

Robert C. Deal  
Doctoral Candidate  
Department of History  
Temple University

Fast-Fish, Loose-Fish: How Whalemen, Lawyers, and Judges Created the  
British Property Law of Whaling

“It frequently happens that when several ships are cruising in company, a whale may be struck by one vessel, then escape, and be finally killed and captured by another vessel,” wrote Herman Melville in *Moby-Dick*. “Thus the most vexatious and violent disputes would often arise between the fishermen, were there not some written or unwritten, universal, undisputed law applicable to all cases.” Melville went on to state that American whalemen, acting as their own lawyers and legislators, without statutory dictate or judicial guidance, created and enforced their own rules. The universal law that prevented such “vexatious and violent disputes” was reduced by Melville to a pair of pithy maxims. “I. A Fast-Fish belongs to the party fast to it. II. A Loose-Fish is fair game for anybody who can soonest catch it.”<sup>1</sup>

Like most attempts at brevity and concision in the law, Melville’s summation raised more questions than it answered. What, for example, constituted a fast fish? How much control must a whaler have had over his prey before it was deemed fast? Melville’s gloss provided some answers. “Alive or dead a fish is technically fast, when it is connected with an occupied ship or

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<sup>1</sup> Herman Melville, *Moby Dick or, The Whale* (New York: Penguin Books, 2003), 432, 433.

boat, by any medium at all controllable by the occupant or occupants, – a mast, an oar, a nine-inch cable, a telegraph wire, or a strand of cobweb, it is all the same.” In Melville’s telling, control of a whale’s fate or even its movement was clearly not required. The fictive nature of control in obtaining the right to a whale was emphasized by Melville’s further explanation that a whale was also “technically fast” when it carried the waif or other “recognized symbol of possession” of a ship that had the present ability and intention of taking the animal. Although Melville presented whaling norms as unchanging, his description of these practices in *Moby-Dick* captured much of the confusion and ambiguity that governed confrontations at sea. Melville managed to seamlessly conflate two standards that would, if strictly applied, render contradictory results. Fast-fish, loose-fish, which Melville deemed the universal law, required that a physical connection between whale and boat or crew member be maintained to defeat the claims of a rival vessel. Yet, he also introduced the norm of “iron holds the whale” which provided that a boat retained its claim to a whale even in the absence of an attached line if a properly marked harpoon remained fast and the ship continued in pursuit with the ability – absent interference – to capture its prey. Melville indicated that a third standard – justice – was also sometimes invoked by the more honorable whalers to award whales to captains whose claims, while morally compelling, were weak under the prevailing norms.<sup>2</sup>

How then did whalers use such vague guidelines to settle arguments over a valuable commodity at a great distance from the formal institutions of the

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<sup>2</sup> Melville, *Moby-Dick*, 432-435. A waif is a flag that is attached to a pole that is affixed to a dead whale.

law? Melville answered the question concerning dispute resolution with a statement that appears to belie his earlier observation that violence was averted by application of an undisputed law. “[T]he commentaries of the whalers themselves sometimes consist in hard words and harder knocks – the Coke-upon-Littleton of the fist. True, among the more upright and honorable whalers allowances are always made for peculiar cases, where it would be an outrageous moral injustice for one party to claim possession of a whale previously chased or killed by another party. But others are by no means so scrupulous.”<sup>3</sup>

While historians, perhaps accepting Melville’s dual explanation of peaceful agreement and violence, have paid little attention to how whalers settled disputes over the capture of whales, legal scholars have found the question particularly germane to an understanding of the legal basis for the ownership of nature. The legal status of whales and other wild animals, or what the law calls *ferae naturae*, were a standard feature of compilations of English law from Bracton in the thirteenth century to the treatises of Blackstone upon which most of the early nineteenth century American understanding of the common law of property was based. As the importance of converting wild animals into personal property has waned as a subject of litigation, legal theorists, such as Robert C. Ellickson, have found the whaling cases of the eighteenth and nineteenth century fruitful in understanding how property law is

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<sup>3</sup> *Moby Dick*, 433-435. Coke-upon-Littleton is a reference to the first part of Edward Coke’s 1639 *Institutes of the Lawes of England*. Generally referred to as Coke upon Littleton, it is a commentary on Thomas Littleton’s fifteenth century treatise on property law.

