SUPERIOR COURT OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO

UNLIMITED JURISDICTION

DEPARTMENT 306

December 18, 2002

STATEMENT OF DECISION

HONORABLE KEVIN M. McCARTHY

ALEX POPOV	)	
	)	
Plaintiff,	)	
	)	**#400545**
	)	
vs.	)	
	)	
PATRICK HAYASHI	)	
	)	
Defendant	)	
	)	
_____	)	

FACTS

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[1] 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.[2] 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 testimony of these witnesses varied on many important points. Some of the witnesses had a good vantage point and some did not. Some appeared disinterested in the outcome of the litigation and others had a clear bias. Some remembered the events well and others did not. Some were encumbered by prior inconsistent statements which diminished their credibility.

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.

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[1] It has been suggested that the ball might sell for something in excess of $1,000,000

[2] The Giants' website contains a page which shows where each of Bonds' home runs landed in 2001. This page was introduced into evidence and is part of the record. It shows that most of the balls are clustered in the arcade area.

Even as the ball was going into his glove, a crowd of people began to engulf Mr. Popov.[3] 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.[4]

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.[5] 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

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[3] Ted Kobayashi, a defense expert, testified that there was insufficient reaction time for the crowd to descend on Mr. Popov. This opinion is completely unconvincing. It is premised on the assumption that people did not begin to react until the ball hit Mr. Popov's glove. A number of witnesses testified that they began reacting while the ball was in the air. People rushed to the area where they thought the ball would land. If people were unable to anticipate where a ball will land while it is still in the air, no outfielder would ever catch a ball unless it was hit directly to him or her. Moreover, the tape itself shows people descending on Mr. Popov even as he was attempting to catch the ball.

[4] Because the probability of truth does not favor the testimony of any of these witnesses in other particulars, their entire testimony is rejected. BAJI 2.22 This finding does not apply to Mr. Hayashi.

[5] Plaintiff argues that the Keppel tape shows Mr. Hayashi biting the leg of Brian Shepard. The tape does not support such a conclusion. The testimony which suggests that a bite occurred is equally unconvincing. In addition, there is insufficient evidence that Mr. Hayashi assaulted or attempted to take the ball away from Mr. Popov.

away from him and that he was unwilling to show it until he was on videotape. Although he testified to the contrary, that portion of his testimony is unconvincing.

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. [6] Security guards then took Mr. Hayashi to a secure area of the stadium.[7]

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

Plaintiff has pled causes of actions for conversion, trespass to chattel, injunctive relief and constructive trust.

Conversion is the wrongful exercise of dominion over the personal property of another.[8] There must be actual interference with the plaintiff's dominion[9]. 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.[10]

The act constituting conversion must be intentionally done. There is no requirement, however, that the defendant know that the property belongs to another or

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[6] Defense counsel has attempted to characterize this encounter as one in which Mr. Popov congratulates Mr. Hayashi for getting the ball and offers him a high five. This is an argument that only a true advocate could embrace.

[7] Testimony was also received about events which occurred after baseball officials escorted Mr. Hayashi to a secure area. This evidence was admitted to allow counsel to explore the possibility that Major League Baseball retained constructive possession of the ball after it landed in the stands and later gifted it to Mr. Hayashi. Defense counsel has properly abandoned this theory. There is no evidence to support it.

[8] See generally, Witkin, Summary of California Law, Ninth Edition, section 610. See also, Fresno Air Service v. Wood (1965) 232 Cal.App.2d 801, 806.

[9] Jordan v. Talbot (1961) 55 Cal.2d 597, 610.

[10] Edwards v. Jenkins (1932)214 Cal 713, 720, Witkin, supra, at section 622.

that the defendant intends to dispossess the true owner of its use and enjoyment. Wrongful purpose is not a component of conversion[11]

The injured party may elect to seek either specific recovery of the property or monetary damages.[12]

Trespass to chattel, in contrast, exists where personal property has been damaged or where the defendant has interfered with the plaintiff's use of the property. Actual dispossession is not an element of the tort of trespass to chattel.[13]

In the case at bar, Mr. Popov is not claiming that Mr. Hayashi damaged the ball or that he interfered with Mr. Popov's use and enjoyment of the ball. He claims instead that Mr. Hayashi intentionally took it from him and refused to give it back. There is no trespass to chattel. If there was a wrong at all, it is 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.[14] 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.[15] The first person who came in possession of the ball became its new owner.[16]

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.

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[11] Henderson v. Security National Bank (1977) 72 Cal.App.3d 764, 771; Witkin, supra at section 624.
[12] Witkin, supra, at section 611.
[13] Zaslow v. Kroenert (1946) 29 Cal.2d 541, 551.
[14] Metropolitan Life Insurance Company v. San Francisco Bank (1943) 58 Cal.App.2d 528, 534; Witkin, supra, at section 617.
[15] See generally, Fugitive Baseballs and Abandoned Property: Who Owns the Home Run Ball?; Cardozo Law Review, May 2002, Paul Finkelman, (Chapman Distinguished Professor of Law).
[16] See generally, Past and Future: The Temporal Dimension in the Law of Property, (1986) 64:667;. Washington U.L. Quarterly, Professor Richard A. Epstein (James Parker Hall Professor of Law, University of Chicago; Irwin v. Phillips (1855) 5 Cal. 140; Potter v. Knowles (1855) 5 Cal. 87.
[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.

