

Introduction

Pierson v. Post (1805) is a famous (and some might say infamous) leading American property law case. It had its origins in a dispute over possession of a wild fox that occurred on a beach on early nineteenth-century Long Island between the sons of two wealthy families from the Hamptons. A young man named Nathan Post, who was engaged in hunting a fox “with dogs and hounds,” and another young man, Jesse Pierson, who intervened in the hunt and killed that fox.¹ It has been used in law school classrooms for over a hundred years to introduce students to the concept of possession, read by literally tens of thousands of law students each year. As one modern property casebook puts it, “[s]o many students have begun their legal studies with *Pierson v. Post*, it is almost unbelievable that an American-educated lawyer would be unfamiliar with it.”² And, according to the online database HeinOnline, it has been referenced in nearly eight hundred law journal articles and other secondary legal sources to date.³

Pierson poses the following question in stark terms: Who has first possession of a wild animal (a fox) – the person pursuing it (Post) or the person who actually kills and takes it (Pierson)? A majority of the New York Supreme Court in 1805 sided with the interloper, Pierson – referred to memorably by the dissenting judge, Henry Brockholst Livingston, as “a saucy intruder.”⁴ Despite Livingston’s often witty protest, the majority decision in *Pierson* became a serious precedent in

¹ *Pierson v. Post*, 3 Cai. R. 175 (N.Y. Sup. Ct., 1805), 175.

² Susan Fletcher French and Gerald Korngold eds., *Cases and Text on Property*, 6th ed. (New York: Aspen, 2015), 71.

³ The count of citations up to July 21, 2015, was 783. ⁴ *Pierson*, 181.

the common law world for what became known as the capture rule: an unowned or so-called fugitive resource such as a wild animal – or air, or oil and gas, or ground water – becomes owned only when it is tamed or controlled or captured and is thereby effectively reduced to possession.⁵ In a hunt, even in the case of an imminent taking by one who is publicly or notoriously engaged in the chase (like Post), the animal can and often does escape; so the clearest manifestation of control is to kill it (as Pierson did). Killing the animal constitutes best possession. This is sometimes referred to as a “bright line” rule, said to be clearer and easier to apply than the allegedly “fuzzy” standard of an imminent taking that might still go awry. Yet it is acknowledged even by those who think the capture rule is a good one from the perspective of clarity and the promotion of beneficial competition that it encourages overconsumption and waste in an environmental context, as individuals seek to capture and hold more of an unowned natural resource than they need or can process and use in order to be the effective owner of it and exclude others from it. The capture rule has been called “cataclysmic” for nonhuman animals given the lessons of the North American bison and the American passenger pigeon.⁶

Governments are free to legislate around the capture rule and they have in places like Texas where its use for oil and gas fields would have created waste and a free-for-all of vast proportions.⁷ The same is true of groundwater regulation in hot dry states like Texas and California.⁸ Wild animals too were placed under state ownership for their protection and management.⁹

⁵ William Blackstone wrote of wild animals (animals *ferae naturae*) and “the very elements, of fire or light, of air, and of water” that “they are of a vague and fugitive nature, and therefore can admit only of a precarious and qualified ownership, which lasts so long as they are in actual use and occupation, but no longer.” *Blackstone’s Commentaries on the Laws of England* (Oxford: Clarendon Press, 1765–69): Book 2 *The Rights of Things* (1766), 395 (emphasis added) (<http://avalon.law.yale.edu>). Subsequent references to Blackstone’s *Commentaries* come from the Avalon edition.

⁶ See Rance L. Craft, “Of Reservoir Hogs and Pelt Fiction: Defending the *Ferae Naturae* Analogy Between Petroleum and Wildlife,” 44 *Emory Law Journal* (1995): 697–733, 715–18.

⁷ See *ibid.*, 712 (“During the 1920s, the Federal Oil Conservation Board estimated that extraction under the rule of capture yielded recovery rates of 20–25% of total petroleum deposits, where 85–90% recovery rates were possible with controlled drilling”).