created and implemented. Is it imposed upon society from above by judges and legislators or do the formal institutions of the law merely endorse the norms and customs that are fashioned by those most intimately concerned with the relevant issues in the field and, in the case of whales, at sea?<sup>4</sup>

If Melville's whalers were governed by the law of might hiding behind a veneer of civility, Ellickson portrays the same men as part of a close knit community that were able to peacefully resolve potential disputes by creating norms that minimized the costs of doing business and maximized the welfare of all participants. Ellickson, a leading proponent of the idea that in real life close knit groups often work out their own solutions to problems without recourse to legal institutions or even knowledge of the applicable statutory and case law, argues that nineteenth century whalers operated on the basis of norms that were enforced by a neighborly sense of a shared pursuit. If a captain failed to play by the rules he might be subjected to an escalating series of rebukes from his colleagues ranging from peer pressure to, on rare occasions, threats of violence. Central to Ellickson's theory is the existence of a series of norms that all participants understood. Without such an understanding, the informal mechanisms of enforcement that Ellickson postulates would not be effective.

While Ellickson recognizes that customs changed over time and the vast expanse of waters hunted, he maintains that whalers in different historical fisheries created and enforced the evolving practices with little interference from

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<sup>4</sup> Robert C. Ellickson, "A Hypothesis of Wealth-Maximizing Norms: Evidence from the Whaling Industry," 5 *J. L. Econ. & Org.* 83 (Spring, 1989); Robert C. Ellickson, *Order without Law: How Neighbors Settle Disputes* (Cambridge: Harvard University Press, 1991).

courts and legislators. Ellickson's vision of how the law of whaling was created enjoys wide support. Henry E. Smith has, for example, recently observed that in the case of whaling, "property law has adopted wholesale the customs developed by communities that stand in a special relationship to use conflicts." As the history of how British whalers resolved disputes in the Greenland fishery and the way in which English and Scottish courts adjudicated the handful of litigated cases makes clear, whaling law was not created entirely at sea. British lawyers, judges, and legal scholars of the eighteenth and nineteenth centuries did not merely provide their imprimatur to that which was presented to them as whaling custom. The process by which the property law of whaling developed was, instead, collaborative.<sup>5</sup>

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January 1812 brought a familiar ritual to the port of Whitby on England's northeast coast. Captains began stocking their vessels for the summer season in the Greenland whalefishery. Since 1753, Whitby had sent its ships into Arctic waters in pursuit of bowheads or what locals called the Greenland or Common whale. Captain William Scoresby, Jr. had every reason to be optimistic about the upcoming season as the meat of 26½ pigs was salted, packed, and stowed aboard the *Resolution* in early January. The Yorkshire-born child of a whaling master of the same name, Scoresby was introduced to Arctic waters at age ten

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<sup>5</sup> Henry E. Smith, "Community and Custom in Property," *Theoretical Inquiries in Law*, Vol. 10, No. 1 (January 2009), 5-41, 6.

on his father's 1800 summer voyage to the Greenland fishery. By 1803, the younger Scoresby served as an apprentice in his father's employ and at age sixteen he was promoted to first mate. Scoresby had enjoyed much success in 1811, rewarding the faith placed in the twenty-one year old novice captain by the owners of the *Resolution*.<sup>6</sup>

The timing of the *Resolution's* March 27<sup>th</sup> departure from Whitby for the 1812 Greenland whaling season was dictated by a confluence of factors relating to meteorology, oceanography, glaciology, early nineteenth century maritime technology, and the patterns of bowhead migration. As Scoresby explained, the conditions prior to the middle of April in the areas north of 75° latitude where bowheads might be found were simply too dangerous. The risk of encountering the prevalent drift ice in the dark prior to the spring advent of twenty-four hour daylight far outweighed any advantage an early start to the whaling season might provide. The severity of the frost and storms before the middle of April in

