“Jesse Pierson was walking home from his job as a schoolteacher “when he saw the fox fleeing from his pursuers and run into the hiding place,” which Hedges identified as “an old shoal well.” “In a moment, with a broken rail, he was at the well’s mouth and killed the fox, threw it over his shoulder, and was taking it home when Lodowick Post, with his hounds and partisans, met him and demanded the fox.” Jesse demurred.
“It may be you was going to kill him, but you did not kill him,” he retorted. “I was going to kill him and did kill him.”
Pierson and Post had their altercation on December 10, 1802.” (Daniel Ernst, Pierson v. Post. The new learning)

PIERSON v. POST.

SUPREME COURT OF JUDICATURE OF NEW YORK

August, 1805, Decided

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.

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* (wild beast) , 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, sec. 13), and Fleta (lib. 3, ch. 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 recognized by Breton (Bracton) (lib. 2, ch. 1, p. 8).

Puffendorf (lib. 4, ch. 6, sec. 2 and 10) defines occupancy of beasts ferae naturae, to be the actual corporeal possession of them, and Bijnkershoek 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 *feræ naturæ* 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 in his notes, the more accurate opinion of *Grotius,* with respect to occupancy. That celebrated author, lib. 2. c. 8. s. 3. p. 309. speaking of occupancy, proceeds thus: "*Requiritur autem corporalis quædam possessio ad dominium adipiscendum; atque ideo, vulnerasse non sufficit*." But in the following section he explains and qualifies this definition of occupancy: "*Sed possessio illa potest non solis manibus, sed instrumentis, ut decipulis, retibus, laqueis dum duo adsint: primum ut ipsa instrumenta sint in nostra potestate, deinde ut fera, ita inclusa sit, ut exire inde nequeat*." This qualification embraces the full extent of *Barbeyrac's* objection to *Puffendorf's* definition, and allows as great a latitude to acquiring property by occupancy, as can reasonably be inferred from the words or ideas expressed by *Barbeyrac* in his notes. 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.

We are the more readily inclined to confine possession or occupancy of beasts ferae naturae (wild beasts), 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 this 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," (the enemy of mankind")and although "de mortuis nil nisi bonum" (we must say nothing but good words about the deceased")be a maxim of our profession, the memory of the deceased has not been spared. His depredations on farmers and on barnyards, 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,"(in cold weather) 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 honors or labors 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 anything, therefore, in the digests or pandects shall appear to militate against the defendant in error, who, on this occasion, was the fox hunter, we have only to say *tempora mutantur* ("times change"); and if men themselves change with the times, why should not laws also undergo an alteration?

Justinianus, Institutiones, 2.1.13

12. Wild beasts, birds, fish and all animals, which live either in the sea, the air, or the earth, so soon as they are taken by anyone, immediately become by the law of nations the property of the captor; for natural reason gives to the first occupant that which had no previous owner. And it is immaterial whether a man takes wild beasts or birds upon his own ground, or on that of another. Of course any one who enters the ground of another for the sake of hunting or fowling, may be prohibited by the proprietor, if he perceives his intention of entering. Whatever of this kind you take is regarded as your property, so long as it remains in your power, but when it has escaped and recovered its natural liberty, it ceases to be yours, and again becomes the property of him who captures it. It is considered to have recovered its natural liberty, if it has either escaped out of your sight, or if, though not out of your sight, it yet could not be pursued without great difficulty.

13. It has been asked, whether, if you have wounded a wild beast, so that it could be easily taken, it immediately becomes your property. Some have thought that it does become yours directly when you wound it, and that it continues to be yours while you continue to pursue it, it then ceases to be yours, and again becomes the property of the first person who captures it. Others have thought that it does not become your property until you have captured it. We confirm this latter opinion, because many accidents may happen to prevent your capturing it.

Bracton, Commentaries on the Laws and Customs of England (ed. S. Thorne)

Of wild beast.

