Chapter 3

PROPERTY RIGHTS IN WILD ANIMALS

SYNOPSIS

§ 3.01 The Origin of Property Rights

Property courses often begin with a surprising topic—ownership of wild animals. In a sense, the topic seems almost irrelevant. Modern disputes about who owns a particular squirrel or fish, for example, are uncommon. And it is simply too expensive to litigate the rare dispute that does arise. So why study the topic?

The law governing ownership of wild animals helps answer a key question—how do property rights originate?[1] Today, virtually everything around us is owned by someone. But because wild animals in nature are considered unowned, they occupy a unique niche in property law. The legal principles governing acquisition of title to wild animals shed light on the policies that influenced the development of American property law. More directly, the principles governing ownership of wild animals were

[1] *See generally* Richard A. Epstein, *Possession as the Root of Title*, 13 Ga. L. Rev. 1221 (1979); Carol M. Rose, *Possession as the Origin of Property*, 52 U. Chi. L. Rev. 73 (1985).

ultimately extended by analogy to the ownership of other resources, including water, oil, and natural gas (*see* Chapter 31).

§ 3.02 The Capture Rule in General

[A] Basic Rule

As a general principle, no one owns wild animals—in Latin, *ferea naturae*—in their natural habitat.[2] Under the common law "capture rule," property rights in wild birds, fish, and other animals are obtained only through physical possession. The first person to capture or kill a wild animal acquires title to it.[3] For example, suppose that F finds and pursues a deer, only to have it escape; F has no rights to the deer. If G now traps the deer in a net, he "owns" the deer. But even G's ownership rights are limited. If the deer escapes from the net, G loses his rights and another hunter may acquire title through capture.

Understandably, this rule does not apply to domesticated or tame animals (*domitae naturae*). Suppose that F's cow strays onto G's land, where G captures it. Because the cow is considered a domestic animal, the capture is irrelevant. The rules concerning domestic animals are grounded in policies quite different from those relevant to wild animals. F still owns the cow, absent adverse possession by G.[4]

[B] *Pierson v. Post*

[1] Facts

The landmark case illustrating the capture rule—and much more—is *Pierson v. Post*.[5] It is still celebrated as one of the most famous decisions in American law. The facts of the case are deceptively simple. One day in the early 1800s, Post was hunting in the New York wilderness with his dogs. On a patch of "unpossessed" land, he found and pursued a fox. Pierson, fully aware that Post was chasing the fox, killed it himself to prevent Post from catching it. Although not clear from the case, this incident sparked or worsened a feud between the Post and Pierson families. The ensuing litigation was more about offended honor than the monetary value of the fox carcass.

Post sued Pierson for the value of the fox, claiming trespass on the case. Post won and Pierson appealed to the New York Supreme Court. Both parties agreed that property rights in wild animals were obtained only by

---

[2] Douglas v. Seacoast Prods., Inc., 431 U.S. 265, 284 (1977).

[3] *See, e.g.*, Pierson v. Post, 3 Cai. R. 175 (N.Y. 1805); Missouri v. Holland, 252 U.S. 416, 434 (1920) ("Wild birds are not in the possession of anyone; and possession is the beginning of ownership.").

[4] *See, e.g.*, Conti v. ASPCA, 353 N.Y.S.2d 288 (City Civ. Ct. 1974) (owner still held title to trained parrot after its escape, because parrot was a domesticated animal).

[5] 3 Cai. R. 175 (N.Y. 1805).

"occupancy," that is, by first possession. Thus, as the court phrased it, the issue was "what acts amount to occupancy" of a wild animal?[6] Pierson maintained that only killing or other *actual capture* of the animal constituted possession. Post argued for what might be called a *probable capture* standard: a pursuing hunter with a reasonable chance of success has sufficient "possession" to create ownership. No prior English or American decision had addressed the issue.

[2] Majority Opinion

The majority adopted the actual capture test in a somewhat mechanical opinion. Writing for the court, Justice Tompkins examined ancient treatises on Roman, European, and English law to locate an applicable rule. Finding that these authorities uniformly endorsed the actual capture standard, he concluded that the fox "became the property of Pierson, who intercepted and killed him."[7] To a lesser degree, Tompkins also relied on public policy factors. He suggested that the actual capture standard rewarded successful hunters, ensured certainty in property rights, and minimized quarrels.