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<sup>6</sup> The scientific name for the bowhead whale is *Balaena mysticetus*. Although the word bowhead was not used by the British, it is employed throughout as it has come to be the most common name for *Balaena mysticetus*. First used by American whalers in the nineteenth century, the name bowhead is a reference to the animal's bow-shaped skull. J. Jerome Montague, "Introduction," in John J. Burns, J. Jerome Montague, and Cleveland J. Cowles, editors, *The Bowhead Whale* (Lawrence, KS: The Society for Marine Mammalogy, 1993), 1-21. For a brief biographical sketch of William Scoresby, see C. Ian Jackson, editor, *The Arctic Whaling Journals of William Scoresby the Younger: Volume I, The Voyages of 1811, 1812 and 1813* (London: The Hakluyt Society, 2003), xxi-xxxiii. Scoresby's career as whaling captain, scientist, and cleric are also addressed in Michael Bravo, "Geographies of Exploration and Improvement: William Scoresby and Arctic Whaling, 1782-1882," *Journal of Historical Geography*, 32 (2006), 512-538; Anita McConnell, "The Scientific Life of William Scoresby, Jnr, with a Catalogue of his Instruments and Apparatus in the Whitby Museum," *Annals of Science*, 43 (1986), 257-286; and Constance Martin, "William Scoresby, Jr. (1789-1857) and the Open Polar Sea – Myth and Reality," *Arctic*, Vol. 41, No. 1 (March 1988), 39-47. The most recent full biography of Scoresby is Tom Stamp and Cordelia Stamp, *William Scoresby, Arctic Explorer*, (Whitby, England: Caedmon of Whitby Press, 1975). For Scoresby's 1812 preparations, see Jackson, editor, *The Arctic Whaling Journals of William Scoresby*, 63-66.

combination with the ice and darkness “probably produce as high a degree of horror in the mind of the navigator . . . as any combination of circumstances which the imagination can present.” If Scoresby’s fellow captains were wary of the conditions they might encounter if they reached the whaling grounds too early, they were also concerned that their competitors might beat them to the whales. A captain with a head start over his colleagues might in a single week alone amidst a herd of bowheads guarantee a profitable season before other masters even spied a single whale.<sup>7</sup>

The gamesmanship of captains in timing their departure from Whitby was a mere prelude to the constant interactions between masters that marked any season in a whalefishery. Whaling was, fundamentally, a group endeavor. Intensely competitive, yet, at the same time, whalers were remarkably collegial and, on occasion, extremely generous. Captains were well aware that their success was dependent upon watching the movements of other ships through the ice and in sharing information about conditions and bowhead locations with their fellow masters. Scoresby, like all whaling captains, recognized that the master, whose miscalculation of ice conditions could be taken advantage of to gain a whale, might later prove savior should the *Resolution* find itself trapped in the ice. As competitors and allies in a shared battle in a harsh environment where the flick of a bowhead’s tail or the tardy

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<sup>7</sup> Scoresby, *An Account of the Arctic Regions*, II: 199-221, 207.

cutting of a line attached to a sounding whale could mean death, how did British whalers resolve ownership disputes over their valuable quarry?<sup>8</sup>

Scoresby was very clear, in his magisterial 1820 *An Account of the Arctic Regions with a Description of the Northern Whale-Fishery*, that whalers had, in the absence of legislation, created their “own equitable system of regulations” that curbed the greed of individual captains and worked to the “mutual benefit” of all. He explained that the Greenland practice of fast-fish, loose-fish discouraged litigation and prevented whales from escaping capture. Scoresby indicated that when a whale was struck by a harpoon it became the property of the ship that dealt the blow. Possession was retained so long as the whaler maintained that connection through the harpoon and lines to the animal. It did not matter that the line so tenuously rested upon the whale that its escape could be easily achieved. If, at the moment after a second whaler inflicted a fatal wound, the line of the original hunter should lose its connection to the whale the first striker would still be entitled to possession. The claim of a first striker was bolstered by the mechanism for determining whether a whale was fast when a second whaler joined the fray. Upon harpooning a whale, a whaleboat and the ship from which it was sent hoisted a flag, or jack, to signal friends for assistance and to warn off competitors. A whaler flying the jack was presumed to remain fast to a whale unless the second ship could present convincing evidence to the contrary. The competitor’s claim was always subject to the compelling rejoinder that a

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<sup>8</sup> Scoresby, *An Account of the Arctic Regions*, II: 199-221; and Jackson, editor, *The Arctic Whaling Journals of William Scoresby*, 71.



displaced line may well have maintained contact with the whale beneath the water's surface and out of view.<sup>9</sup>

