

NOTES, QUESTIONS, AND PROBLEMS:**THE RULE OF CAPTURE AND OTHER
"FUGITIVE" RESOURCES**

[I]nquiries into the acquisition of title to wild animals . . . may seem purely academic; how often, after all, do we expect to get into disputes about the ownership of wild pigs . . . ? These cases are not entirely silly, though. . . . [A]nalogies to the capture of wild animals show up time and again when courts have to deal on a nonstatutory basis with some "fugitive" resource that is being reduced to property for the first time. . . . [Carol M. Rose, *Possession as the Origin of Property*, 52 U. Chi. L. Rev. 73, 75 (1985).]

1. *Oil and gas*. Oil and natural gas commonly collect in reservoirs that underlie many acres of land owned by many different people.²¹ The resources have a fugitive character in that they wander from place to place. Oil or gas once under the land of *A* might migrate to space under the land of *B* as the result of natural circumstances or because *B* drops a well and mines a common pool beneath *A*'s and *B*'s land. The oil or gas mined by *B* may even have been placed in the pool by *A* (gas and oil extracted elsewhere are often reinjected for storage or secondary recovery).

When these obviously problematic situations first led to litigation — usually (but not always) a suit by someone like *A* to recover the value of gas or oil drawn away by someone like *B* — the courts were induced by the fugitive nature of the resources in question to liken them to wild animals. And because ownership of wild animals had long been settled in terms of the rule of capture, the courts reasoned that ownership of oil and gas should be determined in the same manner. The resources, one early case said,

may be classed by themselves, if the analogy be not too fanciful, as minerals *feræ naturæ*. In common with animals, and unlike other minerals, they have the power and the tendency to escape without the volition of the owner. . . . They belong to the owner of the land, and are part of it, so long as they are on or in it, and are subject to his control; but when they escape, and go into other land, or come under another's control, the title of the former owner is gone. Possession of the land, therefore, is not necessarily possession of the gas. If an adjoining, or even a distant, owner, drills his own land, and taps your gas, so that it comes into his well and

21. Or located in several countries, a point you should bear in mind when we come eventually to consider the implications of the rule of capture. See, e.g., Thomas C. Hayes, *Confrontation in the Gulf: The Oilfield Lying Below the Iraq-Kuwait Dispute*, N.Y. Times, Sept. 3, 1990, §1 at 7.

At the heart of Iraq's dispute with Kuwait over oil, money and boundaries lies a huge banana-shaped oil formation some 10,200 feet below the desert sands.

One of the world's largest oil reservoirs, the Rumaila field runs beneath the Iraq-Kuwait border, and the bulk of the 50-mile-long formation lies under Iraq. Yet much of the oil pumped from Rumaila in the last decade was taken by the Kuwaitis. Just as the pump at the edge of a lake can pull water from the entire lake, Kuwait's wells could eventually, in theory, bring up oil from the entire Rumaila pool.

As Iraq sees it, Kuwait has been stealing its oil. And the Rumaila field is a rich prize, estimated by some American oil experts to still contain more than 30 billion barrels, or three times the original size of the Prudhoe Bay formation in Alaska.

under his control, it is no longer yours, but his. [Westmoreland & Cambria Natl. Gas Co. v. DeWitt, 18 A. 724, 725 (Pa. 1889).]

Go back to the examples involving *A* and *B* above and consider the following:

(a) Does *A* have any remedy at all if *B* starts draining the pool? See *Barnard v. Monongahela Natural Gas Co.*, 65 A. 801 (Pa. 1907) (*A* can go and do likewise). Compare *Union Gas & Oil Co. v. Fyffe*, 294 S.W. 176 (Ky. 1927) (suggesting that *A* might be able to get an injunction against excessive drilling or nonratable extraction). Which of these approaches is better, and why?

(b) Suppose *B*'s well starts on her land but angles down such that it "bottoms" underneath land owned by *A*. Does the rule of capture still apply? See 1 Howard R. Williams & Charles J. Meyers, *Oil and Gas Law* 55, 59 (1986); John D. McKinis, *Directional Drilling, Subsurface Trespass, and Conversion*, 4 J. Min. L. & Policy 235 (1988-1989).

(c) Suppose that *A* has reinjected gas (it could as well be oil) that moves under *B*'s land. *B* sues to recover damages for the use and occupation of her land by *A*'s gas. What result? See *Hammonds v. Central Kentucky Natural Gas Co.*, 75 S.W.2d 204 (Ky. 1934).

Unsurprisingly, perhaps, the court in the *Hammonds* case just cited held that *A* was not liable because, under the rule of capture, the gas was no longer hers. Because fugitive resources are to be treated like "wild animals," when they "escape" or are "restored to their natural wild and free state, the dominion and individual proprietorship of any person over them is at an end and they resume their status as common property." 75 S.W.2d at 206.

Hammonds has been criticized and rejected by a number of jurisdictions on the grounds that the analogy to wild animals is silly, that reinjected gas or oil hasn't really "escaped," and that in any event it is not "returned to its natural habitat" by reinjection. The Supreme Court of Kentucky eventually overruled *Hammonds*. See *Texas American Energy Corp. v. Citizens Fidelity Bank & Trust Co.*, 736 S.W.2d 25 (Ky. 1987). We presume it is also the case today that rejection does not ordinarily give rise to liability for the use and occupation of parts of a reservoir underlying the land of neighbors, even though ownership of the reinjected minerals remains intact. See, e.g., *Railroad Commn. of Texas v. Manziel*, 361 S.W.2d 560 (Tex. 1962).