[3] Dissent

In his sometimes facetious dissent, Justice Livingston criticized the majority's blind application of ancient rules to the fundamentally different conditions prevailing in the United States: "[I]f men themselves change with the times, why should not laws also undergo an alteration?"[8] He observed that the fox was a "noxious beast," akin to a pirate, that caused damage to farmers. Viewing the law as an instrument of social change, he argued that the court should select the standard that provided "the greatest possible encouragement"[9] for the destruction of foxes. He reasoned that the better rule required only continued pursuit together with a "reasonable prospect . . . of taking" the fox (i.e., a probable capture standard).

[4] *Pierson* in Context

Pierson is important at several levels. It established the actual capture rule as the American standard for acquiring title to wild animals. As a prominent decision in a legal system with little case law, it also provided a bridge for extending the capture rule by analogy to other natural resources.[10] More fundamentally, *Pierson* symbolizes the struggle between

---

[6] *Id.* at 177.

[7] *Id.* at 178.

[8] *Id.* at 181 (Livingston, J., dissenting).

[9] *Id.* at 180 (Livingston, J., dissenting).

[10] *See, e.g.*, Hammonds v. Central Kentucky Natural Gas Co., 75 S.W.2d 204 (Ky. Ct. App. 1934); Elliff v. Texon Drilling Co., 210 S.W.2d 558 (Tex. 1948). Indeed, one modern decision extended the *Pierson* standard to a new situation: ownership of a baseball used to set a home-run record. In Popov v. Hayashi, 2002 WL 31833731, the trial court held that the capture rule would apply ("A person who catches a baseball that enters the stands is its owner."), but found on the facts that the plaintiff had not "achieved complete control of the ball." *See generally* Patrick Stoklas, Comment, Popov v. Hayashi, *A Modern Day* Pierson v. Post: *A Comment on What the Court Should Have Done with the Seventy-third Home Run Baseball Hit by Barry Bonds*, 34 Loy. U. Chi. L.J. 901 (2003).

two theories of jurisprudence—formalism and instrumentalism. The majority opinion reflects the older, formalistic approach to judging; the judge mechanically derives the appropriate rule from existing authorities, however remote. The dissent represents the then-emerging view of the American judiciary that the law should serve as an instrument of social change. The dissent's insistence that law must "change with the times" still resonates today.

[C] Defining "Capture"

[1] The Actual Capture Standard

Pierson recognizes that a hunter who actually kills or captures a wild animal, and immediately takes possession of it, acquires title. It also suggests that the mortal wounding of an animal "by one not abandoning his pursuit"[11] may constitute capture.[12] Later decisions have somewhat relaxed the *Pierson* standard. For example, if F sets a trap that catches a wild muskrat in his absence, the muskrat still belongs to F. Similarly, if G begins chopping down a tree housing a wild bee hive, he has acquired sufficient title to the hive to prevail over H, a stranger who drives him away.[13]

[2] Two Fish Stories

A well-known pair of decisions involving ownership of fish illustrates the capture standard. In *State v. Shaw*,[14] a long funnel-shaped net directed fish into a holding net about 28 feet square; the narrow end of the funnel entering the holding net was less than 3 feet wide. Although fish could both enter and exit the holding net through this opening, under normal conditions few, if any, fish actually escaped. Finding that it was "practically . . . impossible" for fish to escape, the *Shaw* court held that the net owners had captured the fish.

Conversely, in *Young v. Hichens*,[15] the court held that plaintiff did not possess a school of fish that was virtually surrounded by his net. The lengthy net was drawn around the fish in almost a complete circle, leaving a gap of only about 40 feet. Before plaintiff's employees could close the gap with a second net, defendant's boat sailed through the gap into the circle and captured the fish. Lord Denman concluded that even though it was "almost certain" plaintiff *would have* obtained possession but for

[11] Pierson v. Post, 3 Cai. R. 175, 178 (N.Y. 1805).

[12] *See also* Dapson v. Daly, 153 N.E. 454 (Mass. 1926) (hunter who merely wounded and pursued deer did not obtain ownership); Buster v. Newkirk, 20 Johns. 75 (N.Y. Sup. Ct. 1822) (where first hunter wounded deer but abandoned pursuit, and deer ran six miles before second hunter killed it, second hunter owned deer).

[13] Adams v. Burton, 43 Vt. 36 (1870).

