v. Kilts, 15 Wend. 550 (N.Y. Sup. Ct. 1836); Gillet v. Mason, 7 Johns. 16 (N.Y. Sup. Ct. 1810); 2 W. BLACKSTONE, COMMENTARIES *392–93; Annot., 39 A.L.R. 352 (1925). In 1916, a New York court cited Justinian, Pufendorf, Bracton, Blackstone, etc., to support its position that the qualified property in *animalia feræ naturæ* (bees) continues in the possessor even if the bees go onto another's land, so long as the original possessor keeps them in sight or has the power to pursue them. Brown v. Eckes, 35 N.Y. Crim. 150, 160 N.Y.S. 489 (Yonkers City Ct. 1916).

5. *See generally* R. BROWN, PERSONAL PROPERTY § 2 (W. Raushenbush ed. 1975) <the online editions are all older than this one>; 2 W. BLACKSTONE, COMMENTARIES *389–95, *403, *410–19; 2 J. KENT COMMENTARIES *348–50; Annot., Ann. Cas. 1917B, at 949; E. Arnold, *Law of Possession Governing the Acquisition of Animals Feræ Naturæ*, 55 AM. L. REV. 393 (1921).

KEEBLE v. HICKERINGILL

King's Bench.

11 East 574; 103 Eng. Rep. 1127; *sub nom.* Keeble v. Hickeringall, Cas.t.Holt 14, 17, 19; 90 Eng. Rep. 906, 907, 908; *sub nom.* Keble v. Hickringill, 11 Mod. 74, 88 Eng. Rep. 898; 11 Mod. 130, 88 Eng.Rep. 945; *sub nom.* Keeble v. Hickeringhall, 3 Salk. 9, 91 Eng. Rep. 659 (1707).

ACTION upon the case. Plaintiff declares that he was, 8th November in the second year of the queen, lawfully possessed of a close of land called *Minott's Meadow*, *et de quodam vivario*,[1] *vocato* a decoy pond, to which divers wildfowl used to resort and come; and the plaintiff had at his own costs and charges prepared and procured divers decoy-ducks, nets, machines, and other engines for the decoying and taking of the wildfowl, and enjoyed the benefit in taking them; the defendant, knowing which, and intending to damnify the plaintiff in his vivary, and to fright and drive away the wildfowl used to resort thither, and deprive him of his profit, did, on the 8th of November resort to the head of the said pond and vivary, and did discharge the said gun several times that was then charged with the gunpowder against the said decoy pond, whereby the wildfowl was frighted away, and did forsake the said pond [for four months]. Upon not guilty pleaded a verdict was found for the plaintiff and 20 pounds damages.

[The defendant made a motion in King's Bench for arrest of judgment on the ground that the declaration was insufficient in law. The case was argued twice; the arguments of counsel were varied. Two important additional facts were brought out apparently as having been proven below or at least as not inconsistent with the declaration: (1) Hickeringill also had a decoy on his ground, and (2) he was on his own ground when he fired the gun. Hickeringill's counsel argued, among other things, that the plaintiff had no "property possessory" in the ducks and "admitting the plaintiff had a property possessory, yet [he] has but a right of taking them upon his own ground, . . . and the defendant may certainly shoot them upon his own ground: and it is not said that the defendant came on the plaintiff's ground to shoot; nor is it found that he did; therefore it shall be intended that he shot upon his own ground; and it is not found that he shot at the defendant's [sic] ducks, and it is of common right for every man to shoot on his own [p*20] ground, and even at this day every freeholder qualified may do it, and the defendant is so qualified."

[On the basis of Lord Holt's questions from the bench, it seems as if he were prepared to hold that the fact that the wildfowl were "in the plaintiff's decoy pond, and so in his possession, . . . [was] sufficient without showing that he had any property in them." Upon reargument, however, counsel for the defendant pointed out that the declaration did not state that the birds ever settled in the pond, but simply "that they used to resort and come" to it. It is perhaps for this reason that Lord Holt developed the theory announced in the opinion:]

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[1] *Inst.* 100. Vivarium is a word of large extent, and ex vi termini signifieth a place in land or water where living things are kept.

HOLT, C.J. I am of opinion that this action doth lie. It seems to be new in its instance, but is not new in the reason or principle of it. For, 1st, this using or making a decoy is lawful. 2dly, This employment of his ground to that use is profitable to the plaintiff, as is the skill and management of that employment. As to the first, Every man that hath a property may employ it for his pleasure and profit, as for alluring and procuring decoy ducks to come to his pond. To learn the trade of seducing other ducks to come there in order to be taken is not prohibited either by the law of the land or the moral law; but it is as lawful to use art to seduce them, to catch them, and destroy them for the use of mankind, as to kill and destroy wildfowl or tame cattle. Then when a man useth his art or his skill to take them, to sell and dispose of for his profit this is his trade; and he that hinders another in his trade or livelihood is liable to an action for so hindering him. Why otherwise are scandalous words spoken of a man in his profession actionable, when without his profession they are not so? Though they do not affect any damage, yet are they mischievous in themselves; and therefore in their own nature productive of damage; and therefore an action lies against him. Such are all words that are spoken of a man to disparage him in his trade, that may bring damage to him; though they do not charge him with any crime that may make him obnoxious to punishment; to say a merchant is broken, or that he is failing, or is not able to pay his debts. 1 Roll. 60, 1; all the cases there put. How much more, when the defendant doth an actual and real damage to another when he is in the very act of receiving profit by his employment.

