

Outline – Class 03

I. PIERSON (concluded)

1. How often do we have a case that could come out either way? (See footnote.¹) So why did the court decide the way that it did?
 - a. Politics?
 - b. Class interests?
 - c. The silliness of the suit?
 - d. Showing off?
2. Somewhat more generally and crudely:
 - a. The breakfast theory of jurisprudence.
 - b. The lunch theory of jurisprudence.
 - c. The pegs theory of jurisprudence.
3. The huge problem of unintended consequences: James Krier's theory that *Pierson* caused the first Gulf War.

II. AGWAY (Factoid1: Agway, Inc. went bankrupt in 2012, though the name is still owned by an agricultural products company, the Southern States Cooperative. Prior to that time Agway, Inc. was a regional [NY, PA, NJ, CT] agricultural products company and what it dumped in the river was probably fertilizer or pesticide byproducts or both. Factoid2: French Creek flows south. Its waters end up in the Allegheny, and, ultimately, into the Gulf of Mexico, not in Lake Ontario.)

<https://www.google.com/maps/@41.901947,-79.8444383,9.74z>

<http://www.arcgis.com/home/webmap/viewer.html?webmap=9d3865149e79401db8a132e078e7dadb&extent=-80.6687,41.4039,-79.2487,42.184>



1. You're sitting around in the PA Attorney General's Office. The PA Fish Commission has just told you that they have 12,000 dead fish and 60,000 dead minnows that they have to clean up, and they're pretty sure the reason why they're dead is that Agway, Inc. dumped chemicals in the river. They want you to sue, and sue big. The question is how do you frame the action?
2. It didn't work. Why didn't it work?
3. What is troubling the concurring judge?

¹ No person except a natural born citizen, or a citizen of the United States, at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty five years, and been fourteen Years a resident within the United States. U.S. Const. art. 2, § 1, para. 5.

Outline – Class 03

4. Does the decision mean that the state has only limited power to regulate? See p. S38 (*Hughes v. Okla.* overruling *Geer v. Conn.*)
5. Does the statute raise constitutional problems? Think of alternatives.
6. How about a private action by fishermen who have been damaged by the actions of Agway, Inc.?
7. How would you proceed in the case if it arose today? Today we have a major federal statute on the topic, but it is not clear that the statute would extend to this river. Water Quality Improvement Act of 1970, *as amended*, 33 U.S.C. §§ 1251–1376. Pennsylvania has a Clean Streams Act, which may well apply. It also has a constitutional provision that asserts that the Commonwealth of PA owns the wild animals in the state. See *EQT Production Company v. Department of Environmental Protection*, 193 A.3d 1137, (Penn. Cmwlth. 2018).
8. The fork in the road:
 - a. The high road—occupation as the root of property.
 - b. The low road—practical implications. *Agway* as an example of S. F. C. Milsom’s remark that the common law proceeds through the unceasing abuse of its fundamental ideas.
 - c. The middle road—where we spend most of our time in law school.

III. THE OCCUPATION AND LABOR THEORIES OF PROPERTY

1. The occupation theory.
 - a. What is the occupation theory of property?
 - b. To what extent is it a justification of property?
 - i. Preservation of the species.
 - ii. In order to protect the peace.
 - iii. By protecting acquisitiveness we are protecting human will.
 - iv. On the ground of efficiency.
2. The labor theory.
 - a. Once more the normative and the descriptive.
 - b. How does it differ from the occupation theory?
 - c. Can anyone think of a situation today where we give someone property rights in something that did not already exist as a reward for labor?