

NOTES ON THE STYLE OF THE LAW

Happy Foxing Day!

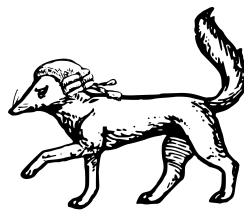
by

ELIJAH Z GRANET

≈ celebrations ≈ scarlet days ≈ holidays ≈ observances
≈ beasts ≈ in memoriam ≈



FESTIVE observances abound this time of year, but, in the eyes of the legal world, none are held more sacred, more joyous, more glorious than that holiest of all days on the legal calendar, Foxing Day! First instituted in the memory of the vulpine mascot of the Southwark Bar (who was tragically and brutally killed on 26 December 2019), Foxing Day reminds us of the beauty and joy these four legged canids have brought to law. The new traditions of the Bar are as vital to its fabric as the ancient ones, and in that spirit, I present a review of some of the many ways that foxes have enriched legal history. Let the Foxing Day festivities commence!



The Fox as Pariah

The natural place to start with fox law is one of the most famous cases in all of American law, *Pierson v Post*,¹ which is ‘is as well known to every law student in the United States as *Donoghue v Stevenson* is here.’² The case revolves around one of those alluringly simple questions of law: is there a proprietary right in a wild

¹ (1805) 3 Caines 175, NY

² *Borwick Development Solutions Ltd v Clear Water Fisheries Ltd* [2021] Ch 153, para 70, CA *per* Peter Jackson LJ

animal being chased? Post was hunting a fox with a pack of hounds, when Pierson shot the fox. The Opinion of the Court, given by Tompkins J and based on consideration of the learned jurists from Justinian onward held that no such right arose in an animal *feræ naturæ*. Yet, the great judicial consideration of the fox comes instead in the dissent giving by Livingston J:

By the pleadings it is admitted that a fox is a ‘wild and noxious beast’. Both parties have regarded him, as the law of nations does a pirate, ‘*hostem humani generis*’, and although ‘*de mortuis nil nisi bonum*’, be a maxim of our profession, the memory of the deceased has not been spared. His depredations on farmers and on barn yards, have not been forgotten; and to put him to death wherever found, is allowed to be meritorious, and of public benefit. Hence it follows, that our decision should have in view the greatest possible encouragement to the destruction of an animal, so cunning and ruthless in his career.³

This casual anti-renardism, though in dissent in *Pierson* comes across clearly in much of fox case law. However, *contra* Livingston J, that did not mean that all foxhunting was necessarily in the public interest. In the Scottish case *Marquis of Tweedale v Dalrymple*, it was held that a fox may be a ‘noxious animal’, but [t]he object in hunting is the sport, and not the destruction of these animals, for which other means are more effectual.⁴ However, in Scots law, pursuing a fox was still as entirely justifiable as pursuing a ‘mad dog’ or a ‘thief’ and following such pursuit excused one for entering another’s land.⁵ In the words of the Lord Justice Clerk, Lord Moncreiff, foxes are ‘eminently vermin.’⁶ However, judges did show some appreciation of foxhunting; in a somewhat anomalous trusts case, Clauson J allowed a non-charitable purpose trust for the purpose of advancing foxhunting.⁷

This status as a legal villain does not mean the fox is evil, however. In *Williams v Williams*,⁸ : Lord Hodson, in dissent, drew a vivid picture of the fox in the context of the law surrounding insanity:

The fox which robs a hen roost presumably knows perfectly well what he is doing, but he is following his natural instincts, and it is just as absurd to describe him as cruel as to say that he has committed larceny.⁹

The Fox as Victim

After the turn of the millennium, cases on foxes stopped to be about the etiquette of slaughtering them, and rather about the legislatures of this country taking active steps to protect them. This was resisted, of course,

