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Craig Anderson

The Law School

Robert Gordon University

As a teacher of both property law and Roman law, it is a delight to me when the two come together in a case. This is particularly so when the case considers an issue that has not, as far as I am aware, previously been considered in Scots law. The purpose of this article is to explore certain issues arising from a recent case of this kind. Although it is an English case, there is nonetheless much of interest in it for Scots property lawyers. The area of property law with which the case is concerned is one in which, unusually, the English Common Law tradition has drawn heavily on the Roman-based Civil Law tradition.

Suppose that I own an area of land on which there sits a loch. This loch is plentifully stocked with fish, and I charge anglers for the privilege of fishing there. A creditor of mine holds a standard security over the land. On my default, the creditor exercises its rights under the standard security and sells the land to a third party. Who owns the fish? After all, the standard security extends only to heritable property, and so the creditor cannot directly have conveyed any right in the fish to the third-party purchaser. At the same time, much of the value of the land presumably arises from the ability to charge for fishing there, and it would be odd indeed if the owner of the land had no right to allow fishing there. Equally, I may have spent considerable sums stocking the loch with fish, and am likely to feel aggrieved if I lose any right to those fish in this way. In fairness to that sentiment, it is probable that, if I had sold the land to the third party myself, some part of the purchase price would have reflected the value of the fish.

The facts of *Borwick Development Solutions Ltd v Clear Water Fisheries Ltd* [2020] EWCA Civ 578 were very much along these lines. This was a decision of the English Court of Appeal, in which the issues were considered by a bench of three judges (Sir Timothy Lloyd, Lady Justice Rose and Lord Justice Peter Jackson.) BDS (the claimants and respondents) had previously owned land on which there were seven enclosed lakes, which they had operated as a commercial fishery from 2002, except for a period when the fishery was operated by a tenant. There had been abortive negotiations with CWS (the defendants and appellants) for the sale of the land to them. The price was to be £700,000 for the land and £200,000 for the fish. In 2016, the land was sold to CWF,

pursuant to a security held by a third party. The purchase price was £625,000, with no mention made of the fish. The case was a dispute over ownership of the fish.

Before going further into discussion of the issues raised by the case, there are certain points that we must take note of. Although English law has much in common with Scots law in this area, on account of both drawing on Roman law, there are important differences.

First, English law makes a distinction between "absolute property" and "qualified property". Thus, in his judgment, Sir Timothy Lloyd (at para 15) quotes from Halsbury's *Laws of England* (vol 2 (2017), para 8), to the effect that there is "no absolute property in wild animals while living, and they are not goods or chattels. There may, however, be what is known as a qualified property in them". This distinction does not derive from Roman law. It need hardly be said that it does not reflect Scots law either, in which a person either owns absolutely or not at all, and in which wild animals are as capable of being owned as anything else.

Second, it was accepted by the court in *Borwick* that a landowner has this "qualified property" in wild animals that are on his or her land, by virtue of the animals' presence there. If a poacher should catch a wild animal there, ownership of that wild animal is acquired by the landowner rather than by the poacher. Roman law was quite different on this point (see *e.g.* D.41.1.5.2; D.41.1.3.1). While the poacher may well be delictually liable for his or her actions, that liability is based on the landowner's rights in the land itself. Roman law did not give the landowner any right in wild animals simply by virtue of their presence on the land. They remained ownerless (*res nullius*, "nobody's property"), and so open to acquisition. There is ample authority to the effect that Scots law follows the Roman law on this point (see *e.g.* Stair, *Inst.* 2.1.33; *Wemyss v Gulland* (1847) 10 D 204; *Scott v Everitt* (1853) 15 D 288; *Wilson v Dykes* (1872) 10 M 444; *Assessor for Argyll v Broadland Properties Ltd* 1973 SC 152.)

The practical consequence of this is that, for present purposes, we can disregard the discussion by the court in *Borwick* of the rights of a landowner to wild animals on his or her land. This leaves us with the role of possession in the ownership of wild animals. The basic position in Roman, Scots and English law (though of course each system differs on points of detail) is that ownership of a wild animal is acquired by taking possession of it. That ownership lasts only as long as possession is retained, and ownership is lost where the wild animal escapes beyond reasonable hope of recovery.

What must be proved

In a case of this kind, then, there are three questions that need to be asked.

