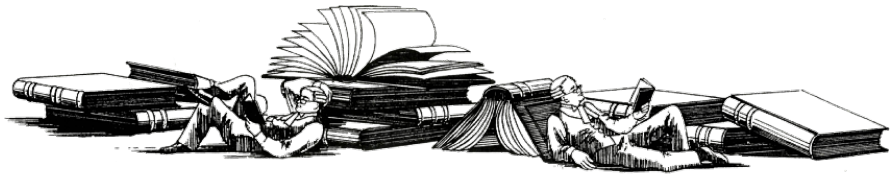

NOTES ON THE STYLE OF THE LAW

Happy Foxing Day!

by

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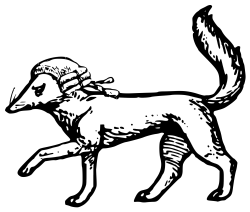
26 Dec 2023, 2 Car III

foxes — vulpine matters — vixens — lists — traditions — Foxing Day — antirenardism — fox law — canid law — animal law — foxhunting — fox farming —

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 by a baseball-bat wielding kimono-clad maniac 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 fox contributions to the law, focusing this time on the law of the United States, after last year's Note focused on that of the United Kingdom.[1] American law, of course, has the famous foxing case of *Pierson v Post*,[2], covered in last year's Note, but it also has many more iconic fox law cases, some of which will be discussed here. Let the Foxing Day festivities commence!



Foxhunting

Cruelty to foxes is a matter of particular care for those of us in the legal community, who will not soon remember the brutal murder of our colleague by the aforementioned kimono-

1 See 'Happy Foxing Day!', Note of 26 December 2022.

2 (1805) 3 Caines 175, NY

clad monster. British readers will be familiar with the Hunting Act 2004, and the subsequent case law (discussed in last year's Note), but across the Pond, we also find concern for vulpine safety. In 1887, the Supreme Judicial Court of the Commonwealth of Massachusetts considered the case of a man, one Elmer Turner, who, having custody and charge of a fox, released it to be hunted by dogs. Massachusetts then (and perhaps now) considered the fox a pest and provided bounties for the successful hunting of the beasts. However, in a great victory for fox-rights, the Mass. SJC, in *Cth v Turner*,[3] ruled that even 'noxious' animals like a fox were protected by the a statute prohibiting those with charge over an animal from causing 'it to be subjected to unnecessary torture, suffering, or cruelty of any kind'. Allen J, giving the Opinion of the Court, held that it was 'as obnoxious to the reason of the statute to wantonly torture a wild animal, held in subjection by force, as a tame animal.'[4] Where a fox in the wild, fleeing pursuit, might lawfully be hunted with dogs, Allen J momentously granted unto the fox the fundamental right of decent treatment in captivity. His Honour's stirring words echo down the centuries:

> It cannot be said, as matter of law, that throwing a captive fox among dogs, to be mangled and torn by them, is not exposing it to unnecessary suffering.[5]

As a historical footnote, *Turner* was later cited as authority for expanding the law's protection to include goldfish![6]

Escaping foxes

While the case *supra* may have established basic rights for the captive ox, it is nonetheless true that the fox, in particular the patriotic American fox, longs for liberty much as do his human fellow inhabitants of the Land of the Free. In *Hughes v Reese*,[7] an action delightfully brought in replevin (a cause of action sadly long since obsolete in England), the Supreme Court of Mississippi considered the question of qualified property rights in an animal *feræ naturæ*, *viz* a fox, which had escaped the confinement of its captor. The appellant, Mr Hughes, had imported fur foxes for breeding, confining a pair of them in a place designed to amorously excite the beasts and produce in the usual fashion more foxes. Unfortunately, as can happen even in the best of marriages, conditions broke down, and the unnamed male fox, unable to access the divorce courts, fled the marital pen to seek his fortune elsewhere away from his vixen. This did not work out very well for the escapee, who was captured twelve miles away and skinned. The replevin action was for the hide of the late runaway. Mr Hughes argued that the fox was tame enough it has *animus revertendi*, like bees, and thus could be considered still in his captivity even if it wandered off, because

