revertendi*) is still considered property. In this instance, the law's interest in motivating owners to tame wild animals for productive use outweighs the concern for certainty.

§3.03 Evaluation of the Capture Rule

[A] Rationale for the Rule

American law has traditionally viewed wild animals in nature as either dangerous or worthless. The primary policy underlying the capture rule is to encourage the killing or capture of wild animals for the benefit of society, consistent with utilitarian theory.

For example, if H is aware that he can acquire title to any deer he can kill, he has an incentive to invest his money and time in deer hunting. As a result, society will obtain additional venison and skins. But if title could be obtained merely by chasing deer, H might not be willing to devote his time to hunting.

Any wild deer H finds might be already owned by someone else who had pursued it unsuccessfully. If H killed the deer, the prior pursuer might claim it as his property. Thus, the capture rule rewards success, not mere effort.

In addition, the rule creates a clear, "bright line" standard for determining ownership which provides several benefits. Possession provides notice to the world of the owner's rights. Consider the example of property rights in a wild duck.

Under the capture rule, it is simple to determine who has possession of—and thus owns—the duck.

Accordingly, the rule tends to avoid disagreement and thus prevent quarrels which may erupt into violence. Further, from the perspective of law and economics, the rule is an efficient mechanism for resolving any disputes that do occur; ownership can be established with minimal expenditure of society's resources (e.g., attorney's fees, judicial time).

Finally, the certainty of title stemming from the rule encourages an owner to invest time and energy in making the captured animal more useful to society (e.g., training a wild parrot to perform tricks).

[B] Criticism of the Rule

Today the capture rule is uniformly condemned by legal scholars for the very reason that once supported it: the rule encourages the destruction of wild animals. It is seen as an anachronism from the era when the United States was a vast wilderness.[22]

Advocates of the law and economics movement observe that the capture rule results in over-intensive hunting.[23]

Because no person can control hunting by others, each person has an incentive to protect his or her individual self interest by killing animals as rapidly as possible. As Harold Demsetz observed in a landmark article, “it is in no person's interest to invest in increasing or maintaining the stock of game.”[24] Under such a system, conservation of wild animals for prudent, long-term human use is impossible.

Environmental law scholars view the capture rule—and the ethic it reflects—as an unmitigated tragedy that devastates natural ecosystems.[25] They observe that the modern capture rule threatens the continued existence of uncounted species, just as unregulated nineteenth-century hunting eradicated the American passenger pigeon.

§3.04 Rights of Landowners

[A] No Ownership of Animals

Does the owner of land also own the wild animals on the land?

Under the English doctrine of *ratione soli*, wild animals were considered to be in the “constructive possession” of the landowner. But the landowner did not acquire title to such an animal until and unless it was captured, whether by the landowner or by someone else.

Thus, if poacher P killed a deer on O's land, O now owned the deer.[26] Yet attempts to transplant the *ratione soli* principle to the United States were ineffective. Early American courts viewed the rule as both undemocratic and inconsistent with the policies underlying the capture rule.

Accordingly, in the United States a landowner generally owns no rights in wild animals on the land. For example, in one case[27] a group of Wyoming landowners asserted that the state's refusal to grant them licenses to hunt elk and other wild animals on their own lands was an unconstitutional “taking” of property.

The court reasoned, however, that mere ownership of the animals' habitat did not confer property rights in the animals: “[N]o one ‘owns’ wild animals, in the proprietary sense, when they are in their natural habitat unless and until the animals are reduced to something akin to possession.”[28]

The relatively narrow exception to this rule involves immobile animals such as clams, mussels, and oysters. Permanently affixed to the land (much like trees and other vegetation), these immobile animals are usually deemed the property of the landowner.[29]

[B] Right to Exclude Hunters

The trespass doctrine provides an American landowner with protection similar to *ratione soli.* A landowner may bar hunters and others from trespassing on his land.[30] As a practical matter, to the extent consistent with hunting laws, this doctrine gives the landowner the exclusive opportunity to capture wild animals on the property.[31]

§3.05 Regulation by Government

[A] State and Federal Restrictions

Modern game laws and other government restrictions have substantially eroded—though not erased—the capture rule.

States routinely regulate hunting and fishing within their borders to protect wild animals on behalf of the public in general.

For example, under the police power, states may ban hunting altogether, or regulate its frequency, duration, and manner.[32] Federal law similarly protects wild animals to some extent; for example, the Endangered Species Act[33] prohibits the killing of certain protected species. When hunting is permitted, government regulations are usually consistent with the capture rule—the first successful captor acquires title to the wild animal.