First, is the animal a wild animal? That is, does it fall into the class of animals that are *ferae naturae*? This is important, because ownership of domestic animals (*domitae naturae*, in the terminology adopted by the court in *Borwick*) is not precariously dependent on continued possession. If my neighbour's pet dog escapes, my neighbour continues to own the dog. Even if my neighbour gives up hope of recovering the dog, such that the dog is to be considered abandoned, the effect of that in Scots law is that ownership of the dog falls to the Crown. It does not become ownerless. By contrast, a wild animal that escapes beyond reasonable hope of recovery becomes ownerless, and is open once more to acquisition.

Second, if the animal is wild, is it possessed? As we have seen, continued ownership of a wild animal depends on continued possession of that animal.

Third, if the animal is wild, and it is possessed, does ownership of the animal transfer along with ownership of the land on which it is detained?

(i) Is the animal wild?

It is important to understand that whether an animal is wild or domestic is not determined by the characteristics of the individual specimen. A dog, for example, is always a domestic animal, however fierce. Instead, it is classified by species. By this is not necessarily meant "species" in the sense that a zoologist would understand the term, the law in this area pre-dating modern biological classifications. There may, for example, be wild and tame "species" of the same kind of animal. Wild and pet rabbits would perhaps be an example of this.

It is not always clear into which category a particular species of animal falls. Certainly the most common kinds of pet and farm animal are to be considered domestic. As to fish, in *Borwick* it was argued that fish should be treated as domestic animals if they are bred in captivity or, if not so bred, they were brought into captivity with the intention that they should remain there. This argument was briskly rejected by the court. Sir Timothy Lloyd said (at para 12) that it was "not open to the court to alter the long established classification of animals in this respect and to regard certain fish as animals *domitae naturae*." Any change would be a matter for Parliament.

For England, then, the point is evidently clear enough. What of Scotland? The point was considered in *Valentine v Kennedy* 1985 SCCR 89, a case of prosecution for theft in the Sheriff Court. In this case, a group of accused were charged with theft of a number of rainbow trout. These had been raised in a fish farm, and then purchased and used to stock a reservoir for the benefit of anglers who would pay for the privilege of fishing for them. A number of fish escaped from the reservoir, and were caught by the accused in a nearby burn.

The Sheriff in *Valentine* held (at p. 91) that farmed fish ceased to be *res nullius*. By this he seems to have meant, not simply that they were not ownerless, but that they were reclassified as domestic animals, for he held that the fish continued to be owned even after their escape. It is disappointing and surprising, however, to see this conclusion being reached without any reference to authority, and with only very brief discussion. Perhaps the fact that it was a criminal case meant that the court was not sufficiently alert to the property law issues that ought to have been determinative of the question. That, though, is speculation. At any rate, there does not appear to be any prior authority to the effect that a wild animal can be reclassified as a domestic animal simply by virtue of having been bred in captivity. Accordingly, little reliance can be placed on *Valentine* on this point.

Valentine, it must be said, is complicated by the fact that the fish in question were a non-native species. It is true that it has been suggested that non-native animals are a special case, on the basis that they are more easily identifiable as escapees (for discussion, see C Anderson, *Possession of Corporeal Moveables* (Edinburgh Legal Education Trust 2015), paras 7-71 - 7-75). At first sight, it might have been thought that this influenced the Sheriff in *Valentine*. Indeed it did, but not to the extent of holding non-native animals to be different *in principle*. The Sheriff said (at p. 91) that, had the accused caught fish of a native species, "a conviction of theft would have been unlikely to follow since it would have been unlikely to be possible to hold that the brown trout [a native species] caught had escaped from the reservoir". In other words, the accused would have escaped conviction if they had caught escaped brown trout, not because the trout would be ownerless, but because they would be unlikely to be provably owned, not being distinguishable from unowned fish.

In the case of fish of a native species, this difficulty does not in any case arise. In the absence of more convincing authority than *Valentine v Kennedy*, the better view seems to be that the fact of fish being bred in captivity makes no difference to their status as wild animals. They are therefore owned if possessed; ownership is lost if possession is lost beyond reasonable hope of recovery.

(ii) If the animal is wild, is it possessed?

If fish are considered to be wild animals even when farmed, ownership of them will depend on possession. Here the court referred to *Borwick* referred to Roman authorities (in particular J.2.1.14 and G.2.67-68) for this general point. Ownership of wild animals is precarious, and depends on continued possession. If a wild animal escapes beyond reasonable hope of recovery, and returns to its natural state of freedom, it becomes ownerless once more. This is also the position in Scots law, as an exception to the general rule that property, once owned, can never become ownerless.

