

## OUTLINE — LECTURE 21

### Early Modern Legal Thought

#### The Spanish Scholastics and Academic Lawyers:

Francisco de Vitoria (Victoria), c. 1483–1546—*De Indis et de iure belli relectiones* (pub. posthumously)

Domingo de Soto, 1494–1560—*De iusticia et iure* (1556)

Diego Covarruvias y Layva, 1512–1577, the ‘Spanish Bartolus’

Thomas Sánchez, 1550–1610—*Disputationes de sancto matrimonii sacramento* (1602)

The Spanish scholastics did not write just about theory

Francisco Suárez, 1548–1617—*Tractatus de legibus et Deo legislatore* (1612)

1. Beginning with the problem of the Indies
2. Expanding to dealing with the nation-state

#### The Natural Law School:

Huigh de Groot (Hugo Grotius) 1583–1645—*De iure belli et pacis* [Concerning the law of war and peace] (1625); *Introduction to the Legal Science of Holland* (1631)

3. The notion of eminent domain

Samuel von Pufendorf, 1623–1694—*De iure naturae et gentium libri octo* [Eight books on the law of nature and of nations] (1672)

Christian Thomasius, 1655–1728—*Fundamenta iuris naturae et gentium* [Fundamentals of natural law and of the law of nations] (1705); *Institutionum iurisprudentiae divinae libri tres* [Three books of institutes on divine law] (1687)

Jean Barbeyrac, 1674–1744—Translates and annotates Grotius and Pufendorf

Giambattista Vico, 1668–1744, *De universi iuris uno principio et fine uno liber unus; De constantia iurisprudentis; Notae* [One book concerning the single principle and single end of universal law; On the consistency of the jurisprudent; Notes] (1720–22)<sup>1</sup>

<sup>1</sup>The publication history of this work is complicated. The whole is available in an English translation by Giorgio Pinton and Margaret Diehl: *Universal Right* (2000).

Jean-Jacques Burlamaqui, 1694–1748, *Principes du droit naturel* [Principles of natural law] (1747)

#### International Law:

[Naturalist] Johannes Wolfgang Textor, 1683–1701, *Synopsis iuris gentium* [Synopsis of the law of nations] (1680)

[Positivist] Cornelis van Bynkershoek, 1673–1743—*De dominio maris* [Concerning the dominion of the sea] (1702)

4. The ‘naturalist’ vs. the ‘positivist’ school of international law

[Naturalist] Christian von Wolff, 1679–1754—*Ius naturae methodo scientifico pertractatum* [The law of nature treated by the scientific method] (1710–19); *Institutiones iuris naturae et gentium* [Institutes of the law of nature and of nations] (1754)

[Moderate positivist] Emer (Emerich) de Vattel, 1714–1767—*Le droit des gens ou principes de la loi naturel* [The law of nations or principles of the natural law] (1758)

- The move of the center of legal studies from Spain to the Netherlands to Germany
5. There is no sharp line between the natural lawyers and the international lawyers
  6. How the natural law school is ultimately derived from the humanists
  7. How is all of this related to the practice of law?

**‘Elegant jurists’:**

Gerardus Noodt, 1647–1725, *Probabilia iuris* [Probable opinions about law] (1678).

Bernard Reinold, 1677–1726, *Observationes ad titulum Digestorum de acquirendo rerum dominio* [Observations on the Digest title concerning the acquisition of ownership of things] (1719)

Christfried Wächtler, 1652–1732, *Notae ad Noodt* (1681)

**Practical lawyers — *usus modernus pandectarum*:**

Diodor von Tuldenus, ?1595–1645, *Commentarius in quattuor libros Institutionum* [Commentary on the four books of Institutes] (1622)

Samuel Stryk, 1640–1710, *Usus modernus pandectarum* (1690) [The Modern Use of the Pandects]