Now, there are two sorts of acts for doing damage to a man's employment, for which an action lies; the one is in respect of a man's privilege; the other is in respect of his property. In that of a man's franchise or privilege whereby he hath a fair, market, or ferry, if another shall use the like liberty, though out of his limits, he shall be liable to an action; though by grant from the king. But therein is the difference to be taken between a liberty in which the public hath a benefit, and that wherein the public is not concerned. 22 H. 6, 14, 15. The other is where a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood; there an action lies in all cases. But if a man doth him damage by using the same employment; as if Mr. Hickeringill had set up another decoy on his own ground near the plaintiff's, and that had spoiled the custom of the plaintiff, no action would lie because he had as much liberty to make and use a decoy as the plaintiff. This is like the case of 11 H. 4. 47. One schoolmaster sets up a new school to the damage of an ancient school, and thereby the scholars are allured from the old school to come to his new. (The action there was held not to lie.) But suppose Mr. Hickeringill should lie in the way with his guns, and fright the boys from going to school, and their parents would not let them go thither; sure that schoolmaster might have an action for the loss of his scholars. 29 E. 3. 18. A man hath a market, to which he hath toll for horses sold: a man is bringing his horse to [p*21] market to sell: a stranger hinders and obstructs him from going thither to the market: an action lies because it imports damage. Action upon the case lies against one that shall by threats fright away his tenant at will.[2] 9 H. 7. 8. 21 H. 6.31. 9 H. 7.7. 14 Ed. 4.7. Vide Rastal. 622. 2 Cro. 423. Trespass was brought for beating his servant, whereby he was hindered from taking his toll; the obstruction is a damage, though not the loss of his service.

There was an objection that did occur to me, though I do not remember it to be made at the bar; which is, that it is not mentioned in the declaration what number or nature of wildfowl were frightened away by the defendant's shooting. . . . Now considering the nature of the case, it is not possible to declare of the number, that were frighted away; because the plaintiff had not possession of them, to count them. Where a man brings trespass for taking his goods, he must declare of the quantity, because he, by having had the possession, may know what he had, and

[2] Upon the same principle it was held, that an action lay against the master of a vessel for purposely firing a cannon at some negroes at *Calabar* on the coast of *Africa*, and thereby deterring them from trading with the plaintiff. Tarlton & al. v. M'Gawley, Peake's Ca. 205.

therefore must know what he lost. . . . Secondly, says Mr. Solicitor,[3] here is not the nature of the wildfowl stated; for wildfowl are of several sorts; ducks, teal, mallard, and indeed all birds that are wild are wildfowl. [Lord Holt's answer to this is that the term "wildfowl" is a technical one known in treatises, cases and statutes.] . . .

And when we do know that of long time in the kingdom these artificial contrivances of decoy ponds and decoy ducks have been used for enticing into those ponds wildfowl, in order to be taken for the profit of the owner of the pond, who is at the expense of servants, engines, and other management, whereby the markets of the nation may be furnished; there is great reason to give encouragement thereunto; that the people who are so instrumental by their skill and industry so to furnish the markets should reap the benefit and have their action. But in short, that which is the true reason, is, that this action is not brought to recover damage for the loss of the fowl, but for the disturbance.

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[3] [This is a strange use of this word, for even by Lord Holt's time the term "solicitor" was coming to have its modern English meaning of a lawyer who represented a person out of court but did not speak for him in the central royal courts, the latter function being confined to barristers. Lord Holt apparently is using the word in its older sense meaning simply a person who urges, prompts or instigates. *See* 6 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 448–49 (2d ed. 1937); *see generally id.* 431–81; H. COHEN, HISTORY OF THE ENGLISH BAR AND ATTORNATUS TO 1450, at 126–43, 277–341 (1929). There may also be a hint of opprobrium in Holt's usage. Ed.]

Notes and Questions

1. Lord Holt's English is a lot closer to Shakespeare's than it is to ours, so getting through this opinion may be tough going. I have added some paragraphing to help out; the original is all one paragraph. If you take is slowly, you ought to be able to get it.

2. How does the holding of *Keeble* differ from *Pierson*? Why does it so differ?

3. *Keeble* is cited in *Pierson* as "11 *Mod* 74–130," *supra*, p. S8. Is Justice Tompkins' distinction persuasive? Can you distinguish the cases? For some suggestions as to why Justice Tompkins perceived *Keeble* as he did, see the following note. [p*22]

4. At first glance it would seem that if Post had been able to persuade the court in *Pierson*, he may have had an automatically winning case. It's not quite that simple, however. It has been argued that *Keeble* would not apply to situations where the hunting was being done for sport. *See* Simpson, *The Timeless Principles of the Common Law*: Keeble v. Hickeringill *(1707)*, in *id.*, LEADING CASES IN THE COMMON LAW 64 (1995). (The Simpson article also contains a wonderful description of what an elaborate contraption a "decoy pond" was. One should not be thinking of the plastic decoys favored by duck hunters in the U.S.) For an argument distinguishing *Keeble* on policy grounds, see Krier, *Capture and Counteraction: Self-Help by Environmental Zealots*, 30 U. RICH. L. REV. 1045–52 (1996).