[14] 65 N.E. 875 (Ohio 1902).

[15] 115 Eng. Rep. 228 (Q.B. 1844).

defendant's intervention, it was "quite certain" that plaintiff *did not* actually obtain possession.[16]

Both decisions turn on the likelihood that fish might escape from the net. In *Shaw*, the facts established that fish rarely escaped from the trap. But the net circle in *Young* was incomplete, creating a small risk that fish could escape before the gap was plugged.

[3] Role of Custom

Custom may also help define capture, as reflected in a series of decisions concerning property rights in whales, notably *Ghen v. Rich*.[17] There, Ghen shot a bomb lance into a fin-back whale off the Cape Cod coast, killing it instantly. The whale immediately sank, presumably to the sea bottom. Three days later a beachcomber found the carcass stranded on a beach 17 miles away, and sold it to Rich who extracted its valuable oil. *Pierson* might suggest that Ghen had no rights in the whale. Although he killed it, he failed to take immediate possession of the carcass and in fact left the area, thus arguably "abandoning his pursuit."

The custom in the Cape Cod region, however, was that a whale killed in this manner belonged to the fisherman, while the finder of the carcass received a small reward for his help. Judicial acceptance of this custom was critical to the survival of the local whaling industry.[18] The court awarded the value of the whale to Ghen under the custom, noting that if a fisherman does "all that it is possible to do to make the animal his own, that would seem to be sufficient."[19]

[D] Release or Escape After Capture

In general, ownership rights end when a wild animal escapes or is released into the wild.[20] Suppose K captures a wild rabbit; one week later, the rabbit escapes back into the forest, where it is instantly killed by L. L owns the rabbit. Once K's qualified property rights lapsed, the rabbit was again unowned and subject to capture by another. If the law were otherwise, hunters like L might be deterred from hunting at all. How could they distinguish an "owned" rabbit from an "unowned" rabbit?

But suppose a wild animal escapes onto land that is far from its native habitat. If O's giraffe flees into the Colorado mountains, for example, P cannot acquire title by capturing it. The exotic nature of the animal

---

[16] *Id.* at 230.

[17] 8 F. 159 (D. Mass. 1881).

[18] *See* Robert C. Ellickson, *A Hypothesis of Wealth-Maximizing Norms: Evidence from the Whaling Industry*, 5 J.L. Econ. & Org. 83 (1989).

[19] Ghen v. Rich, 8 F. 159, 162 (D. Mass. 1881).

[20] *See, e.g., In re* Oriental Republic Uruguay, 821 F. Supp. 950 (D. Del. 1993) (owner who released wild ducks into marshland could not obtain damages when they were later killed by an oil spill); Mullett v. Bradley, 53 N.Y.S. 781 (App. Div. 1898) (owner's rights ended when undomesticated sea lion escaped).

effectively puts P on notice that it is already owned by another.[21] O's investment in the giraffe is protected.

An interesting problem arises when a captured wild animal is tamed and then released back into nature. For example, suppose that K allows his captured rabbit to roam the forest during the daytime, knowing that it will faithfully return each night. L cannot shoot the rabbit. A captured animal that has the habit of occasionally returning to its captor (*animus revertendi*) is still considered property. In this instance, the law's interest in motivating owners to tame wild animals for productive use outweighs the concern for certainty.

§ 3.03 Evaluation of the Capture Rule

[A] Rationale for the Rule

American law has traditionally viewed wild animals in nature as either dangerous or worthless. The primary policy underlying the capture rule is to encourage the killing or capture of wild animals for the benefit of society, consistent with utilitarian theory. For example, if H is aware that he can acquire title to any deer he can kill, he has an incentive to invest his money and time in deer hunting. As a result, society will obtain additional venison and skins. But if title could be obtained merely by chasing deer, H might not be willing to devote his time to hunting. Any wild deer H finds might be already owned by someone else who had pursued it unsuccessfully. If H killed the deer, the prior pursuer might claim it as his property. Thus, the capture rule rewards success, not mere effort.

In addition, the rule creates a clear, "bright line" standard for determining ownership which provides several benefits. Possession provides notice to the world of the owner's rights. Consider the example of property rights in a wild duck. Under the capture rule, it is simple to determine who has possession of—and thus owns—the duck. Accordingly, the rule tends to avoid disagreement and thus prevent quarrels which may erupt into violence. Further, from the perspective of law and economics, the rule is an efficient mechanism for resolving any disputes that do occur; ownership can be established with minimal expenditure of society's resources (e.g., attorneys fees, judicial time). Finally, the certainty of title stemming from the rule encourages an owner to invest time and energy in making the captured animal more useful to society (e.g., training a wild parrot to perform tricks).

