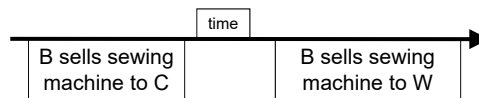


Property

- Module 3
- Allocation

Chain of Title example



Pierson v. Post (Sup. Ct. NY 1805)

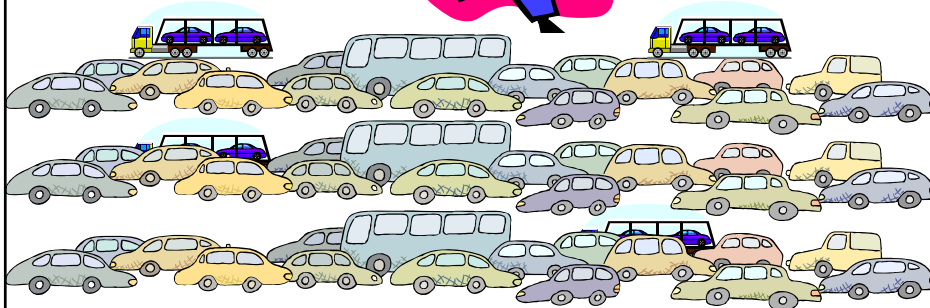


- Dispute?
- What is required to make “occupancy” to acquire rights in wild animals?
- Majority:
 - hot pursuit plus wounding creates the entitlement?
- Dissent:
 - hot pursuit plus probable capture creates the entitlement?
- Interests served by the majority and dissent arguments?
- Mode of argumentation by majority and dissent?

Pierson v. Post (Sup. Ct. NY 1805)



- Car Salesperson Hypo



Berger, It's Not About the Fox

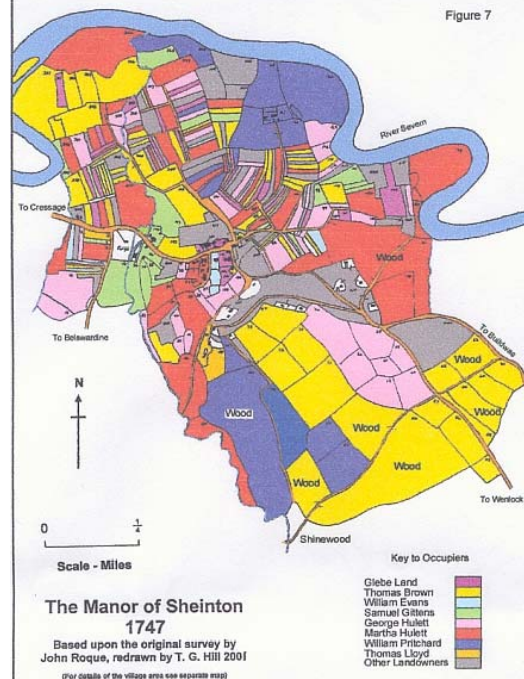
The dispute between the Piersons and the Posts, I argue, was part of this conflict, and was motivated by a dispute over who had the right to use the common lands of the community, and whether those lands would be used for the leisure activities of the wealthy or to support the agricultural pursuits of the town's original settlers.

. . . the Piersons had a particular claim to the land on which the fox was caught. . . . The Piersons were a farming family, and would have used the land to pasture their stock. . . . Lodowick [Post], riding across the pasture closest to the Piersons' home with his dogs and hounds would not have been . . . welcome.

Equally important, the location indicates that the fox was not caught on truly unclaimed land, but on some of the last common land in the community, over which the members in the town were in a bitter fight for ownership and control. The commons were still crucial to Southampton's agricultural economy. . . .