Johannes Voet, 1647–1713, *Commentarius ad Pandectas* [Commentary on the Pandects] (1698–1704)

Gottlieb Gerhard Titius, 1661–1714, *Iuris privati romano-germanici . . . libri duodecim* [Twelve books on Romano-Germanic private law] (1709); *Disputatio de dominio in rebus occupatis ultra possessionem durante* [Disputation concerning dominion lasting beyond possession in thing occupied] (1704)

Augustin Leyser, 1683–1752, *Meditationes ad Pandectas* [Meditations on the Pandects] (1741–48)

8. Roman-Dutch law and the curious divide in legal writing in the Netherlands
9. The move of the center to Germany

**Pierson v. Post, 3 Caines Reports 175 (N.Y. Supreme Court 1805)**

Let us imagine that a huntsman has started a fox and is pursuing it with his hounds and horses. As he is right on the verge of catching the beast, a neighbor emerges from the woods and kills the fox. Let us also suppose that the huntsman alleges that the neighbor did what he did out of spite, not to get the fox for himself, but to prevent the huntsman from getting it. These are the facts of *Pierson v. Post*. In the case Post was the huntsman and Pierson was the neighbor. The events are alleged to have taken place on a beach, on public property, and hence the possibly competing rights of the landowner are not at issue. Over a strong dissent, the majority of the court held for Pierson, the man who killed the fox.

The following authorities were either (a) cited by the court in coming to its conclusion or (b) could have been known to the court. We’ve been pursuing this problem all semester. The questions are (a) granted this state of the authorities was the court in *Pierson* compelled to come out the way it did? (b) if not, why did it decide in the way that it did? (c) (more broadly) what does this examination of the authorities tell us about the history of the concept of property from Justinian to 1805?

**Justinian’s *Institutes* 2.1.12–.13.**

Wild animals, birds, and fish, that is to say all the creatures which the land, the sea, and the sky produce, as soon as they are caught by any one become at once the property of their captor by the law of nations; for natural reason admits the title of the first occupant to that which previously had no owner. So far as the occupant's title is concerned, it is immaterial whether it is on his own land or on that of another that he catches wild animals or birds, though it is clear that if he goes on another man's land for the sake of hunting or fowling, the latter may forbid him entry if aware of his purpose. An animal thus caught by you is deemed your property so long as it is completely under your control; but so soon as it has escaped from your control, and recovered its natural liberty, it ceases to be yours, and belongs to the first person who subsequently catches it. It is deemed to have recovered its natural liberty when you have lost sight of it, or when, though it is still in your sight, it would be difficult to pursue it. It has been doubted whether a wild animal becomes your property immediately [when] you have wounded it so severely as to be able to catch it. Some have thought that it becomes yours at once, and remains so as long as you pursue it, though it ceases to be yours when you cease the pursuit, and becomes again the property of any one who catches it: others have been of opinion that it does not belong to you till you have actually caught it. And we confirm this latter view, for it may happen in many ways that you will not capture it.

Known to the court in *Pierson v. Post* and quoted in the opinion

**Digest 41.1.55** (extract, full text *Mats.* VII–4)

. . . Still I think the governing principle to be this, that if he [the wild boar] has come into my power he has become mine. But if you had released to his natural liberty a wild boar who had become mine and he had thereby ceased to be mine, then an *actio in factum* ought to be accorded to me, according to the opinion given when a man had thrown another's cup overboard.

**Digest 47.10.13.7** (extract, full text *Mats.* XVIII–10)

If someone prevent me from fishing in the sea or from lowering my net . . . , can I have an action for insult (*actio iniuriarum*) against him? . . . And Pomponius and the majority are of opinion that the complainant's case is similar to that of one who is not allowed to use the public baths or to sit in a theater seat or to conduct business, sit or converse in some other such place, or to use his own property; for in these cases too, an action for insult is apposite. . . . Now what are we to say if I forbid someone to fish in front of my house on my approaches? . . . In this context, it has been frequently stated in rescripts that the sea and its shores, as also the air, being common to all, no one can be prohibited from fishing; no more can a person be from fowling, unless it be a case where he can be barred from entering another's land. However, the position has been adopted (by landowners), although with no legal justification, that one can be banned from fishing before my house or my approaches; hence, if someone be so barred, there can, in those circumstances, be an action for insult. But I can prohibit anyone from fishing in a lake which I own.