[B] Criticism of the Rule

Today the capture rule is uniformly condemned by legal scholars for the very reason that once supported it: the rule encourages the destruction of

[21] The classic illustration is E.A. Stephens & Co. v. Albers, 256 P. 15 (Colo. 1927), where the court held that the escape of a non-native silver fox in Colorado did not end the owner's rights.

wild animals. It is seen as an anachronism from the era when the United States was a vast wilderness.[22]

Advocates of the law and economics movement observe that the capture rule results in over-intensive hunting.[23] Because no person can control hunting by others, each person has an incentive to protect his or her individual self interest by killing animals as rapidly as possible. As Harold Demsetz observed in a landmark article, "it is in no person's interest to invest in increasing or maintaining the stock of game."[24] Under such a system, conservation of wild animals for prudent, long-term human use is impossible.

Environmental law scholars view the capture rule—and the ethic it reflects—as an unmitigated tragedy that devastates natural ecosystems.[25] They observe that the modern capture rule threatens the continued existence of uncounted species, just as unregulated nineteenth-century hunting eradicated the American passenger pigeon.

§ 3.04 Rights of Landowners

[A] No Ownership of Animals

Does the owner of land also own the wild animals on the land? Under the English doctrine of *ratione soli*, wild animals were considered to be in the "constructive possession" of the landowner. But the landowner did not acquire title to such an animal until and unless it was captured, whether by the landowner or by someone else. Thus, if poacher P killed a deer on O's land, O now owned the deer.[26] Yet attempts to transplant the *ratione*

---

[22] *See generally* Michael C. Blumm & Lucus Ritchie, *The American Rule of Capture and State Ownership of Wildlife*, 35 Envtl. L. 673 (2005); John G. Sprankling, *The Antiwilderness Bias in American Property Law*, 63 U. Chi. L. Rev. 519 (1996).

[23] A related law and economics theme is that the capture rule encourages overinvestment, which wastes societal resources.

[24] Harold Demsetz, *Toward a Theory of Property Rights*, 57 Am. Econ. Rev. 347, 351 (1967); *see also* Garrett Hardin, *The Tragedy of the Commons*, 162 Sci. 1243 (1968); Richard A. Posner, Economic Analysis of Law (6th ed. 2003); Richard J. Agnello & Lawrence P. Donnelley, *Property Rights and Efficiency in the Oyster Industry*, 18 J.L. & Econ. 521 (1975).

[25] *See, e.g.*, Lynton K. Caldwell, *Land and the Law: Problems in Legal Philosophy*, 1986 U. Ill. L. Rev. 319; Eric T. Freyfogle, *Ownership and Ecology*, 43 Case W. Res. L. Rev. 1269 (1993); Carol M. Rose, *Given-ness and Gift: Property and the Quest for Environmental Ethics*, 24 Envtl. L. 1 (1994); Steven M. Wise, *The Legal Thinghood of Nonhuman Animals*, 23 B.C. Envtl. Aff. L. Rev. 471 (1996).

[26] Keeble v. Hickeringill, 103 Eng. Rep. 1127 (Q.B. 1707), was cited by the *Pierson* court as illustrating the *ratione soli* principle. In *Keeble*, the plaintiff owned a "decoy pond"—a pond specially constructed to lure wild ducks so that plaintiff could capture them. On three occasions, the defendant discharged guns near the pond for the purpose of frightening away the wild ducks that had landed there. Yet the *ratione soli* principle does not satisfactorily explain why plaintiff prevailed in his later damages action. Although the ducks were in his constructive possession, he had not yet captured them and thus did not own them. *Keeble* is best explained under tort law, not property law: defendant maliciously interfered with the plaintiff's business.

soli principle to the United States were ineffective. Early American courts viewed the rule as both undemocratic and inconsistent with the policies underlying the capture rule.

