The Pigeon and the Law, from the Lawyer and Banker and Bench and Bar Review

Ralph B. LeCocq

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The Pigeon and the Law

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New circumstances, new industries, new ideas and methods of thought, constantly demand the new application, or sometimes, the abandonment of the old rules and principles of the common law. The saying, now almost a proverb, that the common law is reason often needs radical modification when the reason of the particular rule of law has ceased to exist. The law "makes haste slowly," and as a result we often find the old rule still existing and adhered to by our courts, through their reverence for precedent or fear of usurping legislative functions, in cases now far removed from the reason of the rule. It is our purpose to call the reader's attention to one of such instances which should interest the lawyer and layman alike, the former because of some interesting legal points involved, the latter because of his financial interest in a growing industry.

In a few of our Western States, especially Minnesota, the Dakotas and Nebraska, many persons are beginning to be interested in the raising of doves, or pigeons on a large scale. The rapid increase of these animals, the ease with which they can be raised in large numbers, and their value as food combine to assure the "pigeon ranch" a bright future and a permanent place among our animal raising industries.

But it is a well known fact, that ever since its original ancestor was given its freedom by Noah, the pigeon has been a vagrant and a wanderer. Not only have they been a source of constant anxiety to the owner because of their wandering habits, but they have proved to be a great nuisance to neighboring farmers by reason of damages sustained through injuries to their grain shocks and stacks by feeding flocks of these pigeons. This situation has already caused litigation, which promises to increase rapidly in the near future. It may, therefore, be of timely interest and practical value to examine how the law regards these heretofore worthless and harmless creatures. What, then, is their legal status?

The question which presents itself upon the very outset of this inquiry is whether the pigeon is an animal deminuir naturae or an anima frave naturae; a domestic or a wild animal. It is a well recognised fact, of course, that the ancestors of all our common domestic animals were once wild. But at the time Blackstone wrote his classic work all our common animals, such as the horse, cow, pig, sheep and fowl, were considered as belonging to the class deminuir naturae. Blackstone, however, classified deer, rabbits, fish, hawks, phaetons and doves as frave naturae. (1) The only American case which squarely decides the question is one from New England, (2) where the court decided that doves, or pigeons, are animas frave naturae, the court stating that the "reason for this principle is that it is difficult to distinguish them from other fowl of the same species since they often take flight and mix in large flocks with the doves of other persons.

It is difficult to see the force of this reasoning. The same might be said of chickens and other common barn-yard fowls, or of cattle on our large western ranches, which are just as difficult to distinguish when intermingled with (1) Codey v. Black, 200, (2) Commonwealth v. Chase, 8 Pick. (Mass.), 15.

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those of others. Moreover, there is a large class of cases involving intermixture of inseminate property of the same kind and quality, where the well recognized rule applies that the parties become tenants in common of the whole mass. This same principle has also been applied where sheep or cattle have intermingled, and the same rule should logically be applied to pigeons. The fact that they are difficult to distinguish from others of the same species is no logical reason why they should be classed as frave naturae. That fact alone can only influence the manner in which the rights of the different owners shall be treated and protected, the particular remedy to be applied. To say that they are frave naturae because they are difficult to distinguish, is giving the result of the condition as the reason why such a condition exists. This is illogical. We must first determine by applying some legitimate and accurate test whether they are frave naturae or deminuir naturae, and if the former, then the fact that they are difficult to distinguish can determine only the remedy of the different owners of the pigeons, and although difficult, the law will find some way by which both parties may receive their just rights.

But, assuming, as we must, in the light of the only American authority, that the pigeon is an animal frave naturae, what are some of the legal consequences which naturally must follow? It is an old rule of the law of wild animals that they may be subject of the qualified ownership or property when claimed by man and held in captivity and possession; but if they escape and regain their natural liberty without the anima reverendi—mind or intent of returning, such ownership ceases and they again become frave naturae and the property of the next taker. (3) "For if the pheasants escape from the mew, or the fishes from the trunk, and are seen wandering at large in their proper element, they become frave naturae again, and are free and open to the first occupant that hath ability to seize them." (4) Some of the state statutes in regard to the ownership of wild animals provide that "Animals, wild by nature, are subjects of ownership when taken or taken and held in possession, or disabled and immediately pursued." (5) Such statutes seem to be to some declaratory of the common law and have no particular bearing upon the subject now under consideration.

Hence, we have this peculiar situation. The owner of a large modern pigeon ranch must keep his pigeons at his peril. If they escape he must immediately pursue them or the first occupant will be the legal owner of his property; if they fly away, or are accredited to do, any one upon whose premises they happen to light, without the knowledge of the owner and without his intention to immediately go in pursuit, can kill or catch them without liability whatsoever, but, on the contrary, thereby acquires the absolute property in them. Even though a stranger should shoot the pigeons while feeding on the owner’s premises, the latter could only maintain trespass against him. (6) A flock of his pigeons might stray into his neighbor’s yard, as any of his domestic animals occasionally do, and his neighbor would acquire the absolute ownership in them as soon as he has reduced them to his possession. One might take several pigeons from the owner’s dove-cote during the night and not be guilty of larceny, since animals frave naturae are not the subject of larceny. (7) Moreover, a person upon whose premises the pigeons happen to be can reduce them

to his possession by shooting or otherwise killing them, and such pigeons would then be the subject of larceny by the real or former owner should he attempt to possess them, for the one who kills animals *ferae naturae* on his premises is the owner of such animals. On the other hand, the real owner cannot be held liable for any damages which his pigeons may cause his neighbor, since when once out of his possession, and no *animus revertendi* existing, the pigeons are again *ferae naturae*. The title, theoretically, is in the state for the public benefit. (8) and the state would be liable to the person whose grain or other products are injured by the pigeons. But the state cannot be sued without its consent. Hence, we are at the mercy of the pigeon unless we kill and destroy them.

There is considerable authority which holds that the owner of animals *ferae naturae*, which are in their nature vicious, is under all circumstance liable for injuries done by them, and he is conclusively presumed to have knowledge of their mischievousness. (9) But what constitutes viciousness within this rule? And, furthermore, this rule is based upon the premise that the animal is still under the control and possession of the owner, or at least has not made its escape so entirely that it may be said to be an animal purely *ferae naturae* again, for if *ferae naturae* and not immediately pursued by its owner, it would again be subject to ownership by the first taker, and the former owner could on no possible grounds be held responsible for any injuries caused by it.

These interesting results may be qualified by the application of the qualification of the rule itself as laid down by Blackstone, namely, that the *animus revertendi* must not exist. If this does exist the animals can not be said to be *ferae naturae*, in the sense that they are subject to ownership by the first taker. Whether or not this *animus revertendi* existed in the minds of the pigeons would necessarily be a question for the jury to be determined from all the facts and circumstances of the particular case under consideration, a question necessarily of extreme difficulty in view of the wandering habits of these pigeons: In any event, if the evidence should fail to show the existence of *animus revertendi*, all of the above results would follow.

Such, then, are a few of the interesting consequences of the rule as laid down by Blackstone and the only American authority in point, that pigeons are animals *ferae naturae*. Will the courts of highest resort, when the proper case arises, adhere to this old rule, or will they modify or abandon it so that the promoter of a recently growing industry will be protected in his property rights? Or will it remain for our legislatures to put the pigeon on an equal basis with our other domestic animals? Time only can tell. In the meantime the proprietor of our "pigeon ranch" is at the mercy, although in most cases happily unaware of the fact, of a rule of law no longer supported by reason, and logically obsolete in a world of growing industries.

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