Both of these passages could have been known to the court in *Pierson v. Post*, but there is no evidence that either of them were; they certainly did not use them

**The Glossators and Commentators on these and parallel passages.**

Review the documents in Parts 7 and 13 of the *Materials*. Do they help?

As we have seen (*Mats.*, Part VII), glossatorial effort on these passages seems largely to have been devoted to ensuring that they could be used in a world that had an elaborate

system of customary rules that determined both who was entitled to hunt and who as between competing hunters was entitled to the animal once captured. The Roman law of hunting as reflected in the *Corpus Iuris* could not be reconciled with these customary rules, but it could be interpreted to bring it closer to them, and this, consciously or unconsciously, is what the glossators did.

As we also saw (*Mats.*, Part XIII), the commentators tended to dismiss the torturing of the Roman texts in which the glossators had engaged, recognizing simply that they came out one way and customary law was different. The commentators also shifted the focus more to the genial principles of natural law or the law of nations that were at stake in these cases, but they came to no firm conclusions about them.

There is no evidence that any of this material was known to the court in *Pierson v. Post*. It probably could not have been granted what was available in the U.S. at the time.

### The ‘natural law school’.

Hugo Grotius, *De Iure Belli et Pacis* 1:398–99 (W. Whewell abr. trans., 1854):

“Some corporeal possession is required for obtaining *dominium* ... But that possession can be not only with the hands, but with instruments, such as snares, nets, traps, so long as two elements are present: first, that the instruments themselves be in our power; second, that the wild things be so encompassed that they cannot get out. It is Natural Law, not simply, but in a certain state of things, that is, if it be not otherwise provided. But the peoples of Germany, when they wished to assign to their princes and kings some rights to sustain their dignity, wisely thought that they might best begin with those things which can be given without damage to any one; of which kind are the things which have not yet become the property of any; [and thence they gave them a right to the game]. And this too was what the Egyptians did. For there the king’s proctor claimed things of that kind. The law might transfer the ownership of these things even before occupation, since the law alone is sufficient to produce ownership.”

Known to the court in *Pierson v. Post* and used by it.

For Pufendorf and Barbeyrac, I’m going to have to refer to Part 18 of the *Materials*. They are too long to quote here. Pufendorf and Barbeyrac obviously disagree. Why? What’s at stake here? Consider the fact that the leading political philosopher when Pufendorf wrote was Hobbes (though Pufendorf disagreed with him). By the time that Barbeyrac wrote, Locke had written. (Barbeyrac cites him.) This difference can be seen clearly enough in the first two pairs of extracts:

Samuel von Pufendorf, *The Law of Nature and Nations* §§ 4.4.4–.5 at 366–67 [1st ed. 1672] (with the notes of Jean Barbeyrac [1st ed., 1706]) (B. Kennet trans., 5th ed., 1749) (this is probably the translation that was used by the participants in *Pierson*)

[Pufendorf, 4.4.4] “ ... [T]here is no precept of natural law to be discovered, by which men are enjoined to make such an appropriation of things, as that each man should be allotted his particular portion, divided from the shares of others, though the law of nature doth indeed sufficiently advise the introducing of separate assignments, as men should appoint, according to the use and exigencies of human society; yet [it does it] so as to refer it to their judgment, whether they would appropriate only some particular things, or whether they would possess some things without bringing them to a division and leave the rest as they found them, only forbidding any particular man to challenge them to

himself alone. Hence too, the law of nature is supposed to approve and confirm all agreements made by men about the possession of things, provided they neither imply a contradiction, nor tend to the disturbance of society. Therefore the property of things flowed immediately from the compact of men, whether tacit or express. For although after the donation of God, nothing was wanting but for men to take possession; yet that one man's seizing on a thing should be understood to exclude the right of all others to the same thing [2] could not proceed but from mutual agreement. And though right reason moved and persuaded men to introduce distinct properties, yet this doth not hinder, but that they might derive their rise and original from human covenant."