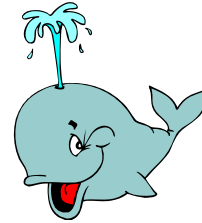
- Implications for chain of title?

common field system



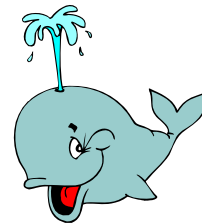
Ghen v. Rich (U.S. Dist. Ct. 1881)

- Property entitlement in question?
 - How does the system of capture and property rights identification occur?
 - Role of whaling company?
 - Role of finder on beach?
- Related customs of usage discussed
 - Anchoring a whale with an identifying mark secures rights, even if whale goes adrift from anchorage
 - Anchored whale, gone adrift and mark lost, prior “firm possession” still vests entitlement
 - “Iron holds the whale”



Ghen v. Rich (U.S. Dist. Ct. 1881)

- Enforce the custom of usage?
 - Under what conditions should custom of usage be enforced?
 - Should all be bound by the custom, or only those in the group that generated it?
- Principles to evaluate whether to enforce custom of usage
 - Groups generating the custom versus those impacted by it
 - What are the interests of these groups?
 - Costs and benefits for these groups
 - Only enforce customs engrained throughout society, or similar to society-wide practices?
 - How would you imagine that the whaling customs are similar or dissimilar to generally applicable rules?



Johnson v. M'Intosh (US 1823)

- Dispute?
- Discovery versus Conquest?
 - What is the traditional discovery rule for creation of property?
 - How does it contrast with Conquest?
- What general privileges did the other European countries grant to the first discoverer?
- What privileges/rights with respect to the Native Americans did the other European countries grant the first discoverer?



Johnson v. M'Intosh (US 1823)

- In what two ways could the European first-discoverer acquire title from the Native Americans?
- Under a chain of title analysis, why did Johnson lose?
- Under the law of conquest, why did Johnson lose?

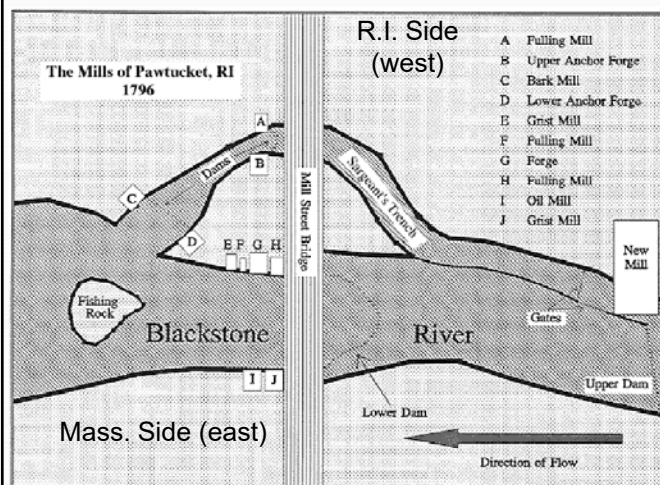
Keeble v. Hickeringill (Queen's Bench 1707)



- Entitlement in question?
 - How has Hickeringill upset Keeble?
- Outcome?
- Doctrine of constructive possession for wild animals on one's land – landowner is regarded as prior possessor of the animal
 - “constructive”
 - the word is a way of pretending what whatever word it modifies depicts a state of affairs that actually exists when actually it does not
- Importance for encouragement of this sort of activity
- Compare and contrast with Pierson v. Post

Tyler v. Wilkinson (D. R.I. 1827)

- “By our law, upon principles of public convenience, the term of twenty years of exclusive uninterrupted enjoyment has been held a conclusive presumption of a grant or right”
- Trench owners (defendants) limited to accustomed flow over that time
- “[I]f there be a deficiency, it must be borne by all parties”

