Denver Law Review

Volume 18 | Issue 11 Article 6

July 2021

The Law of the Chase

Charles J. Beise

The Law of the Chase

By CHARLES J. BEISE*

Post smiled to himself, a smile of satisfaction. And why not? It had been a hard chase, a real run. The kill was but a matter of minutes away. His hounds had started the fox in the dim grey light of the early morning and now after three hours of hard pursuit, Post listened to their cry—a cry of the kill.

"A real pack, even if I trained them myself," he thought.

It was steep climbing and the soft snow didn't help any. Post walked slowly.

"What's the difference," Post reflected, "twenty more feet and I'm where I can see over Crane's fields—and that's where the fox is." He struggled up.

At the summit a shot sounded, a stranger was making away with the fox!

"Damn the man," Post shouted. He started to run. "If I can only lay hands on him"—but he couldn't. Exhausted by the chase, Post sat down and watched the stranger make away with a fox. A fox? His fox! He'd show him, he knew who that was, he'd take it to court! No man could shoot his fox just as the hounds were ready for the kill!

And that's just what he did. It all happened in 1805 and musty law books report the case of *Pierson vs. Post*.[1] Post won the cause in the lower court but Pierson appealed. The appellate court reversed the decision of the lower court, gave judgment for the defendant and denied Post any damages. The court in overruling the lower court said:

> "If we have recourse to the ancient writers upon general principles of law the judgment below is obviously erroneous: Justinian's Institutes adopt the principle that pursuit alone vests no property or right in the huntsman; and even pursuit accompanied with wounding is equally ineffectual for that purpose unless the animal be actually taken."

Pierson was not exactly popular with the court, however. The judge remarked of him:

> "However uncourteous or unkind the conduct of Pierson toward Post in this instance may have been, yet his act was productive

*Recently of the Durango bar; now with the United States Bureau of Reclamation, Salt Lake City.

[1]3 Caines 175, 2 Am. Dec. 264 (1805).

of no injury or damage for which a legal remedy can be applied."

And so Post discovered, as have many others to their sorrow, that where wild animals are concerned, "possession is nine points of the law." Possession as defined by most of the decisions means actual, physical, bodily seizure of the animal. The huntsman must have the game completely under his control before he has initiated a property right the courts can protect.

The *Post* case was far reaching. It heralded another legal theory which was to take over a century to develop in our courts. Dictum was announced by the court in that case and governed future lawsuits as we shall see. In discussing the case the court indicated that the mortal wounding of a beast by a huntsman who does not abandon his pursuit may be deemed sufficient possession of the animal to sustain title to the animal and entitle a hunter to invoke the protection of the courts.

Fifteen years later in the same state the court had occasion to more carefully consider its former dictum. In 1822, Newkirk sued Buster.[2] This time it was over a deer hide and the facts can be summarized as follows: On the afternoon of December 31, 1819, the plaintiff wounded a deer about six miles from Newkirk's house and continued the chase, occasionally discovering blood, when he returned to his home for a night's rest and, arising early, resumed the chase the next morning. In a short time he found where the defendant had killed the deer late in the afternoon of the previous day some six miles from the place he, the plaintiff, had wounded it. Plaintiff was hunting with dogs which, after plaintiff shot, took up the chase and had laid hold of the deer when the defendant, hearing the commotion, approached and killed the deer, removing the carcass to his home. Newkirk demanded the venison and skin and Buster gave him the venison but refused to deliver the hide to Newkirk. A lawsuit to recover damages for the hide resulted. This time the court had a case nearly in point with the hypothetical question it had discussed in the *Post* case. There was, however, this one distinguishing feature—plaintiff had returned home at night for his sleep—and thereby lost his buck. The court held that such action amounted to a temporary abandonment of the hunt, and one more defendant was allowed to keep the prize. Again the New York court sustained the principle that it could not aid the hunter unless he had actual physical possession of the animal before the defendant took it from him.

Gradually but surely, precedent gives way to changing conditions. Years pass and then some other person decides to vindicate himself.

In Wisconsin, nearly a hundred years later, a case of importance occurred which finally developed the "dictum" of the New York court

[2]Buster v. Newkirk, 20 Johns. 75 (N. Y. 1822).

in the *Post* case and established a precedent of importance, a rule which shook from the courts the precedents of centuries.