⁸ See e.g. Burke W. Griggs, “Does Groundwater Management Work?” 15 *Kansas Journal of Law and Public Policy* (2005–2006): 391–405, 393 (noting that the capture rule from *Pierson v. Post* “itself [...] ran wild” in the Western United States, in Texas forcing regulations on producers in order to save them from themselves, and in the San Joaquin Valley of California, groundwater pumping dropped land surface levels by nearly thirty feet).

⁹ See Craft, “Of Reservoir Hogs and Pelt Fiction,” 726–27 (explaining that in the 1930s states began to take seriously the conservation required to protect depleted wildlife stocks,

Yet in an unlegislated environment, *Pierson* and the capture rule is often the default or first-stop common law rule – the wasteful rule that values the animal killer/capturer over the mere pursuer.

Of the thirty-three American cases included in Appendix A, “Citation History,” that cite to *Pierson*, nineteen relate to wild animals and the rest to a wide array of other topics. This low number of citations and the limited impact of *Pierson* as a working precedent stand in sharp contrast to the fame and notoriety given to *Pierson* by its regular appearance in law school classrooms through prominent inclusion in law school casebooks. Probably for this reason and due to its inherently fertile philosophical nature it has been and remains a touchstone in American law journal articles. Significant numbers of citations appear on articles written about intellectual property, the property status of human body parts, and, perhaps surprisingly, home-run baseballs hit into the stands that become the object of contentious dispute.¹⁰ As the editor of a symposium on the

providing funding for enforcement and establishing licensing requirement and hunting seasons). See also Michael C. Blumm and Lucus Ritchie, “The Pioneer Spirit and the Public Trust: The American Rule of Capture and State Ownership of Wildlife,” 35 *Environmental Law* (2005): 673–720 (defending state ownership of wild animals and giving an account of its survival in American constitutional law).

¹⁰ On intellectual property see e.g. Shantanu C. Pathak, “The AIA and the First-to-File Provision: Consequences and Constitutionality,” 28 *Temple International and Comparative Law Journal* (2014): 115–46, 126–27 (noting that the 2011 US patent law overhaul takes its cue from *Pierson v. Post* in following a “first in time, first in right” principle, where first in time means the capture of first-to-file, rather than first-to-invent, the older rule that required more investigation to determine which of two rivals invented first, described as too “fuzzy” when compared against “bright-line notice”). Intellectual property use of *Pierson* became common in the 1990s. See e.g. Scott A. Chambers, “Exhaustion Doctrine in Biotechnology,” 35 *IDEA: The Journal of Law and Technology* (1994–95): 289–330, 292–93 (wondering if escaped transgenic material such as laboratory mice and wind pollinated genetically modified grain crops would qualify as *ferae naturae* and be subject to the capture rule).

On property in human body parts, see e.g. Radhika Rao, “Property, Privacy, and the Human Body,” 80 *Boston University Law Review* (2000): 359–460, 375 (referring to *Pierson* for the idea that may have animated a particular case that “severed body parts – much like oil, water, wild animals, and other migratory resources – become free for ‘capture’ by the first person who recognizes this commercial potential and puts them to productive use”).

On baseballs, see e.g. Paul Finkelman, “Fugitive Baseballs and Abandoned Property: Who Owns the Home Run Ball?” 23 *Cardozo Law Review* (2001–2002): 1609–33, 1629; Patrick Stoklas, “*Popov v. Hayashi*, a Modern Day *Pierson v. Post*: A Comment on What the Court Should Have Done with the Seventy-Third Home Run Baseball Hit by Barry Bonds,” 34 *Loyola University Chicago Law Journal* (2002–2003): 901–43, 910–12, 932–40; Jason Cieslik, “There’s a Drive . . . Way Back . . . It Might be . . . It Could Be . . . Another Lawsuit: *Popov v. Hayashi*,” 20 *Thomas M. Cooley Law Review* (2003):

rule of capture in the journal *Environmental Law* in 2005 put it, “the universal implications of capture” as they are traditionally explored by law professors through topics such as oil and gas, wildlife, cattle grazing rights, and public land use will play a role in facing twenty-first century problems of “new capture possibilities – such as new territory on other planets, genome sequencing techniques, or power generated from tidal flows.”¹¹

