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Ferocity of Oysters

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bludgeon with which to kill the craven rascal should he lay down his wooden cross for a moment or deviate from his journey.

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THE FEROCITY OF OYSTERS

"He was a bold man who first ate an oyster" says Jonathan Smith in his "Polite Conversation (Dialogue 11)" and most of us will readily subscribe to that view. But he was probably a bolder man who remarked at the oyster supper given by the Ladies Society for the Prevention of Cruelty to Animals that the bivalves are really and truly *wild animals.* While a curtain of mercy must be drawn over the ensuing scene it will be admitted that he was not completely without adherents, for the faction of the club that had voted against the proposed affair on the ground that oysters could not be eaten because there are no R's in Wednesday regarded this turn of affairs as a moral victory. We however are interested merely in the legal status of the most prominent member of the genus Ostrea.

It is a matter of fact that the lowly shell-fish has provoked as rich comment in our courts of law as in the literature of the race where, indeed, it seems firmly intrenched. Shakespeare speaks of it twice; once in the second scene of the second act of "The Merry Wives of Windsor" when he says: "Why, then the world's mine oyster, which I with sword will open." This stand, by the way, was taken in the case of *State v. Johnson* which we will discuss at length later. Then again we find the mollusk prompting Shakespeare to say "Rich honesty dwells like a miser, sir, in a poor house; as your pearl in your foul oyster. (As You Like It."—Act. V. Scene 4.)

The idea that an oyster should not be eaten in months having no R in their spelling comes from Butler (Dyets Dry Dinner 1599). Alexander Pope speaks of the fish, borrowing verbatim from Boileau: (Epitre II—a M. I' Abbe des Roches) as does Richard Brinsley Sheridan in "The Critic" where we are assured that "An oyster may be crossed in love' (Act III, Scene 1), a sentiment, by the way, which conflicts with Dicken's view, "as secret and self contained and solitary as an oyster" (Christmas Carol, Stave 1).

But while the literary men may hold conflicting views on the subject it would seem that their legal brethren are no better. The oyster has been the center of many stormy debates at the bar and has been decided to be several different things (i. e., *ferae domitae, State v. Taylor* 72 D. 347) including a wild animal—although it must be admitted that the decisions have not seemed to trouble Mr. Oyster one whit.

The exact status of the oyster is important in many cases and has arisen most frequently in cases where men have been indicted for larceny of these fish. If oysters are *ferae naturae* no larceny can be committed, for animals are not considered to be the property of anyone until taken into possession. This idea of the possession and the ability to commit a larceny on *ferae naturae* comes from the common law which in turn obtained its view from the tenets of the old Roman Law. The Romans held that wild animals were the property of all the citizens of the state and that anybody could take them. Hence without the existence of specific statutes to the contrary all wild animals could be taken at common law (and can still be) without the taker being guilty of any offense.

Probably the first citation in American law holding that the shelled delicacy is in reality *ferae naturae* is the case of *Brinckerhoff v. Starkins* (11 Barb. 248), a New York Case decided in the year 1851; but the wording given by the Supreme Court of Washington in the case of *State v. Johnson* (141 Pac. 1050) offers a more complete answer to the question as stated above.

That the oyster was classified as *ferae naturae* at common law can be obtained from a perusal of some of the following authorities: 2 Blackstone Commentaries 390, 392; Chitty on Criminal Law, Volume 3 page 947; Archibald Criminal Pleadings 116; Wharton on Criminal Law, sec. 1754, 1755.

This was the state of affairs in the case of *State v. Johnson* (141 Pac. 1040). Here the prosecuting attorney of Mason county in the state of Washington, filed an information against the defendant Johnson charging larceny of certain oysters, the property of the state of Washington.

The court held that Johnson could not be could not be convicted of larceny because oysters are *ferae naturae* and that "the only penalty that can be imposed is the one provided by the

statute". The statute in this case made it unlawful for a man to remove oysters from the state tidelands during certain periods of the year,—a thing which Johnson had done.

In deciding as it did however the court points out that oysters are to be classed as wild animals. It was argued by the prosecutor that they were not to be so denominated because the state had brought them under possession. This possession be held was not actual but constructive in that the state had taken them into possession by the passage of the statue mentioned above.

This view was refused by the court: "Unquestionably, we think oysters in common with other shell fish, found on the lands belonging to the state, are so far wild by nature, that any one finding them may, in the absence of any statute prohibiting the act, take them and convert them to this own use without violating any of the criminal statutes of the state."

This holding created quite a bit of merriment when it was handed down, most probably because of the phrase "so far wild by nature". For authority that the oyster is a fish we have the cases of *Moulton v. Libbey* (37 Maine 7, 472; 59 Am. Dec. 57) and *Caswell v. Johnson* (58 Maine 164).

Of course private property can be acquired in oysters in the same manner that it can be acquired in any other animal wild by nature: that is, by taking into actual possession. The possession of the oyster has this distinct advantage; once taken into possession, due to the fact that it has not the power of locomotion, it cannot escape.

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