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Published version

CHARLISH, P. (2005). Solomon's baseball. International sports law review, 4 (5), 82-88.

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When George Herman Ruth Junior, (better known as Babe), hit his sixtieth home run in 1927, he etched his name for ever on the American consciousness—the first player to achieve such a tally. A home run, the baseball equivalent of a six in cricket, usually occurs when the batter hits the ball out of the field of play. The home run, however, is more significant than any six could ever be. It is the very heart of the game of baseball—what all players strive to achieve and what all fans want to see. That Ruth should hit this record number of home runs befitted his position as the godfather of baseball—the greatest ever player, playing for the New York Yankees, universally regarded as the greatest team.

Ruth's record stood for many years, until in 1961, disaster struck. A quiet, unheralded, unassuming player named Roger Maris broke Babe's record. He hit his 61st home run in the very last game of the season, thereby inscribing his own name above Babe's in the record books—only it wasn't quite as simple as that. The league had expanded since Ruth's time, and the season now lasted for 163 games as against 155 in the days of Babe. Rather than receiving the adulation and credit that his feat deserved, Maris was despised for having the temerity to break the great man's record. It was thus therefore that the most famous asterisk in American sports history was created. Because Maris played in a longer season than Ruth, his total was recorded with an asterisk next to it, quite separately from Ruth's—therefore retaining Babe's name in the home run record list and denying Maris the recognition that his feat deserved.

Periodically Maris' total was threatened, but never matched or bettered until 1998. It was then that Mark McGwire of the St Louis Cardinals and Sammy Sosa from the Chicago Cubs ran neck and neck in a gripping race for the record until McGwire pulled ahead in the final few games to eventually hit a total of 70 home runs to Sosa's 66.

When Ruth hit his 60th home run in 1927, no one could have imagined that the ball he hit would be worth a small fortune. In the case of th McGwire/Sosa battle, Major League Baseball (MLB) were well aware of the potential value and used specially coded balls when either player went in to bat, to ensure authentication in the event of a sale of "the Ball". McGwire's 70th home run ball eventually sold for $3 million. In a sign of different times, the fan who caught the ball that Roger Maris hit to break Babe Ruth's record in 1961 actually returned the ball to Maris in exchange for a photograph, complimentary tickets and an autograph[1]. That this deed may be referred to as "*returning* the ball" to Maris is a point of view shared by many baseball fans, but few lawyers, as will be discussed later.

The new record set by McGwire, did not last long, and in 2001 Barry Bonds of the San Francisco Giants hit 73 home runs in one season. Once again, as Bonds closed in on the record, coded balls were pitched to him so that the ball could be authenticated. The final home run was hit at Bonds's home stadium in the final game of the regular season.

There was a tremendous feeling of excitement generated by Bonds' pursuit of the record, not just in San Francisco, but throughout the United States. As was later acknowledged, people came to the ground "prepared for the possibility that a record-setting ball would be hit in their direction".[2] Some fans positioned themselves in the part of the arena to which Bonds hit most of his home runs and brought baseball gloves to the stadium,

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[1] *The Times*, December 12, 2001.

[2] *Popov v Hayashi* 2002 WL 31833731 (Cal. Superior), at 1.

specifically to aid them in any attempt to catch the record-breaking ball. Alex Popov and Patrick Hayashi were two such fans. The subject of this article is the case between the two as to the ownership of the ball.

Barry Bonds hit the first home run of the game, true to form, into the area of the stadium where both Popov and Hayashi were standing. What happened next was the subject of the legal action that followed.[3] It is not in dispute that Mr Popov made initial contact with the million-dollar ball, and equally, it is not in dispute that Mr Hayashi somehow ended up with the ball in his possession. It is, at least according to Mr Popov, during that *lost* time that he in effect had the ball unlawfully taken from him after he had gained possession of it from Mr Bonds' home run.

Abandonment and ownership

It is difficult to draw an analogy between the potential value of this particular ball and any piece of sports memorabilia that may be dear to fans in the United Kingdom. Perhaps the ball from the 1966 World Cup final would come close, but even this is an inadequate comparison. There is an obsession with statistics and records in baseball, to a level that does not exist in other sports. The commercial market for balls that have been part of significant moments in baseball history is quite simply phenomenal.[4] A clear contributing factor to this market is the convention that if a ball is hit into the crowd, it belongs to whoever gets possession of it.