3 *Pierson* (n 1), 180

4 [1778] Mor 4992, 4994

5 *Colquhoun v Buchanan* [1785] Mor 4997, 4998

6 *Gosling v Brown* (1878) 15 SLR 434, 435

7 *In re Thompson* [1933] T 589

8 [1964] AC 598, HL

9 For technical reasons, your correspondent did not have access to the *Appeal Cases* report for pinpoint, and apologises profusely for that absence.

but cases of this time held that the cruelty of foxhunting was not merely an objective matter of act, but also a ‘value judgment’ the legislature was best placed to make.¹⁰ As far as human rights went, hunting (which after all had been considered a public service in the days when fox were vermin) was an inherently public activity, and not covered by art 8 ECHR.¹¹

This era of foxhunting litigation, as so often in the law, involved many ill-founded suits of cranks produced some really important jurisprudential developments. For instance, *Whaley v Lord Watson Of Invergowrie* gave valuable insight into how rules on members’ interests in the Scottish Parliament intersected with backbench bills ‘sponsored’ by campaigning groups.¹² The case, *par excellence*, of this phenomenon is, of course, the legendary *Jackson v Attorney General*,¹³ which will be intimately familiar even to beginning public law students. The lineup of leading counsel alone on this case (Sir Sydney Kentridge KC, the Lord Pannick KC, and the Lord Goldsmith KC) is thunderous, and that’s before looking at the junior counsel, which includes a young Mr Philip Sales (who is now Lord Sales JSC). However, while the case exists solely because of disputes about foxes, the word ‘fox’ occurs only three times in the case, with Their Lordships being far too concerned with the constitution to spend much time waxing lyrical about foxes. The closest to great fox prose comes in the judgment of the Lord Steyn, who writes ‘[t]he New Labour government decided that it would abolish the ancient liberty of the British people, regularly exercised by a great many individuals up and down the land, to take part in fox hunting.’¹⁴

A more substantive discussion of fox came in *R (Countryside Alliance) v Attorney General*,¹⁵ where the Lord Bingham of Cornhill, very nearly straying into a philosophical discussion of qualia, posited that fox suffering is beyond the understanding of humanity:

There is, however, a body of reputable professional opinion which accepts that the pursuit and digging out of foxes, and their killing by hounds, imposes a degree of suffering. This accords with common sense. To suppose that the contrary is generally true strains one’s credulity to breaking point. The degree of suffering is, I think, unknowable.¹⁶

It is interesting to note that in the same case, it was also accepted that ‘[f]oxes are a pest and the fox population has to be culled’,¹⁷. The older case law had not affected the negative view of the fox, but rather, a changing understanding of animals had led to the conclusion that even foxes have some rights (such as to a more humane execution by being shot). The converse question, of the potential pain of the hunter, has been considered by courts in Ireland, where foxhunting remains legal. In *Begadon v Laois Hunt Club*,¹⁸

10 *Adams v Scottish Ministers* [2004] SC 665, para 40

11 *Whaley v Lord Advocate* 2008 SC (HL) 107, para 23 *per* the Lord Bingham of Cornhill

12 [2000] SC 340. For why I use square brackets around the year in this citation, see my article on the subject at this link.

13 [2006] 1 AC 262

14 *ibid*, para 72

15 [2008] AC 719,

16 *ibid*, para 42

17 *ibid*, para 39

18 [2019] IEHC 343

O’Hanlon J held that falling from a horse (with painful injuries following) was an inherent risk of hunting a fox while mounted.¹⁹ Foxhunting’s danger and unpredictability is not a tortious risk but rather ‘forming a big attraction’ to the pursuit, and thus the participant necessarily assumed that degree of risk when taking part (and a failure to give warnings did not give rise to liability).²⁰

The fox as property

Foxes are, by their nature, animals *feræ naturæ*, meaning they generally cannot be owned the way domestic animals may be. In Canada, there is a general propensity to raise silver foxes commercially, and the courts there have had conflicting rulings about if a semi-domestic silver fox could be *feræ mansuetæ*. In Ontario, they remained wild;²¹ in PEI, they could be domestic.²² The commentary on these cases notes it is difficult to specify ‘tameness’; silver foxes may want to escape captivity, but so do many dogs.²³ Given that there is a long-running Russian experiment using selective breeding to create effectively ‘domesticated’ silver foxes (who display much of the neoteny shown in the domestic dog), this may become a more live question as the breed develops.²⁴ Interestingly, these foxes in the Russian silver fox experiment may have had their origin in an already somewhat time line of foxes from PEI.²⁵

