PART XVIII. THE NATURAL LAW SCHOOL: WILD ANIMALS

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A. PIERSON V. POST

Supreme Court of New York
3 Caines 175 (1805)[1]

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

The declaration stated that *Post*, being in possession of certain dogs and hounds under his command, did "upon a certain wild and uninhabited, unpossessed and waste land, called the beach, find and start one of those noxious beasts called a fox," and whilst there hunting, chasing and pursuing the same with his dogs and hounds, and when in view thereof, *Pierson*, well knowing the fox was so hunted and pursued, did, in the sight of *Post*, to prevent his catching the same, kill and carry it off. A verdict having been rendered for the plaintiff below, the defendant there sued out a *certiorari*,[2] and now assigned for error, that the declaration and the matters therein contained were not sufficient in law to maintain an action.

Sanford, for the now plaintiff. It is firmly settled that animals, *feræ naturæ*, belong not to any one. If, then, *Post* had not acquired any property in the fox, when it was killed by *Pierson*, he had no right in it which could be the subject of injury. As, however, a property may be gained in such an animal, it will be necessary to advert to the facts set forth, to see whether they are such as could give a legal interest in the creature, that was the cause of the suit below. Finding, hunting, and pursuit, are all that the plaint enumerates. To create a title to an animal *feræ naturæ*,[3] occupancy is indispensable. It is the only mode recognised by our system. 2 *Black. Com.* 403. The reason of the thing shows it to be so. For whatever is not appropriated by positive institutions, can be exclusively possessed by natural law alone. Occupancy is the sole method this code acknowledges. Authorities are not wanting to this effect. *Just*. lib. 2, tit. 1, s. 12. ... ["Wild beasts therefore, when they are seized by someone, by the law of nations they begin immediately to be his."][4] 2. There must be a taking; and even that is not in all cases sufficient, for in the same section he observes, ... ["Whatsoever of them you might seize from that time forth it is understood to be yours while it is held in your custody; when it escapes your custody, and returns to its natural liberty, it ceases to be yours and becomes again his who seizes it."] 3. It is added also that this natural liberty may be regained even if in sight of the pursuer, ... ["This is so since following it is difficult."] 4. In section 13, it is laid down, that even wounding will not give a right of property in an animal that is unreclaimed. For, notwithstanding the wound, ["Many things can happen, so that you don't seize it," and "it is not yours, unless you seize it."] 5. *Fleta*, b. 3, p. 175, and *Bracton*, b. 2, c. 1, p. 86, are in unison with the *Roman* lawgiver. It is manifest, then, from the record, that there was no title in *Post*, and the action, therefore, not maintainable.

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

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[1] [I.e., 3 GEORGE CAINES, NEW-YORK TERM REPORTS: OR CASES ARGUED AND DETERMINED IN THE SUPREME COURT OF THAT STATE [1803–1805], at 175–82 (1806). Ed.]

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

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

[4] [Full text, above, Part I. Ed.]

as manucaption itself. The contrary idea, requiring actual taking, proceeds, as Mr. *Barbeyrac* observes, in *Puffendorf*, b. 4, c. 6, s. 10, on a "false notion of possession."

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

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

The question submitted by the counsel in this cause for our determination is, whether *Lodowick Post*, by the pursuit with his hounds in the manner alleged in his declaration, acquired such a right to, or property in, the fox as will sustain an action against *Pierson* for killing and taking him away? The cause was argued with much ability by the counsel on both sides, and presents for our decision a novel and nice question. It is admitted that a fox is an animal *feræ naturæ*, and that property in such animals is acquired by occupancy only. These admissions narrow the discussion to the simple question of what acts amount to occupancy, applied to acquiring right to wild animals.

If we have recourse to the ancient writers upon general principles of law, the judgment below is obviously erroneous. *Justinian's Institutes*, lib. 2, tit. 1, s. 13, and *Fleta*, lib. 3, c. 2, p. 175, adopt the principle, that pursuit alone vests no property or right in the huntsman; and that even pursuit, accompanied with wounding, is equally ineffectual for that purpose, unless the animal be actually taken. The same principle is recognised by *Bracton*, lib. 2, c. 1, p. 8.