If the fast fish provisions favored the original striker, the loose fish component worked to the advantage of an intervening whaler. Once a whale was loose, regardless of the circumstances, it was free for the taking. The harshness of this rule was illustrated by Scoresby's hypothetical example of a ship towing a dead whale awaiting the passing of a storm to commence cutting in. If the line should break, a second whaler would be free to claim the animal. Scoresby acknowledged that this custom may appear inequitable. He defended the Greenland practice, however, with the observation that it prevented whales from going uncaptured and diminished the likelihood of litigation. If the law permitted a ship to maintain possession of a whale to which it was no longer connected, the contentious issue would arise as to what constituted a sufficient degree of proximity and pursuit for the original striker to retain possession. A second whaler would, under this framework, hesitate to pursue a loose whale out of fear that its effort would go unrewarded or result in expensive litigation should it capture the animal. The end result, Scoresby explained from his perspective as a captain, would be unfortunate: the failure of the Greenland fishery to yield its maximum economic return. Yet, the "universal respect" for these principles established by custom in the Greenland fishery seemed to evaporate as Scoresby proceeded to explain their actual application at sea.

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<sup>9</sup> *An Account of the Arctic Regions*, vol. II, 318-328, 522-523.

What, at first glance, appeared simple and certain became a good deal messier in practice.<sup>10</sup>

After extolling the practical, legal virtues of fast-fish, loose-fish, Scoresby suggested that rules of whaling would be improved by observance of the precept from *Matthew 7:12* that one do unto others. While this appears, at first, to be the pious platitude of a man who in a few years would seek ordination, it was a thorough indictment of his fellow captains and a compelling argument for a new standard. Scoresby asserted that to take a whale bearing the harpoon, but not the line, of another ship constituted robbery and “that nothing could justify such an act, but the certainty, that the original strikers could have little or no chance of ever recovering the possession of the fish itself.” Particular note was taken of a captain who sends his boats to assist in the taking of a whale fast to a competitor. Should that whale become loose, Scoresby asserted that “according to the principles of right and honor, I conceive it is the property of the first striker, and as such, ought to be given up.” Having provided several examples of the unfairness of fast-fish, loose-fish, Scoresby – despite his obvious preference for a rule that allowed a harpoon to mark a whale for future capture – lamented that the economic self-interest of whalemens clouded the “integrity of character” needed to permit adoption of a new rule. An explanation for Scoresby’s obviously conflicted feelings on this topic and the degree to which the rules of the Greenland fishery were not nearly as settled as the captain suggested, can

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<sup>10</sup> *An Account of the Arctic Regions*, vol. II, 318-328.

be found in the logbook Scoresby kept during the 1812 voyage of the *Resolution*.<sup>11</sup>

On 21 July 1812, at about 78° north and 4° east in the prime bowhead grounds near Spitzbergen, the crew of the *Resolution* was determined to profitably spend their final few days in the fishery before returning home. The *Resolution*, having followed the *John* through some ice, encountered several bowheads. One of the boats belonging to the *Resolution* attempted to strike a whale, but its harpoons failed to stay fast. Disappointed, Scoresby ordered his boats to assist the *John* in capturing a fast whale that was running their competitor's line toward the *Resolution*. Scoresby's decision to assist the *John* would not have been viewed by his crew as an unusual order. Captains often directed that such assistance be rendered. While such aid was not rewarded with a share of the captured whale, the help was recognized as part of a code of behavior that urged recipients of assistance to reciprocate the favor to another vessel. Had the *John's* line remained fast, any harpoons from the *Resolution* that found their mark would have been deemed "friendly" and returned to the latter with a show of appreciation when the target of the chase was captured. As frequently happened, however, the *John's* harpoon drew loose. The whale that had for the previous hour been pursued by the *Resolution* on behalf of the *John* was now, according to a strict interpretation of fast-fish, loose-fish, free for the taking. The *Resolution* managed thereafter to affix a harpoon and take the whale.<sup>12</sup>

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<sup>11</sup> *An Account of the Arctic Regions*, vol. II, 318-328, 326.

<sup>12</sup> Jackson, editor, *The Arctic Whaling Journals of William Scoresby*, 119-120.