The dispute over ownership of this particular ball was between Mr Popov and Mr Hayashi. As such it was not necessary to investigate to any great length details of title prior in time to this. The court simply found as fact that the governing body, MLB, were the true owners of the ball prior in time to the home run. McCarthy J. stated[5]:

> "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."

It is in this notion of abandonment that baseball clearly differs from almost any other major sport. There is no sense of abandonment of any cricket ball or football or American football or rugby ball or even tennis ball. If those balls go into the crowd, convention has it that the ball is returned to the field of play. They are not simply abandoned to the spectator who has the good fortune to gain possession of them. Indeed, some rugby clubs even go as far as to reclaim balls that are kicked out of their grounds into neighbouring gardens,[6] clearly being of the opinion that these balls have not been abandoned and that therefore as the true owners, they retain best title to the balls. Golf is probably the nearest relation to baseball in this respect. In golf, any lost ball is abandoned, in a sense, to the course. Any lost balls remain the property of the members of that particular private club,[7] and further convention seems to indicate that where a golfer finds other balls during the course of a round, they are entitled to take possession of those balls and thus acquire rights over them superior to all except the true owner. It is arguable that due to the apparent abandonment by the rightful owner, the finder actually acquires rights good against the whole world. If those balls haven't been abandoned, (instead simply lost), then it would seem that the previous owner would be able to recover the

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[3] *Popov v Hayashi*, *ibid*.
[4] The Mark McGwire home-run ball that broke Roger Maris' record sold for $3 million.
[5] *Popov v Hayashi*, above, n.2 at 4.
[6] Newport Rugby Football Club regularly request the return of balls that are kicked from their ground at Rodney Parade in South Wales and land in gardens adjacent to the ground.
[7] *Hibbert v McKiernan* [1948] 2 K.B. 142

property.[8] Battersby develops this principle and points out that in the event of there being a second finder of a particular ball, they would not succeed against the first finder,[9] (*i.e.* the first finder in time would retain superior title).

The notion that the baseball in question was abandoned, rather than simply lost or discarded temporarily, does, however, serve to eliminate the previous owners, (in this case MLB), from the equation. If a finder is a trespasser then this also would alter the rights of the claimants. The rights of lawful visitors to a golf course for example do not extend to trespassers who may happen to find any abandoned balls.[10] In this situation, the balls, (as stated above), remain the property of the members of the private club. There is thus a clear difference between the position in *Hibbert v McKiernan,*[11] where the golf balls were appropriated by a trespasser, and that in *Popov v Hayashi,*[12] where both parties in the case were lawful visitors to the baseball ground. This difference was acknowledged by Humphreys J. in *Hibbert v McKiernan*:

> "The appellant was not an honest finder; indeed, he was not a "finder" at all, except in the sense in which a burglar may be said to "find" the jewellery upon the dressing-table of the householder, to steal which is the object of his entry upon the premises."[13]

It is quite clear that in any "finders" dispute concerning chattels, the true owner, if they can be located, will always win. Pratt C.J. held in *Armory v Delamirie*:[14]

> "That the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover."

The true owner

Therefore, it seems sensible to first try and establish whether the *true* owner of the particular baseball in question can be identified.[15] Finkelman addressed this issue extensively,[16] and examined the respective rights of the batter, pitcher, (bowler), catcher (wicketkeeper), home team owners, and MLB, (in effect the governing body of baseball in USA). The claims, Finkelman argued, of the batter, pitcher and catcher could be fairly easily dismissed. Perhaps the most obvious reason for this is that those players are all employed by their teams, and as such will be deemed to have gained possession on behalf of their respective teams.[17] Investigating their claims more fully, it is clear that the batter, who most true fans of the game would view as having the best moral claim to the ball, in effect has very weak title. He never had any possession of the ball. Indeed, as Finkelman points out, his sole aim is to project the ball as far away from himself as possible.[18]

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[8] *Moffatt v Kazana* [1969] 2 Q.B. 52

[9] G. Battersby, "The present status of the jus tertii principle" (1992) *Conveyancer and Property Lawyer* Mar/Apr, 100 at 103.

[10] *Hibbert v McKiernan*, above, n.7.

[11] *ibid.*

[12] *Popov v Hayashi*, above n.2.

[13] *Hibbert v McKiernan*, above, n.7.