By the jus gentium or natural law the dominion of things is acquired in many ways. First by taking possession of things that are owned by no one and do not now belong to the king by the civil law, no longer being common as before as wild beasts, birds, and fish, that is all the creatures born on the earth, in the sea or in the heavens, that is, in the air, no matter where they may be taken. When they are captured they begin to be mine, because they are forcibly kept in my custody, and by the same token, if they escape from it and recover their natural liberty they cease to be mine and are again made the property of the taker. They recover their natural liberty when they escape from my sight into the free air and are no longer in my keeping, or when though still within my view, their pursuit is no longer possible.

Of fishing, hunting and capture

The taking of possession also includes fishing, hunting and capture. It is not pursuit alone that makes a thing mine, for though I have wounded a wild beast so severely that it may be captured, it nevertheless is not mine unless I capture it; rather it will belong to the one who next takes it, for much may happen to prevent my capture of it. And so if a wild boar falls into a net you have set, and though he is caught fast in it I have extricated him and carried him off; he will be mine if he comes into my power, unless custom rules to the contrary or the king's privilege.

Fleta, Book 3 chap. 2 Of Accessions

By the law of nations or by natural law the ownership of things is acquired in many ways, sometimes by taking possession of things that are not the property of anyone else and which now do not belong to the king by civil law and are not common property as once they were. Such are wild beasts, birds, fish and animals which have never been domesticated and which are born on the earth, in the sea or in the air. These, when they are captured, become the captor's, but if they should escape and recover their natural freedom so that their pursuit is in vain, they cease to be their captor's and belong, on the contrary, to him who again takes possession of them. The taking of possession also comprises fishing, hunting, confining and seizing. But pursuit alone does not make a thing mine; for even though I should wound a wild beast so that it is possible for me to capture it, nevertheless it is not mine unless I do so, but belongs to him who takes possession of it.

Grotius, De Iure Belli ac Pacis

Book II Chapter VIII *Of Such Properties as are commonly called Acquisitions by the Right of Nations.*

III. The *Roman* Lawyers say, that we lose our Property in wild Beasts, as soon as ever they recover their natural Liberty; but in all other Things the Property acquired by Possession does not cease with the loss of Possession; nay, it gives us a Right even to claim and recover our Possession. And whether they be taken away from us by another, or getaway of themselves, as a fugitive Slave, it is all one. Wherefore it is more reasonable to say, that our Property is not lost merely because the wild Beasts have made their Escape,See Ch. 4. § 5. of this Book. but from a probable Conjecture, that by Reason of the difficulty of pursuing and recovering them, we may have abandoned them, especially if we cannot tell which are ours from others. But this Conjecture may be destroyed by other Conjectures, as by putting Γνωρίσματα (attributes), *Marks,* or *Crepundia,* Bells, upon them, as has been often done to Stags and Hawks, whereby they have been known, and restored to their Owners. Now to gain a Property in Things, it is requisite that we should have a corporal Possession, and therefore it is not enough to have wounded the Beast, as it was rightly decided against *Trebatius*. Hence comes the Proverb, *Aliis leporem excitasti.You have started the Hare, but others run away with it*. And *Ovid* tells us, in his fifth Book of *Metamorphoses,* that *It is one Thing to know where a Thing is, and another to find it*.

IV.*Whether Possession may be gained by Instruments, and how*. Now this corporal Possession may be gained not only with our Hands, but with Instruments, such as Traps, Nets, Gins, *&c*. provided that these two Circumstances go along with it. First, That those Instruments be in our own Power; and Secondly, that the Beast be so secured as that it cannot get away. And thus must we decide the Case of *the Boar in the Toil*.

V. *It is not against the Law of Nations that all wild Beasts should belong to the Crown*. These Things are then only to take Place, where no Civil Law intervenes; wherefore our Modern Lawyers are very much mistaken, who think those Rights to be so natural, as that they cannot be changed; for they are not purely, and simply natural, but only with Regard to a certain state of Things, that is, if it be not otherwise provided. Thus the People of *Germany* consulting about making some Allowances to their Princes and Kings to support their Dignities, very wisely thought it proper to begin with such Things as might be given without Damage to any one, such are those which no Person could lay particular Claim to; which I find that the *Egyptians* also practised: For there the King's Intendant, whom they called ἴδιον λόγον, seized on all such Things to the Use of the Crown. The Law indeed could of it self transfer a Property in those Things before Possession, since the Law alone is sufficient to create a Right of Property.