How anyone comes to own anything in a world, a state of nature, where no one owns anything, was traditionally explored through the concept of occupation or *occupatio*. Blackstone discussed how thinkers such as Grotius and Pufendorf asserted that a tacit assent gave occupation the ability to turn what would be an illegitimate taking from the common property of mankind into a legitimate personal appropriation, and how those like Barbeyrac and Locke thought “that the very act of occupancy, alone, being a degree of bodily labour, is from a principle of nature justice, without any consent or compact, sufficient of itself to gain a title.”¹² Blackstone noted, with some impatience, that this was “[a] dispute that favours too much of nice and scholastic refinement! However, both sides agree in this, that *occupancy* is the thing by which the title was in fact originally gained.”¹³ Hence, occupation and how one effectively became a “first taker” was an extremely important starting point in an understanding of legal property, and of how anyone comes to be acknowledged as an owner of anything.¹⁴

TEXT, SOURCES, AND ARGUMENT: A FIRST FORAY

The question of how one owns a piece of property that wanders free – and really is not yet any one’s property – was traditionally explored in Ancient Roman law and by later civil and natural law thinkers through the hypothetical of the wild animal, such as a boar or a bear or whatever animal that culture or country had an interest in hunting and was familiar to the educated male readers of the legal or philosophical text. The usual rhythm in these texts was the following: there are two kinds of property, real (or unmovable) property (i.e. land) and personal (or movable)

605–38, 626–27. See also Amy Beckham Osborne, “Baseball and the Law: A Selected Annotated Bibliography, 1990–2004,” 97 *Law Library Journal* (2005): 335–70.

¹¹ Frank Lupo, “Introduction Symposium: The Rule of Capture and its Consequences,” 35 *Environmental Law* (2005): 647–48, 648.

¹² Blackstone, *Commentaries*, 2: 8. ¹³ *Ibid.* (emphasis added). ¹⁴ *Ibid.*, 9.

property – the latter known as chattels in the common law, but movable property was the civil law term. Of the second kind, namely, property that moves, ownership is either absolute or qualified. Only a qualified property might be had in items that are owned by no one and subject to the use of all (*res communes*) such as light, air, the sea, and running water. Wild animals (or animals *ferae naturae*) are capable of individual appropriation but they too, unlike a domestic animal that would be owned absolutely, are qualified property that must be reduced to a first possession or occupation in order for the ownership right to be absolute and capable of excluding others.¹⁵ And so the question arises: What degree of control is necessary in order for that first possession or occupation to be established? Was wounding required? If so, did it need to be mortal wounding? What if a trap was used? Did it need to be an inescapable trap?

Unlike domesticated animals where loss of possession would not result in loss of ownership, wild animals or animals *ferae naturae* had to remain in the power or control of the first occupant otherwise ownership of them would be lost – hence the qualified nature of the ownership.¹⁶ This explains Pierson’s lawyers’ reliance on the passage from Justinian’s *Institutes* (Book 2, Chapter 12), which stated that:

Wild beasts, birds, fish, and all the animals which are bred either in the sea, the air or upon the earth, do, as soon as they are taken, become instantly by the law of nations, the property of the captor [. . .] But, tho’ wild beasts, or fowl, when taken, are esteemed to be the property of the captor, whilst they continue in his custody, yet, when they have once escaped and recovered their natural liberty, the right of the captor ceases, and they become the property of the first, who seizes them.¹⁷

¹⁵ “[T]hings *res communes* are available for the use of all [. . .] but cannot, by their nature, become the property of any person or persons. Things *res nullius* can become the property of a person or persons” but had either never been owned or had been abandoned by their previous owner. See Prue Taylor, *An Ecological Approach to International Law: Responding to Challenges of Climate Change* (London; New York: Routledge, 1998), 270.