[14] *Armory v Delamirie* 8 Geo. 1 Strange, 506.

[15] As stated above, the court merely accepted that MLB had been the previous owners and had intentionally abandoned the property, however, there was little or no discussion attached to the issue of previous ownership and therefore it may prove instructive to investigate this issue further at this moment in time.

[16] P. Finkelman, "Fugitive baseballs and abandoned property: Who owns the home run ball?" (2002) 23:5 *Cardozo Law Review* 1609.

[17] *M'Dowell v Ulster Bank* (1899) 33 I.L.T. 225

[18] P. Finkelman, above, n.16.

Rapp (an associate of the law firm O'Shea and Gardner in Washington DC), however, argued that the ball should have been turned over to Barry Bonds, the player who hit the record breaking home run in the first place.[19] He stated: "Who should win? My answer: Neither fan. Instead, the court should award the ball to Barry Bonds himself. Barry ought to intervene and claim what is rightfully his." Rapp argues that the justification for this is that before Bonds hit it, the ball was worth no more than $1.99 as the bare price that is paid for a baseball on the open market. However, it was the action of Bonds in striking that particular ball for his 73rd home run of the season that caused it to become the subject of this legal action. Whilst this is undoubtedly true, there still remains a certain perversity in handing such a valuable item to a man who is already a multi-millionaire. However, this is no real argument for not giving the item to Bonds, (I use "give" rather than "return" the ball because to say *return* implies that at some stage Bonds had possession of the ball which is quite simply not the case). The real reason for not handing the ball over to Bonds is simply that legally it cannot be justified (whatever Mr Rapp argues). This is a dispute with notions of possession at its very heart, and as such, the claims of the batter to the ball are virtually non-existent.

Similarly, the catcher never had any possession of the ball, he might have been trying to gain temporary possession, but even if he acquired such possession, he would immediately turn the ball over to the pitcher again. As such, he too is unable to acquire title to the ball.

The pitcher does present a slightly different problem, and his claim cannot be dismissed quite as easily. He clearly took the ball into his possession, albeit temporarily. The importance of taking possession was illustrated in *Parker v British Airways Board*,[20] where it was held: "The plaintiff in taking the bracelet into his care and control acquired rights of possession except against the true owner".

In throwing the ball away, (*i.e.* pitching it to the batter), has the pitcher discarded or abandoned the chattel? In addressing this question, there is obviously the supposition that the pitcher has already been able to establish a possessory title to the ball. It is perhaps possible to draw an analogy between the actions of the pitcher and the actions of a golfer who loses a ball, (although their motivation is clearly different, as in the case of the pitcher, he is deliberately discarding the ball whereas the golfer certainly is not aiming to abandon his ball—at all times he wants to keep control of it).

To more fully understand the nature of title that the pitcher may have, it is necessary to investigate just how he obtains possession of the ball. Under normal circumstances, the balls used in a game are the property of the home team. As such, the balls pitched to Barry Bonds in home games would be owned by his team, the San Francisco Giants. However, as already stated, when he was nearing the record, coded balls were pitched to him. Finkelman observed:

> "While home teams usually provide all baseballs for games, in the case of Bonds's record breaking home run, the specific ball pitched to Bonds apparently was not provided by the home team, the San Francisco Giants. Instead, when Bonds came to bat specially marked balls, apparently provided by MLB, were used". [21]

Finkelman further argues that MLB have no legitimate claim, (or at least would not assert any claim), over the ball, not because they have no rights to assert over the ball, but because of convention and past practice. Part of the baseball experience, which has been present in the

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[19] G. Rapp, "Who owns Barry Bonds's million-plus-dollar baseball?" Findlaw Legal Commentary at *http://writ.news.findlaw.com/commentary/20021023_rapp.html.*

[20] *Parker v British Airways Board* [1982] 1 Q.B. 1004

[21] P. Finkelman, above, n.16. at p.1614

game for many years is the opportunity for fans to collect a piece of memorabilia by catching a home-run ball. Finkelman continues:

> "MLB has not done any of this and, for marketing reasons, if nothing else, is unlikely to do so. MLB clearly abandoned any claim to the Barry Bonds record-breaking ball. Any doubt about this is resolved by the procedures following the homerun. After Barry Bonds's 67th home run, each ball and whoever held it at the time, were taken to a special room in the stadium where a MLB official and representative of the Arthur Andersen accounting firm, authenticated the ball, marked it, and returned it to the person who had possession of it before it was authenticated …. Major League Baseball did own this home run ball before it was hit, but clearly relinquished any claim to it when it sailed over the fence".[22]

