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CHAPTER TWO

PERSONAL PROPERTY



SECTION A. PROPERTY RIGHTS BASED ON POSSESSION

"Captured" property has no original owner. It typically consists of things found in nature, such as wild animals, minerals and other natural resources. In contrast, "found" property is assumed to have had a prior owner, who either lost, mislaid or abandoned the item. The underlying theme of cases involving captured and found property is the concept of *possession*. Possession determines who has the superior legal right to the captured or found property if the true owner does not claim it.

Possession has two required elements, both of which must be satisfied (to a greater or lesser degree, as we will see) before a court will conclude that a party has obtained possession of the property. For possession to occur, there must be: (1) a physical act of control over the object; and (2) the intent to control the object, or the intent to exclude possession of the object by others.

1. CAPTURED PROPERTY

Under the common law, captured property belongs to the first person to possess it. Judges may differ in their analysis of what constitutes first possession. For example, in the classic case of *Pierson v. Post*, 3 Cai. Rep. 175 (N.Y. Sup. 1885), the court had to determine who first "possessed" a fox. The competing claimants were a hunter, who spotted the fox and chased it in hot pursuit, and another person, who intervened at the last minute in the chase, killed the fox, and took the carcass. A majority of the court required a very strong physical act of control over the fox—killing it and "occupying" (holding) the carcass—to establish possession. A dissenting judge preferred to award the fox carcass to the initial "hot" pursuer instead. The dissent would have required a lesser degree of physical control over the fox carcass to establish "possession" due in part to the labor invested in spotting and chasing the fox, and in part due to the custom among hunters that the "hot" pursuer acquires the right to possession of the pursued animal.

In another classic case, *Ghen v. Rich*, 8 F. 159 (D. Mass. 1881), the outcome was different. *Ghen v. Rich* was a dispute over who was entitled to a whale carcass. Should possession be awarded to the person who first

harpooned the whale, or to the person who later found the whale's carcass once it had washed ashore many miles away? The majority in *Ghen* determined that the harpooner of the whale was entitled to the value of the carcass based on the labor expended and industry custom. To rule against the harpooner would discourage an economic activity—the whaling industry—that was an important part of the local economy at the time of the court's decision.

As you read *Popov v. Hayashi*, notice how the court uses these prior precedents to attempt to determine who “owns” the record-setting baseball.

POPOV V. HAYASHI

Superior Court, San Francisco County, California, 2002
2002 WL 31833731

FACTS

MCCARTHY, JUDGE

In 1927, Babe Ruth hit sixty home runs. That record stood for thirty four years until Roger Maris broke it in 1961 with sixty one home runs. Mark McGwire hit seventy in 1998. On October 7, 2001, at PacBell Park in San Francisco, Barry Bonds hit number seventy three. That accomplishment set a record which, in all probability, will remain unbroken for years into the future.

The event was widely anticipated and received a great deal of attention.

The ball that found itself at the receiving end of Mr. Bond's bat garnered some of that attention. Baseball fans in general, and especially people at the game, understood the importance of the ball. It was worth a great deal of money and whoever caught it would bask, for a brief period of time, in the reflected fame of Mr. Bonds.

With that in mind, many people who attended the game came prepared for the possibility that a record setting ball would be hit in their direction. Among this group were plaintiff Alex Popov and defendant Patrick Hayashi. They were unacquainted at the time. Both men brought baseball gloves, which they anticipated using if the ball came within their reach.

They, along with a number of others, positioned themselves in the arcade section of the ballpark. This is a standing room only area located near right field. It is in this general area that Barry Bonds hits the greatest number of home runs. The area was crowded with people on October 7, 2001, and access was restricted to those who held tickets for that section.

Barry Bonds came to bat in the first inning. With nobody on base and a full count, Bonds swung at a slow knuckleball. He connected. The ball sailed over the right-field fence and into the arcade.

Josh Keppel, a cameraman who was positioned in the arcade, captured the event on videotape. Keppel filmed much of what occurred from the time Bonds hit the ball until the commotion in the arcade had subsided. He was standing very near the spot where the ball landed and he recorded a significant amount of information critical to the disposition of this case.

In addition to the Keppel tape, seventeen percipient witnesses testified as to what they saw after the ball came into the stands. * * *

The factual findings in this case are the result of an analysis of the testimony of all the witnesses as well as a detailed review of the Keppel tape. Those findings are as follows:

When the seventy-third home run ball went into the arcade, it landed in the upper portion of the webbing of a softball glove worn by Alex Popov. While the glove stopped the trajectory of the ball, it is not at all clear that the ball was secure. Popov had to reach for the ball and in doing so, may have lost his balance.