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

It therefore only remains to inquire whether there are any contrary principles, or authorities, to be found in other books, which ought to induce a different decision. ... [The court then proceeds to distinguish the English cases on the topic. It is not at all clear that the distinctions are valid, but for purposes of this course we can take it as given that no English cases were relevant to the decision of the case. Ed.]

Barbeyrac, in his notes on *Puffendorf*, does not accede to the definition of occupancy by the latter, but, on the contrary, affirms, that actual bodily seizure is not, in all cases, necessary to constitute possession of wild animals. He does not, however, describe the acts which, according to his ideas, will amount to an appropriation of such animals to private use, so as to exclude the claims of all other persons, by title of occupancy, to the same animals; and he is far from averring that pursuit alone is sufficient for that purpose. To a certain extent, and as far as *Barbeyrac* appears to me to go, his objections to *Puffendorf*'s definition of occupancy are reasonable and correct. That is to say, that actual bodily seizure is not indispensable to acquire right to, or possession of, wild beasts; but that, on the contrary, the mortal wounding of such beast, by one not abandoning his pursuit, may, with the utmost propriety, be deemed possession of him; since, thereby, the pursuer manifests an unequivocal intention of appropriating the animal to his individual use, has deprived him of his natural liberty, and brought him within his certain control. So also, encompassing and securing such animals with nets and toils, or otherwise intercepting them in such a manner as to deprive them of their natural liberty, and render escape impossible, may justly be deemed to give possession of them to those persons who, by their industry and labor, have used such means of apprehending them. *Barbeyrac* seems to have adopted, and had in view in his notes, the more accurate opinion of *Grotius*, with respect to occupancy. That celebrated author, (lib. 2, c. 8, s. 3, p. 309,) speaking of occupancy, proceeds thus: ... ["Some corporeal possession is required for obtaining *dominium* [a technical term roughly translated 'ownership'], and therefore wounding is not enough."] But in the following section he explains and qualifies this definition of occupancy: ... ["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."] This qualification embraces the full extent of *Barbeyrac*'s objection to *Puffendorf*'s definition, and allows as great a latitude to acquiring property by occupancy, as can reasonably be inferred from the words or ideas expressed by Barbeyrac in his notes. The case now under consideration is one of mere pursuit, and presents no circumstances or acts which can bring it within the definition by occupancy by *Puffendorf*, or *Grotius*, or the ideas of *Barbeyrac* upon that subject. ...

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

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

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

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

This is a knotty point, and should have been submitted to the arbitration of sportsmen, without poring over *Justinian*, *Fleta*, *Bracton*, *Puffendorf*, *Locke*, *Barbeyrac*, or *Blackstone*, all of whom have been cited; they would have had no difficulty in coming to a prompt and correct conclusion. In a court thus constituted, the skin and carcass of poor reynard would have been properly disposed of and a precedent set, interfering with no usage or custom which the experience of ages has sanctioned, and which must be so well known to every votary of *Diana*. But the parties have referred the question to our judgment, and we must dispose of it as well as we can, from the partial lights we possess, leaving to a higher tribunal, the correction of any mistake which we may be so unfortunate as to make. By the pleadings it is admitted that a fox is a "wild and noxious beast." Both parties have regarded him, as the law of nations does a pirate, "*hostem humani generis*,"[5] and although "*de mortuis nil nisi bonum*,"[6] be a maxim of our profession, the memory of the deceased has not been spared. His depredations on farmers and on barn yards, have not been forgotten; and to put him to death wherever found, is allowed to be meritorious, and of public benefit. Hence it follows, that our decision should have in view the greatest possible encouragement to the destruction of an animal, so cunning and ruthless in his career. But who would keep a pack of hounds; or what gentleman, at the sound of the horn, and at peep of day, would mount his steed, and for hours together, "*sub jove frigido*,"[7] or a vertical sun, pursue the windings of this wily quadruped, if just as night came on, and his strategems and strength were nearly exhausted, a saucy intruder, who had not shared in the honors or labors of the chase, were permitted to come in at the death, and bear away in triumph the object of pursuit? Whatever *Justinian* may have thought of the matter, it must be recollected that his code was compiled many hundred years ago, and it would be very hard indeed, at the distance of so many centuries, not to have a right to establish a rule for ourselves. In his day, we read of no order of men who made it a business, in the language of the declaration in this cause, "with hounds and dogs to find, start, pursue, hunt, and chase," these animals, and that, too, without any other motive than the preservation of Roman poultry; if this diversion had been then in fashion, the lawyers who composed his institutes, would have taken care not to pass it by, without suitable encouragement. If any thing, therefore, in the digests or pandects shall appear to militate against the

