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. postumously)
Domingo de Soto, 1494–1560—De justicia et jure (1556)
Diego Covarruvias y Layva, 1512–1577, the ‘Spanish Bartolus’
Thomas Sanchez, 1550–1610—Disputationes de sancto matrimonii sacramento (1602)
Francisco Suarez, 1548–1617—Tractatus de legibus et Deo legislatore (1612)

The Natural Law School:
Huigh de Groot (Hugo Grotius) 1583–1645—De jure belli et pacis [Concerning the law of war and peace] (1625)
Samuel von Pufendorf, 1623–1694—De jure 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 jurisprudentiae 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 jurisprudentis; Notae [One book concerning the single principle and single end of universal law; On the consistency of the jurisprude; Notes] (1720–22)

International Law:
[Positivist] Cornelis van Bynkershoeck, 1673–1743—De dominio maris [Concerning the dominion of the sea] (1702)
[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)

‘Elegant jurisprudences’:
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, *Juris 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)


**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 shot 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 examintion 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.

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.

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. ch. 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 Juris 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. ch. 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 general 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.

The ‘natural law school’.


“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.”

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 pretentions 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, translator 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\(^1\) 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\(^2\) made this distinction in the case: “If the Beast were followed with the larger dogs or hounds, then he was the property of the hunter, not of the chance-occupant; and in like manner, if he were wounded or killed with a lance or sword. But if he were followed with beagles only, then he passed to the occupant, not to the first pursuer. If he was slain with a dart, a sling, or a bow, he fell to the hunter, provided he was still in chase after him, and not to the person who afterwards found or seized him.” We judge it may in general be affirmed, that if the beast be mortally wounded, or very greatly maimed, he cannot fairly be intercepted by another person whilst we are in pursuit of him, provided we had a right of passing through such a place: But the contrary is to be held, in case the wound were not mortal, nor such as would considerably retard the beast in his flight. ...

\(^1\) [A Roman jurist of the period of the Republic. Ed.]

\(^2\) [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.

**Occupancy and Property in Early Modern Legal Thought**

**Titius and Thomasius**

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

“This also is to be observed: that occupation is required for acquiring ownership not simply but rather as a means of indicating to others the will of him who is to acquire; hence other 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 jurisprudentiae divinae libri tres* 2.10.26, 32, 34 (1687) (ed. Halle, 1730) 185, 186:

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

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

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

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

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 [?2.1.13] (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 Pendectas* 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.”