The evidence submitted to the court established these facts: Plaintiffs mortally wounded the wolf and had so followed up their attack on the animal as to substantially have it in their possession. They had it where and in such condition and circumstances that escape was improbable, if not impossible. The defendant came upon the scene and interfered by delivering a shot at a distance of three feet which finally ended the animal's life. He took the animal and the plaintiff sued to recover the body of the wolf. This is the case of *Liesner v. Wanie.*[3] The court said:

> "The instant a wild animal is brought under the control of a person so that actual possession is practically inevitable, a vested property interest in it occurs which cannot be divested by another's intervening and killing it. * * * That at such instant the plaintiffs were in vigorous pursuit of the same, the evidence is clear, and that in a few moments, at most, they would have had actual possession is quite clear. So we must hold the verdict was properly directed [for the plaintiff] and the judgment properly rendered thereon."

This seems to be the first instance in the United States where the courts have protected a hunter who did not have actual physical possession of the animal. It is the more "modern" view, a more liberal construction of old legal principles. Just how many of the courts of the various states will fall in line, remains to be seen.

One hundred and nine years elapsed from the dictum in the *Post* case to the decision sustaining it in the *Liesner* case. Yet that is relatively a short period of time, for the law of the chase has been in the process of formation for centuries. Kings and rulers throughout the ages have been confronted by this problem. A brief review of the history of the law is not amiss. The writer of a learned article in the Repertoire of the Journal du Palais mentions the fact that, "The law of Athens forbade the killing of game," and Merlin says that, "Solon, seeing the Athenians gave themselves up to the chase to the neglect of the mechanical arts, forbade the killing of game."[4]

Even the old problem of the sportsman and the farmer was present. The Institutes of Justinian recognized the right of an owner of land to forbid another from killing game on his property. At first the whim of the king was the law. Gradually, however, restrictions were placed on the royal prerogative and on the granting of the Magna Charta the rights of the king were restricted and the small sportsman began to assert

[3]156 Wis. 16, 145 N. W. 374 (1914).
[4]Geer v. Connecticut, 161 U. S. 519, 16 S. Ct. 600, 40 L. ed. 793 (1896).

his rights.[5] The rule of the Roman law which recognized the qualified title of the sovereign in wild animals, having been adopted by England, became the common law of the United States and here, today, title to wild animals is in the state for the benefit of its citizens.

Originally the right to pursue and take animals wherever they could be found existed and such right continued without hindrance until the community ownership of the earth's surface was abandoned and division of it was made among the multiplying human family. Then a recognition of land title, rather than property in wild animals, prevented the pursuit of game on the land of another.[6] Today the legislatures of the various states by statute prescribe the limit where public proprietorship ends and that of the individual begins.[7] But the right to pursue and take any wild animal exists in every individual except so far as restrained by express provision of law.[8]

Barring questions of trespass, some of the legal principles evolved can be summarized as follows: Individual property in wild animals becomes vested in the person reducing them to possession, prior to which time no individual can claim an exclusive right to them. Just what constitutes possession is not certain; cases are few. Originally actual physical seizure was essential, but this doctrine has been modified, at least in Wisconsin, to the extent that mortal wounding of a beast coupled with pursuit is sufficient to establish title. But pursuit alone gives no right of property in animals *ferae naturae*.

The common law has been expressly repealed by statute in some jurisdictions. For example, in *Charlebois v. Raymond*[9] the court pointed out that in that jurisdiction the civil law was different from the common law in recognizing the first to wound a wild animal as the owner of it. In that case the plaintiff recovered the value of a bear which the defendant had killed while the plaintiff was pursuing it and after his dogs wounded it. This, of course, was the result of a specific law.

The question of what constitutes mortal wounding of an animal can be of great importance. After the decision of *Liesner v. Wanie* was announced, a case arose in Massachusetts which aptly illustrates the point, *i. e.* the facts themselves as determined by the first court control the outcome of the case.

