stated in a dissenting opinion written some 150 years after Johnson v. M'Intosh. See United States v. Sioux Nation of Indians, 448 U.S. 371, 437 (1980).

7. *Epilogue and prologue.* See Rose, supra, at 19-20:

> But perhaps the deepest aspect of the common law text of possession lies in the attitude that this text strikes with respect to the relationship between human beings and nature. At least some Indians professed bewilderment at the concept of owning the land. Indeed they prided themselves on not marking the land but rather on moving lightly through it, living with the land and with its creatures as members of the same family rather than as strangers who visited only to conquer the objects of nature. The doctrine of first possession, quite to the contrary, reflects the attitude that human beings are outsiders to nature. It gives the earth and its creatures over to those who mark them so clearly as to transform them, so that no one else will mistake them for unsubdued nature.
>
> To be sure, we may admire nature and enjoy wildness. But those sentiments find little resonance in the doctrine of first possession. Its texts are those of cultivation, manufacture, and development. We cannot have our fish both loose and fast, as Herman Melville might put it. The common law of first possession makes a choice. The common law gives preference to those who convince the world that they can catch the fish and hold it fast. This may be a reward to useful labor, but it is more precisely the articulation of a specific vocabulary within a structure of symbols understood by a commercial people. It is this commonly understood and shared set of symbols that gives significance and form to what might seem the quintessentially individualistic act: the claim that one has, by "possession," separated for one's self property from the great commons of unowned things.

B. Acquisition by Capture

Pierson v. Post

Supreme Court of New York, 1805
3 Cai. R. 175, 2 Am. Dec. 264

This was an action of trespass on the case commenced in a justice's court, by the present defendant against the now plaintiff.

The declaration stated that Post, being in possession of certain dogs and hounds under his command, did, "upon a certain wild and uninhabited, unpossessed and waste land, called the beach, find and start one of those noxious beasts called a fox," and whilst there hunting, chasing and pursuing the same with his dogs and hounds, and when in view thereof, Pierson, well knowing the fox was so hunted and pursued, did, in the sight of Post, to prevent his catching the same, kill and carry it off. A verdict having been rendered for the plaintiff below, the defendant there sued out a *certiorari,* and now assigned for error, that the declaration and the matters therein contained were not sufficient in law to maintain an action....

TOMPKINS, J., delivered the opinion of the court. This cause comes before us on a return to a *certiorari* directed to one of the justices of Queens county.

The question submitted by the counsel in this cause for our determination is, whether Lodowick Post, by the pursuit with his hounds in the manner alleged in his declaration, acquired such a right to, or property in, the fox, as will sustain an action against Pierson for killing and taking him away?

The cause was argued with much ability by the counsel on both sides, and presents for our decision a novel and nice question. It is admitted that a fox is an animal *ferae naturae,* and that property in such animals is acquired by occupancy only. These admissions narrow the discussion to the simple question of what acts amount to occupancy, applied to acquiring right to wild animals?

If we have recourse to the ancient writers upon general principles of law, the judgment below is obviously erroneous. Justinian's Institutes, lib. 2, tit. 1, s.13, and Fleta, lib. 3, c.2, p. 175, adopt the principle, that pursuit alone vests no property or right in the huntsman; and that even pursuit, accompanied with wounding, is equally ineffectual for that purpose, unless the animal be actually taken. The same principle is recognised by Bracton, lib. 2, c.1, p. 8.

Puffendorf, lib. 4, c.6, s.2, and 10, defines occupancy of beasts *ferae naturae,* to be the actual corporal possession of them, and Bynkershoek is cited as coinciding in this definition. It is indeed with hesitation that Puffendorf affirms that a wild beast mortally wounded, or greatly maimed, cannot be fairly intercepted by another, whilst the pursuit of the person inflicting the wound continues. The foregoing authorities are decisive to show that mere pursuit gave Post no legal right to the fox, but that he became the property of Pierson, who intercepted and killed him.

It therefore only remains to inquire whether there are any contrary principles, or authorities, to be found in other books, which ought to induce a different decision. 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 *ferae naturae* have been apprehended; the former claiming them by title of occupancy, and the latter *ratione soli.* Little satisfactory aid can, therefore, be derived from the English reporters.