Samuel von Pufendorf , On the Law of nature and Nations

Of Occupancy Book IV chap. VI

II We have sufficiently made it appear in our former remarks that after Men came to a Resolution or quitting the primitive communion upon the strength of a previous contract they assigned to each person his share out of the general stock, either by the authority of parents, or by universal consent or by lot, or sometimes by the free choice and option of the party receiving. Now it was at the same time agreed that whatever did not come under this grand division should pass to the first occupant; that is to him who before others took bodily possession of it with intention to keep it as its own.

I then fix a Property in them, when I either remove them as Priſoners to my own Quarters; or for ſome time ſet a Guard over them where they lie, to hinder their Eſcape. Now this Seizure is made not only with our Hands, but with Inſtruments; as ſuppoſe, Snares, Gins, Traps, Nets, Weels, Hooks, and the like [a]: Provided the Inſtruments be, as they term it, *in noſtra poteſtate*, under our Power; that is, ſet in a Place where we have a Right of following the Game, and not yet broken by the Prey, but holding them faſt, at leaſt till ſuch time as we might probably come up. And hence we may decide the noted Caſe of *the Boar in the Toil*, propoſed in the *Digeſts* [z]. For if the Beaſt were ſo entangled, that he could not poſſibly break thro', and the Snare were laid either in your peculiar Lordſhip, or in a publick Place where you had a right of Hunting, then he was cetainly your own; and I, if I had loos'd him, and reſtor'd him to his natural Liberty, ſhould have been bound to make full Satisfaction, whatever Name ſuch an Action might bear at Law, or under what Head ſoever it might be ranked. But if the Snare were ſet on my Ground, as I might at firſt have hinder'd your Entrance thither, ſo if I afterwards break what you placed there without my Leave, you have no Reaſon to think your ſelf injured.

X. It hath likewiſe been diſputed, Whether by giving a Beaſt a Wound in Hunting we preſently make him our own? *Trebatius* [i] long ſince declar'd on the Affirmative ſide; but then he ſuppoſeth us to purſue the Beaſt, which if we omit to do, he ſays, *We loſe our Property, and the Right paſſeth to the firſt Occupant*. Others are of the contrary Opinion, maintaining, That we can by no other means appropriate the Beaſt, but by actually taking him, becauſe many Caſualties may hinder him from ever coming into our Hands. The Emperor *Frederick* made this Diſtinction in the Caſe [b]: *If the Beaſt were followed with the larger Dogs or Hounds, then he was the Property of the Hunter, not of the Chance-Occupant; and in like manner, if he were wounded or killed with a Lance or a Sword. But if he were followed with Beagles only, then he paſſed to the Occupant, not to the firſt Purſuer. If he was ſlain with a Dart, a Sling, or a Bow, he fell to the Hunter, provided he was ſtill in Chaſe after him, and not to the Perſon who afterwards found or ſeized him.* According to the Conſtitution of the *Lombards* [c], he who found or kill'd a Beaſt wounded before by another, was to carry off a Shoulder and the Ribs, and to leave the Reſidue as the Hunter's Right: Though this Right to the Remainder continued no longer than the Space of twenty-four Hours. We judge it may in general be affirm'd, That if the Beaſt be mortally wounded, or very greatly maim'd, he cannot fairly be intercepted by another Perſon whilſt we are in Purſuit of him, provided we had a Right of paſſing through ſuch a Place: But the contrary is to be held, in caſe the Wound were not mortal, nor ſuch as would conſiderably retard the Beaſt in his Flight [z]. Therefore when *Meleager* in *Ovid* [d] admits *Atalanta* to a Share in the Glory of killing the *Caledonian* Boar, it was not ſo much an Act of Juſtice, as of Love. But the Game which my Dogs kill, when I did not ſet them on, doth not become my Property, 'till I have actually taken hold of it [e].

