N.Y.S. 781 (Sup. Ct. 1898). *Cf.* Koop v. United States, 296 F.2d 53 (8th Cir.1961); *R. Brown, Personal Property* § 2 (W. Raushenbush ed. 1975); 2 W. BLACKSTONE, COMMENTARIES *391–94.

3. In Problem (2), above, suppose Post had the fox in the cage and Pierson came along and opened the door of the cage and let it out. Same result as in the principal case? Why or why not? *Cf.* Haywood v. State, 41 Ark. 479 (1883) (theft of a mockingbird from a cage); State v. House, 65 N.C. 315, 6 Am. R. 744 (1871) (theft of an otter from a trap).

Sollers v. Sollers, 77 Md. 148, 26 A. 188 (1893), holds that fish which have been captured and then placed in an inlet with a fence which blocks their access to a main stream may still be captured by another. Can you distinguish?

4. Assume the same operative facts as in the principal case except that the animal being pursued is (a) a lamb strayed from Post's flock, (b) a deer, or (c) bees swarming from Post's hive. Can you think of ways to distinguish these situations from the principal case? Do you think Justice Tompkins would accept your distinctions? Justice Livingston? Why or why not? On straying animals, see Oakley v. State, 152 Tex. Crim. 361, 214 S.W.2d 298 (1948) (a cow); Tim Kinney & Co. v. First National Bank, 10 Wyo. 115, 67 P. 471 (1902) (sheep); *cf.* Helsel v. Fletcher, 98 Okla. 285, 225 P. 514 (1924) (a cat); Herries v. Bell, 220 Mass. 243, [p*19] 107 N.E. 944 (1915) (a dog). Because of their habit of swarming and their disregard of property lines, bees have been productive of much litigation. *See* Rexroth v. Coon, 15 R.I. 35, 23 A. 37 (1885); Goff 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 ferœ naturœ* (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); 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 Ferœ Naturœ*, 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

[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.

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:]

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 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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[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.

[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. 5. 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 official reporter series. Most of the larger states, however, still issue

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[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 165–218 (15th ed. 1991), 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 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. 18, 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 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

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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 Quebec 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 34.

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. 30, 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. We shall return to this topic after a brief digression about the "occupation theory" of property and its consequences.

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* pp. 14–17. 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]

**JOHNSON v. M'INTOSH**

Supreme Court of the United States
21 U.S. (8 Wheat.) 543 (1823)

ERROR to the District Court of Illinois. This was an action of ejectment for lands in the State and District of Illinois, claimed by the plaintiffs under a purchase and conveyance from the Piankeshaw Indians, and by the defendant, under a grant from the United States. It came up on a case stated, upon which there was a judgment below for the defendant. The case stated set out the following facts: ...

[The statement of the case outlines the boundaries in the royal charter establishing the Virginia Company in 1609, which included the land north of the Ohio River forming today the southern parts of Illinois and Indiana. In 1773 the plaintiffs' predecessors in title purchased a huge tract of land in southern Illinois from the Illinois Indians for the then-enormous sum of $24,000; in 1775 another group of plaintiffs' predecessors in title purchased a similarly large tract of land in southern Indiana from the Piankeshaw Indians for $31,000. Both deeds granted the land to the plaintiffs' predecessors in title "or to George the Third, then King of Great Britain and Ireland, his heirs and successors, for the use ... of the grantees ... by whichever of those tenures they might most legally hold." After the Revolution, Virginia ceded its claim to lands beyond the Appalachians to the United States, and in 1818 the United States conveyed by patent title to William M'Intosh to the 11,560 acres specifically at issue in this case. Neither the plaintiffs nor any of their predecessors in title ever obtained possession of the land,] but were prevented by the war of the American revolution, which soon after commenced, and by the disputes and troubles which preceded it, from obtaining such possession. ... [S]ince the termination of the war, and before it, they have repeatedly, and at various times, from the year 1781, till the year 1816, petitioned the Congress of the United States to acknowledge and confirm their title to those lands, under the purchases and deeds in question, but without success.

Judgment being given for the defendant on the case stated, the plaintiffs brought this writ of error.

The cause was argued by Mr. *Harper* and Mr. [*Daniel*] *Webster* for the plaintiffs, and by Mr. *Winder* and Mr. *Murray* for the defendants. ...

On the part of the plaintiffs, it was contended, 1. That upon the facts stated in the case, the Piankeshaw Indians were the owners of the lands in dispute, at the time of executing the deed of October 10th, 1775, and had power to sell. But as the United States had purchased the same lands of the same Indians, both parties claim from the same source. It would seem, therefore, to be unnecessary, and merely speculative, to discuss the question respecting the sort of title or ownership, which may be thought to belong to savage tribes, in the