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. To a certain extent, and 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; but that, on the contrary, the mortal wounding of such beasts, by one not abandoning his pursuit, may, with the utmost propriety, be deemed possession of him; since, thereby, the pursuer manifests an unequivocal intention of appropriating the animal to his individual use, has deprived him of his natural liberty, and brought him within his certain control. So also, encompassing and securing such animals with nets and toils, or otherwise intercepting them in such a manner as to deprive them of their natural liberty, and render escape impossible, may justly be deemed to give possession of them to those persons who, by their industry and labour, have used such means of apprehending them. Barbeyrac seems to have adopted, and had in view of his notes, the more accurate opinion of Grotius, with respect to occupancy.... The case now under consideration is one of mere pursuit, and presents no

circumstances or acts which can bring it within the definition of occupancy by Puffendorf, or Grotius, or the ideas of Barbeyrac upon that subject.

The case cited from 11 Mod. 74-130, I think clearly distinguishable from the present; inasmuch as there the action was for maliciously hindering and disturbing the plaintiff in the exercise and enjoyment of a private franchise; and in the report of the same case, (3 Salk. 9) Holt, Ch. J., states, 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.*

We are the more readily inclined to confine possession or occupancy of beasts *ferae naturae,* within the limits prescribed by the learned authors above cited, for the sake of certainty, and preserving peace and order in society. If the first seeing, starting, or pursuing such animals, without having so wounded, circumvented or ensnared them, so as to deprive them of their natural liberty, and subject them to the control of their pursuer, should afford the basis of actions against others for intercepting and killing them, it would prove a fertile source of quarrels and litigation.

However uncourteous or unkind the conduct of Pierson towards Post, in this instance, may have been, yet his act was productive of no injury or damage for which a legal remedy can be applied. We are of opinion the judgment below was erroneous, and ought to be reversed.

LIVINGSTON, J. My opinion differs from that of the court. Of six exceptions, taken to the proceedings below, all are abandoned except the third, which reduces the controversy to a single question.

Whether a person who, with his own hounds, starts and hunts a fox on waste and uninhabited ground, and is on the point of seizing his prey, acquires such an interest in the animal, as to have a right of action against another, who in view of the huntsman and his dogs in full pursuit, and with knowledge of the chase, shall kill and carry him away?

This is a knotty point, and should have been submitted to the arbitration of sportsmen, without poring over Justinian, Fleta, Bracton, Puffendorf, Locke, Barbeyrac, or Blackstone, all of whom have been cited; they would have had no difficulty in coming to a prompt and correct conclusion. In a court thus constituted, the skin and carcass of poor *reynard* would have been properly disposed of, and a precedent set, interfering with no usage or custom which the experience of ages has sanctioned, and which must be so well known to every votary of Diana. But the parties have referred the question to our judgment, and we must dispose of it as well as we can, from the partial lights we possess, leaving to a higher tribunal, the correction of any mistake which we may be so unfortunate as to make. By the pleadings it is admitted that a fox is a "wild and noxious beast." Both parties have regarded him, as the law of nations does a pirate, *"hostem humani generis,"* and although *"de mortuis nil nisi bonum,"* be a maxim of our profession, the memory of the deceased has not been spared. His depredations on farmers and on barn yards have not been forgotten; and to put him to death wherever found, is allowed to be meritorious, and of public benefit. Hence it follows, that our decision should have in view the greatest possible encouragement to the destruction of an animal, so cunning and ruthless in his career. But who would keep a pack of hounds; or what gentleman, at the sound of the horn, and at peep of day, would mount his steed, and for hours together, *"sub jove frigido,"* or a vertical sun, pursue the windings of

this wily quadruped, if, just as night came on, and his stratagems and strength were nearly exhausted, a saucy intruder, who had not shared in the honours or labours of the chase, were permitted to come in at the death, and bear away in triumph the object of pursuit? Whatever Justinian may have thought of the matter, it must be recollected that his code was compiled many hundred years ago, and it would be very hard indeed, at the distance of so many centuries, not to have a right to establish a rule for ourselves. In his day, we read of no order of men who made it a business, in the language of the declaration in this cause, "with hounds and dogs to find, start, pursue, hunt, and chase," these animals, and that, too, without any other motive than the preservation of Roman poultry; if this diversion had been then in fashion, the lawyers who composed his institutes would have taken care not to pass it by, without suitable encouragement. If any thing, therefore, in the digests or pandects shall appear to militate against the defendant in error, who, on this occasion, was the foxhunter, we have only to say *tempora mutantur;* and if men themselves change with the times, why should not laws also undergo an alteration?