XI. The *Jewiſh* Cuſtoms, as Mr. *Selden* informs us [f], decided theſe and the like Points in the manner following: *Fiſh or Beaſts were not to be taken from the Repoſitories or Places of Store: Yet it was lawful to take Fiſh out of another Man's Net, whilſt yet in the Sea, and Beaſts out of another Man's Snare, if it were laid in a deſert Place. He that ſpread a Net in another's Ground might poſſeſs the Game he had*

[a] See *Grot.* l. ii. c. 8. ſ. 14. [b] *Godofred.* ad iſtam leg. ex *Radevico* de geſt. *Frederic.* l. i. c. 26. [c] Lib. i. tit. 22. l. 4, & 6. [d] *Metam.* l. viii. ver. 427. [e] Add. *Alberic. Gentil.* Advoc. Hiſpan. l. i. c 4. [f] *De Jur. Nat. & Gen. ſec. Hebr.* l. vi. c. 4.

Mr. BARB. *NOTES on* §. IX, X.

more than in the following Caſe, where he determines otherwiſe than I do. Suppoſe that one ſeizes upon a thing which he finds in a publick Place, but which he can't carry with him that Moment; whereupon he leaves it, declaring to ſome other preſent, that he intends to take it, and will come ſoon for it. In this Caſe, ſays Mr. *Thomaſius*, the firſt can't complain, if the laſt takes it, ſeeing it is out of his Poſſeſſion, and left in a publick Place; but in my Opinion the contrary muſt be underſtood, that either he that took poſſeſſion of the thing has relinquiſh'd it, or that he may reaſonably preſume it, becauſe he delays long his Return to take it, and ſo may be thought not to mind it. In fine, I can't but take notice, that in the Place which I have quoted, p. 452, &c. Mr. *Thomaſius* confutes the Hypotheſis of Mr. *de Bynkerſhoek*, upon which I have given my Opinion above, §. 1. n. 1. but I had not then ſeen the Note of that able and judicious Lawyer when I wrote mine, which I have not ſince changed; yet I muſt own, that I have not always the ſame Notions, tho' for the main we are agreed.

[z] The Words of the *Digeſts* are, *In laqueum, quem venandi cauſa poſueras, aper incidit; cùm eo hæreret, exemptum eum abſtuli;* —— *Reſpondit Proculus, laqueum videamus, ne interſit in publico an in privato poſuerim: & ſi in privato poſui, utrum in meo, an alieno: & ſi in alieno, utrum permiſſu ejus, cujus fundus erat, an non permiſſu ejus poſuerim? Præterea, utrùm in eo caſu ita hæſerit aper, ut expedire ſe non poſſit ipſe, an diutius luctando expediturus ſe fuerit? ſummam tamen hanc eſſe puto, ut ſi in meam poteſtatem pervenit, meus factus ſit. Sin autem aprum meum ferum in ſuam naturalem laxitatem dimiſiſſes, eo facto meus eſſe deſiiſſet, & actionem mihi in factum dari oportere, veluti reponſum, cum quidam poculum alterius ex nave ejeciſſet*, Digeſt. l. xli. tit. 1. *De acquirendo rerum Dominio*, leg. 55. This Law ought not to be underſtood as it is by the Interpreter; no, not by *Trebonianus*. Mr. *Noodt* with his uſual Sharpneſs has happily diſcover'd the true Senſe of that antient Lawyer; for he proves in his *Probab. Juris*, l. ii. c. 6. §. 3. that *Proculus* was one of thoſe who believed, that to obtain a thing by the Right of firſt Occupancy it was not always neceſſary to take a corporal Poſſeſſion; and he proves it from theſe Words, *Ut ſi in meam poteſtatem PERVENIT, meus factus ſit*, ſignifying, provided that he who laid the Nets, was inclined to ſeize it corporally, when he ſaw the Boar that he had been taken, (*i. e.*) That no other can looſe him, though he be in a publick Place, and that if it is upon another's Land, the Proprietor may not hinder him from going on it, though otherwiſe he has Right to do it. Mr. *Noodt* afterward quotes, and at the ſame time corrects another Law; from whence it appears, that *Paul* the Lawyer, reaſoning upon the ſame Principle, maintains, that one ſeizes upon a Treaſure found in his Field, as ſoon as he knows it, and will make it his own.