Note on Reports

Any system of law which depends on decided cases as a principal source of law needs, in order to become at all sophisticated, some way of recording and reporting the decisions of the cases. The lawyers who were involved in administering the English common law responded early to this need for a system of reporting cases. (Indeed, it has been suggested that the existence of a system of reported common law cases, along with a centralized judiciary and a professional bar, constitute the chief reasons why England did not adopt a civil law system during the "reception" of Roman law which is sometimes thought to have taken place in Europe during the Renaissance.) Like so many other things about our legal system, the reporting of cases developed over a long period of time. At different times it was done for different purposes and with differing

degrees of accuracy. The earliest reports are to be found in hand-written books, called "Year Books" which begin toward the end of the thirteenth century. Printed Year Books begin in the late fifteenth century and run until 1535. During the sixteenth and seventeenth centuries, most of the Year Books were printed in volumes, called, because of their heavy gothic type, the "black letter editions," and some Year Books are available today only in those editions. Others have been edited and published in modern editions by the Rolls Series, the Selden Society, and the Ames Foundation. For example, the case cited in the principal case as "11 H. 4. 47" (more fully today "Y.B.Hil. 11 Hen. 4, f. 47, pl. 19 (1410)") is a Year Book case to be found in the black letter Year Book of the eleventh year of the reign of Henry IV (1409–10) on page 47 (the nineteenth plea of Hilary term), first printed by Richard Tottel in 1553. *See generally* 2 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 525–56 (4th ed. 1936); T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 268–73 (5th ed. 1956).

Whether or not the Year Book reporters had an official status is a matter of some controversy. What is clear, however, is that after the Year Books ceased to be published, the reporting of English cases became a function of private members of the English bar.[1] The judges continued to deliver their opinions, as they had in the Middle Ages, orally in open court. Arguments of counsel, too, were an exclusively oral affair. The reporters, or persons working for them, sat in court and took it all down in shorthand as best they could. The *Keeble* case is one among many cases which were subject to multiple and conflicting reports. According to J.W. Wallace, a nineteenth century reporter of the United States Supreme Court, who made an extensive study of the matter, none of the reporters of the *Keeble* case prior to East is reliable. See J. WALLACE, THE REPORTERS 387–88, 398–400 (4th ed. 1882). For this reason the version given here relies principally on East, which is said to have been taken from Lord Holt's manuscript. 11 East was not published until 1815, over one hundred years after the decision was rendered and, significantly, after the decision in *Pierson v. Post*, a fact which may have been of some relevance to both the advocacy and the decision in the latter case.

This somewhat haphazard system of individual reporting of decisions continued in England to the end of the eighteenth century, when courts and lawyers [p*23] began to realize that something more reliable was necessary. Courts in both England and America[2] began to take a hand in making reports more official. In America the courts came to employ a reporter of decisions whose reports would be the official ones for that court. George Caines, for example, the reporter of *Pierson v. Post*, was the first official New York reporter. F. AUMANN, THE CHANGING AMERICAN LEGAL SYSTEM 76 (1940). Traditionally, the early decisions of the Supreme Court through volume ninety of the U.S. Reports are referred to by the names of the early reporters of decisions: Dallas, Cranch, Wheaton, Peters, Howard, Black and Wallace. While the name of the reporter of decisions is still to be found on the title page of most reports, the proliferation of reported decisions and the confusion of multiple citations to different reporter's names has led to the practice of numbering American reports consecutively by jurisdiction, e.g., 95 U.S., 57 N.Y., etc. The availability of the unofficial reports of the West Publishing Company, which are published on a regional basis (e.g., N.E., N.W., etc.), has led some states to discontinue their

[1] *Black's Law Dictionary* has the most comprehensive tables of what the abbreviations of the various reports stand for, e.g., 11 Mod. 30 means that the case is to be found in volume eleven of Style's *Modern King's Bench Reports* at page 30. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (19th ed. 2010), published by the editors of the Harvard Law Review and subscribed to by the editors of the Columbia and University of Pennsylvania Law Reviews and the Yale Law Journal, contains a more or less generally followed set of abbreviations for American reports.

[2] Reporting of American decisions did not begin until late in the eighteenth century, a fact which paradoxically increased the authority of English common law decisions. *See* F. AUMANN, *supra*, 71–77.

official reporter series. Most of the larger states, however, still issue official reports. *See generally* Surrency, *Law Reports in the United States*, 25 AM. J. LEGAL HIST. 48 (1981).