¹⁶ See Blackstone, *Commentaries*, 2: 389 (“animals, which have in themselves a principal and power of motion, and (unless particularly confined) can convey themselves from one part of the world to the another”), 390 (the tame or domestic animal has an *animus revertendi*, or habit of returning, and so can be owned absolutely, i.e. it remains in continuous occupation or possession so long as it returns; whereas one can only have a qualified property in the wild animal).

¹⁷ I rely here on a translation of the *Institutes* that early Americans would have had access to, namely *D. Justiniani Institutionum Libri Quatuor: The Four Books of Justinian’s Institutions, translated into English, with notes, by George Harris LL.D.*, 2nd ed. (London, Printed by J. Purser, 1761), Book Two, Chapter 1, section 12, pp. 4–5. This is the edition listed in Herbert A. Johnson, *Imported Eighteenth-Century Law Treatises in American Libraries, 1700–1799* (Knoxville: University of Tennessee Press, 1978), 18.

Application of this passage to the situation in *Pierson* was ambiguous, as Post (at least according to Livingston) was allegedly about to take the animal and was certainly in continued pursuit of it; the fox had not been caught and escaped from him as the Justinian point hypothesized.¹⁸ Blackstone too seemed to have in mind the situation of capture and escape when he discussed animals *ferae naturae* as a species of qualified property. He wrote that the property in a wild animal “ceases the instant they are out of possession: for, when no man is engaged in their actual occupation, they become again common, and every man has an equal right to appropriate them to his own use.”¹⁹

There were other authors who agreed that the degree of control Livingston at least thought Post had, imminent taking, especially if it included wounding or trapping, was sufficient. The ancient Roman jurist Trebatius was of this view. And, indeed, Justinian did include reference to Trebatius: his views of the effect of wounding were mentioned in Gaius’s discussion of the occupation of a wild animal, a passage included in Justinian’s longer work, the *Digest*.²⁰ However, the *Digest* was

It was also included in David Hoffman, *A Course of Legal Study: Respectfully addressed to the students of law in the United States* (Baltimore: Coale and Maxwell, 1817), 269.

¹⁸ The rest of the passage in Chapter 12 reads: “And they are understood to have recovered their natural liberty, if they have run or flown out of sight; and even if they are not out of sight, when it so happens, that they can not without difficulty be pursued and retaken.” *Institutes*, 5. Charles Donahue points out that this passage is inconclusive on the *Pierson* facts. See Charles Donahue Jr., “*Animalia Ferae Naturae*: Rome, Bologna, Leyden, Oxford and Queen’s County, N.Y.” in Roger S. Bagnall and William V. Harris eds., *Studies in Roman Law: In Memory of A. Arthur Schiller* (Leiden: E. J. Brill, 1986), 39–63, 41–42. See also Charles Donahue Jr., “Noodt, Titius, and the Natural Law School: The Occupation of Wild Animals and the Intersection of Property and Tort” in J.A. Ankum, J.E. Spruit and F.B.J. Wubbe eds., *Satura Roberto Feenstra* (Fribourg: Presses Universitaires de Fribourg, 1985) 609–29, 610.

¹⁹ Blackstone, *Commentaries*, 2: 395. Pierson’s citation to Blackstone is to a later point in the text in the next chapter, p. 403, to support the point that occupation is indispensable to create title in an animal *ferae naturae*. This is not the best passage to cite from Blackstone on the point, which is made more emphatically and directly in the previous chapter; but there is a passage at p. 403 on wild animals that mentions they are qualified property and the chapter is titled “Of Title to Things Personal by Occupancy.” See *Pierson*, 176; Blackstone, *Commentaries*, 2: 403.

