

## Outline – Class02

1. Last hour we suggested that Colden made a fundamental mistake in arguing the case as if the outcome depended on his showing that Post had occupancy of the fox. It was a fundamental mistake for two reasons:
  - a. It's a lot harder, as we will see today, to argue that Post had occupancy of the fox granted the state of the authorities than it is that Pierson committed a wrong in interfering with the hunt.
  - b. It's a fundamental mistake for another reason. At least in my view, that's not what Post was angry about. Sometimes you have to win cases for reasons that are not what's on the client's mind, but it always helps to pay attention to what the client says.

Thus, the case was argued as if it were a case of trespass whereas in fact it was trespass on the case. Did everybody get that?

I want to focus on the authorities in *Pierson v. Post* today, mostly those that it cites and a few that it doesn't. The question toward which is all of this heading is: Granted the state of the authorities at the time of the case did the court have to reach this result?

2. Last time we began a brief run-through of the sources of law mentioned in the case:
  - a. “Now, as we are without any municipal regulations of our own.” (Livingston, p. S6). Were they? We will say something about it today.
  - b. “Most of the cases which have occurred in England, relating to property in wild animals, have either been discussed and decided upon the principles of their positive statute regulations, or have arisen between the huntsman and the owner of the land upon which beasts *feræ naturæ* have been apprehended; the former claiming them by title of occupancy, and the latter *ratione soli*.” (Tompkins, p. S3–S4) This statement is true, and if the conclusion is not inevitable, it is at least plausible. We'll get to that question immediately.
  - c. “The case cited from 11 *Mod.* 74–130, I think clearly distinguishable from the present ... .” (Tomkins, p. S4). Is it? We'll also get to that question immediately.
  - d. General wisdom. How does the court get to Justinian? Assuming, without deciding, that the court is going to decide the case on the basis of Justinian, does Justinian's text compel the result? How about the numerous authorities between Justinian and 1805 that had tried to come to grips with Justinian's text? We'll get to that in the middle of this class.
  - e. Custom. “This is a knotty point, and should have been submitted to the arbitration of sportsmen.” (Livingston, p. S5) He says nothing more about that than that, and the majority doesn't say anything about custom. Why?
  - f. Policy, in both the dissent and the majority. We'll get to that at the end of the class today.

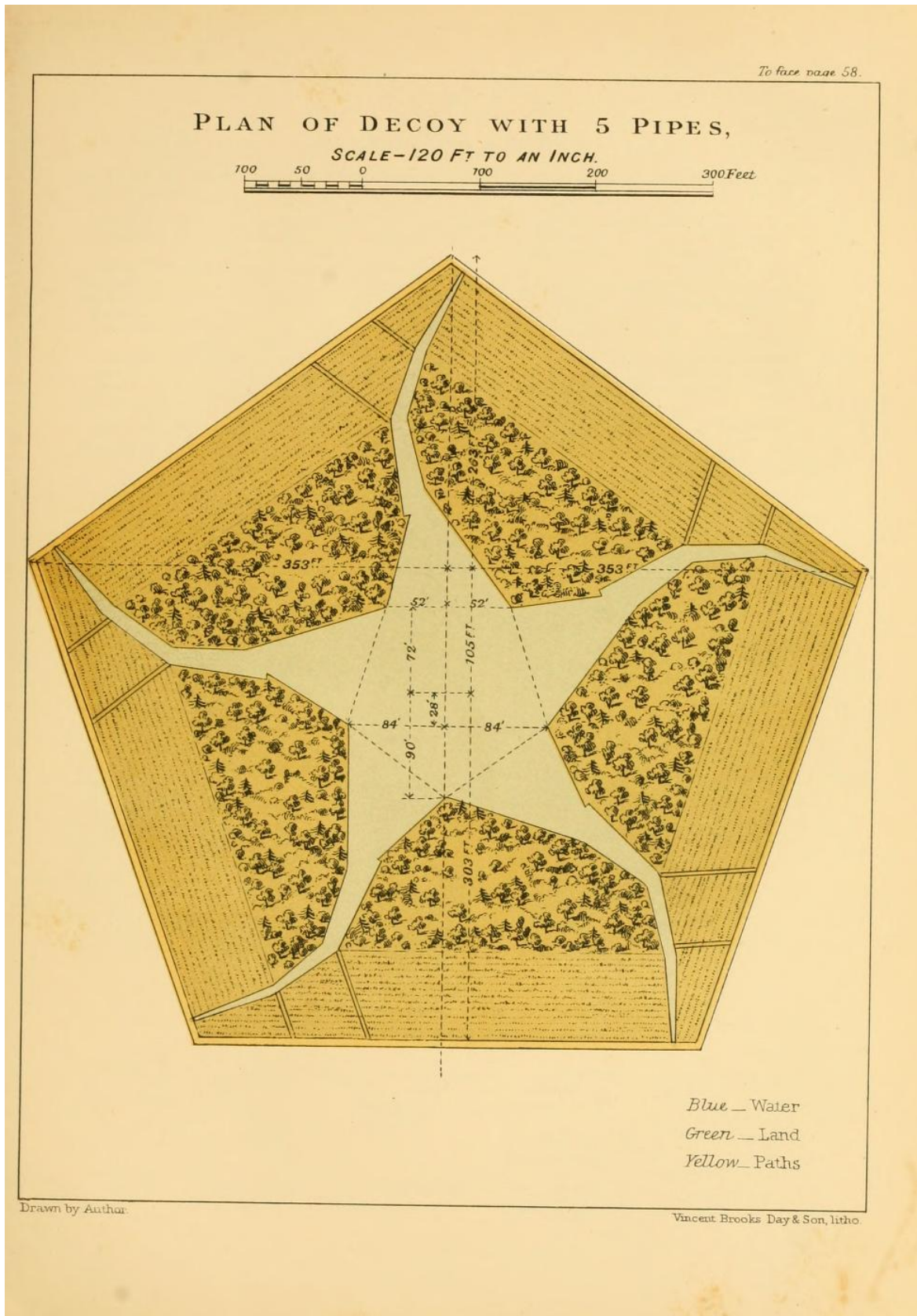
We concluded last time that granted the apparent absence of any New York cases or statutes and the court's distinguishing of the English authorities, the court turned to wisdom, as reflected in English treatise-writers, Bracton, Fleta and Blackstone, and from the authorities cited in them to writers in the natural law school (the court does not use the term, but Sanford does).