Frank Dapson arose early one morning to go deer hunting. Donning his bright red cap and tucking his "old trusty" under his arm, Dapson took to the hills—and with good luck. Dapson surprised the mon-

[5] 3 Corpus Juris 18, §5, *et seq.*
[6] 3 Corpus Juris 18, §§5 and 6.
[7] 2 American Jurisprudence 698.
[8] Note (1914) 50 L. R. A. (N. S.) 704.
[9] 12 Lower Can. Jur. 55 (1867).

arch of them all and proceeded to aim, fire and hit the buck. Mr. Buck, however, refused to give up the ghost and rightfully betook himself to other places. So far everything was all right, but, unfortunately for Mr. Buck he encountered a gentleman by the name of Daly, who ended the life of Mr. Buck. Dapson sued Daly to recover the carcass of the deer. The lower court awarded the deer to Daly, finding that the deer was not so wounded by Dapson that it was about to be deprived of its natural liberty, and that the fatal shot was fired by Daly. Dapson appealed but the Supreme Judicial Court sustained the verdict. However, the Massachusetts court apparently rejected the principle of the *Liesner* case, saying:

> "The controlling principle of the common law is that the huntsman acquires no title to a wild animal by pursuit alone, even though there is wounding unless the animal is followed up and reduced to occupation, that is, actual possession."[10]

If Dapson's aim had been truer and a mortal wound ensued, the court might have arrived at a different decision.

We know from personal experience that these lawsuits are not tried in a day. What the books fail to mention, and what I wonder is: how did the venison taste after the case had been in court for several years?

Aside from the question of who is entitled to the kill, several other interesting and equally knotty problems have arisen, *e. g.* possession out of season. Of course possession must be legal. If game is killed out of season, no right of property ensues.[11]

A hungry man might try to poach a hare out of season, believing his neighbors would not see him, but imagine the fortitude of a man who took a moose out of season and thought he could conceal it! That is just what one James did in Maine in 1889. He waited until the snows got deep, drove the moose until it was exhausted, tied it up with ropes, threw it on his sled and took the moose home, "a la Frank Buck." Wood was a game warden who, hearing of James' feat, liberated the moose unbeknown to James. James sued Wood[12] for damages caused by liberating the moose. The court refused to award him compensation, saying:

> "So long, then, as the possession of live game is illegal, qualified property in it is illegal also, and the releasing of such game interferes with no legal right or title of the person illegally holding it captive."

Continuing, the court amplified its position:

---

[10]*Supra* note 3.

[11]Dapson v. Daly, 257 Mass. 195, 153 N. E. 454, 49 A. L. R. 1496 (1926).

[12]James v. Wood, 82 Me. 173, 19 Atl. 160, 8 L. R. A. 448 (1889).

"Suppose a hunter has his rifle leveled at game in close time and someone shoves it aside so that the game is missed. Shall the hunter have damages? He has only been prevented from committing a criminal act."

The illegal possession of game borders on the question of trespass, *i. e.* pursuit of game on a man's ground without his permission. Of this, much has been written. Thus, if possession is effected by one who is at that moment a trespasser, no title to the property captured is created in him, but it vests in the owner of the soil and the wrongdoer is liable for the trespass. This rule, however, applies only where the game is killed on the land whereon it is found. If a trespasser starts game on the land of one person and kills it on that of another, he acquires title to the game although he is liable in trespass at the suit of both landowners.[13]

These distinctions have been drawn very fine. For instance, in *Churchward v. Studdy*,[14] Churchward started a hare on the ground of a third person and chased it into Studdy's field, where being quite spent, the hare ran between the legs of one of Studdy's laborers, who picked the hare up alive, but admittedly for the benefit of Churchward. The court held Churchward was entitled to the hare as against Studdy, who came up before the hunter and took possession of the hare from the laborer. The court said, however, that had the laborer taken the hare for Studdy, even though the dogs were about to catch it, the case would have been different.

Here the court came near splitting the proverbial hare.

Summarizing, in the absence of statutes, the following principles will generally control:

1. Possession is still "nine points of the law."
2. "Possession" means actual physical possession of the animal.
3. Constructive possession, *i. e.* mortal wounding, plus fresh and hot pursuit will suffice in some states.
4. The taking must be lawful, *i. e.* by a licensed hunter in season.
5. As against the landowner, a trespasser may have difficulty in establishing his title.

Bold Face Listings Condemned

The Grievance and Ethics Committee wish to call the attention of the members of the association to a recent opinion of the Professional Ethics Committee of the American Bar Association holding that the listing of a lawyer's name in the nonclassified section of a telephone or city directory in a distinctive manner, such as bold face type, followed by words indicating the listee is a lawyer, is a form of advertising and as such a violation of Canon 27.

[13] 3 Corpus Juris 18, §5, *et seq.*
[14] 14 East (K. B.) 249, 104 Reprint 596 (1811).