Even as the ball was going into his glove, a crowd of people began to engulf Mr. Popov. He was tackled and thrown to the ground while still in the process of attempting to complete the catch. Some people intentionally descended on him for the purpose of taking the ball away, while others were involuntarily forced to the ground by the momentum of the crowd.

Eventually, Mr. Popov was buried face down on the ground under several layers of people. At one point he had trouble breathing. Mr. Popov was grabbed, hit and kicked. People reached underneath him in the area of his glove. Neither the tape nor the testimony is sufficient to establish which individual members of the crowd were responsible for the assaults on Mr. Popov.

The videotape clearly establishes that this was an out of control mob, engaged in violent, illegal behavior. Although some witnesses testified in a manner inconsistent with this finding, their testimony is specifically rejected as being false on a material point.

Mr. Popov intended at all times to establish and maintain possession of the ball. At some point the ball left his glove and ended up on the ground. It is impossible to establish the exact point in time that this occurred or what caused it to occur.

Mr. Hayashi was standing near Mr. Popov when the ball came into the stands. He, like Mr. Popov, was involuntarily forced to the ground. He committed no wrongful act. While on the ground he saw the loose ball. He picked it up, rose to his feet and put it in his pocket.

Although the crowd was still on top of Mr. Popov, security guards had begun the process of physically pulling people off. Some people resisted those efforts. One person argued with an official and another had to be pulled off by his hair.

Mr. Hayashi kept the ball hidden. He asked Mr. Keppel to point the camera at him. At first, Mr. Keppel did not comply and Mr. Hayashi continued to hide the ball. Finally after someone else in the crowd asked Mr. Keppel to point the camera at Mr. Hayashi, Mr. Keppel complied. It was only at that point that Mr. Hayashi held the ball in the air for others to see. Someone made a motion for the ball and Mr. Hayashi put it back in his glove. It is clear that Mr. Hayashi was concerned that someone would take the ball away from him and that he was unwilling to show it until he was on videotape. * * *

Mr. Popov eventually got up from the ground. He made several statements while he was on the ground and shortly after he got up which are consistent with his claim that he had achieved some level of control over the ball and that he intended to keep it. Those statements can be heard on the audio portion of the tape. When he saw that Mr. Hayashi had the ball he expressed relief and grabbed for it. Mr. Hayashi pulled the ball away. Security guards then took Mr. Hayashi to a secure area of the stadium.

It is important to point out what the evidence did not and could not show. Neither the camera nor the percipient witnesses were able to establish whether Mr. Popov retained control of the ball as he descended into the crowd. Mr. Popov's testimony on this question is inconsistent on several important points, ambiguous on others and, on the whole, unconvincing. We do not know when or how Mr. Popov lost the ball.

Perhaps the most critical factual finding of all is one that cannot be made. We will never know if Mr. Popov would have been able to retain control of the ball had the crowd not interfered with his efforts to do so. Resolution of that question is the work of a psychic, not a judge.

LEGAL ANALYSIS

Conversion is the wrongful exercise of dominion over the personal property of another. There must be actual interference with the plaintiff's dominion. Wrongful withholding of property can constitute actual interference even where the defendant lawfully acquired the property. If a person entitled to possession of personal property demands its return, the unjustified refusal to give the property back is conversion.

The act constituting conversion must be intentionally done. There is no requirement, however, that the defendant know that the property belongs to another or that the defendant intends to dispossess the true owner of its use and enjoyment. Wrongful purpose is not a component of conversion. * * *

Conversion does not exist, however, unless the baseball rightfully belongs to Mr. Popov. One who has neither title nor possession, nor any right to possession, cannot sue for conversion. The deciding question in this case then, is whether Mr. Popov achieved possession or the right to possession as he attempted to catch and hold on to the ball.

The parties have agreed to a starting point for the legal analysis. Prior to the time the ball was hit, it was possessed and owned by Major League Baseball. At the time it was hit it became intentionally abandoned property. The first person who came in possession of the ball became its new owner.

The parties fundamentally disagree about the definition of possession. In order to assist the court in resolving this disagreement, four distinguished law professors participated in a forum to discuss the legal definition of possession.¹⁷ The professors also disagreed.

The discussion was held during an official session of the court convened at The University of California, Hastings College of the Law. The session was attended by a number of students and professors including one first year property law class which used this case as vehicle to understand the law of possession.