3 (1887) 145 Mass 296; 14 NE 130
4 *ibid*, 300
5 *ibid*, 301
6 *Knox v Mass. Soc. for Prevention of Cruelty to Animals* (1981) 12 Mass App Ct 407; 425 NE 2nd 393
7 (1926) 144 Miss 304; 109 So 731

it would eventually return. Smith CJ, giving the Opinion of the Court, gave this argument short shrift. Establishing that the fox's flighty was essentially trite law, His Honour held:

> If he intended by this to say (which we doubt) that all fox have *animum revertendi*, the contrary is so well and universally known that the court will take judicial knowledge thereof.[8]

Property in pelts

Yet, the case *supra* is not the end of the matter. While the argument that a fox can essentially become a domestic animal lacks any legal merit, it is true that some property right may persist in the pelt of an escaped fox. In *E A Stephens & Co v Albers*,[9] the Supreme Court of Colorado modified the traditional common law rules discussed in the last case, to account for the economic importance of fox farming as a growing Colorado industry. A fox, whose name was apparently 'McKenzie Duncan',[10] escaped and was shot by a neighbour, who sold on the pelt. The Colorado court disregarded traditional common law rules to note that the knowledge of defendants that fox farming was a lucrative industry and that fur foxes were not native to the area changed the traditional position of merely shooting and thus gaining property in a roaming wild animal. As Burke CJ said, giving the Opinion of the Court:

> This defendant in fact had, or is charged with, knowledge that the pelt purchased was the product of a vast, legitimate, and generally known industry; that it had a considerable and easily ascertainable value; that it bore the *indicia* of ownership; that it had been taken in an unusual way; that the seller was not the owner; that no right of innocent purchasers had intervened; and that it was from an animal taken in a locality where its kind *feræ naturæ* was unknown and in a state where large numbers were kept in captivity.
>
> We are loath to believe that a man may capture a grizzly bear in the environs of New York or Chicago, or a seal in a millpond in Massachusetts, or an elephant in a cornfield in Iowa, or a silver fox on a ranch in Morgan county, Colo. and snap his fingers in the face of its former owner whose title had been acquired by a considerable expenditure of time, labor, and money; or that the rule, which requires that where one of two persons must suffer the loss falls upon him whose carelessness caused it, has any application here. If the owner was negligent in permitting the escape, the dealer was even more reckless in making the purchase.[11]

8 *ibid*, 732
9 (1927)81 Colo 488; 256 P 15; 52 ALR 1056
10 This is not a joke—see *ibid*, 489.
11 *ibid*, 496–497

Foxhunting packs and trespass

It is trite law that a wandering dog does not by itself commit trespass or create liability by wandering, where it had no known propensity to do so, onto the lands of a neighbour and causing damage. However, in *Pegg v Gray*,[12] the Supreme Court of North Carolina, *per* Johnson J, held that the common law inherited from England, absent statutory interventions like England's Game Act 1831, did not protect foxhunting packs from liability for trespass and damage, because in such cases the packs were foreseeably going to enter and cause damage as part of the sport to rights of others. For this proposition, His Honour cited favourably the decision of the High Court *per* the Lord Coleridge CJ in *Paul v Summerhayes*, (1878) 4 QBD 9. The foxhunters, therefore, had to pay for the damage their dogs had done, though it should be noted no damages were awarded to the families of any bereaved foxes!

Missed aim

It would not be a review of American law without at least one case of firearms gone wrong. For better or worse, the law allows the shooting of foxes, but the irresponsible hunter is as liable to shoot a dog as a fox. In *Wright v Clark*,[13] the Supreme Court of Vermont considered whether exemplary damages could be awarded where a hunter aiming at a fox did in fact shoot a dog. The relevant question was if the hunter had fired the shot 'intentionally and wantonly'; in this case, the decision to fire the gun was plainly voluntary and required a great deal of prudence to avoid mistaken damage. Nor was a dog in pursuit of the fox (as alleged) a dog running amok that could be freely shot.[14] Thus, fox law helped dog law, and the two canid families were able to, in this one case, make peace.

12 (1954) 240 NC 548; 82 SE 2nd 757
13 (1877) 50 Vt 130
14 *ibid*, 134–136

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