[i] The Words are, *Illud quæſitum eſt, an fera beſtia, quæ ita vulnerata ſit, ut capi poſſit, ſtatim noſtra eſſe intelligatur? Trebatio placuit, ſtatim noſtram eſſe, & eo uſque noſtram videri, donec eam perſequamur. Quod ſi deſierimus eam perſequi, deſinere noſtram eſſe, & rurſus fieri occupantis. Itaque ſi per hoc tempus, quo eam perſequimur, alius eam ceperit, eo animo, ut ipſe lucrifaceret, furtum eum videri nobis commiſiſſe. Plerique non aliter putaverunt eam noſtram eſſe, quàm ſi eam ceperimus, quia multa accidere poſſunt, ut eam non capiamus, quod verius eſt*, ibid. leg. 5. §. 1.

[z] This Diſtinction is not neceſſary. The Author always reaſons from a falſe Notion of the Nature of taking poſſeſſion. The Truth is, that 'till we ceaſe purſuing the Beaſt, and ſo leave it to the firſt Occupant, it belongs to us as much as can be; ſo that no Man can lawfully put in a claim to it,

caught,

I then fix a Property in them, when I either remove them as Priſoners to my own Quarters; or for ſome time ſet a Guard over them where they lie, to hinder their Eſcape. Now this Seizure is made not only with our Hands, but with Inſtruments; as ſuppoſe, Snares, Gins, Traps, Nets, Weels, Hooks, and the like [a]: Provided the Inſtruments be, as they term it, *in noſtra poteſtate*, under our Power; that is, ſet in a Place where we have a Right of following the Game, and not yet broken by the Prey, but holding them faſt, at leaſt till ſuch time as we might probably come up. And hence we may decide the noted Caſe of *the Boar in the Toil*, propoſed in the *Digeſts* [2]. For if the Beaſt were ſo entangled, that he could not poſſibly break thro', and the Snare were laid either in your peculiar Lordſhip, or in a publick Place where you had a right of Hunting, then he was cetainly your own; and I, if I had loos'd him, and reſtor'd him to his natural Liberty, ſhould have been bound to make full Satisfaction, whatever Name ſuch an Action might bear at Law, or under what Head ſoever it might be ranked. But if the Snare were ſet on my Ground, as I might at firſt have hinder'd your Entrance thither, ſo if I afterwards break what you placed there without my Leave, you have no Reaſon to think your ſelf injured.

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On the Duty of Man and Citizen according to Natural Law, 1675

Book 1 chap 12, *On Duty as Regards the Acquisition of Ownership*

5. The methods of acquiring ownership are either original or derivative. By the former a thing becomes property in the beginning; by the latter an ownership already established passes from one to another. Again the former are either absolutely such, -- and by these ownership of the substance of a thing is acquired, -- or relatively, by which property already ours receives some accession.

6. After individual ownership of things had been adopted among men, it was agreed by them that whatever had not come under the primitive division should fall to the occupant, that is, the first man to seize the thing by physical means, with intent to keep it for himself. Hence to-day the only original method of acquiring ownership of the substance of a thing is occupancy. By this means then we acquire desert regions which no man ever claimed as his. These become the property of him who first enters them with the intent to keep them for himself, bringing them under cultivation, and establishing certain limits up to which he claims ownership. But when a numerous company jointly occupies any tract of land, the common practice is to assign some part of it to the individual members of the company, and to count the remainder as belonging to the whole company. By occupancy also are acquired wild beasts, birds, fishes in the sea, rivers, or lakes; also whatever is usually thrown up by the sea upon the shore; provided, however, the promiscuous capture of things of this sort has not been interdicted by the civil authority, or assigned to some particular person. If these are to become ours, we must seize them by physical means, and bring them into our power. By occupancy also we acquire things, when the ownership to which they had previously been subject has been clearly extinguished. For instance, things thrown away with the intent that they are no longer to be ours, or things which we lose unwillingly in the first place, but later count as abandoned. Here too belongs the treasure-trove, that is, money whose owner is unknown. This falls to the finder, when it has not been ordained otherwise by the civil laws.

