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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*?

EXPLANATIONS

Post–*Pierson* Problems

1. (a) No. The only difference is the interruption in Post's hunt — and, if anything, that interruption seems to give the result in favor of Pierson more, rather than less, support. Post would likely argue that his dogs carried on the hunt for him, so the hunt never really was interrupted, and that the dogs put Post in constructive pursuit all the while. But pursuit is not possession.

   (b) It might. With this additional proof, Pierson's intent is not to seize the fox, but to deprive Post of it. A court that considers the subjective intent or an objective manifestation of spite or maliciousness might rule in Post's favor, or more specifically might rule against Pierson because of Pierson's bad conduct. Alternatively, a court may conclude Pierson does not have the requisite intent to possess that the law requires for legal possession — i.e., two requirements are necessary for possession: intents to possess and control. Control by itself is not enough. Other courts may not look to Pierson's motives but may conclude his action of picking up the fox exhibited the requisite intent to possess and control.

   (c) Post owes no damages. An escaped wild animal is deemed to have returned to nature and once more belongs to no one. There are exceptions. If the animal is not native to the area such that a reasonable person would gather that the animal belonged to someone, the original owner remains the owner. A person seeing a kangaroo hopping though the streets of San Francisco, for example, should expect that the kangaroo belongs to someone. Second, under the doctrine of *animus revertendi*, a person does not lose his interest in an animal that has the habit of returning to its owner's property. This usually applies to domesticated animals, and is easy to apply to cats, dogs, horses, and cattle. The doctrine is less predictable for traditionally wild animals such as deer and raccoons.

   (d) Easy question. Post must return the fox. Pierson's property interest in the fox remains in full force as long as the fox is caged. Post's unlocking the cage is a wrongful interference with Pierson's rightful possession.

   Post's trespass onto Pierson's land, moreover, factors against Post. The law frowns on trespassers, with the result that trespassers usually lose out to landowners.

   (e) It might be a pursuit (1) halted by an interference that gives rise to tort liability; or (2) halted by a person like Pierson, but whose actions also violate the hunting regulations of the state; or (3) halted by a person who commits a crime or violates some other public

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.