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

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

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

defendant in error, who, on this occasion, was the fox hunter, we have only to say *tempora mutantur*;[8] and if men themselves change with the times, why should not laws also undergo an alteration?

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

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

When we reflect also that the interest of our husbandmen, the most useful of men in any community, will be advanced by the destruction of a beast so pernicious and incorrigible, we cannot greatly err, in saying, that a pursuit like the present, through waste and unoccupied lands, and which must inevitably and speedily have terminated in corporal possession, or bodily *seisin*,[9] confers such a right to the object of it, as to make any one a wrongdoer, who shall interfere and shoulder the spoil. The *justice*'s judgment ought therefore, in my opinion, to be affirmed.

Judgment of reversal.

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[8] ["Times change." Ed.]

[9] [A technical in Anglo-American common law, roughly equivalent to 'possession'.]

B. NOTES TO PIERSON v. POST

adapted from C. Donahue, P. Kauper, P. Martin, *Cases and Materials on Property* (2d ed. 1983) 13–17

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

In *It's Not About the Fox: The Untold History of Pierson v. Post* (55 DUKE L.J. 1089 [2006]) Bethany R. Berger, reviews the evidence for who the parties were and what the dispute was really about.[1] The article provides a fascinating insight into life on the eastern end of Long Island in the late eighteenth and early nineteenth centuries. It turns out that the "certain wild and uninhabited, unpossessed and waste land, called the beach," was actually, at least arguably, community land, which was hugely controversial, and, yes, there was no love lost between the Piersons and the Posts, though it is unlikely that the fathers of the protaganists were as important as the protagonists themselves. Also, it seems unlikely that the speculation that the Posts were of Dutch descent is correct, but class and wealth distinctions were involved. The Piersons almost certainly regarded Post's fox hunting as "putting on airs."

Why are these details omitted from the opinion? Are they important? "relevant"? Are all the details furnished by the court important? "relevant"? [p*8]

Appellate courts rarely redetermine the facts found at the trial court level. This characteristic of appellate adjudication has led some commentators to conclude that the trial court's decision, in effect, determines the outcome of the case on appeal. The difficulties of the fact-finding process suggest that at times, perhaps frequently, the reasoning of the appellate courts is so far removed from the realities of what happened between the parties as to yield what is for them irrelevant decisions. For a full discussion of this problem, see J. FRANK, COURTS ON TRIAL (1963). In the case of *Pierson v. Post*, however, there is a further reason why the court did not review the facts in the case. In order to determine why this is the case you should try to define as precisely as possible the question that the court was called upon to decide.[2]