While the problem of determining the official text of any decision has been considerably reduced, there is always the possibility of a variance between the official and unofficial version. The problem is perhaps most serious not with reported court decisions but with statutes. In the case of statutes, a single word or piece of punctuation is frequently critical. In many jurisdictions the official Code is not complete or not up-to-date. For statutes not in the official Code the uncodified statutes-at-large or session laws contain the only official text. The moral is simple: when in doubt, check. Even if not in doubt, use the official text for any point which depends on one or two key words.

Note on the Private Law of Wild Animals Today

By and large the common law jurisdictions have followed the directions suggested in *Pierson*. The cases cited in the Problems, *supra*, p. S26, are typical. There are occasional deviations. In Liesner v. Wanie, 156 Wis. 16, 145 N.W. 374 (1914), the court affirmed a directed verdict for a plaintiff-hunter who had mortally wounded a wolf against a defendant who delivered the final shot and seized the animal. It purported to rest its opinion on "the law of the chase by common-law principles, differing from the more ancient civil law which postponed the point of vested interest to that of actual taking." *Id.* at 20, 145 N.W. at 376.[1] Some courts have also refused to follow the doctrine of Justinian as it applies to wild animals which escape from captivity. E.A. Stephens & Co. v. Albers, 81 Colo. 488, 256 P. 15 (1927), involved a silver fox named "McKenzie Duncan," a second-generation captive who escaped and was shot while prowling near a chicken house. His pelt was sold to the defendant whom the original [p*24] owner sued for the return of the pelt or its value. The court held for the original owner:

> We are loath to believe that a man may capture a grizzly bear in the environs of New York or Chicago, or a seal in a millpond in Massachusetts, or an elephant in a cornfield in Iowa, or a silver fox on a ranch in Morgan County, Colo. and snap his fingers in the face of its former owner whose title had been acquired by a considerable expenditure of time, labor, and money; or that the rule which requires that where one of two persons must suffer the loss falls upon him whose carelessness caused it, has any application here. If the owner was negligent in permitting the escape the dealer was even more reckless in making the purchase.

81 Colo. at 497, 256 P. at 18. Conti v. ASPCA, 77 Misc. 2d 61, 353 N.Y.S.2d 288 (N.Y. Civ. Ct. 1974) (concerning a parrot named "Chester"), is to the same effect.

In some settings control over access is an effective substitute for ownership of wild animals. Does it make any difference whether fish in a pond owned by *A* are themselves owned by *A* so long as *A*'s ownership of the pond permits *A* to exclude *B* and all other members of the public from fishing in it? See Dycus v. Sillers, 557 So. 2d 486, 502 (Miss. 1990) ("a case about a fishin' hole"):

> . . . [N]ot all waters nor all fish swimming therein are public. . . . Easiest are the now familiar catfish ponds, wholly man-made, which dot the Delta and into which fingerlings are placed, fed, raised and harvested, at all times privately owned . . . . Where a lake or pond is wholly man-made or "artificial", the record title holders own the waters and all life within them . . . whether the lake or pond has been built for commercial, drainage, recreational or

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[1] Never underestimate the power of a treatise writer. The sole authority cited for this proposition in *Liesner* is a similar statement in J. INGHAM, WILD ANIMALS 5–6 (1900). Ingham's authority for the proposition? A Québec case (Charlebois v. Raymond, 12 Low. Can. Jr. 55 (Cir. Ct. 1868)) which states that the French law of the chase differs from the Roman and *Pierson v. Post*! Can we cross *Liesner* off as a mistake, then, or is something more going on? *See* Note on Game Laws, *infra*, at S31.

aesthetic reasons. By the same token, our law protects from interference a record titleholder's interest in small, completely landlocked natural . . . lakes.

In *Dycus* the court concluded that the fishing hole in question (which covered 92 acres) fell within the category of "natural landlocked" bodies of water even though Corps of Engineers dredging had opened a channel allowing boats to pass from an adjacent lake. This supported the plaintiff's action to enjoin the defendant's fishing. In such a situation is the ownership of the fish an issue? Would it be an issue if the plaintiff's action were for the value of fish taken from their fishing hole? *See Commonwealth v. Agway*, *infra*, p. S32, and the notes following.

Land ownership also figured in an early Minnesota duck shooting case. In Lamprey v. Danz, 86 Minn. 317, 90 N.W. 578 (1902) the defendant was enjoined from "shooting ducks or any other game on or over the land of the plaintiff" on the basis of the landowner's "exclusive right of hunting and fishing on his land, and the waters covering it." (Emphasis added.) How different is this from the situation and legal theory of *Keeble*?

The most important recent developments concerning the law of wild animals, however, have not concerned suits between individuals but rather regulation of hunting and conservation by the state.

B. PUBLIC REGULATION OF THE CAPTURE OF WILD ANIMALS

COMMONWEALTH v. AGWAY, INC.

Superior Court of Pennsylvania.
210 Pa. Super. 150, 232 A.2d 69 (1967).

JACOBS, J. The Commonwealth of Pennsylvania brought this suit in trespass to recover damages for the value of fish killed as a result of pollution of the South Branch of French Creek and French Creek near Union City. The complaint alleged that the discharge of certain chemicals into the creek caused the death of some 12,000 fish and 60,000 minnows, all such fish being in a state of freedom in the inland waters of the Commonwealth.