As a twenty-two year old captain in only his second year in command, Scoresby faced a serious challenge. His crew was adamant that pursuant to the custom of the fishery the whale was rightfully the sole property of the *Resolution*. Scoresby concurred that they had a legal right to the whale, but argued that “by the laws of honour” the claim of the *John* should prevail. The *Resolution*, after all, had rendered aid with the intent that the *John* should take the prize. Scoresby’s men would never have been in a position to take the whale without the actions of the *John* in originally striking and wounding the creature. The crew of the *Resolution* countered with the rejoinder that the *John* had fallen off the pace of the whale once it swam free of its harpoon and would never have successfully closed the gap. Scoresby’s crew in arguing for a strict application of fast-fish, loose-fish introduced an essential element of iron holds the whale: the likelihood that the *John* would, without the assistance of the *Resolution*, have captured its quarry. Scoresby’s dilemma was complicated by the fact that his father was the captain of the *John*. Revered as one of England’s leading and most innovative whalers, William Scoresby, Sr. was an imposing figure. In addition to the normal familial bonds, the younger Scoresby almost certainly owed his command to his father’s influence. As the crew of the *Resolution* was well aware, the father had passed the ship’s command to his son when he assumed the captaincy of the *John* the previous year. The discomfort felt by the son is evident in the pages of the *Resolution*’s logbook. “In this dilemma [sic] placed between the duty as a Master and duty as a Son which had opposite actions I was in an unhappy strait.” A similar conflict with any other vessel would

have permitted Scoresby to do what he considered honorable and surrender the whale free of the accusation that he was acting in the thrall of his father's influence. In a move that might have struck his crew as desperate and undermined his authority, Scoresby argued that his father was "wroth." That the captain of the *John* was extremely angry meant little to the crew of the *Resolution* convinced that the whale was rightfully theirs. In an attempt to resolve the dispute to the satisfaction of all, Scoresby boarded the *John* to speak with his father.<sup>13</sup>

Scoresby's initial suggestion was that they simply split the whale. The elder Scoresby was not immediately disposed to follow this course. After much discussion, the *John's* master agreed, or so it appeared. While the logbook account is a bit cryptic, the elder Scoresby apparently reverted suddenly to his earlier state of rage. He blamed his son for the entire situation and threatened to enforce his legal right to the disputed whale once he returned to England. Disconsolate, Scoresby returned to the *Resolution* where the crew began removing the whale's blubber for storage. Likely seeking some sort of reconciliation with his father, Scoresby thereafter had his ship draw up close to the *John*. The logbook entry for the day ends with a statement that described

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<sup>13</sup> Jackson, editor, *The Arctic Whaling Journals of William Scoresby*, 119-120. For Scoresby's own assessment of his father's ability to intimidate others through his physical strength and forceful personality, see William Scoresby, *Memorials of the Sea. My Father: Being Records of the Adventurous Life of the Late William Scoresby, Esq. of Whitby* (London: Longman, Brown, Green, and Longmans, 1851), 21-23. The younger Scoresby did not make reference to his unpleasant 1812 encounter with his father when he penned a biography of the latter nearly forty years later.

the ship's position and captured the mood of its author. "The Ice seems to have quite enclosed us."<sup>14</sup>

This incident, like most disputes over captured whales, did not end in litigation. Was the elder Scoresby's threat of legal action, therefore, merely empty invective shouted in frustration at a lost whale or was it made in the hope that the courts might provide some relief? A quick review of the reported British cases might suggest that Scoresby's father knew full well that any court would award the whale as a loose-fish to the *Resolution*. As early as 1786, a dispute between two British whalers was resolved by application of fast-fish, loose-fish. *The Times* of London reported that Justice Buller of the Court of King's Bench instructed the jury that according to the law of the Greenland whalefishery any fast whale that "gets loose by any means, though she has harpoon and lines about her," may be taken by another ship. At the York Lent Assizes in 1788 a ruling was issued in *Littledale v. Scaith* that provided a clear statement of fast-fish, loose-fish that came to be cited by most judges and legal commentators throughout the nineteenth century as the universally accepted custom of the Greenland fishery. Yet, the elder Scoresby's threat of litigation was not made without some basis in the law and the practices of the Greenland fishery. Despite frequent speculation in the nineteenth century that the custom as set forth in *Littledale* had been followed since the dawn of Greenland whaling and the tendency of many courts and commentators to view fast-fish, loose-fish as rigid and unchanging, it was, in fact, a fairly recent development in the late

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<sup>14</sup> Jackson, editor, *The Arctic Whaling Journals of William Scoresby*, 119-120.

eighteenth century and – as Scoresby’s experience suggests – was never uniformly applied at sea.<sup>15</sup>

