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## Pierson v. Post and the America's Cup Litigation

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## **PIERSON v. POST AND THE AMERICA'S CUP LITIGATION**

by Lynda L. Butler

Remember when you were sitting in your first-year property class discussing Pierson v. Post. Remember how you wondered why you were studying a case about a fox. Remember how you thought that the case would never have any relevance to the practice of law. Well think again. In the recent decision Mercury Bay Boating Club v. San Diego Yacht Club, the concurring opinion actually relies on Pierson v. Post to support his conclusion that the San Diego Yacht Club was the legitimate winner of the 1988 race for the America's Cup. See 1989 WestLaw 106612 (N.Y. App. Div. 1st Dep't. Sept. 19, 1989) (Rubin, J., concurring). The legacy of Pierson v. Post thus continues to this day.

The America's Cup litigation involved a challenge to the 1988 America's Cup race. Plaintiff, the Mercury Bay Boating Club, had brought an action to set aside the results of that race, arguing that San Diego's defense of the Cup in a multihull yacht violated the terms and the spirit of the deed of trust, or the document governing the race. The district court agreed, setting aside the results of the 1988 race and ordering the San Diego Yacht Club to forfeit the Cup to Mercury Bay. The court explained that the America's Cup was established to foster "friendly competition between foreign countries." San Diego's defense in a catamaran did not, in the court's view, promote this goal because it was contrary to the intent of the deed of trust.

On appeal, the appellate division reversed, concluding that the lower court "improperly relied on extrinsic evidence to construe an unambiguous instrument." While the concurring justice generally agreed with this conclusion, he apparently felt the need to provide an additional basis for the decision: Pierson v. Post. Describing that case as "venerable" precedent, concurring justice Rubin explained his reliance on Pierson by defining the scope of the decision. As he noted, Pierson stands for the "basic proposition of property law that no right to a wild animal is created until it is reduced to possession." But beyond that proposition, Pierson is also important for the question that the court refused to answer. According to Rubin, that question was whether "it was sporting for Pierson to have killed the fox when Post . . . 'was on the point of seizing it.'" The majority in Pierson concluded that it could not answer that question because unsportsmanlike conduct did not have a legal remedy.

Pierson v. Post thus suggests the need to make an important distinction in resolving the America's Cup litigation. As the concurring opinion explained, that distinction concerns two questions: one, "whether the entry of a catamaran in the America's Cup race is consistent with the terms of the deed of trust" and, two, "whether it constitutes good sportmanship under the particular ethos of the yachting community to pit a catamaran against a monohull." The failure to distinguish between these two questions results in confusion between the actual intent of the America's Cup deed of trust and the "meaning sought to be attributed to it by reference to" yachting customs and practices. While yachting practices might define what constitutes a sporting challenge, they do not, in Rubin's view, define what is legally permissible under the deed of trust.

The irony of Rubin's use of Pierson v. Post is that judicial intervention is still needed to resolve sporting contests. When Pierson was decided in 1805, a court decision represented the only peaceful way to resolve such a controversy; had the plaintiff not chosen judicial intervention, the dispute probably would have been resolved through a duel. Thus, when Pierson is discussed in the first-year property course, professors typically stress that today's society is much more civilized and that a peaceful solution

now could be reached through alternative forms of dispute resolution. The America's Cup litigation, of course, disproves both the assessment of the impact of Pierson and the assessment of society. After the America's Cup litigation, Pierson v. Post does indeed deserve the label "venerable."