Accordingly, in the United States a landowner generally owns no rights in wild animals on the land. For example, in one case[27] a group of Wyoming landowners asserted that the state's refusal to grant them licenses to hunt elk and other wild animals on their own lands was an unconstitutional "taking" of property. The court reasoned, however, that mere ownership of the animals' habitat did not confer property rights in the animals: "[N]o one 'owns' wild animals, in the proprietary sense, when they are in their natural habitat unless and until the animals are reduced to something akin to possession."[28] The relatively narrow exception to this rule involves immobile animals such as clams, mussels, and oysters. Permanently affixed to the land (much like trees and other vegetation), these immobile animals are usually deemed the property of the landowner.[29]

[B] Right to Exclude Hunters

The trespass doctrine provides an American landowner with protection similar to *ratione soli*. A landowner may bar hunters and others from trespassing on his land.[30] As a practical matter, to the extent consistent with hunting laws, this doctrine gives the landowner the exclusive opportunity to capture wild animals on the property.[31]

§ 3.05 Regulation by Government

[A] State and Federal Restrictions

Modern game laws and other government restrictions have substantially eroded—though not erased—the capture rule. States routinely regulate hunting and fishing within their borders to protect wild animals on behalf of the public in general. For example, under the police power, states may ban hunting altogether, or regulate its frequency, duration, and manner.[32]

---

[27] Clajon Prod. Corp. v. Petera, 854 F. Supp. 843 (D. Wyo. 1994).

[28] *Id.* at 852.

[29] *See, e.g.*, McKee v. Gratz, 260 U.S. 127, 135 (1922) (mussels in stream bed with "a practically fixed habitat" were held possessed by landowner).

[30] In order to bar hunting on undeveloped land, statutes in most states require that the owner "post" appropriate "no hunting" signs on his land. The lack of such posting may imply permission from the owner to use his land for hunting. McKee v. Gratz, 260 U.S. 127 (1922). *See also* Mark R. Sigmon, Note, *Hunting and Posting on Private Land in America*, 54 Duke L.J. 549 (2004).

[31] Some decisions suggest that a landowner is entitled to wild animals killed on his land by a trespasser. *See, e.g.*, State v. Repp, 73 N.W. 829 (Iowa 1898).

[32] *See generally* George C. Coggins & Robert L. Glicksman, Public Natural Resources Law § 18.01 *et seq.* (2006); *see also* Bilida v. McCleod, 211 F.3d 166 (1st Cir. 2000) (person who illegally possessed wild raccoon could not maintain due process challenge to government's seizure of animal because she did not own it).

Federal law similarly protects wild animals to some extent; for example, the Endangered Species Act[33] prohibits the killing of certain protected species. When hunting is permitted, government regulations are usually consistent with the capture rule—the first successful captor acquires title to the wild animal.

[B] No Proprietary Ownership of Animals

Despite the breadth of these regulatory powers, state and federal governments do not "own" wild animals in a proprietary sense. During the nineteenth century, states uniformly declared ownership over the wild animals within their territories, usually by enacting statutes to the effect that the state held wildlife in trust for its residents. A substantial body of case law embraced this state ownership theory. With its 1977 decision in *Douglas v. Seacoast Products, Inc.*,[34] however, the Supreme Court rejected this claim as "no more than a 19th-century legal fiction."[35] Writing for the Court, Justice Brennan restated the capture rule: "Neither the States nor the Federal Government, any more than a hopeful fisherman or hunter, has title to these creatures until they are reduced to possession by skillful capture."[36] Thus, most courts hold that government entities are not liable for damage to private property caused by wild animals.[37] For example, if wild turkeys eat O's corn crop, O cannot obtain damages from the government.

---

[33] 16 U.S.C. §§ 1531–1544.

[34] 431 U.S. 265 (1977).

[35] *Id.* at 284.

[36] *Id. See also* Hughes v. Oklahoma, 441 U.S. 322 (1979) (an Oklahoma statute barring transportation of lawfully-caught wild minnows out of state violated the Commerce Clause; because Oklahoma had never owned the minnows, it did not have a special right to the property within its jurisdiction); North Dakota v. Dickinson Cheese Co., 200 N.W.2d 59 (N.D. 1972) (North Dakota did not have a sufficient property interest in wild fish to recover damages from polluter who killed fish).

[37] *See, e.g.*, Sickman v. United States, 184 F.2d 616 (7th Cir. 1950), *cert. denied*, 341 U.S. 939 (1951) (geese); Moerman v. State, 21 Cal. Rptr. 2d 329 (Ct. App. 1993) (elk).