[Barbeyrac, note 2] "Not at all. It is certain, on the contrary, that the immediate foundation of all particular right which any man has to a thing which was before common is the first possession. This is, also, the most ancient way of acquirement. For, indeed, when several things are given in general to a number of men which exist not at the same time and who neither can nor will possess all things in common, ... the intention of the donor doubtless is that those who come first shall gain a particular right to those things that they have gotten, exclusive of the pretensions of all others, without any consent of theirs needful to be given. All possession, according to the will of the donor, hath in it an effectual virtue to make the first occupant appropriate to himself lawfully any thing before held in common, provided he takes no more than he needs, and leaves enough for others. This is [shown by "Mr. Locke"] ... in his excellent Treatise of Civil Government, where amongst other things he has, with great accuracy and solidity, cleared up the manner how the property of goods is acquired. [Barbeyrac then paraphrases 2.27–2.28g Locke's *Second Treatise*.] ... But it doth not hence follow that we may gather as many fruits, take as many beasts, or possess ourselves of as many acres of land or, in a word, appropriate to ourselves as many goods as we please. For the same law of nature, which hath given every one a particular right to those things, which, by his own industry, he has taken from that common stock, wherein they lay, the same law, I say, has set certain bounds to this right. ... Wherefore, the property of goods, acquired by labour, must be regulated by the good usage which may be made of them for the necessity and convenience of life. . . ."

[Pufendorf next quotes the arguments to the same effect of Lambert van Velthuysen (1622–85), Dutch philosopher and theologian, publicize of Hobbes.] "That there is in nature no more reason why men should desire a right from the first occupancy of things, [6] than from the first discovery of them with the eye. ..."

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

[Pufendorf 4.6.2] We have sufficiently made it appear in our former remarks, that after men came to a resolution of quitting the primitive communion, upon the strength of a previous contract they assigned to each person his share out of the general stock, either by the authority of parents, or by universal consent, or by lot, or sometimes by the free choice and option of the party receiving. Now it was at the same time agreed, that whatever did not come under this grand division, should pass to the first occupant; that is,

to him who, before others, took bodily possession of it, [2] with intention to keep it as his own.

[Barbeyrac, 2] ... [W]e may observe that taking possession actually (*occupatio*) is not always absolutely necessary to acquire a thing that belongs to nobody. It is only a means to let all others know that we have an intention to appropriate such a thing. Indeed, that which properly constitutes the right of the first occupier is that **he makes known to others his design to seize upon a thing**. If then he declares his will by some other act, as significative, or if others have openly renounced with respect to him the right which they had to any thing which belonged no more to him than to them, he may then acquire the original property without any actual possession. ... We may, also, add, that he must be **within reach of taking what he declares his design to seize on**, otherwise the boundless covetousness of most men will render his right unprofitable to others, and be a foundation for perpetual disputes and quarrels. Another thing we must remark on is that the effect we ascribe here to a simple declaration of our intentions to appropriate any thing before common is only reduced to this; that it prevents those who might have the same design. For it was never pretended that this was sufficient to acquire a full right of property to the exclusion of every other claim. If being within reach of taking corporal possession of what we had a mind to we neglected to do it, we should give room to believe we did not value it and had altered our opinion. The desire of appropriation and the signs we give of it to exclude other concurrents tend in themselves to the enjoyment of that right which is imperfect without possession. Therefore, from the moment we neglect to procure this enjoyment, we renounce the right we began to acquire, and the others, with whom we were before-hand, recover theirs. ...