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.

The disagreement is understandable. Although the term possession appears repeatedly throughout the law, its definition varies depending on the context in which it is used.[18] Various courts have condemned the term as vague and meaningless.[19]

This level of criticism is probably unwarranted.

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[20] 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."[21]

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 power 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."[22]

The task of this court is to use these principles as a starting point to craft a definition of possession that applies to the unique circumstances of this case.

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

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[18] Brown, The Law on Personal Property (Callaghan and Company, 3rd Edition, 1975) section 2.6, page 19.
[19] Kramer v. United States 408 F2d 837, 840 (CA 8th 1969); State v. Strutt (1967) 236 A2d 357, 359.
[20] Professor Bernhardt is the author of the textbook Property, Cases and Statutes, published by the West Group as well as the co-author of Real Property in a Nutshell with Professor Ann M. Burkhart.
[21] Real Property in a Nutshell, Roger Bernhardt and Ann M. Burkhart, chapter one, page 3.
[22] Brown, The Law on Personal Property (Callaghan and Company, 3rd Edition, 1975) section 2.6, page 21.

that intent to the world.[23] The question is whether he did enough to reduce the 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 Finkelman[26]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 must be significant and they must be reasonably calculated to result in unequivocal dominion and control at some point in the near future.[28]

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[23] Literally.

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

[25] Pierson v. Post 3 Caines R. (N.Y. 1805); Young v. Hitchens 6 Q.B. 606 (1844); State v. Shaw (1902) 67 Ohio St. 157.

[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 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 (1981)640 F.2d 560, 571. (emphasis added)

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

This rule is applied in cases involving the hunting or fishing of wild animals[29] 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. The 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 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

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[29] Liesner v. Wanie (1914) 145 N.W. 374; Ghen v. Rich 8 F. 159 (D. Mass. 1881); Pierson v. Post 3 Caines R. (N.Y. 1805); Young v. Hitchens 6 Q.B. 606 (1844); State v. Shaw (1902) 67 Ohio St. 157.See also Herbert Hovenkamp and Sheldon Kurtz, The Law of Property (5th ed. West Group 2001) at page 2.
[30] Indian River Recovery Company v. The China 645 F.Supp. 141, 144 (D. Del. 1986); Treasure Salvors Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel (1981)640 F.2d 560; Rickard v. Pringle 293 F.Supp.981 (S.D.N.Y. 1968).
[31] Swift v. Gifford 23 F. Cas. 558 (D. Mass. 1872)
[32] See note 27.
[33] Brady v. S.S. African Queen 179 F. Supp. 321, 324 (E.D.Va, 1960)

contact. It is because he was attacked. His efforts to establish possession were interrupted by the collective assault of a band of wrongdoers.[34]

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.[35]

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. That will not happen.

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.**[37]

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-possessory interest in the property. That pre-possessory interest constitutes a qualified right to possession which can support a cause of action for conversion.

Possession can be likened to a journey down a path. Mr. Popov began his journey unimpeded. He was fast approaching a fork in the road. A turn in one direction would lead to possession of the ball --- he would complete the catch. A turn in the other

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[34] Professor Gray has suggested that the way to deal with this problem is to demand that Mr. Popov sue the people who assaulted him. This suggestion is unworkable for a number of reasons. First, it was an attack by a large group of people. It is impossible to separate out the people who were acting unlawfully from the people who were involuntarily pulled into the mix. Second, in order to prove damages related to the loss of the ball, Mr. Popov would have to prove that but for the actions of the crowd he would have achieved possession of the ball. As noted earlier, this is impossible.

[35] There are a number of ways courts can enforce the rule of law. Major League Baseball, as well as each individual team has a duty to provide security against foreseeable violence in the stands. The failure to provide that security, or worse, the tacit acceptance of some level of violence, will inevitably lead to lawsuits against the teams and the parent organization.

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

[37] See note 14

direction would result in a failure to achieve possession --- he would drop the ball. Our problem is that before Mr. Popov got to the point where the road forked, he was set upon by a gang of bandits, who dislodged the ball from his grasp.

Recognition of a legally protected pre-possessory interest, vests Mr. Popov with a qualified right to possession and enables him to advance a legitimate claim to the baseball based on a conversion theory. Moreover it addresses the harm done by the unlawful actions of the crowd.

It does not, however, address the interests of Mr. Hayashi. The court is required to balance the interests of all parties.

Mr. Hayashi was not a wrongdoer. He was a victim of the same bandits that attacked Mr. Popov. The difference is that he was able to extract himself from their assault and move to the side of the road. It was there that he discovered the loose ball. When he picked up and put it in his pocket he attained unequivocal dominion and control.