The court below dismissed the complaint on the grounds that the Commonwealth did not have a property interest in such ferae naturae that would support a suit in trespass for damages, and that the exclusive remedy for the Commonwealth was the penal provisions of The Fish Law of 1959, Act of December 15, 1959, P.L. 1779, as amended, 30 P.S. § 1 et seq.[1]

The controlling question in this case is whether the Commonwealth has a property interest in fish in a state of freedom, the invasion of which will [p*31] support an action in trespass for

[1] That act provides, inter alia: "§ 200. No person shall put or place in any waters within or on the boundaries of this Commonwealth any electricity, explosives or any poisonous substances whatsoever for the purpose of catching, injuring or killing fish. . . . No person shall allow any substance of any kind or character, deleterious, destructive or poisonous to fish, to be turned into or allowed to run, flow, wash or be emptied into any waters within this Commonwealth, unless it is shown to the satisfaction of the Commission or to the proper court that every reasonable and practicable means has been used to abate and prevent the pollution of waters in question by the escape of deleterious substances.

"§ 202. Any person violating the preceding provisions of this article shall, on conviction as provided in chapter 14 of this act, be sentenced to pay a fine of not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1,000.00).

"§ 310. It is the intent of this act to prescribe an exclusive system for the angling, catching and taking of fish, and for their propagation, management and protection in waters within, bounding on, or adjacent to, this Commonwealth. . . ."

(Purdon 2012). And in 1971 the Pennsylvania Constitution was amended to add the following section:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

PA. CONST. art. 1, § 27 (2012). As a lawyer in the Pennsylvania Attorney General's Office, how would you now proceed if a case like *Agway* arose? *See generally*, Dernbach, *Taking the Pennsylvania Constitution Seriously When It Protects the Environment* (pts. 1–2), 103 DICK. L. REV. 699 (1999), 104 DICK. L. REV. 97 (1999).

4. Could a group of commercial fishermen who customarily fished in the polluted stream recover damages or obtain an injunction against future discharges? *See* Columbia River Fishermen's Protective Union v. City of St. Helens, 160 Or. 654, 87 P.2d 195 (1939) (allowing injunction but not damages). Could the owner of a private pond polluted by the stream recover for the fish killed as a consequence? For a case which reviews the history of fishing from the Creation through Noah and Isaak Walton and holds that a lower riparian may not sue an upper riparian whose pollution has destroyed the fish in the river, see Hampton v. North Carolina Pulp Co., 49 F.Supp. 625 (E.D.N.C.1943), *rev'd per curiam*, 139 F.2d 840 (4th Cir.1944). For the state court decision that prompted its reversal, see Hampton v. North Carolina Pulp Co., 223 N.C. 535, 27 S.E.2d 538 (1943).

5. If the pollution had reached a state-run fish hatchery where fish were raised in small ponds, could the state have recovered in trespass?

6. The principal case is noted in 72 DICK. L. REV. 200 (1967) and discussed in M. BEAN, THE EVOLUTION OF NATIONAL WILDLIFE LAW 35–37 (U.S. Council on Environmental Quality, 1977). See State v. Dickinson Cheese Co., 200 N.W.2d 59 (N.D. 1972) (accepting *Agway*); Maryland v. Amerada Hess Corp., 350 F. Supp. 1060 (D. Md. 1972) (allowing suit by state for an oil spill on the ground of the public trust); State v. Jersey Central Power & Light Co., 69 N.J. 102, 351 A.2d 337 (1976) (allowing suit but denying liability for death of fish caused by change in temperature of water discharged from a nuclear power plant).

7. Today we have a major federal statute on the topic of water pollution, but it is not clear that the statute would extend to this river. It depends on whether the river is "navigable." Water Quality Improvement Act of 1970, *as amended*, 33 U.S.C. §§ 1251–1376 (2012). Pennsylvania has a Clean Streams Act, as indicated in Note 3, which may well apply to this river. As of 2012, no one has suggested unconstitutionality of the Pennsylvania fish statute under *Hughes v. Oklahoma*, *infra*, p. S38, but the only reported case involving direct private enforcement by the state is *Agway*. The principal effect of the Pennsylvania constitutional provision seems to have been to give members of the public standing to sue.

If you were representing the Commonwealth of Pennsylvania today, and the same fact-situation arose as in *Agway*, how would you proceed?

Note on Game Laws

The King's Prerogative and the Ratione Soli. The court in *Pierson v. Post*, you will recall, commented on general lack of English authority on the naked question of how possession in wild animals is acquired. The authorities cited [p*34] involved questions of private franchise, statute

or title *ratione soli*.[1] All these questions may be viewed as being dependent upon the notion of the king's prerogative: "Whereby a right may accrue to the crown itself, or to such as claim under the title of the crown, as by the king's grant, or by prescription, which supposes an ancient grant." 2 W. BLACKSTONE, COMMENTARIES *408. One species of prerogative property is "the property of such animals *feræ naturæ*, as are known by the denomination of game, with the right of pursuing, taking, and destroying them: which is vested in the king alone, and from him derived to such of his subjects as have received the grants of a chase, a park, a free warren, or free fishery." 2 W. BLACKSTONE, COMMENTARIES *410–11. (The fact that the owner of a chase or warren had the privilege of pursuing onto anyone's property animals started within the warren may be the source of the curious statements about the common law in *Liesner v. Wanie*, *supra*, p. S31. *See* 7 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 491–95 (2d ed. 1937).)