²⁰ F. De Zulueta trans., *Digest 41, 1 & 2* (Oxford: Oxford University Press, 1920), 10 (“It has been asked whether a wild beast, which has been so wounded that it can be captured, at once becomes the property of the wounder. Trebatius held that it becomes his property at once, and is considered his so long as he keeps up its pursuit, but that, if he gives up its pursuit, it ceases to be his, and once more becomes the property of the first taker [. . .] The usual opinion has been that the animal only becomes a man’s property if he actually captures it, since many things may occur to prevent his capturing it; and this is the truer view”).

a complicated text and much harder to come by in the United States than the *Institutes*. Post's lawyer, Cadwallader David Colden, probably did not have access to it.²¹ Section 13 of the *Institutes*, which Pierson's lawyer, Nathan Sanford, cited, simply said that even wounding was insufficient, as "many accidents frequently happen; which prevent the capture."²² The author of the majority opinion, Justice Daniel Tompkins, did discuss wounding at length.²³ The point is not made explicitly but the line of reasoning seems to be that if wounding, even serious wounding, did not establish possession, then mere pursuit would not.²⁴ The focus of the majority opinion is that all the authorities agree that mere pursuit was not enough.

So was *Pierson* a case of mere pursuit? The majority decision certainly treated it as if it were. Tompkins wrote in his majority decision: "The case now under consideration is one of mere pursuit."²⁵ This is noteworthy as Post's lawyer, Colden, conceded in his argument that there would be no occupation in the wild animal if there had only been pursuit. He said

- ²¹ See Alan Watson, "Introduction to Law for Second-Year Students?" 46 *Journal of Legal Education* (1996): 430–44, 440 (discussing *Pierson's* failure to refer to the *Digest*, noting that *Institutes* was the go-to source for Americans and the "*Digest* was often simply not readily to hand or was thought too difficult"). There is no listing for the *Digest* in Johnson, *Imported Eighteenth-Century Law Treatises in American Libraries*. David Hoffman discusses how much more complex the *Digest* or *Pandects* are than the *Institutes*. See Hoffman, *A Course of Legal Study*, 265. See also 89 ("It seemed wise to the great digester of the Roman law, to arrange and abridge in the Institutes [...] the multifarious learning of the Code and Pandects").
- ²² *Pierson*, 176; George Harris (1761) translation of the *Institutes*, 5. Donahue thinks this passage is also inconclusive. See Donahue, *Animalia Ferae Naturae*, 42–43; Donahue, "Noodt, Titius, and the Natural Law School," 610–11.
- ²³ There was disagreement amongst the authorities as to the effect of wounding, Pufendorf conceding reluctantly that yes it gave the original striker a right while the pursuit continued and Bynkershoek agreed. Tompkins understood Barbeyrac to be in agreement, at least on this point, that "mortal wounding [...] by one not abandoning his pursuit [...] may [...] be deemed possession of him." *Pierson*, 178. Like Justinian, Grotius thought that wounding was not enough but snares, nets or traps might be so long as the instruments themselves are in the person's power and the animal is trapped so that it cannot escape. See *Pierson*, 179. The quotes from Grotius are in Latin. To examine the passages in English in their original context, see Hugo Grotius, *The Law of War and Peace (De Jure Belli ac Pacis)*, Louise R. Loomis trans. (New York: Walter J. Black, 1949), 121–22.
- ²⁴ Donahue writes that "[s]urely if a wounded animal does not become 'yours' even if the wounding enables you to capture it, then *ipso fortiori* pursuit alone, even pursuit that would have resulted in capture, is not sufficient, absent capture. This is clearly the line of reasoning that impressed the majority of the *Pierson* court, but even this line, though plausible, is not inevitable." Donahue, *Animalia Ferae Naturae*, 42–43; Donahue, "Noodt, Titius, and the Natural Law School," 610.
- ²⁵ *Pierson*, 179.

“I admit [...] that pursuit alone does not give a right of property in animals *ferae naturae*”.²⁶ This point is difficult (if not impossible) to see in many casebook reproductions of *Pierson*, which omit the lawyers’ arguments and jump straight to Tompkins’s majority opinion.²⁷ Livingston wrote that property in wild animals could be acquired “without bodily touch or manucaption, provided the pursuer be within reach, or have a *reasonable* prospect (which certainly existed here) of taking.”²⁸ Post’s lawyer and Livingston spoke as if this was a situation of some kind of hot pursuit. It was certainly not a situation in which the animal was captured and lost or pursuit was difficult (the points addressed in Chapter 12 of the *Institutes*) or where the claim was based on wounding alone (spoken to in Chapter 13 of the *Institutes*). There is no suggestion that there was any wounding of the fox (minor or mortal) and so much of what Tompkins writes about in the majority decision is not really on point. True, if wounding were not enough, mere pursuit could not be; but the question was whether something more than mere pursuit, i.e. hot pursuit, was sufficient. The majority left that question undecided. Indeed, they outright ignored it, even though that was the case put to them by Post, and to which Livingston took himself to be speaking.