2. *The Justices*. The court which decided *Pierson v. Post* contained two future United States Supreme Court justices, a future governor of New York, a man who was to become a powerful force in New York politics, and one whose name is permanently associated with American legal scholarship. The chief justice, James Kent (1763–1847), later became Chancellor of New York. In retirement he wrote *Kent's Commentaries*, one of the best known books on American law in the pre-Civil War period. Kent was a conservative in politics, probably the most conservative member of the court at the time. Ambrose Spencer (1765–1848) was in the anti-Federalist camp at the time the case was decided. He later changed his views and was to become a powerful force in conservative polities in New York. Daniel Tompkins (1774–1825), the author of the majority opinion, later became Governor of New York and Vice President of the United States. He was associated with the anti-Federalists throughout his political career. Brockholst Livingston (1757–1823), the author of the dissent and probably the most learned member of the court except for Kent, became a justice of the United States Supreme Court in 1807 and served until his death. On the Court Livingston seems to have abandoned the anti-Federalist views which he held before his appointment and largely followed the lead of Chief Justice Marshall. Smith Thompson (1768–1843), the final member of the *Pierson* majority, succeeded Livingston on the United States Supreme Court in 1824 and served until his death. Thompson, in contrast with Livingston, stuck to his anti-Federalist views when he became a member of the Court. One of his most notable opinions is his dissent in Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 50 (1831), in which he urged the Court to hold that the Cherokees were a sovereign state and hence had standing to sue Georgia in the federal courts. On Kent, Spencer and Tompkins, see 10 DICTIONARY OF

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[1] After some years in which interest in *Pierson v. Post*, seemed to be waning, three young legal historians have just published articles on the topic. Bethany Berger's is treated here. The contributions of Angela Fernandez will treated immediately below. In *Legal Fictions in Pierson v. Post* (105 MICH. L. REV. 735 [2007]), Andrea McDowell reviews once more the doctrinal moves that the court made and comes to the conclusion (*semble*) that the majority did not do as bad a job as might be suggested (and as we will suggest in class). All three contributions are nicely reviewed with further references in Ernst, *Pierson v. Post: The New Learning* (http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1111&context=fwps_papers, last visited 8/10/09).

[2] For many years, it was assumed that the record in the case had been lost. It is possible, however, to reconstruct what was in it making use of the George Caines's (and the justices') cryptic summary. We need no longer guess. With amazing assiduity—and, it must be admitted, some good luck—Angela Fernandez has found the record, transcribed it, and published it. *See* Fernandez, *The Lost Record of Pierson v. Post, the Famous Fox Case*, 27 LAW & HISTORY REV. 149 (2009). The transcript may be found at http://www.historycooperative.org/journals/lhr/27.1/tompkins.html (last visited 8/8/09). For what it adds to our knowledge of the case, see Donahue, *Papyrology and 3 Caines 175*, 27 LAW & HISTORY REV. 179-81 (2009). Of some relevance here is the fact that the record shows that the actual damages awarded in the justices's court were $.75 (yes, there's a decimal point in that, 75 cents). To get some sense of the modern equivalent multiply by twenty. Whatever the case was about, it was not about the value of fox skin.

AMERICAN BIOGRAPHY 343 (1933); 17 id. 443 (1935); 18 id 583 (1936); for Livingston and Thompson, see 1 L. FRIEDMAN & F. ISRAEL, THE JUSTICES OF THE UNITED STATES SUPREME COURT 387–98, 475–92 (1969). To what extent can the views of the justices in *Pierson* be predicted from their politics at the time? To what extent can their subsequent views be predicted from their vote and/or opinions in *Pierson*?

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

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

5. *The "Natural Law School*." Justinian's *Institutes* were published in Constantinople in 533 A.D.; Bracton and Fleta are treatises on English law (with considerable Roman law mixed in in curious ways) composed in the thirteenth century. Locke was an English political philosopher who wrote at the end of the seventeenth century, who popularized the "labor theory" of property. Blackstone was a writer on English law in the middle of the eighteenth century. The principal commentators on the Roman law, however, whose works are cited in the arguments and opinions in *Pierson v. Post* are Continental writers of the "Natural Law School" of the seventeenth and eighteenth centuries. Continental legal scholarship in the sixteenth century (particularly that of the French humanists) had shown that centuries of interpretation of Roman law texts had led to their being used in contexts and in ways far from that contemplated by the original Classical authors. Recognizing this fact the writers of the Natural Law School sought to go behind the specifies of the Roman texts to see if it was possible to find in them a body of transcendent principles which would be valid for all times and all peoples. Not surprisingly they turned their attention to international law, and Hugo Grotius' *De jure belli et pacis*, first published in 1625, and quoted in Justice Tompkins' opinion, is one of the first and most influential products of the school. *See generally* E. DUMBAULD, THE LIFE AND LEGAL WRITINGS OF HUGO GROTIUS (1969). Justice Tompkins' quotations from Grotius are accurate so far as they go, but he fails to cite the Grotius passage which follows right after Grotius' remarks about the traps, snares and nets:

> This is the rule, if no Civil Law intervene: for jurists are much mistaken who think that it is so decidedly Natural Law that it cannot be changed.
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> It is Natural Law, not simply, but in a certain state of things, that is, if it be not otherwise provided. But the peoples of Germany, when they wished to assign to their princes and kings some rights to sustain their dignity, wisely thought that they might best begin with those things which can be given without damage to any one; of which kind are the things which have not yet become the property of any; [and thence they gave them a right to the game]. And this too was what the Egyptians did. For there the king's proctor claimed things of that kind. The law might transfer the ownership of these things even before occupation, since the law alone is sufficient to produce ownership.

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

While Grotius' principal aim was the elucidation of the *jus gentium*, what today we call international law, Samuel Pufendorf's *De jure naturae et gentium*, first published in 1672, had a grander scheme: to outline all the principles of both the law of nature and of nations in the form of a comprehensive code. Pufendorf's theory of the origins of property shows considerable influence of the English political philosopher Thomas Hobbes. For Pufendorf, as for Hobbes, there is no natural right to property which one has seized, but agreement or positive law establish that right. Jean Barbeyrac, who translated and annotated Pufendorf (1st ed. Amsterdam, 1706), strongly disagreed and argued, on the basis of Locke, that man has a natural right to those things which he acquires by his labor from the common stock of goods which nature has provided. The following passages, most of them quoted or referred to in *Pierson*, illustrate both the conflict between Pufendorf and Barbeyrac and the implications of that conflict for the law of wild animals:[3]

> [Pufendorf 4.4.4] ... [T]here is no precept of natural law to be discovered, by which men are enjoined to make such an appropriation of things, as that each man should be allotted his particular portion, divided from the shares of others, though the law of nature doth indeed sufficiently advise the introducing of separate assignments, as men should appoint, according to the use and exigencies of human society; yet [it does it] so as to refer it to their judgment, whether they would appropriate only some particular things, or whether they would possess some things without bringing them to a division and leave the rest as they found them, only forbidding any particular man to challenge them to himself alone. Hence too, the law of nature is supposed to approve and confirm all agreements made by men about the possession of things, provided they neither imply a contradiction, nor tend to the disturbance of society. Therefore the *property* of things flowed immediately from the compact of men, whether *tacit* or *express*. For although after the donation of God, nothing was wanting but for men to take possession; yet that one man's seizing on a thing should be understood to exclude the right of all others to the same thing [2] could not proceed but from mutual agreement. And though right reason moved and persuaded men to introduce distinct properties, yet this doth not hinder, but that they might derive their rise and original from human covenant.
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> [Barbeyrac, 2] Not at all. It is certain, on the contrary, that the immediate foundation of all particular right which any man has to a thing which was before common is the first possession. This is, also, the most ancient way of acquirement. For, indeed, when several things are given in general to a number of men which exist not at the same time and who neither can nor will possess all things in common, ... the intention of the donor doubtless is that those who come first shall gain a particular right to those things that they have gotten, exclusive of the pretentions of all others, without any consent of theirs needful to be given. All 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 secs. 2.27–2.28g of 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,

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

must be regulated by the good usage which may be made of them for the necessity and convenience of life. ...

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

[Pufendorf next quotes the arguments to the same effect of Velthuysen[4] who affirmed:] "That there is in nature no more reason why men should desire a right from the first occupancy of things, [6] than from the first discovery of them with the eye."

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

[Pufendorf 4.6.2] We have sufficiently made it appear in our former remarks, that after men came to a resolution of quitting the primitive communion, upon the strength of a previous contract they assigned to each person his share out of the general stock, either by the authority of parents, or by universal consent, or by lot, or sometimes by the free choice and option of the party receiving. Now it was at the same time agreed, that whatever did not come under this grand division, should pass to the first occupant; that is, to him who, before others, took bodily possession of it, [2] with intention to keep it as his own.