... [Pufendorf 4.6.10] It hath, likewise, been disputed, Whether by giving a beast a wound in hunting we presently make him our own? Trebatius<sup>1</sup> long since declared on the affirmative side; but then he supposeth us to pursue the beast, which if we omit to do, he says, “We lose our property, and the right passeth to the first occupant.” Others are of the contrary opinion, maintaining that we can by no other means appropriate the beast but by actually taking him, because many casualties may hinder him from ever coming into our hands. The *Emperor Frederick*<sup>2</sup> made this distinction in the case: “If the Beast were followed with the larger dogs or hounds, then he was the property of the hunter, not of the chance-occupant; and in like manner, if he were wounded or killed with a lance or sword. But if he were followed with beagles only, then he passed to the occupant, not to the first pursuer. If he was slain with a dart, a sling, or a bow, he fell to the hunter, provided he was still in chase after him, and not to the person who afterwards found or seized him.” We judge it may in general be affirmed, that if the beast be mortally wounded, or very greatly maimed, he cannot fairly be intercepted by another person whilst we are in pursuit of him, provided we had a right of passing through such a place: But the contrary is to be held, in case the wound were not mortal, nor such as would considerably retard the beast in his flight. ...

<sup>1</sup> [A Roman jurist of the period of the Republic. Ed.]

<sup>2</sup> [The twelfth-century Holy Roman Emperor Frederick I. Ed.] [Barbeyrac, 1] This distinction is not necessary. The author always reasons from a false notion of the nature of taking possession. The truth is, that ’till we cease pursuing the beast, and so leave it to the first occupant, it belongs to us as much as can be; **so that no man can lawfully put in a claim to it.**

Known to the court in *Pierson v. Post* and used by it.

## Occupancy and Property in Early Modern Legal Thought

### Titius and Thomasius

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

“This also is to be observed: that occupation is required for acquiring ownership not simply but rather as a means of indicating to others the will of him who is to acquire; hence other acts, equally indicating the will of the same, are efficacious along with occupation. Thus wounding and pursuit also afford ownership of a wild animal (assuming that it is no one’s) as well as occupation. [D.41.1.5.1.] The contrary opinion that prevailed among the Romans [JI.2.1.13] is a matter of the positive law.... Further, occupation naturally has no prerogative over the other acts indicating intent, such as sight, casting a spear, or other similar things; hence if many concur in acquiring a thing, neither sight nor occupation nor casting a spear gives the ownership to one, but rather it is common to all, although others think otherwise; see Pufendorf, [4.6.8].”

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

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

### Noodt and the historical scholars of “elegant jurisprudence”

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

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

Christfried Wächtler, 1652–1732, *Notae ad Noodt* (1681) rejects the ideas of Noodt on what seems to us to be solid historical grounds.

Bernard Reinold, 1677–1726, *Observationes ad titulum Digestorum de acquirendo rerum dominio* [Observations on the Digest title concerning the acquisition of ownership of things] (1719) willing, it would seem, to accept Noodt’s history but rejects his ideas as bad law.

### Practical ‘elegant jurisprudence’ and the *usus modernus pandectarum*:

Diodor von Tuldenus, *Commentarius in quattuor libros Institutionum* 2.18 [?.1.13] (1622) (ed. Louvain, 1702):

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

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

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

*Id.* 41.1.7, 4:89:

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

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

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

There is no evidence that any of this material was known to the court in *Pierson v. Post*. It probably could not have been granted what was available in the U.S. at the time.