[B] No Proprietary Ownership of Animals

Despite the breadth of these regulatory powers, state and federal governments do not "own" wild animals in a proprietary sense. During the nineteenth century, states uniformly declared ownership over the wild animals within their territories, usually by enacting statutes to the effect that the state held wildlife in trust for its residents.

A substantial body of case law embraced this state ownership theory. With its 1977 decision in *Douglas v. Seacoast Products, Inc.*,[34] however, the Supreme Court rejected this claim as "no more than a 19th-century legal fiction."[35]

Writing for the Court, Justice Brennan restated the capture rule: "Neither the States nor the Federal Government, any more than a hopeful fisherman or hunter, has title to these creatures until they are reduced to possession by skillful capture."[36]

Thus, most courts hold that government entities are not liable for damage to private property caused by wild animals.[37] For example, if wild turkeys eat O's corn crop, O cannot obtain damages from the government.

1.See 1. *See generally* Richard A. Epstein, *Possession as the Root of Title*, 13 Ga. L. Rev. 1221 (1979); Carol M. Rose, *Possession as the Origin of Property*, 52 U. Chi. L. Rev. 73 (1985).

2. Douglas v. Seacoast Prods., Inc., 431 U.S. 265, 284 (1977).

3. *See, e.g.*, Pierson v. Post, 3 Cai. R. 175 (N.Y. 1805); Missouri v. Holland, 252 U.S. 416, 434 (1920) ("Wild birds are not in the possession of anyone; and possession is the beginning of ownership.").

4. *See, e.g.*, Conti v. ASPCA, 353 N.Y.S.2d 288 (City Civ. Ct. 1974) (owner still held title to trained parrot after its escape, because parrot was a domesticated animal). *See also* Stacy A. Nowicki, *You Don't Own Me: Feral Dogs and the Question of Ownership*, 21 Animal L. 1 (2014).

5. 3 Cai. R. 175 (N.Y. 1805). For background information on *Pierson*, see Bethany R. Berger, *It's Not About the Fox: The Untold History of* Pierson v. Post, 55 Duke L.J. 1089 (2006).

6. *Id*. at 177.

7. *Id*. at 178.

8. *Id*. at 181 (Livingston, J., dissenting).

9. *Id*. at 180 (Livingston, J., dissenting).

10. *See, e.g.*, Hammonds v. Central Kentucky Natural Gas Co., 75 S.W.2d 204 (Ky. Ct. App. 1934); Elliff v. Texon Drilling Co., 210 S.W.2d 558 (Tex. 1948). Indeed, one modern decision extended the *Pierson* standard to a new situation: ownership of a baseball used to set a home-run record. In Popov v. Hayashi, 2002 WL 31833731, the trial court held that the capture rule would apply ("A person who catches a baseball that enters the stands is its owner."), but found on the facts that the plaintiff had not "achieved complete control of the ball." *See generally* Patrick Stoklas, Comment, Popov v. Hayashi, *A Modern Day* Pierson v. Post*: A Comment on What the Court Should Have Done with the Seventy-third Home Run Baseball Hit by Barry Bonds*, 34 Loy. U. Chi. L.J. 901 (2003). *See also* John William Nelson, *Fiber Optic Foxes: Virtual Objects and Virtual Worlds Through the Lens of* Pierson v. Post *and the Law of Capture*, 14 J. Tech. L. & Pol'y 5 (2009).

11. Pierson v. Post, 3 Cai. R. 175, 178 (N.Y. 1805).

12. *See also* Dapson v. Daly, 153 N.E. 454 (Mass. 1926) (hunter who merely wounded and pursued deer did not obtain ownership); Buster v. Newkirk, 20 Johns. 75 (N.Y. Sup. Ct. 1822) (where first hunter wounded deer but abandoned pursuit, and deer ran six miles before second hunter killed it, second hunter owned deer).

13. Adams v. Burton, 43 Vt. 36 (1870).

14. 65 N.E. 875 (Ohio 1902).

15. 115 Eng. Rep. 228 (Q.B. 1844).

16. *Id*. at 230.

17. 8 F. 159 (D. Mass. 1881).

18. *See* Robert C. Ellickson, *A Hypothesis of Wealth-Maximizing Norms: Evidence from the Whaling Industry*, 5 J.L. Econ. & Org. 83 (1989).

19. Ghen v. Rich, 8 F. 159, 162 (D. Mass. 1881). *See* Robert C. Deal, *Fast-Fish, Loose-Fish: How Whalemen, Lawyers, and Judges Created the British Property Law of Whaling*, 37 Ecology L.Q. 199 (2010).