Thus, private franchises to take game are seen as grants of a portion of the king's prerogative rights. By the same token the king (and later the king in his parliament) can make regulations in the form of game laws for the hunting of his animals since he must give permission to hunt them in the first place. It is not so clear that title *ratione soli* is based upon the king's prerogative. Blackstone seems to think that it is, basing his views on the notion that royal grant is the source of all land titles. Other authors have criticized Blackstone's exclusive reliance on the prerogative as the source of English wild animal law, preferring to see title *ratione soli* as a form of "natural right" by the land owner. See 2 W. BLACKSTONE, COMMENTARIES *419, at 878–79 & nn. 23–28 (W. Lewis ed. 1898); 1 W. HOLDSWORTH, *supra*, at 101 n. 7 (7th ed. 1956). See also *id.* 101–02; 7 *id.* 490–95 (2d ed. 1937).

The matter was not completely settled in England until after the passage of the Game Laws (various dates from the fourteenth to the eighteenth centuries), a series of criminal statutes which had the effect of transferring much of the king's ancient prerogatives in game to the large landowners. See 1 W. HOLDSWORTH, *supra*, at 107–08. The first unequivocal statement of title *ratione soli* does not come until Blades v. Higgs, 11 H.L. Cas. 621, 11 Eng. Rep. 1474 (1865). For a modern account of the whole story with a strong point of view, see 7 W. HOLDSWORTH, *supra*, at 488–95 (2d ed.1937) and authorities cited therein. *See also* P. MUNSCHE, GENTLEMEN AND POACHERS (1981). The queen's prerogative in wild animals (except swans and royal fish) and all franchises of forest, free chase, park and free warren were abolished in England by the Wild Creatures and Forest Laws Act, 1971, c. 47. [p*35]]

State "Ownership" of Wild Animals and the Constitution. In the United States no king's prerogative exists. We do, however, have game laws, the doctrine of title *ratione soli* and even private franchises. What justification is there is this country for these things? The legislatures of the various states have assumed property rights in the state as justification for making laws

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[1] Although we have encountered the concept of title to wild animals *ratione soli* before, a definition at this point might be helpful. Here is how the RESTATEMENT OF PROPERTY § 450 comment *g*, at 2906 (1944) puts it:

> Subject to such paramount authority as may be asserted by the state, [the owner of land] not only has [the] power to prevent appropriation by others, but an attempt at appropriation by others may be rendered ineffective by his right to claim the benefit of the attempt. Thus, if B, a trespasser, shoots wild game upon land possessed by A, A may claim the game or recover damages for its conversion.

This restates what many courts in fact hold, but the following case may be more consistent with the underlying rationale of the wild animal cases which we have developed above: *B*'s marsh buggies exploring for oil and gas inadvertently trespassed upon *A*'s marsh causing the death of several hundred muskrats. *A*, who was in the business of trapping muskrats, sued to recover the value of those killed. The court held that *A* could not recover for the muskrats killed since they were not his property, but that he was entitled to recover damages for the loss to future harvests. Harrison v. Petroleum Surveys, 80 So. 2d 153 (La. App. 1955).

regarding wild animals. The New York legislature, for example, first mentioned this principle explicitly in the Act of April 15, 1912, ch. 318, 175, 1912 N.Y. LAWS 585. The statute remains essentially the same today: "The state of New York owns all fish, game, wildlife, shellfish, crustacea and protected insects in the state, except those legally acquired and held in private ownership. Any person who kills, takes or possesses such fish, game, wildlife, shellfish, crustacea or protected insects thereby consents that title thereto shall remain in the state for the purpose of regulating and controlling their use and disposition." N.Y. ENVIRONMENTAL CONSERV. LAW § 11–0105 (McKinney 2012).

In Geer v. Connecticut, 161 U.S. 519 (1895), cited in the principal case, the Supreme Court was confronted with a challenge to a Connecticut law which, in effect, forbade taking out of the state game killed in the state. The law, it was argued, was beyond the state's competence to pass since it constituted an interference with interstate commerce. The majority opinion sustains the state's right to regulate on the basis both of the king's prerogative and of the civil law concept that res nullius belonged in common to all the citizens of the state. The Court continued, "Whilst the fundamental principles upon which the common property in game rests have undergone no change, the development of free institutions has led to the recognition of the fact that the power or control lodged in the State, resulting from this common ownership, is to be exercised, like all other powers of government, as a trust for the benefit of the people, and not as a prerogative for the advantage of the government, as distinct from the people, or for the benefit of private individuals as distinguished from the public good." 161 U.S. at 529. *See generally* Sax, *The Public Trust Doctrine in Natural Resource Law*: *Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970). Justice Field dissented principally on the ground that the statute interfered with the property rights of individuals; Justice Harlan on the interstate commerce ground. All three opinions are well worth reading as a study in varying judicial philosophies.