### **Once More, the Natural Law School**

If the adherents of the *usus modernus pandectarum*, like the historians, did not, as a general matter accept the Noodt/Titius view on the occupation of wild animals, those views, perhaps because of the influence of Barbeyrac and Thomasius, found much firmer echoes in the writers in the natural law tradition and among the international lawyers. Indeed, one element of these views had already been anticipated by Johann Wolfgang Textor in his *Synopsis of the law of nations*. Textor is most concerned about the problem of ownership of the sea, and he is at pains to hold that it cannot be occupied. This leads him to three principles about occupation

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

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

The last requirement is odd. It would suit Textor’s argument better to hold that actual manucaption or *pedis possessio* is necessary, since neither can be had of the sea. He may

already have been thinking of the more communitarian notions of property developed by Thomasius.

Christian Wolff's definition of occupation, like Textor's, emphasizes the announcement of intention:

Christian Wolff, *Ius naturae methodo scientifica pertractatum* 2.2.174, 184 (1740–8, Frankfurt & Leipzig 1764) II:70, 74

“Occupation is a fact, by which someone declares that a thing belonging to no one ought to be his and reduces it to this state so that it can be his. ... If someone, when ownership of things has begun to be introduced, reduces a moveable belonging to no one to that state in which it can be seized and the fact is such that at the same time he declares that he wishes the thing to be his, he is deemed to have occupied it and to have acquired its ownership. ...

“Wherefore acts of the occupancy consist not in seizure alone, nor is it always required, only that they be such that from them it can be discerned with reasonable probability that you want the thing to be yours. Note especially that the acts of occupancy ought to be so defined or determined ... to avoid the suits that would arise if another frustrated your effort which you had spent on reducing something to that state in which it could be yours, without which, there is no one who does not understand, it could not have become the other's.”

Jean-Jacques Burlamaqui attempts to answer the argument that any rule of occupation that does not require actual seizure is too indefinite for actual application by drawing the line on the other side of those who are on the threshold of actual capture:

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

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

Perhaps the most remarkable statement of the Thomasius/Titius thesis is Emer de Vattel's, for he indicates that he regards it as generally accepted that natural law forbids interference with the act of appropriation:

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

“All members of a community have an equal right to the use of its common property. But the members of the community, as a body, may make such regulations as they think fit concerning the manner of using it, provided such regulations do not violate the principle of equality in the enjoyment of it...”

“The right of the first comer (*ius praeventionis*) should be faithfully observed in the use of common property which can not be used by several persons at the same time....

“For example, if I am actually drawing water from a common or public well, another who comes after me may not push me aside in order to draw water himself, but must wait till I have finished; for in thus drawing water I am acting on my right and may not be troubled in it by anyone; a second comer, who has an equal right, may not exercise it to the impairment of mine, and in stopping me by his arrival he would be claiming a greater right than mine and violating the law of equality. The same rule should be observed with respect to the use of such common property as is consumed in the using. It belongs to the first person who takes actual steps to put it to use; a second comer has no right to deprive him of it. I go to a public forest and begin to cut down a tree; you come upon the scene and want the same tree; you may not take it away from me, for that would be to assert a right superior to mine, and our rights are equal. This rule is similar to that prescribed by the Law of Nature for the use of the fruits of the earth before the introduction of private ownership.”

### Summary

A few patterns are relatively clear in this extraordinary divergence of views:

1. The genre in which the author is writing is a good indicator of his views on the occupation of wild animals.
  - a. If he is writing in the Roman law tradition, he will not give title to the animal to the huntsman who has not succeeded in depriving the animal of its natural liberty. Noodt is the only exception, and as an interpretation of the Roman texts his effort is a failure, however interesting it may be for the legal ideas it suggests.
  - b. On the other hand, those writing in the natural law tradition seem to have abandoned Pufendorf’s Hobbesian views about the occupation of wild animals sometime around the turn of the eighteenth century. This seems to have happened because their philosophical predispositions changed either in the direction of Barbeyrac’s Lockeanism or in the direction of Thomasius’ Leibnizian communitarianism. As a piece of natural law thinking *Pierson v. Post* is a century out of date.
  - c. Those seeking to provide a practical body of rules for the resolution of contemporary legal problems were caught in the middle. If they were like Voet, inclined to accept Roman law solutions and not particularly interested in philosophy, they would hold that title belonged to the first person to seize the animal, but then give wide play to customary and statutory rules that punished those who interfered with the hunt. If they were like Titius, inclined to reconcile their rules with broader philosophical concerns and not particularly interested in preserving the solutions of the Roman texts, they would restate the law of occupation broadly in such a way as to protect the hunter by the rules of property as well as those of delict.
  - d. As a general matter, however, and except for the writers of the natural law school, the Noodt/Titius solution was rejected. Without speculating too broadly about the underlying political or philosophical reasons for this rejection, we can find reasons for it quite close to the concerns of the writers. For the ‘elegant jurists’ and the Romanists the Noodt/Titius solution proved unacceptable, at least in part, because it undercut the authority of the Roman texts. The best that one can do with Noodt’s reading of the texts (as Reinold

showed and as Noodt himself admitted) is to say that some of them show an alternative view that the Romans ultimately rejected. Noodt, Titius, and the natural law school were willing to espouse that view despite the fact that the Romans had rejected it because, as we suggested, they did not hold the Roman texts to be authoritative in quite the same way that Tuldenus, Voet and Reinold did.

- e. For those seeking to develop a practical body of rules, the Noodt/Titius view of occupation raises obvious difficulties of implementation. Tuldenus is particularly strong on this point, and Titius' broad invocation of *socialitas* gives us little confidence that a practical body of rules can be developed from his principles. Wolff's discussion of the quarrels that interference with the hunt can give rise to and Burlamaqui's attempt to find a line as bright as "deprivation of natural liberty" at "the threshold of capture" both suggest that the natural lawyers attempted to answer this criticism. In the end, Noodt, Titius and the natural law school were willing to espouse their view despite this difficulty because, as we suggested, consistency with what they regarded as the principles of the natural law was more important than the difficulty of practical implementation.
  - f. The practical writers, except for Leyser, usually did not leave a huntsman in Post's position without a remedy. The remedy was vague, however. Voet, for example, suggests that the local judge in Holland should fine the interfering huntsman. Although there is a considerable body of writing in this period on the action for *iniuria*, I have yet to find an author who discusses this particular problem in that context.
2. *Un altro modo di possedere* ('another way of possessing')?
- a. When the concept of *abus de droit*, abuse of right, is found in the nineteenth century, it is as if something altogether new has developed. I'm not sure that it is new. I rather suspect that something along these lines was what Gerardus Noodt was driving at in his wild speculations about the meaning of the Roman texts on the occupation of wild animals.
  - b. But the fact is that neither Noodt nor Titius nor the writers of the natural law school put it this way. They do not say that it is an abuse of Pierson's right for him intentionally to interfere with Post's hunt. Rather, they seek to define Post's right in such a way as to give him a right to the fox, and hence against Pierson. That so many authors should struggle with the same problem and not be able to come up with a resolution that seems to us relatively obvious suggests either that for some reason they feared, perhaps unconsciously, the consequences of the alternate road to the solution or that there was something about the structure of legal thought in this period that made it difficult, if not impossible, to find that road.
  - c. The range of possibly-feared consequences is broad, but none seems adequate to explain why this particular group came out the way it did. Our survey of the law of occupation has shown that the writers in this period tended to view that law as determining three questions that were to them as important as, and probably more important than, the question whether a huntsman in Post's position can sue for interference with the hunt: (1) freedom of the seas, (2) the rights of a landowner as against a poacher, and (3) the legitimacy and effect of

the game laws. The Noodt/Titius view of the occupation of wild animals is associated with restrictive views of the freedom of the seas and broad views both of the rights of the landowner and of the legitimacy of the game laws. In the case of Titius this may explain why he found this view attractive. The other writers, however, to the extent that they comment on these issues at all, come out differently, allowing other principles to come to the fore in resolving them. Further pursuit of this argument would lead us far afield. Suffice it say here that basing a decision about interference with the hunt on the basis of tort rather than property principles should not have seriously affected the results that any of these authors reach in related areas.