[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 beforehand, recover theirs. ...

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

After this division, he is said originally to acquire a thing lying void and without a possessor, who happens to be the most early occupant of it; i.e. he who lays hold of such a thing before others, or gets the start of them in putting in his claim to it. ...

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

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

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

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

[Pufendorf goes on to argue that game taken contrary to the positive law belongs not to the taker but to the prince, the huntsman being regarded as acting for the prince.] [1]

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

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

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

... [Pufendorf 4.6.10] It hath, likewise, been disputed, Whether by giving a beast a wound in hunting we presently make him our own? Trebatius[5] 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

[5] [A Roman jurist of the period of the Republic. See above, Ed.]

> hinder him from ever coming into our hands. The *Emperor Frederick*[6] 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. ...
>
> [Barbeyrac, 1] This distinction is not necessary. The author always reasons from a false notion of the nature of taking possession. The truth is, that 'till we cease pursuing the beast, and so leave it to the first occupant, it belongs to us as much as can be; so that no man can lawfully put in a claim to it.

S. PUFENDORF, THE LAW OF NATURE AND NATIONS 4.4.4-.5 at 366–67, 4.6.2-.10 at 386–93 (with Barbeyrac's notes, B. Kennet trans., 5th ed., 1749) (this is probably the translation that was used by the participants in *Pierson*). On the natural law school generally see A. WATSON, THE MAKING OF THE CIVIL LAW 83–98 (1981).

6. *What's Missing in* Pierson. [The following material is largely derived from: C. Donahue, 'Noodt, Titius, and the Natural Law School: The Occupation of Wild Animals and the Intersection of Property and Tort', in J. Ankum, J. Spruit, et F. Wubbe (eds.), *Satura Roberto Feenstra* (Presses Universitaires de Fribourg: Fribourg [CH], 1985) 609–29; cf. *id*., '*Animalia Ferae Naturae*: Rome, Bologna, Leyden, Oxford and Queen's County, N.Y.', in R. Bagnall and J. Harris (eds.), *Studies in Roman Law in Memory of A. Arthur Schiller* (Leiden: E.J. Brill, 1986) 39–63.]

a. D.47.10.13.7 (Watson trans.):

> ULPIAN, *Edict*, book 57: ... **7.** If someone prevent me from fishing in the sea or from lowering my net (which in Greek is σαγήνη), can I have an action for insult (*actio iniuriarum*)against him? There are those who think that I can. 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. The older jurists, however, gave a tenant, assuming that he was a state tenant, the interdict since there is a prohibition on the use of force to prevent a tenant enjoying what he has hired. Now what are to say if I forbid someone to fish in front of my house on my approaches (*praetorium*)? Am I or am I not liable to the action for insult? 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.), can I have an action for insult against him? There are those who think that I can. 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. The older jurists, however, gave a tenant, assuming that he was a state tenant, the interdict since there is a prohibition on the use of force to prevent a tenant enjoying what he has hired. Now what are to say if I forbid someone to fish in front of my house on my approaches (*praetorium*)? Am I or am I not liable to the action for insult? In this context, it has been frequently

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

> 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.

b. 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].

c. 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....

d. Gerardus Noodt, *Probabilia juris* 2.6.1 (1678), in *Opera omnia* (Leyden, 1714) 54:[7]

> 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.

e. 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.

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

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[7] For sharp criticism of Noodt's analysis here, see Christfried Wächtler, *Notae ad Noodt* 2.6 (1681), in *Opuscula* (Utrecht, 1730) 247–55. For a different sort of criticism, see Bernard Reinold, *Ad titulum Digestorum de acquirendo rerum dominio* [D.41.1] c.1, in *Opuscula juridica* (Leiden 1755) 448–59; cf. *id*., *De inscriptionisbus legum Digestorum et Codicis* s.4, in *id*. at 559–62.

> 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.

g. *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.

h. 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.

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

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

j. Christian Wolff, *Jus 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 spend 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.

k. 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 possesssion. 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.

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

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

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

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