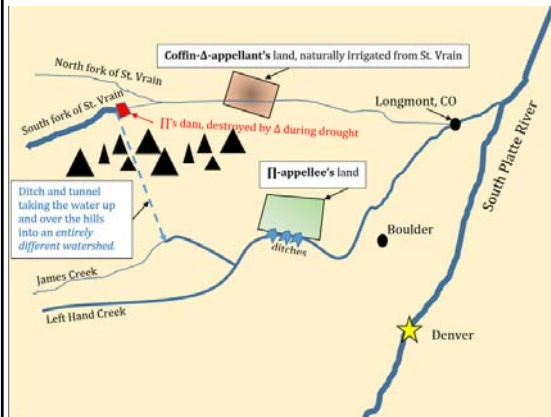


- Non-consumptive use



Coffin v. Left Hand Ditch Co. [LHD] (Colo. 1882)

- Coffin removed the diversion dam created by LHD
- Prior appropriation doctrine instead of riparian rights
 - First in time is first in right to the extent of the use



- Does it matter that the prior appropriation by diversion is for use in a different watershed?
- Consumptive use

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Greer, Ownership of Petroleum and Natural Gas In Place (1923)

- Oil and gas versus solid minerals
- Law of other fugitive resources
- Ownership versus right to capture from on/below one's land
- Comparing oil and gas to underground flows of water (a comparison that does not hold with later scientific understanding)



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Garrett Hardin: The Tragedy of the Commons

- What is the tragedy?
- Examples in use of common resources
 - Parking spots, cattle grazing, national parks, pollution
- Difficulty in influencing a person to act against the logic of the commons
- Mutual coercion mutually agreed upon
 - Prohibition
 - Tax, fees, fines
- Commons only worked under situations of low population density?
- Ways to solve the commons problem?
 - Role of culture in solving or creating commons problems

Demsetz, Toward a Theory of Property Rights

- Property rights (rights to entitlements)
 - Help one form expectations she can hold in her dealings with others
 - These expectations find expression in the laws, customs and mores of a society
- One purpose of property rights relates to externalities
 - Internalizing externalities
 - “Every cost and benefit associated with social interdependencies is a potential externality”
- Allowing transactions increases the degree to which internalization takes place



Demsetz, Toward a Theory of Property Rights

- If the main allocation function of property rights is internalization of beneficial and harmful effects, when do we expect to see new systems of property rights emerge?
- Researchers recounting a relationship between Native American private rights in land around Quebec and the commercial fur trade
 - What is the externality that arises from the commercial fur trade?
 - Did it exist before the fur trade? To what degree both before and after?



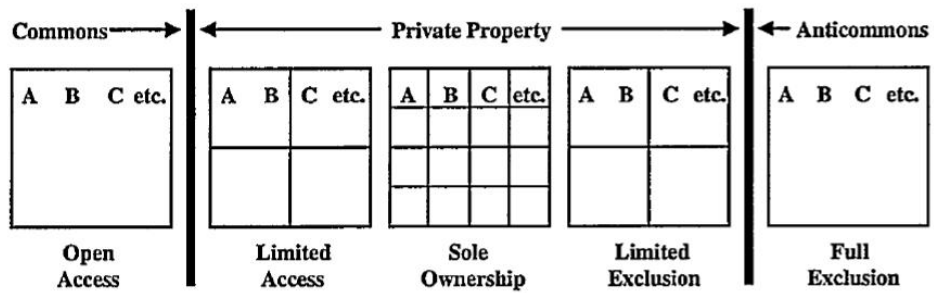
Demsetz, Toward a Theory of Property Rights

- With hunting grounds parceled . . .
 - What is the effect on externalities?
 - What types of externalities remain?
- Types of ownership
 - Communal
 - Private
 - State
 - Anticommons
- Aspects of property . . .
 - Demsetz – utilitarian
 - Wealth distribution/redistribution
 - Nourish individuality and diversity
 - Essential to political freedom?
- Alienability



Anticommons

- Tragedy of the commons
 - versus
- Tragedy of the anti-commons?
 - Possibility of underuse when governments give too many people rights to exclude others
 - Related problem of fragmentation of joint ownership



Michael A. Heller, The Boundaries of Private Property, 108 Yale L.J. 1163, 1167 (1999)