Acquisition by Capture Cont’d

- *Ghen v. Rich*
  - The Role of Custom
- *Keeble v. Hickeringill*
  - Constructive Possession

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**Ghen v. Rich,**
8 F. 159 (D. Mass. 1881),

When Should Courts Follow Custom?

- According to the court?
- According to Professor Richard Epstein?
- According to Judge Richard Posner?
Ghen v. Rich cont’d

Pierson v. Post

• What did the whaler do compared to Post?

• Is this ruling consistent with Pierson v. Post?

Keeble v. Hickeringill,
Queen’s Bench (1707),
Casebook p. 31.

• “Constructive” possession – Ratione soli

• Malicious interference with trade

• Benefits to the market
Keeble v. Hickeringill cont’d

• Effect on *Pierson v. Post*?
• Instrumental end?
Keeble v. Hickeringill cont’d

Practical Implications of Coase

Robert Cooter (Perspectives, p. 209) argues that—

• The law should assign entitlements to the party who values them most, so that the costly process of exchanging entitlements is unnecessary.

• Alternatively, if the party who values the entitlement the most cannot be identified, the entitlement should be assigned to the party who can initiate an exchange at the lowest cost.
GREENPEACE, Whalers, and Coase

To whom should we assign the entitlement?

• Who values the entitlement the most?
• Who is more identifiable for the sake of negotiation?

GREENPEACE, Whalers, and Other Considerations

To whom should we assign the entitlement?

• Who is providing the more useful or valuable labor?
• What are the policies or instrumental ends behind the rule you choose?
The Rule of Capture and Wild Animals

- T, a trespasser, captures a wild animal on the land of O, landowner, and carries it off to her own land where she confines it in a cage.
- T1 trespasses on T’s land and takes away the animal.
- In a suit by T against T1, who should win?
- What if O went and took the animal from T and T sues O. Who should win?

Who Owns Wild Animals?

- F, a farmer, is bothered by wild migrating geese on her land and shoots them in violation of the fish and game laws.
- The government confiscates the carcasses, and F sues for their return.
- The government wins; the court explains that the government owns wild animals, may regulate their taking, and may confiscate animals taken in violation of regulations.
Who Owns Wild Animals?

- When the geese return the next year, F sues the government for damage to her field caused by the geese.
- The government wins again, the court holding that the government does not own wild animals and thus is not liable for any damage caused by them.

Wolf Reintroduction
ID, MT, WY, UT, AZ & NM

The Bailey Wildlife Foundation Wolf Compensation Trust
1987-2003
Defenders of Wildlife

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<th>Description</th>
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<td>Average Payment Per Animal</td>
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The Rule of Capture and Other Fugitive Resources: Oil and Gas

There is a common pool of oil beneath A’s and B’s land.

• Does A have a remedy at all if B starts draining the pool?

• Suppose B’s well starts on her land but angles down such that it “bottoms” underneath A’s land. Does the rule of capture apply?

The Rule of Capture and Other Fugitive Resources: Oil and Gas

There is a common pool of oil beneath A’s and B’s land.

• Suppose A reinjected oil that moves under B’s land. B sues to recover damages for use and occupation of her land by A’s oil. What result?
The Rule of Capture and Groundwater

- **Rule of Capture** – English common law rule of “absolute” right (limited by doctrines against waste and malicious injury) – Texas.

- **American Rule** – reasonable use, usually measured by whether it is used on the land from which it is pumped.

- **Correlative Rights** – fair and just proportion, favoring on-land use as the American Rule, but based on amount of land owned.

- **Prior Appropriation** – First in time, first in right – intentional diversion and beneficial use.
The Rule of Capture and Surface Water

- **Riparian/Natural Flow** – Eastern States – reasonable use and not damaging others
- **Colorado Doctrine/Prior Appropriation** – Rocky Mountain states – diversion and beneficial use
- **California Doctrine/Mixed riparian and appropriative rights** – Western States, including Texas