United States Court of Appeals,

District of Columbia Circuit.

UNITED STATES of America

v.

James EATON, Appellant.

No. 85_6205.

Argued Sept. 30, 1986.

Decided Jan. 13, 1987.

Defendant was convicted of possession with intent to distribute phenmetrazine in the United States District Court for the District of Columbia, Harold H. Greene, J., and he appealed. The Court of Appeals, Jameson, Senior District Judge, sitting by designation, held that: (1) court's jury instruction on constructive possession did not mislead jury so as to warrant reversal, and (2) court correctly found that defendant "opened the door," permitting prosecution to admit evidence of circumstances of prior guilty plea and evidence of prior drug use.

Affirmed.

Before SILBERMAN and WILLIAMS, Circuit Judges and JAMESON,FN* Senior District Judge.
Opinion for the Court filed by Senior District Judge JAMESON.

JAMESON, Senior District Judge:

James Y. Eaton has appealed his conviction, following a jury trial, of possession with intent to distribute phenmetrazine (preludin), in violation of 21U.S.C. s 841(a). The district court denied his motion for a new trial. We affirm the conviction.

I. BACKGROUND

On July 9, 1985, several officers of the Washington, D.C. Metropolitan Police Department, entered the residence of co-defendant Martha McCollum.FN1 The officers found three persons in the residence-McCollum, Eaton, and an unidentified male. Through the open door they observed Eaton sitting on a couch two to three feet from a radiator. The officers testified that they saw Eaton toss away a pink tablet, which they later recovered. The tablet had the marking "BI-62," indicating a 75 mg. phenmetrazine tablet. Two plastic baggies on the radiator were found to contain 300 "BI-62" phenmetrazine tablets.

FN1. A police officer had made an undercover purchase of cocaine from McCollum for $45.00 in pre-recorded police funds. Following the sale, McCollum was observed in front of the residence. As the officers approached her, she backed into the open doorway.

Based on observations through the open door, a search warrant was obtained. The police recovered large amounts of heroin and cocaine, as well as cutting materials, paraphernalia, and several thousand dollars in cash, including the marked bills used by police officers in the undercover cocaine purchase from McCollum. Evidence recovered during the search indicated that McCollum lived in the house. The evidence also established that a person named Joe Brown had links to the house. Nothing, however, other than Eaton's presence, connected him to the house.
Based on the evidence obtained, Eaton was charged by indictment with possession with intent to distribute phenmetrazine, possession with intent to distribute heroin, and possession with intent to distribute cocaine, all in violation of 21U.S.C. s 841(a). The jury found Eaton guilty of a single count of possession with intent to distribute phenmetrazine.FN2

FN2. Co-defendant McCollum entered a plea of guilty prior to trial.
Co-defendant Brown was acquitted on all counts, and Eaton was acquitted on the heroin and cocaine counts.

II. CONTENTIONS ON APPEAL

Eaton contends that (1) the court's instruction on constructive possession misstated the law and substantially prejudiced Eaton; (2) the prosecution's cross-examination of Eaton on his arrest record exceeded the permissible scope of examination; and (3) the prosecution should not have been permitted to cross-examine Eaton on his prior drug use.

III. STANDARD OF REVIEW

All of the issues raised by Eaton relate to the conduct of the trial. These matters are committed to the sound discretion of the trial court. United States v. Soulard, 730 F.2d 1292, 1303 (9th Cir.1984) (choice of language for and formulation of instructions*74 **179 is within the trial court's discretion); United States v. Elders, 569 F.2d 1020, 1026 (7th Cir.1978) (scope and extent of cross-examination is

within the trial court's discretion). We use the abuse of discretion standard in reviewing the trial court's rulings on these issues.