Moreover, although Post’s lawyer, Colden, admitted that pursuit alone would be insufficient, he argued that “manucaption,” actually taking an animal, was “only one of many means, to declare the intention of exclusively appropriating that, which was before in a state of nature.”²⁹ So long as it continued, this declaring of the intention to take was “equivalent to occupancy.”³⁰ So what was required was pursuit plus continued following. “It is all the possession the nature of the subject admits,” Colden argued, “it declares the intention of acquiring dominion, and is as much to be respected as manucaption itself.”³¹ Colden relied on Barbeyrac, an annotator of Puffendorf, as authority for saying that an actual taking was not required.³²

In addition to Barbeyrac, Colden might also have invoked the authority of the great late eighteenth-century French treatise writer Robert-Joseph

²⁶ *Ibid.*, 176.

²⁷ I provide many examples of casebooks excluding the lawyers’ arguments in Chapter 7, including those that do not indicate anything has been removed with ellipses. This matches the current-day practice of not including the arguments of the lawyers in reports of cases but it was controversial to do so at the time. See Chapter 6 on reporters for more discussion of this point.

²⁸ *Pierson*, 182 (emphasis in the original). ²⁹ *Ibid.*, 176. ³⁰ *Ibid.*

³¹ *Ibid.*, 176–77.

³² *Ibid.*, 177 (“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’”).

Pothier. Pothier was a legal scholar of tremendous significance, generally thought to have made the codification of the *droit commun* in the French Code in 1804 possible as a result of the series of legal treatises he wrote starting in the 1760s.³³ He had himself produced an authoritative version of Justinian's *Digest*.³⁴ On the wild animal point, Pothier agreed with the Roman law as it was explained by Trebatius and the old law of the Salians (old customary German law), which favored hot pursuit, understanding it as more civilized (*plus civil*) and what was followed in practice (*est suivi dans l'usage*).³⁵ But Pothier's property treatise was not available in an English translation, which would explain Colden's failure to refer to it. Pufendorf's *Law of Nature and Nations* was available in English, and in an edition that included Barbeyrac's notes on the text.

Pufendorf defined "the most early Occupant" as "he who lays hold on such a thing before others, or gets the start of them in putting in his Claim to it."³⁶ Barbeyrac wrote in his note "that taking Possession actually (*Occupatio*) is not always absolutely necessary to acquire a thing that

³³ See Charles Sumner Lobingier, "Napoleon and his Code," 32 *Harvard Law Review* (1918): 114–34, 119–20, 119 n. 19 (noting the influence of Pothier, especially his book on obligations on the law of contracts and how much the treatises simplified the work of the framers of the Code, creating a kind of advance commentary on the Code). See also Robert Taschereau, "Pothier," 3 *La Revue du Barreau de la province de Québec* (1943): 165–78, 174 (stating that nearly the totality of the Code Napoleon was drawn from Pothier's works, nothing that France might have codified anyway but it would have been a different code without him, and despite the fact that he died thirty years earlier and did not work on the Code directly, Pothier was its veritable creator having provided its paths, material, principles, definitions, and organization).

³⁴ It was a three-volume work published in Paris in 1748 under the title *Pandectae Justinianae in novum ordinem digestae*. See J.E. de Montmorency, "Robert-Joseph Pothier and French Law," 13 *Journal of the Society of Comparative Legislation* (1913): 265–87, 278–79. The *Pandects* were another name for the *Digest*.