What, then, is required for possession? In many cases, this will be clear enough. Possession is based on control, so an animal kept in close confinement is certainly possessed. The situation becomes more doubtful in the case where the animal is less closely confined. Conceivably, an animal could be in an enclosure from which escape is impossible, but which is big enough that the enclosure has no practical effect on the animal's life.

In *Borwick*, it was argued for CWF that close control was needed for possession and that, therefore, BDS had lost ownership of the fish on placing them in the lakes. Both Sir Timothy Lloyd and Lord Justice Peter Jackson noted that the continental authorities were not at one on the point. The latter referred (at para. 74) to a passage from the Dutch jurist Grotius' *On the Law of War and Peace* (1625), book II ch VIII. This passage begins with a reference to a Roman jurist, the younger Nerva. This passage is found at D.41.2.3.14. Here, Nerva says that fish in ponds are owned, but not those in a lake, because of this difference in the level of control. Grotius goes on to say, though, that a different view has been taken in his day. Grotius' position is based on the view that a less strict confinement is nonetheless a confinement, and so even fish in a lake are possessed if they cannot get out of it. Others have taken a different position. For example, at para. 68, the nineteenth century German jurist Savigny is quoted as requiring that the animal is under such constraint that it can be "caught at any moment". Lord Justice Peter Jackson concludes (at para 74) that Grotius' opinion "shows that the classical legal scholars and philosophers were not unanimous on the question of the degree of control necessary for the acquisition of qualified rights."

Indeed, the Common Law tradition does not speak with a single voice on the issue either. In a US case not considered by the court, very similar issues arose. This case was *Sollers v Sollers* (1893) 20 Lawyers' Reports Annotated 94. In this case, the plaintiff had fenced off an inlet of the Patuxent

River in Maryland, of about 1.5-2 acres in extent, such that fish could not escape it. Even though the fish could not escape, it was held that the plaintiff had lost ownership of the fish by placing them in the fenced off area. Page J, delivering the opinion of the court, said (at p. 95):

> "The possession must be complete; and if, when taken, they are voluntarily restored to their native element, so that they can only be regained in like manner to that by which they were originally taken, the right of property is lost."

There is much to be said for Nerva's view. As Lord Rodger has pointed out, the owner of a larger enclosure or body of water "might have trouble finding, far less taking, a fish or animal in these circumstances" (Lord Rodger of Earlsferry, "Stealing Fish" in R F Hunter (ed), *Justice and Crime: Essays in Honour of the Right Honourable the Lord Emslie, MBE, PC, LLD, FRSE* (T & T Clark, 1993), p. 10). In effect, such an animal remains in its state of natural liberty.

There is no clear answer to this question in Scots law. The point is briefly considered in *Valentine v Kennedy*, in which (at p. 90), the sheriff held that "trout may in my opinion lose their status as res nullius at common law if they are confined within an area such as a stank in the same way as other wild animals may lose that character by being enclosed". Beyond a reference to Gordon's *Criminal Law* (2nd edn, para. 14-40), this assertion is unsupported by reference to authority or argument. This is unfortunate because, while the point is beyond dispute with wild animals in smaller enclosures, the position is somewhat more doubtful with larger enclosures.

In *Pollok v McCabe* 1910 SC (J) 23, there was comment on the issue. This was a prosecution under the Theft Act 1607, which imposes a criminal penalty on "quhasoeuir...steillis beis and fisches in propir stankis and loches". At p. 26, Lord Ardwall says that it is "quite apparent that this Act establishes and declares a right of property in bees and in fishes in 'proper stanks and lochs'". With respect, however, it is not clear that this is in fact the case. As Lord Rodger points out ("Stealing Fish", pp. 13-14), nothing in the Act says anything about ownership. Moreover, if the 1607 Act was ever understood as conferring ownership of the fish on the owner of the land, it is remarkable that none of the institutional writers gives any hint of this. In any case, the point is strictly *obiter* in a question of the interpretation of the 1607 Act, and neither of the other judges comments on the question.

A contrary view, that the size of the enclosure makes a difference, is suggested by an observation in *H M Advocate v Macrae* (1888) 15 R (J) 33. This was a prosecution of a number of individuals for mobbing and rioting. The accused had allegedly been part of a crowd that had entered a deer forest as part of a political protest, taking shots at deer. In his charge to the jury, the Lord Justice-Clerk said (at p. 36) that deer "are not private property while running wild." The context of this observation limits its value, but it is at least suggestive. After all, according to the evidence the deer forest was surrounded on all sides by water or fences. Nonetheless, the deer on it were said to be ownerless. The deer forest was, however, some 30,000 acres in extent.