Some of the ramifications of the ownership theory can be seen in the following: (1) In a state with a statute like the New York statute quoted above can the owner of a large tract of uncultivated land sue a trespasser for the mussels which he has taken from the bed of a stream which runs through the tract? *See* Gratz v. McKee, 258 F. 335 (8th Cir.1919), *rev'd on rehearing*, 270 F. 713 (1920), *aff'd as to judgment*, 260 U.S. 127 (1922). (2) Suppose that *A* seizes game in violation of the game laws of his state. Does he own the game? Does it make any difference if he is claiming against (a) a game warden found to have taken the game in performance of his duty (Jones v. Metcalf, 96 Vt. 327, 119 A. 430 (1923)); (b) a fellow hunter (Dapson v. Daly, 257 Mass. 195, 153 N.E. 454 (1926) (alternative holding)); (c) a trespasser on *A*'s land (James v. Wood, 82 Me. 173, 19 A. 160 (1889)). If *A* moves the animal or its skin to another state, does he violate 18 U.S.C. § 2314 (1976) which prohibits interstate shipment of goods "stolen, converted or taken by fraud"? See United States v. Plott, 345 F. Supp. 1229 (S.D.N.Y. 1972). Don't make up your mind completely on these cases until you have read the next section of the book. (3) Suppose that *A*, still in violation of the game laws, takes fish from a pond located on private land with the permission of the owner or shoots game on an enclosed "private" preserve. Has he stolen the state's animals? *Compare* Koop v. United States, 296 F.2d 53 (8th Cir.1961), *with* Washburn v. State, 90 Okl.Crim. 306, 213 P.2d 870 (1950) (fishing without a license on a completely landlocked lake). *See also* Annot., 15 A.L.R.2d [p*36] 754 (1951). (4) Suppose the State of New York forbids the sale of alligator shoes because the alligator is an endangered species. Alligators are not native to New York. Is the statute constitutional? *See* A.E. Nettleton Co. v. Diamond, 27 N.Y.2d 182, 315 N.Y.S.2d 625, 264 N.E.2d 118 (1970). *Cf.* Andrus v. Allard, 444 U.S. 51 (1979) (upholding the ban on sale of eagle feathers in the Federal Eagle Protection Act). (5) Suppose substantial amounts of plaintiff's crops are harvested by geese drawn to a neighboring state wildlife refuge. Can he recover from the state on the theory that they own the animals? *See* Sickman v. United States, 184 F.2d 616 (7th Cir.1950), *cert. denied*, 341 U.S. 939 (1951). On some other theory? *Cf.* Andrews v. Andrews, 242 N.C. 382, 88 S.E.2d 88 (1955).

As indicated in the principal case, Supreme Court cases after *Geer* expressed some doubt that state ownership of game justifies state game laws and preferred to justify such laws on the basis of the "police power," the general power of the state to regulate in the interests of the health, safety and welfare of its people. In Hughes v. Oklahoma, 441 U.S. 322 (1979), *noted in* 60 Or. L. Rev. 413 (1981), the Court expressly overruled *Geer* and held that Oklahoma could not consistent with the commerce clause forbid the export out of the state of minnows raised in the wild in state waters. While the Court noted that "[t]he overruling of *Geer* does not leave the States powerless to protect and conserve wild animal life within their borders" (*id*. at 338), it did not deal with the question of the source of that power nor with the implications of the overruling of *Geer* for the public trust doctrine so powerfully put in that case. The Court also left intact its holding in Baldwin v. Montana Fish & Game Com'n, 436 U.S. 371 (1978), which had rejected equal protection and privileges and immunities clause challenges to Montana's hunting license fees which blatantly discriminate between in-state and out-of-state residents. Could *Hughes* be used to argue for the unconstitutionality of PA. STAT. tit. 30, § 2506, *supra*, p. S34? Arguing the case for Pennsylvania how would you reply?

Game Law Administration. If the constitutional and theoretical bases of game laws remain to be worked out, so too, on a more mundane level, does their administration. Consider New York as a paradigm:

The basic colonial statute on the topic was the "Act for the more Effectual preservation of Deer and other Game and ye Destruction of Wolves Wild Catts and other Vermin" of Sept. 18, 1708, ch. 172, reprinted in 1 THE COLONIAL LAW OF NEW YORK 618–20 (1894). It established seasons for the hunting of deer and certain game birds and authorized the payment of bounties for the taking of wolves, wildcats and "other vermin," including foxes. (Why did Justice Livingston not cite this statute in support of his opinion in *Pierson v. Post*?) The statute only applied to counties on Long Island. Throughout the colonial period statutes were passed regulating the taking of game, particularly deer, and the 1708 act was amended as late as 1772. See ch. 1558, in 5 *id.* 399–400. But the colonial laws were scattered, and their enforcement sporadic. See T. LUND, AMERICAN WILDLIFE LAW 29–31 (1980); see also *id.* 24–34. It seems fair to say that until the middle of the 19th century New York left matters pretty much to individual initiative and the common law.