There is a reason independent of strained analogies to discard the rule in *Hammonds*: It denied society at large the benefits of economical underground storage. (Do you see why?) There are also reasons — again independent of strained analogies — to discard the rule of capture altogether, yet it still applies to so-called native, or pre-severed, gas and oil. Should it? For that matter, should the rule of capture even be applied to wild animals themselves? We shall consider all of this a little later, in the course of examining some consequences of the rule and some means of mitigating them. See pages 52-53.

2. *Water*. The rule of capture has played a formative role in the case of another migratory resource — water. *Groundwater* (water found in underground

aquifers), for example, was governed early on by the English rule of absolute ownership, which allowed each landowner over an aquifer to withdraw freely without regard to effects on neighbors.²² “[F]ramed in property language, the rule was in reality a rule of capture, for a landowner’s pump could induce water under the land of his neighbor to flow to his well — water that was in theory the neighbor’s property while it remained in place.” Restatement (Second) of Torts ch. 41, commentary at 256 (1977). Whoever first captured the water, then, was really its owner. The so-called English rule was adopted by a number of states, but virtually all others followed the American rule of reasonable use, itself a rule of capture but with the slight addition that wasteful uses of water, if they actually harmed neighbors, were considered unreasonable and hence unlawful. As with the English rule, there was no principle of apportionment among overlying users. Today groundwater extraction is commonly governed by legislative and administrative programs.

In the Western states, *surface waters* and some groundwater are allocated according to an explicit rule of first in time, called prior appropriation. The basic principle is that the person who first appropriates (captures) water and puts it to reasonable and beneficial use has a right superior to later appropriators. (Obviously, complications can arise. Suppose that *A* begins efforts to appropriate water from a stream — starts building diversion works — before *B*, but that *B* finishes her works and puts the water to beneficial use before *A*. Who is prior to whom? What would *Pierson v. Post* say?) Prior appropriation doctrine developed as a direct consequence of the scarcity of water in the arid West. Eastern states, where water is abundant, use one or another variant of riparian rights, the thrust of which is that each owner of land along a water source (riparian land) has a right to use the water, subject to the rights of other riparians. At first glance, riparian rights have no relation to a rule of capture, or first in time, but on a closer look they do — because the claims of riparians rest on their underlying holdings of riparian land, and the land itself was originally acquired by first possession. See Richard A. Epstein, *Possession as the Root of Title*, 13 Ga. L. Rev. 1221, 1234 (1979).

The extraordinarily low ratio of streams to land in the West made riparian law a poor means by which to allocate water there; hence prior appropriation. Neither system is perfect. Riparian rights, for example, take little or no account of the relative productivity of the land the water services, encourage the development of uneconomical “bowling-alley” parcels of land perpendicular to the banks of a stream, and ration poorly when stream levels are low. Prior appropriation encourages premature development and excessive diversion. It also rations poorly when supplies dwindle periodically.

3. *Analogies and their consequences.* The rule of capture follows directly from the powerful principle of first in time and finds support in Locke’s theory of labor. See Notes 3 and 4, pages 12-15. The rule was applied early on to wild animals and then later, by analogy, to other fugitive resources of the sorts we have

22. What sorts of effects? See generally the Note on Lateral and Subjacent Support on page 738.

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considered.²³ Reasoning by analogy from the familiar to the new is a common human tendency and a handy problem-solving technique; it is also standard practice among lawyers and judges faced with cases of first impression. See generally Edward H. Levi, *An Introduction to Legal Reasoning* (1948). Rather than undertaking a general inquiry into the matter, we want to focus on the particular analogy drawn in the materials we have been discussing. What might be the consequences of applying the rule of capture to wild animals — and then to oil, gas, water, and other natural resources? What might those consequences have to do with the concept of “common property” mentioned in the quotation from *Hammonds* on page 37? The following reading addresses these fundamentally important questions.

Harold Demsetz, *Toward a Theory of Property Rights*

57 *Am. Econ. Rev.* 347-357 (Pap. & Proc. 1967)

The Concept and Role of Property Rights

In the world of Robinson Crusoe property rights play no role. Property rights are an instrument of society and derive their significance from the fact that they help a man form those expectations which he can reasonably hold in his dealings with others. These expectations find expression in the laws, customs, and mores of a society. An owner of property rights possesses the consent of fellowmen to allow him to act in particular ways. An owner expects the community to prevent others from interfering with his actions, provided that these actions are not prohibited in the specifications of his rights.

It is important to note that property rights convey the right to benefit or harm oneself or others. Harming a competitor by producing superior products may be permitted, while shooting him may not. A man may be permitted to benefit himself by shooting an intruder but be prohibited from selling below a price floor. It is clear, then, that property rights specify how persons may be benefited and harmed, and, therefore, who must pay whom to modify the actions taken by persons. The recognition of this leads easily to the close relationship between property rights and externalities.

Externality is an ambiguous concept.²⁴ For the purposes of this paper, the concept includes external costs, external benefits, and pecuniary as well as nonpecuniary externalities. No harmful or beneficial effect is external to the world. Some person or persons always suffer or enjoy these effects. What converts a harmful or beneficial effect into an externality is that the cost of bringing the effect to bear on the decisions of one or more of the interacting

23. The rule of capture even came into play in the lawsuit that arose when two baseball fans asserted conflicting claims to Barry Bonds' record-breaking home-run baseball. *Popov v. Hayashi*, Superior Court of California, Dec. 18, 2002. But the case was resolved with reference to other doctrines as well, and is best considered in connection with the law of finders, which we take up in the next chapter. See page 114.

24. If you find this paragraph and the three that follow it difficult, skip ahead to the Note on “Externalities” on page 46, then return to the Demsetz essay. — Eds.

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