Whether or not the practice of MLB in not asserting any proprietary rights over previous balls would prevent them from successfully establishing a successful claim over this particular ball is a moot point, as they did not pursue that course of action. MLB did not attempt to exert any claim over the ball, and it is therefore immaterial as to whether they may have had better title. As Battersby points out:

> "In all cases where, for whatever reason neither the plaintiff nor the defendant can (or will) identify a person with a superior title, the old *jus tertii* principle will continue to apply, *i.e.* the plaintiff will win against the defendant if the plaintiff has a title superior to the defendant's even though it is clear that some party has a better title than either of them".[23]

Did he catch it?

The problem over this ball came down to the two individuals, Mr Popov and Mr Hayashi, and it is to this part of the dispute that this article now turns. Having listened to 17 witnesses and watching videotape of the whole incident, the court found as fact that the home-run ball went into the crowd where it was partially secured by Mr Popov. McCarthy J., stated, however, that:

> "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". [24]

Mr Popov subsequently lost all control of the ball which then ended up in the hands of Mr Hayashi. The case therefore hinges on whether or not Mr Popov had complete control over the ball, for if he did then he could establish superior title; if not then Mr Hayashi takes the biscuit. If we first consider general principles of possession and then attempt to apply them to baseball in general, and specifically to the act of catching the ball, we should then be able to assess the claims of the two litigants.

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[22] *ibid.,* at p.1615
[23] Battersby, above n.9, at p.102
[24] *Popov v Hayashi*, above n.2 at 1.

Possession

Issues of possession were raised in *Young v Hichens,*[25] which involved a dispute over possession of pilchards by fishermen. In this particular case, the plaintiff had almost caught the fish with his net, when the defendant disturbed the fish and prevented their capture. Wightman J. opined:

> "If the property in the fish was vested in the plaintiff by his partially inclosing them but leaving an opening in the nets, he would be entitled to maintain trover for the fish which escaped through that very opening". [26]

It was held, however, that almost capturing or enclosing the fish was not the same as completely capturing them, and that superior title could only be established if they had been completely enclosed. Patterson J. concluded that:

> "I do not see how we could support the affirmative of these issues upon the present evidence, unless we were prepared to hold that all but reducing into possession is the same as reducing into possession". [27]

Perhaps most pertinently, Denman C.J., stated:

> "It does appear almost certain that the plaintiff would have had possession of the fish but for the act of the defendant: but it is quite certain that he had not possession. Whatever interpretation may be put upon such terms as "custody" and "possession", the question is whether any custody or possession has been obtained here. I think it is impossible to say that it had, until the party had actual power over the fish. It may be that the defendant acted unjustifiably in preventing the plaintiff from obtaining such power: but that would only shew a wrongful act, for which he might be liable in a proper form of action".[28]

It is clear that the establishment of possession is the central pretext upon which this case should rest. As can be seen from *Young v Hichens*,[29] if the plaintiff (in our case Popov) is unable to establish possession, then he has no claim. What can be seen is that possession must mean complete control or custody—at least in the case of fish. The court in *Young v Hichens*, did however investigate different situations in which these principles of possession would not apply. Such situations included certain types of hunting. The example of whale hunting was specifically addressed by the court, where it was stated:

> "The authorities from the Roman law and Bracton are in favour of the defendant, because in this case there was neither capture, occupation nor custody. The cases as to the whale fishery, including *Skinner v Chapman* (Moo. & M. 59, note) turned on custom. The passage cited from Bell lays down a doctrine which cannot be recognized in an English Court, unless as it may prevail by custom in particular occupations, as the whale fishery".[30]

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[25] *Young v Hichens* 6 Q.B. 607, S.C.D. & M. 592 (1844)
[26] *ibid.,* at p.230
[27] *ibid.*
[28] *ibid.*
[29] *Young v Hichens*, *ibid.*
[30] *Young v Hichens*, *ibid.*

Custom in the whaling industry dictated that the first harpooner to strike the whale claimed rights to it as long as the harpoon remained in the creature. These rights remain, even if another hunter actually removes that harpoon from the whale and appropriates it for himself. The question therefore arises as to whether custom may lead to a different result in a case centred on baseball.