## II

Spitzbergen or Svalbard – as it is known at present – is an archipelago approximately half way between Norway and the North Pole. Although the Vikings possibly knew of its existence, the Dutch explorer William Barents discovered in 1596 an island he dubbed Spitzbergen. In 1607, the English explorer Henry Hudson sailing under a Dutch flag further investigated the island’s coastline. What Barents and Hudson had reached was the largest and nearly westernmost island of the archipelago. About 280 miles long and anywhere from 25 to 140 miles in width, the island, also sometimes called West Spitzbergen, is situated along an extension of the Gulf Stream that keeps the icy waters of its western coast open to navigation approximately six months each year. Although the investigation of Spitzbergen did nothing to advance his goal of finding the hoped for Northeast Passage to the Pacific, Hudson recognized the commercial possibilities of the region. Spitzbergen’s many harbors

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<sup>15</sup> The 1786 matter before Justice Buller was not preserved in one of the volumes of reported cases from which lawyers and judges in common law jurisdictions find precedents. *The Times*, London, 29 December 1786, p. 3. For a brief account of Justice Francis Buller’s career, see William C. Townsend, *The Lives of Twelve Eminent Judges of the Last and of the Present Century* (London: Longman, Brown, Green, and Longmans, 1846), 2 volumes, I: 1-32. *Littledale v. Scaith*, 1 Taunt. 241, 127 Eng. Rep. 825. *Littledale* is appended as a note in the reported Galapagos Island whaling dispute *Fennings v. Lord Grenville*, 1 Taunt. 241, 127 Eng. Rep. 825 (1808). For speculation as to the antiquity of Greenland custom, see, for example the argument of counsel in *Fennings*, 1 Taunt. at 243-244.

abounded with bone-laden, and oil-rich bowhead whales. European commercial whaling heretofore was mostly shore-based and generally limited to Basque hunters primarily off the beaches of southwest France and, secondarily, North America's northeast coast. The abundant bowheads in the bays off the west coast of Spitzbergen were ideal for the prevailing whaling technique that entailed spotters on beach towers alerting crews of generally six men to put to sea at a moment's notice in pursuit of likely prey. Similar crews in other nearby small boats were then summoned to assist in the harpooning and lancing of the targeted whale.<sup>16</sup>

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<sup>16</sup> For Barents and Hudson and their discovery of Spitzbergen, see Louwrens Hacquebord, Frits Steenhuisen, and Huib Waterbolk, "English and Dutch Whaling Stations in Spitsbergen (Svalbard) before 1660," *International Journal of Maritime History*, XV, No. 2 (December 2003), 117-134; John J. Teal, "Europe's Northernmost Frontier," *Foreign Affairs*, Vol. 29, Issue 2 (January, 1951), 263-275; Robert C. Allen and Ian Keay, "Bowhead Whales and the Eastern Arctic, 1611-1911: Population Reconstruction with Historical Whaling Records," *Environment and History*, 12 (2006), 89-113; Robert C. Allen and Ian Keay, "Saving the Whales: Lessons from the Extinction of the Eastern Arctic Bowhead," *Journal of Economic History*, Vol. 64, Issue 2 (June, 2004), 400-432; Robert C. Allen and Ian Keay, "The First Great Whale Extinction: The End of the Bowhead Whale in the Eastern Arctic," *Explorations in Economic History*, 38 (2001), 448-477; and Lance E. Davis, Robert E. Gallman, and Karin Gleiter, *In Pursuit of Leviathan: Technology, Institutions, Productivity, and Profits in American Whaling, 1816-1906* (Chicago: University of Chicago Press, 1997), 31-34. For Basque whaling, see Selma Huxley Barkham, "The Basque Whaling Establishments in Labrador 1536-1632 – A Summary," *Arctic*, Vol. 37, No. 4 (December 1984), 515-519; Aldemaro Romero and Shelly Kannada, "Comment on 'Genetic Analysis of 16<sup>th</sup>-Century Whale Bones Prompts Revision of the Impact of Basque Whaling on Right and Bowhead Whales in the Western North Atlantic,'" *Canadian Journal of Zoology*, Vol. 84, No. 7 (2006), 1059-1065; and Eric Jay Dolin, *Leviathan: The History of Whaling in America* (New York: W. W. Norton & Co., 2007), 21-24. For the basic geography of the archipelago, see "Svalbard" *World Encyclopedia*. Philip's, 2005. *Oxford Reference Online*. Oxford University Press. 16 January 2008 <http://libproxy.temple.edu:2332/views/ENTRY.html?subview=Main&entry=t142.e11243>. Spitzbergen has retained a dual meaning. It can refer to both the largest island and the entire archipelago. As English whalers in seventeenth and eighteenth century generally spelled the island "Spitzbergen," rather than the more modern "Spitsbergen," the older spelling has been employed throughout.