³⁵ See Robert-Joseph Pothier, *Traité du droit de domaine de propriété, de la possession, de la prescription qui résulte de la possession*, vol. 10, *Oeuvres Complètes de Pothier*, M. Siffrein ed. (Paris: Chez Chanson, Imprimeur-Libraire, 1821), 18. Pothier set Trebatius against Gaius on the wounding point. The property treatise was Pothier's last published treatise, first published in 1771–72. See de Montmorency, "Robert-Joseph Pothier and French Law," 282.

³⁶ Samuel Pufendorf, *Law of Nature and Nations: Or, a General System of the Most Important Principles of Morality, Jurisprudence, and Politics. In eight books. Written in Latin by the Baron Pufendorf . . . Done into English by Basil Kennett, . . . To which is prefix'd, M. Barbeyrac's prefatory discourse, . . . Done into English by Mr. Carew, . . . To which are now added, all the large notes of M. Barbeyrac, translated from his fourth and last edition: together with large tables* (London: Printed for J. and J. Bonwicke, R. Ware, J. and P. Knapton, S. Birt, T. Longman [and others], 1749), 386 (Book 4, Chapter 6 "Of Occupancy," section 2).

belongs to no body.”³⁷ If he “makes known to others his Design to seize upon a thing [...] he may then acquire the original Property without any actual Possession” but “he must be within Reach of taking what he declares his Design to feixe on.”³⁸ Now Pierson’s lawyer, Sanford, retorted that “[t]he only authority relied on is that of an annotator,” as if the opinion of a mere commentator should not be given much weight.³⁹ However, Barbeyrac’s annotations on Pufendorf’s text were highly esteemed by early Americans, many of whom, like the mentor of John Adams, thought them superior to the Pufendorf text they annotated.⁴⁰ Pothier favored Barbeyrac over Pufendorf on the hot pursuit point.⁴¹ If the text had been in circulation in an English translation in the way many of Pothier’s other works were, one would have expected to see Colden cite it and for it to carry serious weight with a court inclined to decide the case on the basis of learned authority, as the *Pierson* court appeared to be.

Tompkins agreed with Barbeyrac “[t]o a certain extent,” writing that “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.”⁴² Mortal wounding would do, Tompkins seems to suggest, as would a net, trap, or snare that was in the hunter’s power and made the animal’s escape impossible. Tompkins says this is “the full extent of Barbeyrac’s objection to Puffendorf’s definition [...] as can reasonably be inferred from the words or ideas expressed by Barbeyrac in his notes.”⁴³ Barbeyrac “is far from averring that pursuit alone is sufficient,” Tompkins wrote.⁴⁴ And “[t]he case now under consideration is one of mere pursuit.”⁴⁵

³⁷ *Ibid.*, n. 2. ³⁸ *Ibid.* ³⁹ *Pierson*, 177.

⁴⁰ See Daniel R. Coquillette, “Justinian in Braintree: John Adams, Civilian Learning, and Legal Elitism, 1758–1775” in Daniel R. Coquillette ed., *Law in Colonial Massachusetts, 1630–1800: A Conference held 6 and 7 November 1981 by the Colonial Society of Massachusetts* (Boston, MA: Colonial Society of Massachusetts, 1984), 359–418, 382 n. 7 (John Adams wrote of his mentor, Jeremiah Gridley: “He was a great Admirer of Barbeyrac: thought him a much more sensible and learned Man than Puffendorf”). See also Christopher P. Rodgers, “Continental Literature and the Development of the Common Law by the King’s Bench: c. 1750–1800” in Vito Piergiovanni ed., *The Courts and the Development of Commercial Law* (Berlin: Duncker and Humblot, 1987), 161–94, 169 (noting that “[t]he most frequently used edition of Pufendorf was that by Barbeyrac, whose own commentary on the text was itself cited with approval in a number of cases”).

⁴¹ Pothier, *Traité du droit de domaine de propriété* in *Oeuvres Complètes*, 10: 18.

⁴² *Pierson*, 178. ⁴³ *Ibid.*, 179. ⁴⁴ *Ibid.*, 178. ⁴⁵ *Ibid.*, 179.