There is therefore no conclusive authority on the question of whether a wild animal continues to be owned when its enclosure is big enough that the animal is left in effective liberty. It seems more consistent with general principle, though, to say that such an animal is ownerless when it cannot readily be recovered. That would include a fish in a loch or reservoir. If this is thought to be an undesirable outcome, the problem is really the rule that makes ownership of wild animals dependent on continued possession. If that is thought to be undesirable, it is a matter for Parliament rather than for the courts.

(iii) Does ownership of the fish transfer with ownership of the land?

Finally, assuming that the owner of the land owns the fish that are present on it, does a purchaser of that land acquire ownership of the fish as well? In a normal sale, the matter could have been dealt with straightforwardly enough, by making express provision for the fish in the contract of sale. Ownership of the fish would then have transferred to the buyer in accordance with the provisions of the Sale of Goods Act 1979. In *Borwick*, though, the sale took place at the instance of a secured creditor, whose security did not extend to the fish. Accordingly, the creditor did not purport to be selling the fish. Thus, the question resolves into this: does the acquirer of land acquire possession of wild animals that are on the land, where the condition of those animals was such that they were possessed by the previous owner?

In *Borwick*, the court held that BDS lost possession, and therefore ownership, of the fish when the land was sold. Reliance was placed here on *Kearry v Pattinson* [1939] 1 KB 571. In that case, the plaintiff's bees had swarmed, and had then settled on the defendant's land. The defendant refused permission for the plaintiff to go onto his land to retrieve them. It was held that the plaintiff had lost ownership. In *Borwick*, Sir Timothy Lloyd explained (at para. 50) that the "main focus of the court's

attention in *Kearry* was on the question whether the plaintiff had the lawful power to pursue the bees". Accordingly, BDS lost possession when, on the sale taking place, they lost the legal right to enter the land and retrieve the fish. CWS, having acquired control, acquired possession and therefore ownership of the fish in their stead.

There does not appear to be any direct authority on the point in Scots law. It is not obvious, though, that Scots law would necessarily take the same approach. There is a clear distinction to be drawn between a party that has bought the fish and arranged for them to be placed in the water, and a purchaser who has not contracted to acquire the fish, and from whose point of view the presence of the fish is almost fortuitous. It has been suggested above that the fish are ownerless in this kind of situation. However, if the law is to allocate ownership to one or other of these parties, it seems better to avoid an outcome that gives an unearned windfall to the purchaser.

It is interesting to note the position of Roman law here. We saw earlier that Nerva denied ownership of fish or other wild animals which, although in a confined area, were in effect left in their natural state of freedom. He goes on to say that this is precisely because: "Any other view would mean that the purchaser of a wood thereby should be held to possess all the animals in it". The same would go for fish in a reservoir. Another text is concerned with the question of whether animals are included in the sale of an area of land: "fish which are in a pool are not part of a building or a farm, no more than the chickens or other animals on a farm" (D.19.1.15 (Ulpian)-16 (Pomponius)). Such animals are therefore not acquired by the purchaser of the land.

The Scots courts are, naturally, not obliged to follow either the Roman position or the English position. Of course, the question only needs to be considered if it is incorrect (as argued above) that fish in a loch or reservoir are ownerless. If it is the case that they are owned while left in the water, Scots law is free to adopt either view on whether a purchaser of the land acquires possession and ownership of the fish by taking possession of the land. For the reasons given here, however, the preferable view seems to be that this should not be considered to be the case. In a case where a heritable creditor had sold the land, the previous owner would retain the right to the fish.

Conclusions

This article has considered the question whether a purchaser of land, on which there is a body of water from which fish cannot escape, acquires ownership of those fish by virtue of taking possession

of the land. We have seen that such acquisition requires an affirmative answer to three questions. First, are fish wild animals, open to acquisition by possession? Second, if so, are the fish possessed while in the water? Third, if they are possessed by the owner of the land, does the acquirer of the land also acquire possession of the fish? In *Borwick Development Solutions Ltd v Clear Water Fisheries Ltd*, we saw that the English Court of Appeal answered all three questions in the affirmative. We have seen, though, that even though Scots law draws on the same Roman sources as English law on this point, the Scottish courts might reach a different view on the second and third questions.