

**Elk, Private Ownership Of. Game, Slaughter of by Private Owner.**

Under Sec. 1072, Civil Code, elk and other animals, wild by nature, are the subject of private ownership when so tamed, taken, or held in possession as to subject them to private ownership. Such ownership is not lost by their escaping from possession so long as they have *animus revertendi*, but if, upon escaping they return to their wild state and do not follow the custom of returning to their place of confinement, private ownership in them ceases and they become subject to the game laws of the state.

Helena, Mont., Dec. 18, 1906.

Hon. W. F. Scott,  
State Game Warden,  
Helena, Mont.

Dear Sir:—

The letter of Hon. T. C. Power, addressed to you and by you referred to this office with request for an opinion to you upon the question therein presented, received. From said letter it appears that the Custer Cattle Company has for ten years or more had in its possession some sixty head of elk, which have been kept for a number of years past in a large pasture fenced in by said company; that said elk were confined in said pasture and remained therein until work on the construction of a tunnel for the Billings-Great Falls Railroad was started in or near said pasture; that the blasting and other disturbances caused by the construction work on said tunnel alarmed said elk, whereby they broke out of the pasture and became more or less scattered and since such time have been breaking into other pastures where they eat hay and grass belonging to other persons, and the bulls, by reason of being more or less vicious and dangerous, jeopardize human life and cause a great deal of annoyance to the owners of the farms in the neighborhood of the pasture in which said elk are

supposed to be confined. Upon the above statement of facts, the following question is submitted:

"Can these animals be slaughtered by said Custer Cattle Company or its duly authorized agents, especially after the close of the open season for the killing of wild game, and the meat shipped out of the state?"

The first question to be determined is "Can private ownership be acquired in wild game?"

Sec. 1070 of the Civil Code provides as follows.

"The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others. In this case, the thing of which there may be ownership is called property."

Sec. 1072 of the same code provides that:

"Animals wild by nature are the subjects of ownership, while living, only when on the land of the person claiming them, or when tamed, or taken or held in the possession, or disabled and immediately pursued."

From the above sections it is clear that when the Custer Cattle Company got possession of these elk and held them in their possession upon their land enclosed by fence, they acquired an ownership in such elk whereby they could possess and use the same to the exclusion of others.

The common law rule as to the private ownership of wild animals has not been changed by the statutes of this state. Blackstone, in defining what property is subject to private ownership, says:

"A qualified property may subsist in animals *ferae naturae per industriam hominis*: (1) by a man's reclaiming and making them tame by art, industry, and education; or by so confining them within his own immediate power, that they cannot escape and use their natural liberty.

\* \* \* Such as are deer in a park, hares or rabbits in an enclosed warren, doves in a dove-house, pheasants or partridges in a mew, hawks that are fed and commanded by their owner, and fish in a private pond or in trunks. These are no longer the property of a man than while they continue in his keeping or actual possession; but if at any time they regain their natural liberty, his property instantly ceases; unless they have *animum revertendi*; which is only to be known by their usual custom of returning.

\* \* \* The law therefore extends this possession farther than the mere manual occupation; for my tame hawk that is pursuing his quarry in my presence, though he is at liberty to go where he pleases, is nevertheless my property; for he hath *animum revertendi*. So are my pigeons, that are flying at a distance from their home (especially of the carrier kind), and likewise the deer that is chased out of my park or forest, and is instantly pursued by the keeper or forester;

all which remain still in my possession, and I still preserve my qualified property in them. But if they stray without my knowledge, and do not return in the usual manner, it is then lawful for any stranger to take them. But if a deer, or any wild animal reclaimed, hath a collar or other mark put on him, and goes and returns at his pleasure, or if a wild swan is taken, and marked and turned loose in the river, the owner's property in him still continues, and it is not lawful for any one else to take him; but otherwise, if the deer has been long absent without returning, or the swan leaves the neighborhood.

Blackstone's Commentaries. Book 2, 392.

That private ownership in wild animals, upon the conditions mentioned above, is still the law of this country, where it has not been expressly changed by statute, see

Eli Ullery v. Clayborn Jones et al, 81 Ill., 403;

Fleet v. Hagerman, 14 Wend. (N. Y.) 44;

Mullett v. Bradley, 53 N. Y. Sup. 781;

Cyc. Vol. 2, pp. 306 to 309.

As stated above, property in these elk is qualified and dependent upon their remaining in the possession of the owner. When they get out of the pasture, if their actions are such as to show that they have returned to their wild state and have no *animus revertendi*, then private ownership in them is absolutely lost and they become subject to the game laws of the state and cannot be killed by their former owner or any other person, except in open season and in such numbers as is allowed by the state game laws. On the other hand, the mere fact that they have been frightened and have broken out of the pasture, or have become breachy and got out of the enclosure without being frightened but follow the usual custom of returning to the pasture from time to time and by their actions show that they still have *animus revertendi*, does not destroy the private ownership in such elk, and whenever they have returned to their accustomed pasture the owner may treat them as any other private property, and, if he sees fit, may slaughter them and sell the meat.

Of course, it would always be for the owner of such elk to show that they were the elk which he had tamed or taken or held in his possession, and where they had gotten out of the pasture it would be for him to show, if the question should arise as to his right to have possession of elk meat, that he had taken and held them in his possession and that, although they had been out of his possession they had at all times when out of his possession, had the intention of returning to the pasture or home in which he usually confined them.

A person who has acquired private ownership in elk or other wild animals should, before slaughtering the same and offering the meat for sale, always have witnesses who would be able to testify as to the usual custom of such animals of returning to their place of confinement, so that, in case of prosecution for violation of the game

law, he would be able to prove that the animals, upon escaping from his enclosure, did not return to their wild state, but followed a custom of from time to time returning to the place of their usual confinement.

You are advised that under the facts stated above, the Custer Cattle Company has acquired such an ownership of the elk that it may slaughter the same and sell the meat, subject to the qualifications of ownership mentioned above.

Very truly yours,  
ALBERT J. GALEN,  
Attorney General.