In 1844 the New York legislature reversed *Pierson v. Post* so far as deer hunting in Suffolk and Queens counties was concerned and vested property rights in any person who started the animal "with dogs or otherwise" and was in fresh pursuit of it. The statute also established a hunting season and made other hunting regulations. Act of April 1, 1844, ch. 109, 1844 N.Y. Laws 94. [p*37] Five years later the New York legislature repealed this law and all other game laws in favor of a statute which gave authority to county boards of supervisors to make laws for the protection of game. Act of April 3, 1849, ch. 194, § 4, para. 13, 1849 N.Y. Laws 295. The pursuit law was never re-enacted, but in 1859 the legislature again passed a statute for the protection of wild animals which contained provisions creating a hunting season, regulating the sale of deer skin and venison, and regulating fishing for certain species of fish. Although it was not a very comprehensive law, it nevertheless indicated that the legislature was again interested in taking upon itself the task of regulating wildlife. Act of April 19, 1859, ch. 511, 1859 N.Y. Laws 1185. Then in the Act of June 7, 1895, ch. 974, § 302, 1895 N.Y. Laws 935, the power of the local bodies to regulate was completely repealed.

The precursor to the modern Fish and Wildlife Law was passed in 1900. By this time the game laws were most comprehensive and had become so complex in scope and application that a Forest, Fish, and Game Commission was created. The Commission had the power to control fish stocking and to enforce fish, game, and forest laws. The Conservation Department was created by the Act of July 12, 1911, ch. 647, 1911 N.Y. Laws 1496, and included, among others, a Division

of Fish and Game. This division was given authority to make rules and regulations giving protection beyond the statute upon petition. Act of March 5, 1928, ch. 242, 1928 N.Y. Laws 485. All the divisions of the Department were given power to make rules and regulations to secure enforcement of the provisions of the Conservation laws. Today although the Conservation Department has been abolished and its duties transferred to the Department of Environmental Conservation, that department continues to exercise administrative power and other powers such as granting additional protection to certain animals, issuing and revoking hunting and fishing licenses, establishing restricted areas where hunting and fishing is prohibited, etc. N.Y. ENVIRONMENTAL CONSERV. LAW §§ 11–0305, 11–0311, 11–0321 (McKinney 2012).

The New York development from common law to statutory law to administrative law is typical of many areas of American law. For an excellent discussion of this same process in the context of industrial accidents with a full treatment of its legal process ramifications, see C. AUERBACH, L. GARRISON, W. HURST & S. MERMIN, THE LEGAL PROCESS (1961).

There has been some tendency in recent years for the locus of regulation of wildlife to shift from the states to the federal government. While the shift is not nearly so complete as it is in many other areas of law, federal law and federal administration now play a significant role when the wildlife in question is on federal land (the federal government still owns vast tracts of land, particularly in the West), or outside the United States, or when it is affected by a federal project, such as building a dam. Some of this legislation is preservationist in nature, e.g., Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1543 (1988), which was at issue in the famous "snail darter case," TVA v. Hill, 437 U.S. 153 (1978), or the Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361–1407 (1988), which was an outgrowth of the "Save the Whale" campaign. Some of this legislation is more developmental in nature, conservation for the purpose of ensuring commercial exploitation, *e.g*., Fishery Conservation and Management Act of 1976, 16 U.S.C. §§ 1801–1882 (1988). The conflict in policy remains to be worked out. *See* Child & Haley, *The Marine Mammal Protection Act and the Fishery Conservation and Management Act: The Need for Balance*, 56 WASH. L. REV. 397 (1981). *See also* Tilleman, *It's a Crime: Public Interest Laws (Fish and Game Statutes) Ignore Mens Rea Offenses—Towards a New Classification* [p*38] *Scheme*, 16 AM. J. CRIM. LAW 279 (1989); Amestoy, *Wildlife Habitat Protection Through State-Wide Land Use Regulation*, 14 HARV. ENV. L. REV. 45 (1990); Coggins & Ward, *The Law of Wildlife Management on Federal Public Lands*, 60 OR. L. REV. 59 (1981).

The increasing interest in problems of wildlife conservation has produced a considerable literature. Bibliographies may be found in Coggins & Smith, *The Emerging Law of Wildlife*: *A Narrative Bibliography*, 6 Environmental L. 583 (1975) and in M. BEAN, *supra*, p. S35, at 470–78. More recent still are [U.S.] COUNCIL ON ENVIRONMENTAL QUALITY, WILDLIFE AND AMERICA (H. Brokaw ed. 1978) (an excellent collection of essays) and T. LUND, *supra*.

C. CLASSICAL THEORIES OF PROPERTY

1.The "Occupation Theory" of Property.

We have already seen one statement of the "occupation theory" of property in the extracts from Pufendorf and a criticism of it by Barbeyrac who relied on the "labor theory" of John Locke, *supra*, p. S18. The following is perhaps the most famous statement of the occupation theory by an English writer, though it shows some influence from the labor theory. It is followed by an equally famous criticism of it by Sir Henry Maine, one of the first "social scientists" who applied himself to law. [p*25]