20. *See, e.g., In re* Oriental Republic Uruguay, 821 F. Supp. 950 (D. Del. 1993) (owner who released wild ducks into marshland could not obtain damages when they were later killed by an oil spill); Mullett v. Bradley, 53 N.Y.S. 781 (App. Div. 1898) (owner's rights ended when undomesticated sea lion escaped).

21. The classic illustration is E.A. Stephens & Co. v. Albers, 256 P. 15 (Colo. 1927), where the court held that the escape of a non-native silver fox in Colorado did not end the owner's rights.

22. *See generally* Michael C. Blumm & Lucus Ritchie, *The Pioneer Spirit and the Public Trust: The American Rule of Capture and State Ownership of Wildlife*, 35 Envtl. L. 673 (2005); John G. Sprankling, *The Antiwilderness Bias in American Property Law*, 63 U. Chi. L. Rev. 519 (1996).

23. A related law and economics theme is that the capture rule encourages overinvestment, which wastes societal resources.

24. Harold Demsetz, *Toward a Theory of Property Rights*, 57 Am. Econ. Rev. 347, 351 (1967); *see also* Garrett Hardin, *The Tragedy of the Commons*, 162 Sci. 1243 (1968); Richard A. Posner, Economic Analysis of Law (9th ed. 2014).

25. *See, e.g.*, Eric T. Freyfogle, *Ownership and Ecology*, 43 Case W. Res. L. Rev. 1269 (1993); Carol M. Rose, *Given-ness and Gift: Property and the Quest for Environmental Ethics*, 24 Envtl. L. 1 (1994); Steven M. Wise, *The Legal Thinghood of Nonhuman Animals*, 23 B.C. Envtl. Aff. L. Rev. 471 (1996).

26. Keeble v. Hickeringill, 103 Eng. Rep. 1127 (Q.B. 1707), was cited by the *Pierson* court as illustrating the *ratione soli* principle. In *Keeble*, the plaintiff owned a "decoy pond"—a pond specially constructed to lure wild ducks so that plaintiff could capture them. On three occasions, the defendant discharged guns near the pond for the purpose of frightening away the wild ducks that had landed there. Yet the *ratione soli* principle does not satisfactorily explain why plaintiff prevailed in his later damages action. Although the ducks were in his constructive possession, he had not yet captured them and thus did not own them. *Keeble* is best explained under tort law, not property law: defendant maliciously interfered with the plaintiff's business.

27. Clajon Prod. Corp. v. Petera, 854 F. Supp. 843 (D. Wyo. 1994).

28. *Id*. at 852. Accordingly, an owner is generally not liable when wild animals that exist on her land as a natural occurrence cause injury to others. *See, e.g.*, Christmas v. Exxon Mobil Corp., 138 So. 3d 123 (Miss. 2014) (alligators); Belhumeur v. Zilm. 949 A.2d 162 (N.H. 2008) (bees).

29. *See, e.g.*, McKee v. Gratz, 260 U.S. 127, 135 (1922) (mussels in stream bed with "a practically fixed habitat" were held possessed by landowner).

30. In order to bar hunting on undeveloped land, statutes in most states require that the owner "post" appropriate "no hunting" signs on his land. The lack of such posting may imply permission from the owner to use his land for hunting. McKee v. Gratz, 260 U.S. 127 (1922). *See also* Mark R. Sigmon, Note, *Hunting and Posting on Private Land in America*, 54 Duke L.J. 549 (2004).

31. Some decisions suggest that a landowner is entitled to wild animals killed on his land by a trespasser. *See, e.g.*, State v. Repp, 73 N.W. 829 (Iowa 1898).

32. *See also* Bilida v. McCleod, 211 F.3d 166 (1st Cir. 2000) (person who illegally possessed wild raccoon could not maintain due process challenge to government's seizure of animal because she did not own it).

33. 16 U.S.C. §§1531–1544.

34. 431 U.S. 265 (1977).

35. *Id*. at 284.

36. *Id. See also* Hughes v. Oklahoma, 441 U.S. 322 (1979) (Oklahoma statute barring transportation of lawfully-caught wild minnows out of state violated the Commerce Clause; because Oklahoma had never owned the minnows, it did not have a special right to the property within its jurisdiction); North Dakota v. Dickinson Cheese Co., 200 N.W.2d 59 (N.D. 1972) (North Dakota did not have a sufficient property interest in wild fish to recover damages from polluter who killed fish).

37. *See, e.g.*, Moerman v. State, 21 Cal. Rptr. 2d 329 (Ct. App. 1993) (elk).