3. “Most of the cases which have occurred in England, relating to property in wild animals, have either been discussed and decided upon the principles of their positive statute regulations, or have arisen between the huntsman and the owner of the land upon which

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beasts *feræ naturæ* have been apprehended; the former claiming them by title of occupancy, and the latter *ratione soli*.” (Tomkins, p. S7)

- a. First, a straight-forward question: why are cases between a huntsman and a landowner irrelevant?
- b. Then a harder question: if we adopt English law why are the statutes irrelevant?



*Id.* (This is almost 10 acres [9.87 if my arithmetic is right].)



Drawn by Author.

Vincent Brooks Day & Son, lith.

ENTRANCE TO A DECOY PIPE, WITH DOG AT WORK AND WILD FOWL  
FOLLOWING HIM UP THE PIPE.

Sir Ralph Payne-Gallwey, *The book of duck decoys, their construction, management, and history* (London 1886)  
<https://archive.org/details/bookofduckdecoys00paynega>



**Boarstall (Bucks.) Duck Decoy - a working pipe**

Several pipes lead from duck decoy ponds. This one is in working order. Wide next to the pond, it narrows considerably at the other end where the ducks, lured by a dog, can be caught. <http://www.geograph.org.uk/photo/2170276>

4. *Keeble v. Hickeringill*: “The case cited from 11 *Mod.* 74–130, I think clearly distinguishable from the present ... .” (Tomkins, p. S8). Is it?

- a. “that the ducks were in the plaintiff’s decoy pond, and so in his possession, from which it is obvious the court laid much stress in their opinion upon the plaintiff’s possession of the ducks, *ratione soli*” (Tomkins, p. S8)

Perhaps caused by the bad report, though I must confess that having read the report in *Mod.* I’m darned if I can see how Tompkins got it out of it. The Salkeld report, which the court also cites, comes from a previous hearing in the case:

“And as to the other objection, the plaintiff needs not shew *how many ducks* were frightened, because it is *impossible* for him to do it, and though they were *wild*, yet they were *fluminece volucres* [literally ‘river birds’], and in the plaintiff’s decoy pond, and so in his *possession*, which is sufficient without shewing that he had any *property* in them.” 3 Salk. 10.

Holt probably said this at the first hearing, but the problem is, as yet another report (Cas. t. Holt 17) makes clear, defendant’s counsel objected that that is not what the declaration said. It said simply that the ducks ‘used to resort and come’, which is not the same thing as being in the pond.