If Mr. Popov had achieved complete possession before Mr. Hayashi got the ball, those actions would not have divested Mr. Popov of any rights, nor would they have created any rights to which Mr. Hayashi could lay claim. Mr. Popov, however, was able to establish only a qualified pre-possessory interest in the ball. That interest does not establish a full right to possession that is protected from a subsequent legitimate claim.

On the other hand, while Mr. Hayashi appears on the surface to have done everything necessary to claim full possession of the ball, the ball itself is encumbered by the qualified pre-possessory interest of Mr. Popov. At the time Mr. Hayashi came into possession of the ball, it had, in effect, a cloud on its title.

An award of the ball to Mr. Popov would be unfair to Mr. Hayashi. It would be premised on the assumption that Mr. Popov would have caught the ball. That assumption is not supported by the facts. An award of the ball to Mr. Hayashi would unfairly penalize Mr. Popov. It would be based on the assumption that Mr. Popov would have dropped the ball. That conclusion is also unsupported by the facts.

Both men have a superior claim to the ball as against all the world. Each man has a claim of equal dignity as to the other. We are, therefore, left with something of a dilemma.

Thankfully, there is a middle ground.

The concept of equitable division was fully explored in a law review article authored by Professor R.H. Helmholz in the December 1983 edition of the Fordham Law Review. [38] Professor Helmholz addressed the problems associated with rules governing

[38] Equitable Division and the Law of Finders, (1983) Fordham Law Review, Professor R.H. Helmholz, University of Chicago School of Law. This article built on a student comment published in 1939. Lost, Mislaid and Abandoned Property (1939) 8 Fordham Law Review 222.

finders of lost and mislaid property. For a variety of reasons not directly relevant to the issues raised in this case, Helmholz suggested employing the equitable remedy of division to resolve competing claims between finders of lost or mislaid property and the owners of land on which the property was found.

There is no reason, however, that the same remedy cannot be applied in a case such as this, where issues of property, tort and equity intersect.

The concept of equitable division has its roots in ancient Roman law.[39] As Helmholz points out, it is useful in that it "provides an equitable way to resolve competing claims which are equally strong." Moreover, "[i]t comports with what one instinctively feels to be fair".[40]

Although there is no California case directly on point, Arnold v. Producers Fruit Company (1900) 128 Cal. 637 provides some insight. There, a number of different prune growers contracted with Producer's Fruit Company to dry and market their product. Producers did a bad job. They mixed fruit from many different growers together in a single bin and much of the fruit rotted because it was improperly treated.

When one of the plaintiffs offered proof that the fruit in general was rotten, Producers objected on the theory that the plaintiff could not prove that the prunes he contributed to the mix were the same prunes that rotted. The court concluded that it did not matter. After the mixing was done, each grower had an undivided interest in the whole, in proportion to the amount of fruit each had originally contributed.

The principle at work here is that where more than one party has a valid claim to a single piece of property, the court will recognize an undivided interest in the property in proportion to the strength of the claim.

Application of the principle of equitable division is illustrated in the case of Keron v. Cashman (1896) 33 A. 1055. In that case, five boys were walking home along a railroad track in the city of Elizabeth New Jersey. The youngest of the boys came upon an old sock that was tied shut and contained something heavy. He picked it up and swung it. The oldest boy took it away from him and beat the others with it. The sock passes from boy to boy. Each controlled it for a short time. At some point in the course of play, the sock broke open and out spilled $775 as well as some rags, cloths and ribbons.

The court noted that possession requires both physical control and the intent to reduce the property to one's possession. Control and intent must be concurrent. None of the boys intended to take possession until it became apparent that the sock contained money. Each boy had physical control of the sock at some point before that discovery was made.

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[39] Helmholz at fn. 14.
[40] id. at 315.

Because none could present a superior claim of concurrent control and intent, the court held that each boy was entitled to an equal share of the money. Their legal claims to the property were of equal quality, therefore their entitlement to the property was also equal.

Here, the issue is not intent, or concurrence. Both men intended to possess the ball at the time they were in physical contact with it. The issue, instead, is the legal quality of the claim. With respect to that, neither can present a superior argument as against the other.

Mr. Hayashi's claim is compromised by Mr. Popov's pre-possessory interest. Mr. Popov cannot demonstrate full control. Albeit for different reasons, they stand before the court in exactly the same legal position as did the five boys. Their legal claims are of equal quality and they are equally entitled to the ball.

The court therefore declares that both plaintiff and defendant have an equal and undivided interest in the ball. Plaintiff's cause of action for conversion is sustained only as to his equal and undivided interest. In order to effectuate this ruling, the ball must be sold and the proceeds divided equally between the parties.

The parties are ordered to meet and confer forthwith before Judge Richard Kramer to come to an agreement as to how to implement this decision. If no decision is made by December 30, 2002, the parties are directed to appear before this court on that date at 9:00 am.

The court retains jurisdiction to issue orders consistent with this decision. The ball is to remain in the custody of the court until further order.

December 18, 2002

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Kevin M. McCarthy