While there is a degree of ambiguity built into the term possession, that ambiguity exists for a purpose. Courts are often called upon to resolve conflicting claims of possession in the context of commercial disputes. A stable economic environment requires rules of conduct which are understandable and consistent with the fundamental customs and practices of the industry they regulate. Without that, rules will be difficult to enforce and economic instability will result. Because each industry has different customs and practices, a single definition of possession cannot be applied to different industries without creating havoc.

This does not mean that there are no central principles governing the law of possession. It is possible to identify certain fundamental concepts that are common to every definition of possession.

Professor Roger Bernhardt has recognized that "[p]ossession requires both physical control over the item and an intent to control it or exclude others from it. But these generalizations function more as guidelines than as direct determinants of possession issues. Possession is a blurred question of law and fact."

Professor Brown argues that "[t]he orthodox view of possession regards it as a union of the two elements of the physical relation of the possessor to the thing, and of intent. This physical relation is the actual pow-

¹⁷ They are Professor Brian E. Gray, University of California, Hastings College of the Law; Professor Roger Bernhardt, Golden Gate University School of Law; Professor Paul Finkelman, The Chapman Distinguished Professor of Law, The University of Tulsa School of Law; and Professor Jan Stiglitz, California Western School of Law.

er over the thing in question, the ability to hold and make use of it. But a mere physical relation of the possessor to the thing in question is not enough. There must also be manifested an intent to control it."

* * *

We start with the observation that possession is a process which culminates in an event. The event is the moment in time that possession is achieved. The process includes the acts and thoughts of the would be possessor which lead up to the moment of possession.

The focus of the analysis in this case is not on the thoughts or intent of the actor. Mr. Popov has clearly evidenced an intent to possess the baseball and has communicated that intent to the world. The question is whether he did enough to reduce the ball to his exclusive dominion and control. Were his acts sufficient to create a legally cognizable interest in the ball?

Mr. Hayashi argues that possession does not occur until the fan has complete control of the ball. Professor Brian Gray, suggests the following definition: "A person who catches a baseball that enters the stands is its owner. A ball is caught if the person has achieved complete control of the ball at the point in time that the momentum of the ball and the momentum of the fan while attempting to catch the ball ceases. A baseball, which is dislodged by incidental contact with an inanimate object or another person, before momentum has ceased, is not possessed. Incidental contact with another person is contact that is not intended by the other person. The first person to pick up a loose ball and secure it becomes its possessor."²⁴

Mr. Popov argues that this definition requires that a person seeking to establish possession must show unequivocal dominion and control, a standard rejected by several leading cases.²⁵ Instead, he offers the perspectives of Professor Bernhardt and Professor Paul Finkelman²⁶ who suggest that possession occurs when an individual intends to take control of a ball and manifests that intent by stopping the forward momentum of the ball, whether or not complete control is achieved.

Professors Finkelman and Bernhardt have correctly pointed out that some cases recognize possession even before absolute dominion and control is achieved. Those cases require the actor to be actively and ably engaged in efforts to establish complete control.²⁷ Moreover, such efforts

²⁴ This definition is hereinafter referred to as Gray's Rule.

²⁵ *Pierson v. Post* 3 Cai. R. (N.Y. 1805); *Young v. Hitchens* 6 Q.B. 606 (1844); *State v. Shaw* (1902) 67 Ohio St. 157, 65 N.E. 875.

²⁶ Professor Finkelman is the author of the definitive law review article on the central issue in this case, *Fugitive Baseballs and Abandoned Property: Who Owns the Home Run Ball?*; *Cardozo Law Review*, May 2002, Paul Finkelman, (Chapman Distinguished Professor of Law).

²⁷ The degree of control necessary to establish possession varies from circumstance to circumstance. "The law . . . does not always require that one who discovers lost or abandoned

must be significant and they must be reasonably calculated to result in unequivocal dominion and control at some point in the near future.²⁸

This rule is applied in cases involving the hunting or fishing of wild animals²⁹ or the salvage of sunken vessels.³⁰ The hunting and fishing cases recognize that a mortally wounded animal may run for a distance before falling. The hunter acquires possession upon the act of wounding the animal, not the eventual capture. Similarly, whalers acquire possession by landing a harpoon, not by subduing the animal.³¹

In the salvage cases, an individual may take possession of a wreck by exerting as much control "as its nature and situation permit."³² Inadequate efforts, however, will not support a claim of possession. Thus, a "sailor cannot assert a claim merely by boarding a vessel and publishing a notice, unless such acts are coupled with a then present intention of conducting salvage operations, and he immediately thereafter proceeds with activity in the form of constructive steps to aid the distressed party."³³

These rules are contextual in nature. These are crafted in response to the unique nature of the conduct they seek to regulate. Moreover, they are influenced by the custom and practice of each industry. The reason that absolute dominion and control is not required to establish possession in the cases cited by Mr. Popov is that such a rule would be unworkable and unreasonable. The "nature and situation" of the property at issue does not immediately lend itself to unequivocal dominion and control. It is impossible to wrap ones arms around a whale, a fleeing fox or a sunken ship.