IV. CONSTRUCTIVE POSSESSION INSTRUCTION

[1] Eaton argues that the court's illustrations given in conjunction with its constructive possession instruction confused the jury on the requirement that one must have both the power and the intention to exercise dominion and control over an object to have constructive possession. The instruction given reads as follows:

The law recognizes two kinds of possession, actual possession and constructive possession. A person who knowingly has direct physical control over a thing at a given time is in actual possession. [holding up a pencil] I'm in actual possession of this pencil right now.

A person who, although not in actual possession, knowingly has both the power and the intention at a given time to exercise dominion and control over a thing, either directly or through another person or persons, is in constructive possession.

I'm in constructive possession of my television set in my house. [pencil is now on desk] I am also in constructive possession of this pencil, even though I don't hold it in my hand any more. I can reach it, I can get to it.
The law also recognizes that possession may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole.

If two or more persons share actual or constructive possession of a thing, possession is joint.

Mere presence in the vicinity of a piece of property or mere knowledge of its physical location does not constitute possession. The illustrations, to which Eaton objected at trial, are underlined.

Apart from the illustrations, the instruction given is the standard instruction on constructive possession. District of Columbia Standard Jury Instructions (3d ed. 1978), No. 3.11. Absent the illustrations, there is no question that the instruction accurately states the law on constructive possession. See United States v. Pardo, 636 F.2d 535 (D.C.Cir.1980); United States v. Watkins, 519 F.2d 294 (D.C.Cir.1975); United States v. Holland, 445 F.2d 701 (D.C.Cir.1971);

United States v. Bethea, 442 F.2d 790 (D.C.Cir.1971). The question here is whether the illustrations, which were added to the instruction, could cause the jury to disregard the element of intent and focus only on proximity.

Appellant relies primarily on United States v. Pinkney, 551 F.2d 1241 (D.C.Cir.1976), where this court held that the trial court's illustration given in conjunction with an instruction on reasonable doubt "overstate[d] the degree of uncertainty required for reasonable doubt." Id. at 1244. We find Pinkney distinguishable. There, the illustration was much more extensive than the instruction given in this case.

The illustration in Pinkney related to an extended discussion by members of a family as to whether they should purchase a new car, resulting in a decision not to do so. In holding that it was plain error to illustrate the reasonable doubt required in criminal prosecution by comparing it to doubt generated by consideration of the wisdom of buying the new car, the court said in part: "Thus, the jurors might well believe that for the defendant to prevail he must make out as strong a case against conviction as there was against buying the car. We think that the instruction overstates the degree of uncertainty required for reasonable doubt. And by comparing the level of doubt required in a criminal prosecution to the doubt generated by consideration of the wisdom of buying this clearly unnecessary new car, the illustration tends to denigrate the 'graver, more important transactions of life' concept." 551 F.2d at 1244.

The Pinkney illustration consisted of six paragraphs and followed a correct instruction on reasonable doubt. Here, the illustrations were short and intertwined with a proper instruction. Immediately before the illustrations, the court instructed the jury *75 **180 that constructive possession requires both the power and the intention to exercise dominion and control over an object. Three sentences after the illustrations, the court instructed the jury that mere presence or knowledge does not constitute possession. Although standing alone, the illustrations might mislead the jury as to the requirements for constructive possession, when read in conjunction with the instruction as a whole, the illustrations could not mislead the jury so as to warrant reversal. The district court's use of the illustrations was not an abuse of discretion.

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VI. CONCLUSION

We hold that (1) the court's jury instruction on constructive possession, taken as a whole, did not mislead the jury so as to warrant reversal; and (2) the court correctly found that the defendant "opened the door," permitting the prosecution to admit evidence of the circumstances of his prior guilty plea and evidence of his prior drug use.

Affirmed.