Custom in baseball

In order to assess fully the validity of the claim of possession put forward by Popov, it is necessary to investigate the nature and customs of baseball. It is clear that customary practice can play an important role in assessing possessory claims in different activities, and therefore there is no reason why it should not be considered in our particular context.

It has already been shown how it has been custom in baseball for many years for fans to claim any balls that are hit into the crowd. Finkelman describes how some MLB teams actually have written policies detailing this fact.[31] The custom which is more important in the dispute between Mr Popov and Mr Hayashi, however, is what actually constitutes a valid catch in baseball. By investigating how this is covered in the rules of baseball, it is argued that these rules should then be applied to the dispute, (although clearly, the rules of baseball apply to the field of play and it is at least arguable that the stands do not constitute the field of play. If the rules of baseball do not apply, then we must address more generic rules of possession). If Mr Popov made a valid catch, then the ball should belong to him; if he did not, then the loose ball was fair game and Mr Hayashi would then be able to establish best title to it. The matter may be complicated if the ball had been wrongfully arrested from Mr Popov, and that is an issue which will be dealt with below. The Official Rules of Major League Baseball define a catch, thus:

> "A catch is the act of a fielder in getting secure possession in his hand or glove of a ball in flight and firmly holding it …. It is not a catch however, if simultaneously or immediately following his contact with the ball, he collides with a player, or with a wall, or if he falls down, and as a result of such collision or falling, drops the ball …. In establishing the validity of the catch, the fielder shall hold the ball long enough to prove that he has complete control of the ball and that his release of the ball is voluntary and intentional[32]."

This definition clearly bears some relation to the words of the court in discussing the possession of the disputed fish in *Young v Hichens*.[33] A nearly caught ball is not a caught ball. The question that has to be answered is quite clear. Did Mr Popov make a valid catch according to the stated rules of baseball? If he did, the ball is his. If he did not, the title lies with Mr Hayashi, but that would not necessarily rule out other possible actions by Mr Popov. The court, in addressing the validity of Mr Popov's possessory claim stated the following:

> "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".[34]

The court then continued:

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[31] P. Finkelman, above, n.16. at p.1617

[32] Major League Baseball, Official Rules, 2.00 – Definition of terms.

[33] *Young v Hichens*, above, n.25.

[34] *Popov v Hayashi*, above, n.2 at 1.

> "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".[35]

It is arguable that the final sentence is irrelevant. It has already been established by the rules of baseball that if a player drops or loses possession of the ball before complete control is established by, for example, colliding with another player or a wall, then there is no valid catch. Mr Popov in effect collided with several other people. The manner of this collision is unimportant for the dispute of possession. Donaldson L.J. in *Parker*[36] seemed to establish that the state of mind of the "finder" of an article was important, and therefore it would obviously be possible to extend this principle to cover Mr Hayashi and the other assailants. However, the flaws in the logic of this reasoning were revealed in *Costello*,[37] and when we apply that principle, the validity of Mr Hayashi's claim only strengthens, (issues relating to *Costello* will be raised below). It is clear that in any game of baseball Mr Popov's catch would not have been ruled valid. Wherever there is doubt, just as in cricket, the benefit of that doubt is given to the batter. Therefore if Mr Popov's catch was invalid, then it must surely mean that the ball was fair game for Mr Hayashi. McCarthy J., acknowledged the weakness of Popov's title when he stated:

> "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".[38]

However, as far as McCarthy J. was concerned, that was not the end of the matter. The fact that Mr Popov was attacked by an unruly mob had a clear bearing on the case. It was because of this mass assault that he was deprived of the opportunity of gaining complete control of the ball. McCarthy J. continued:

> "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".[39]

It is submitted that this approach is fundamentally flawed and merely serves to muddy further the already clouded waters surrounding, "finders' disputes" and possession. The decision, whilst clearly being rooted in the court's assessment of morality, seems difficult to justify. It is certainly arguable that a real disservice has been done to Mr Hayashi. The court clearly acknowledged that he had not been part of the mob which assaulted Mr Popov (despite an attempt by Mr Popov to portray him as such), and furthermore stressed quite clearly that he had done all that was necessary to gain complete possession of the ball. McCarthy J. stated:

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[35] *Ibid.*, at 3.
[36] *Parker v British Airways Board,* above, n.20.
[37] *Costello v Derbyshire Chief Constable* [2001] 1 W.L.R. 1437.
[38] *Popov v Hayashi*, above, n.2, at 6.
[39] *ibid.*, at 7.