It may be expected, however, by the learned counsel, that more particular notice be taken of their authorities. I have examined them all, and feel great difficulty in determining, whether to acquire dominion over a thing, before in common, it be sufficient that we barely see it, or know where it is, or wish for it, or make a declaration of our will respecting it; or whether, in the case of wild beasts, setting a trap, or lying in wait, or starting, or pursuing, be enough; or if an actual wounding, or killing, or bodily tact and occupation be necessary. Writers on general law, who have favoured us with their speculations on these points, differ on them all; but, great as is the diversity of sentiment among them, some conclusion must be adopted on the question immediately before us. After mature deliberation, I embrace that of Barbeyrac, as the most rational, and least liable to objection. If at liberty, we might imitate the courtesy of a certain emperor, who, to avoid giving offence to the advocates of any of these different doctrines, adopted a middle course, and by ingenious distinctions, rendered it difficult to say (as often happens after a fierce and angry contest) to whom the palm of victory belonged. He ordained, that if a beast be followed with *large dogs and hounds,* he shall belong to the hunter, not to the chance occupant; and in like manner, if he be killed or wounded with a lance or sword; but if chased with *beagles only,* then he passed to the captor, not to the first pursuer. If slain with a dart, a sling, or a bow, he fell to the hunter, if still in chase, and not to him who might afterwards find and seize him.

Now, as we are without any municipal regulations of our own, and the pursuit here, for aught that appears on the case, being with dogs and hounds of *imperial stature,* we are at liberty to adopt one of the provisions just cited, which comports also with the learned conclusion of Barbeyrac, that property in animals *ferae naturae* may be acquired without bodily touch or manucaption, provided the pursuer be within reach, or have a *reasonable* prospect (which certainly existed here) of taking, what he has *thus* discovered with an intention of converting to his own use.

When we reflect also that the interest of our husbandmen, the most useful of men in any community, will be advanced by the destruction of a beast so pernicious and incorrigible, we cannot greatly err, in saying, that a pursuit like the present, through waste and unoccupied lands, and which must inevitably and speedily have terminated in corporal possession, or bodily *seisin,* confers such a right to the object

of it, as to make any one a wrongdoer, who shall interfere and shoulder the spoil. The justice's judgment ought, therefore, in my opinion, to be affirmed.

Judgment of reversal.

NOTES AND QUESTIONS

1. Thanks to Professor Craig Oren, we have learned that Livingston, J., the author of the dissenting opinion in Pierson v. Post, was Henry Brockholst Livingston (1757-1823). Born into a socially prominent family in New York City, he served in the American Revolution and later as assistant to John Jay when Jay was minister to Spain. Coming back from Spain, Livington was captured by the British but subsequently released. During his career as a lawyer he became an ardent Jeffersonian and wrote a number of newspaper articles opposing Jay's Treaty. In 1806, President Jefferson appointed him to the United States Supreme Court, where he served until his death.

2. The majority and dissenting opinions in Pierson v. Post are peppered with references to a number of obscure legal works and legal scholars. Justinian's Institutes is a Roman law treatise of the sixth century; Bracton was the author of a thirteenth-century tome on English law; Fleta refers to a Latin textbook on English law written in 1290 or thereabouts, supposedly in Fleet prison and possibly by one of the corrupt judges Edward I put there. Barbeyrac, Bynkershoek, Grotius, and Pufendorf (sometimes spelled Puffendorf) were legal scholars who wrote in the seventeenth and eighteenth centuries; the last two of them figured in our discussion of Johnson v. M'Intosh, as did John Locke, the English philosopher (1632-1704) and William Blackstone (1723-1780). See pages 11-14. Blackstone was the first professor of English law at an English university. His famous Commentaries on the Laws of England (1765-1769), the first accessible general statement of English law, was popular and influential in both England and the United States, despite being scorned by the likes of Jeremy Bentham (on whom see page 46) for uncritical acceptance of previous writers and blind admiration of the past. After resigning a professorship at Oxford, Blackstone was appointed to the bench, where in a famous opinion in Perrin v. Blake he concisely formulated the conservative creed of property lawyers of his time: "The law of real property in this country, wherever its materials were gathered, is now formed into a fine artificial system, full of unseen connexions and nice dependencies; and he that breaks one link of the chain, endangers the dissolution of the whole." 1 Francis Hargrave, Tracts Relative to the Law of England 489, 498 (1787).

3. The discussion in Note 3 on page 11 introduced the principle of first in time and suggested the dominant role it plays in the law of property. Did the majority and dissenting justices in Pierson v. Post agree that first in time was the governing principle? Note that the majority held as it did "for the sake of certainty, and preserving peace and order in society." See page 19. How did its opinion (that mere chase is insufficient to confer the rights of first possession) advance those goals? The benefits of peace and order seem obvious enough. What are the advantages of certainty in a property system? Are there any disadvantages in promoting certainty? Consider in this regard the dissenting opinion of Justice Livingston,