The opposite is true of a baseball hit into the stands of a stadium. Not only is it physically possible for a person to acquire unequivocal dominion and control of an abandoned baseball, but fans generally expect a claimant to have accomplished as much. The custom and practice of the

property must actually have it in hand before he is vested with a legally protected interest. The law protects not only the title acquired by one who finds lost or abandoned property but also the right of the person who discovers such property, and is actively and ably engaged in reducing it to possession, to complete this process without interference from another. The courts have recognized that in order to acquire a legally cognizable interest in lost or abandoned property a finder need not always have manual possession of the thing. Rather, a finder may be protected by taking such constructive possession of the property as its nature and situation permit." *Treasure Salvors Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel*, 640 F.2d 560, 571.(1981).

²⁸ *Brady v. S.S. African Queen*, 179 F.Supp. 321 (E.D.Va. 1960); *Eads v. Brazelton* 22 Ark. 499 (1861); *Treasure Salvors Inc.*, 640 F.2d at 571.

²⁹ *Liesner v. Wanie*, 156 Wis. 16, 145 N.W. 374 (1914); *Ghen v. Rich*, 8 F. 159 (D. Mass.1881); *Pierson v. Post* 3 Cai. R. (N.Y.1805); *Young v. Hitchens* 6 Q.B. 606 (1844); *State v. Shaw*, 67 Ohio St. 157, 65 N.E. 875 (1902). See also *Herbert Hovenkamp and Sheldon Kurtz*, *The Law of Property* 2 (5th ed. 2001).

³⁰ *Indian River Recovery Company v. The China*, 645 F.Supp. 141, 144 (D. Del.1986); *Treasure Salvors Inc.*, 640 F.2d at 560; *Richard v. Pringle*, 293 F.Supp. 981 (S.D.N.Y.1968).

³¹ *Swift v. Gifford* 23 F. Cas. 558 (D. Mass.1872).

³² See *supra* note 27.

³³ *Brady v. S.S. African Queen*, 179 F. Supp. 321, 324 (E.D. Va., 1960).

stands creates a reasonable expectation that a person will achieve full control of a ball before claiming possession. There is no reason for the legal rule to be inconsistent with that expectation. Therefore Gray's Rule is adopted as the definition of possession in this case.

The central tenant of Gray's Rule is that the actor must retain control of the ball after incidental contact with people and things. Mr. Popov has not established by a preponderance of the evidence that he would have retained control of the ball after all momentum ceased and after any incidental contact with people or objects. Consequently, he did not achieve full possession.

That finding, however, does not resolve the case. The reason we do not know whether Mr. Popov would have retained control of the ball is not because of incidental contact. It is because he was attacked. His efforts to establish possession were interrupted by the collective assault of a band of wrongdoers.

A decision which ignored that fact would endorse the actions of the crowd by not repudiating them. Judicial rulings, particularly in cases that receive media attention, affect the way people conduct themselves. This case demands vindication of an important principle. We are a nation governed by law, not by brute force.

As a matter of fundamental fairness, Mr. Popov should have had the opportunity to try to complete his catch unimpeded by unlawful activity. To hold otherwise would be to allow the result in this case to be dictated by violence. * * *

For these reasons, the analysis cannot stop with the valid observation that Mr. Popov has not proved full possession.³⁶

The legal question presented at this point is whether an action for conversion can proceed where the plaintiff has failed to establish possession or title. It can. An action for conversion may be brought where the plaintiff has title, possession or the right to possession. Here Mr. Popov seeks, in effect, a declaratory judgment that he has either possession or the right to possession. In addition he seeks the remedies of injunctive relief and a constructive trust. These are all actions in equity. A court sitting in equity has the authority to fashion rules and remedies designed to achieve fundamental fairness.

Consistent with this principle, the court adopts the following rule. Where an actor undertakes significant but incomplete steps to achieve possession of a piece of abandoned personal property and the effort is interrupted by the unlawful acts of others, the actor has a legally cognizable pre-possessionary interest in the property. That pre-possessionary interest con-

³⁶ The court is indebted to Professor Jan Stiglitz of California Western School of Law for his valuable insights and suggestions on this issue.