> "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".[40]

Through no fault of his own, Mr Hayashi had to submit to a co-ownership of the ball. The court referred to this as an "equitable division". Whilst undoubtedly being a real boon to Mr Popov, the same clearly cannot be said of Mr Hayashi, with the estimated value of the ball at around $1 million. The basis for the justification of this "equitable division" rests on what the court described as a "pre-possessory" interest gained by Mr Popov when the ball came into contact with his glove. McCarthy J. explained:

> "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 cognisable 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".[41]

Mr Popov was seeking an equitable remedy, and that therefore gave the court some latitude to arrive at what they believed to be a just and fair decision. The means that they used to arrive at that decision lay in the principle of the "pre-possessory" interest established by Popov. He was able to show this interest because his significant attempts to achieve possession of the abandoned property (the court accepted that the baseball in question had indeed been abandoned by its owners) were interrupted by the unlawful actions of the crowd.

Now from Mr Popov's point of view, this may well be an equitable decision, but from Mr Hayashi's, this is far from the case. He was not a wrongdoer and yet has been forced to relinquish his own undivided ownership. The hypothetical question of what the position might be if Mr Hayashi was not entirely innocent should be addressed. What if he did have dishonest intent following his acquisition of the ball. In *Parker v British Airways Board,* Donaldson L.J. opined: "The finder of a chattel acquires very limited rights over it if he takes it into his care and control with dishonest intent".[42]

This standpoint has subsequently been called into question following the Court of Appeal decision in *Costello v Chief Constable of Derbyshire*[43] where the police seized a suspected stolen car from a member of the public (who was aware that it had been stolen), and then were forced to return it to that individual when the true owner could not be located. It was held that:

> "The fact of possession of a chattel of itself gave to the possessor a possessory title and the possessor was entitled to rely on such title without reference to the circumstances in which such possession was obtained".

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[40] *ibid.*, at 8.
[41] *ibid.*, at 7.
[42] *Parker v British Airways Board,* above, n.20, at 1017.
[43] *Costello v Chief Constable of Derbyshire*, above, n.37, at 1438.

The position adopted by Donaldson L.J. in *Parker*[44] has been disputed by several academic writers,[45] who note the difficulties apparent in the opinions of that court. Battersby argues that:

> "The decision and the reasoning in *Costello* seem absolutely compelling. The notion of relative title, which is built into our law of property, is reasserted in the most uncompromising way. Possession, however acquired, will found a title which will prevail against all claimants whose rights are subsequent to those of the possessor, and conversely, will be defeated only by those who have continuing rights which are prior to those of the possessor".[46]

The logic of this argument is clear, and thus Donaldson L.J.'s position in *Parker*[47] is unsustainable. It palpably makes no difference to the strength of his title whether Mr Parker handed the bracelet in, or whether he merely slipped it into his pocket and made no attempt to locate the true owner. Smith addresses the issue from a similar standpoint. He comments:

> "Therefore, the finder has a better right than any subsequent claimant to the property. This applies even where the finder is a wrongdoer or a thief and the property has been seized by the police. Although some courts have been reluctant to enunciate such a rule, any other principle would allow a free-for-all fight for possession, especially where the true owner is not known".[48]

Therefore, we have to conclude that even if Mr Hayashi had acted dishonestly (which he did not) in attaining possession of the ball, this would not affect the strength of his title in the dispute with Mr Popov. If there are actions elsewhere then this is an entirely separate matter which would not affect the strength of their relative titles.

The court, in coming to its conclusion, may have attempted to display the wisdom of Solomon but with respect—Solomon should have had no place in this decision.

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[44] *Parker v British Airways Board*, above, n.20.
[45] G. Battersby, "Acquiring title by theft" (2002) 65(4) M.L.R. 603; R.G. Smith, *Property Law* (4th ed., Longman Publishing, London, 2003).
[46] G. Battersby, above, n.45 at p.609.
[47] *Parker v British Airways Board* [1982] Q.B. 1004
[48] Smith, *Property Law*, above, n.45 at p.58.