- b. “there the action was for maliciously hindering and disturbing the plaintiff in the exercise and enjoyment of a private franchise” (Tomkins, p. S8)

A careful reading of the opinion leads to the conclusion that franchises are by analogy, or even by way of contrast:

“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.” [Holt is not using the word ‘property’ in the first sentence in the narrow sense that it is being used in *Pierson*.]

- c. It would thus seem that the court in *Pierson* misdistinguished *Keeble*. What would have happened if it hadn’t? Result still not quite compelled because of Holt’s emphasis on employment rather than sport.
- d. Policy may lead in other directions, at least according to the dissent.

5. Assume the sources of law are as both majority and dissent say that they are: statute, cases (first N.Y. then England), writers upon general principles of law, custom, and policy. Did the court have to decide the case in the way in which it did?

- a. Justinian is, of course, not binding authority in New York even in 1805. Assuming, without deciding, that the court is going to decide the case on the basis of Justinian, does Justinian’s text compel the result?

“Wild animals, birds, and fish, that is to say all the creatures which the land, the sea, and the sky produce, as soon as they are caught by any one become at once the property of their captor by the law of nations; for natural reason admits the title of the first occupant to that which previously had no owner.” (p. S16)

“An animal thus caught by you is deemed your property so long as it is completely under your control; but so soon as it has escaped from your control, and recovered its natural liberty, it ceases to be yours, and belongs to the first person who subsequently catches it. It is deemed to have recovered its natural liberty when you have lost sight of it, or when, though it is still in your sight, it would be difficult to pursue it.” (p. S17)

“It has been doubted whether a wild animal becomes your property immediately [when] you have wounded it so severely as to be able to catch it. Some have thought that it becomes yours at once, and remains so as long as you pursue it, though it ceases to be yours when you cease the pursuit, and becomes again the property of any one who catches it: others have been of opinion that it does not belong to you till you have actually caught it. And we confirm this latter view, for it may happen in many ways that you will not capture it.” (p. S17)

- b. Thus, it would seem that even if we look to Justinian, he does not solve the problem.
  - i. He does not deal with malicious interference with the hunt.
  - ii. He resolves the closest analogy, wounding, not by an appeal to natural law but an appeal to imperial authority.
- c. If we look to writers in the natural law school, the court cites three:
  - i. Grotius, who offers the standard of deprived of his natural liberty, but with a qualification. He is at pains to point out how local law can differ. That leads us to the 1708 statute assigned for today, which was being amended as late as 1772 (p. 36: an “Act for the more Effectual preservation of Deear and other Game and ye Detruccion of Wolves Wild Catts and other Vermin” which category includes foxes and for the destruction of which a bounty is paid) which seems to say that foxes are a bad thing, and the court’s curious ignoring of it. This is reinforced by the recently discovered fact that Southampton had a local bounty on foxes at the time.
  - ii. Pufendorf, who also seems to require physical control, and seems to believe that state power does not extend to those things over which the state does not have control, a basically Hobbesian approach
  - iii. Barbeyrac, whose ideas are firmly founded in Locke. One would have thought that children of the American Revolution would be supporting Locke not Hobbes. Tomkins, p. S7: “*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.” This would seem to be just wrong. E.g., p. S21: “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.’”
- d. Other writers of the natural law school, notably Jean-Jacques Burlamaqui (Swiss, 1694–1748) and Emer de Vattel (Swiss, 1714–1767)

None of the 18th century writers on natural law agrees with Pufendorf; they all side with Barbeyrac. Particularly notable are Jean-Jacques Burlamaqui (Swiss, 1694–1748) and

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Emer de Vattel (Swiss, 1714–1767), both particularly notable because their works were known in the U.S. in this period. One would have thought that children of the American Revolution would be supporting Locke not Hobbes.

### 6. Policy.

- a. Should courts be making policy?
- b. Majority's policy of discouraging litigation.
  - i. Easy way to get rid of a silly suit (but why grant the *certiorari*?).
  - ii. Pierson is less likely to bring an action than Post?
  - iii. All this depends on knowledge of the law.
  - iv. Easier standard to apply? “greatly maimed” “deprived of its natural liberty” “render escape impossible”
- c. Dissent
  - i. Foxes are a bad thing. (That could have been supported by the legislation but was not.)
  - ii. Fox-hunters will be encouraged because they know the law? Even if they do, is the purpose of fox-hunting to get the fox?