The commercial breeding of foxes gave rise to an important nuisance case, *Hollywood Silver Fox Farm v Emmett*,²⁶ where a fox farmer was able to get an injunction restraining a neighbouring landowner from firing guns to frighten the silver foxes with noise. Meanwhile, the value of farmed silver foxes can be attractive to thieves; in the New Brunswick case of *R v Trenholm*,²⁷ the defendant was caught in possession of stolen goods including fifteen dead silver foxes. For the same reason, divorcing parties can fight for fox assets; in *deSwart v deSwart*, Bourdreau J of the Nova Scotia Supreme Court solomonically divided the assets as to give the husband the fox farm and the wife the horse farm.²⁸ The revenue too, can want its cut, but for the purposes of taxation, the Manitoba KB held that fox-farming was stock-raising (and thus entitled to tax relief) the same as rearing cattle or any other domestic animal, even if it was a novel animal.²⁹

19 *ibid*, para 38

20 *ibid*, paras 46f

21 *Campbell v Hedley* (1917) 39 OLR 528

22 *Ebers A.v’ MacEachern*, [1932] 3 DLR 41

23 (1939) 17 Can Bar Rev 130, 131

24 See, *eg*, ‘Friendly Foxes’ Genes Offer Hints to How Dogs Became Domesticated’ (*New York Times*, 9 August 2018).

25 See, *eg*, ‘Why Are These Foxes Tame? Maybe They Weren’t So Wild to Begin With’ (*New York Times*, 3 December 2019).

26 [1936] 2 KB 141, HC, *per* MacNaghten J

27 (1988) 210 APR 360

28 [2002] NSSC 224

29 *Re Winnipeg Silver Fox Company Assessment Appeal* (1941) 48 Man R 229, 231 *per* Dysart J

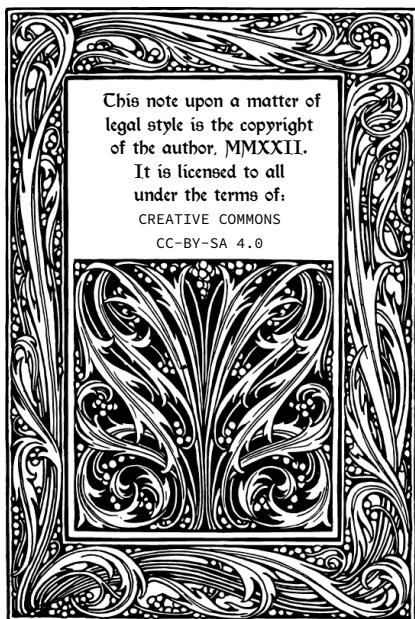
Conclusion

Foxing Day is an occasion of some solemnity, as we remember the tragic loss of the icon of lawyers, not merely in Southwark, not merely in London, but across the world, our beloved fox friend beaten to death in circumstances that defy explanation. Yet, today, let us not only mourn, but rejoice in all that the humble fox has given the law. Long may fox law continue!

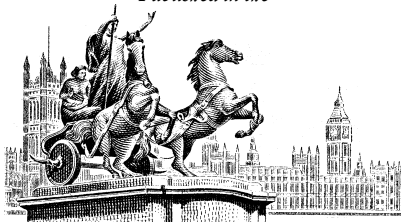


A great tip of the hat to Dr Katy Barnett of the University of Melbourne for her invaluable assistance with this post. (Any errors, of course, are my own) For more animal law, I highly recommend checking out Dr Barnett's book (co-written with Prof. Jeremy Gans) *Guilty Pigs*, a joyous history of animals in the law.





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