- d. If there is nothing in the consequences that would explain why Noodt, Titius and the natural law school reached the result they wanted to reach on the basis of property rather than tort or delict, is there something in the structure of their thought that explains why they did not see the alternative road to the same conclusion? It has recently been suggested, for example, that concern with the natural modes of acquisition in the early modern period represents an attempt by the lawyers of that time to buttress natural rights against an increasingly authoritarian state. If this proposition is true, can we generalize it to the point where we say that a characteristic of early modern legal thought is always to prefer an analysis of rights rather than of duties? Perhaps this is true as a broad generalization, but the particular group with which we are dealing seems peculiarly disposed to emphasize the duties that go along with property in addition to the rights of the property-holder.
- e. My own pursuit of this question has led in a somewhat different direction, back to the Middle Ages and to the effect that medieval commentaries had on structuring legal thought long after they had ceased to be authoritative. In this regard Bartolus' *repetitio* on D.43.12.2, which we have already considered (*Mats.*, p. XIII–4), what he called his 'treatise on mills', with its analysis of the problem of competing mill-owners in terms of possession of rights rather than duties to respect what another has begun and with its multiple citations to the law of wild animals, suggests the way in which thought on this topic was structured. It is not only that wild animals are always talked about in the context of the Institutes title *On the division of things* or the Digest title *On acquiring ownership in things*, although this itself is a powerful incentive to think of the problem in terms of property rather than or delict, it is also that the medieval habit of analyzing problems whenever possible on the basis of possessory claims fundamentally affects the way the succeeding generations think about rights in situations of conflict. A great deal happened in the legal thought in the 17th and 18th centuries, but the basic structures remained largely the same, and that point, I think, justifies the amount of time that we spent on the Middle Ages.
- f. Now if I were asked a final and much more difficult question: why did Bartolus' mind run along these lines, I would be hard pressed to come up with a simple answer. He certainly knew the difference between property and obligation. His famous *repetitio* on conflicts of law is dependent on it. I think that it is at least possible that the tendency to think first of property rather than obligation, which is characteristic of Bartolus and many legal thinkers of his period, is the product of a long and complicated development that had much to

do not with what they found in the Roman-law texts but in what was happening in the world around them. We have noted that there is relatively little law of property in the earliest Germanic codes, so the tendency does not go back that far. We also noted two important characteristics of the confusing situation of the 11th and 12th centuries. Because of feudalism property rights were conceived of in terms of obligation rather than as *in rem* rights, and different folks were possessed of different kinds of law. In both situations it was easier to analyze any kind of right in terms of the Roman law of possession than it was to analyze it in terms of the Roman law of ownership or in terms of the Roman law of obligations, and this for two reasons: (1) possession is a fact and easier to prove in Roman law than is ownership, and (2) possession leads to prescription. Rather than showing that a right exists in Roman law, I show that it has been prescribed for, as the pleadings go, 10, 20, 30, 40, years, each period corresponding to a prescriptive period in Roman law. Now analysis of the *Pierson v. Post* problem along these lines in the middle ages might well lead to Post's arguing that he had a prescriptive right to hunt to the exclusion of Pierson, or that the prescriptive custom of the area was that the huntsman in hot pursuit has a right to be free of interference with the hunt. The first argument was still available in the 17th and 18th centuries, though it would not have done Post any good because it was manifestly untrue. The second argument died out with the decline of customary law and the increasing realization that it was incompatible with Roman concepts of property. Hence, when they are trying to reach the same result, writers in the 17th and 18th centuries focus not on the possession of the right to be free from interference but on the right to the fox itself.