Dutch, British, German, and Basque operations were quickly established, setting off in the first years of the fishery contentious battles – occasionally with the use of arms – for the best harbors. Shore based whaling with its use of buildings to boil blubber, store oil, and house workers precluded the creative, spontaneous decision making that so marked a successful pelagic captain. Anchored to a particular location for an entire season, shore based whalers displayed a territoriality absent once ships ventured out to sea for extended periods of time. As whaling historian Gordon Jackson has remarked, the English effort in the first years of Spitzbergen whaling was directed more at excluding the Dutch than actually killing whales. Violence and the threat of further disruptions in the business of harvesting oil led the participating nations prior to the 1619 season to an agreement assigning Spitzbergen harbors by nationality. While the 1619 assignment of harbors was initially viewed as a victory for the British, the northern coast of Spitzbergen to which the Dutch were relegated proved particularly advantageous. The annual migration of bowheads from the north allowed the Dutch to thin the ranks of whales available in the English harbors to the south. Dutch whalers also used their northern base of operations to venture out to the edge of the ice in the vicinity of 79° north. This allowed the Dutch to gain their first experience of pelagic whaling in an area that would prove to be the Greenland fishery's most productive hunting grounds. By 1650, the Dutch began a century as the preeminent European whaling nation.<sup>17</sup>

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<sup>17</sup> Hacquebord, Steenhuisen, and Waterbolk, "English and Dutch Whaling Stations in Spitsbergen," 129-133; Jackson, *The British Whaling Trade*, 11-26; Allen and Keay, "Bowhead Whales and the Eastern Arctic, 1611-1911," 90-95; Allen and Keay, "Saving the Whales," 400-401; Allen and Keay, "The First Great Whale Extinction," 448-451;

The Dutch, unlike the British and later the Americans, provided some statutory guidance concerning disputed whales. The States-General of Holland and West Friesland enacted in 1695 a comprehensive set of laws governing its whaling industry. Each captain and chief officer was required to take an oath prior to departure swearing adherence to the regulations. Revising an unsuccessful code promulgated in 1677, the new law provided among its twelve articles:

9. Any one having killed a whale in the ice, but who cannot conveniently take it on board, shall be considered as the owner thereof, so long as any of his crew remains along with it; but whenever it is deserted, though made fast to a piece of ice, it becomes the property of the first who can get possession of it.

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and Davis, Gallman, and Gleiter, *In Pursuit of Leviathan*, 31-34. The Dutch ultimately took control of the Greenland fishery for a number of reasons. For the advantages the Dutch enjoyed in labor productivity in whaling, see Christiaan van Bochove and Jan Luiten van Zanden, "Two Engines of Early Modern Growth? Herring Fisheries and Whaling during the Dutch Golden Age (1600-1800)," in S. Cavaciocchi, editor, *Ricchezza del Mare secc XIII-XVIII* (LeMonnier, 2006), 557-574. While dealing with issues of productivity for other areas of Dutch maritime activity, the following unpublished draft article is suggestive for the whaling industry: Milja van Tielhof and Jan Luiten van Zanden, "Productivity Changes in Shipping in the Dutch Republic: the Evidence from Freight Rates, 1550-1800," <http://www.iisg.nl/research/two-engines.pdf> and <http://www.iisg.nl/research/productivity-shipping-app.pdf>, 17 January 2008. For the ability of Dutch merchants to shape government policy in ways favorable to their interests, see Jelle C. Riemersma, "Oceanic Expansion: Government Influence on Company Organization in Holland and England (1550-1650)," *The Journal of Economic History*, Vol. 10 (1950), 31-39; and J. Braat, "Dutch Activities in the North and the Arctic during the Sixteenth and Seventeenth Centuries," *Arctic*, Vol. 37, No. 4 (December, 1984), 473-480. For Jackson's view of English efforts to defeat Dutch whaling interests, see Gordon Jackson, "Government Bounties and the Establishment of the Scottish Whaling Trade, 1750-1800," in John Butt and J. T. Ward, editors, *Scottish Themes: Essays in Honour of Professor S. G. E. Lythe* (Hamden, CT: Archon Books, 1976), 46-67, 47. The Dutch asserted that the waters near Spitzbergen constituted *mare liberum* and thus the bowheads in the archipelago's bays were not the property of any one nation. The English argued – somewhat tortuously – that they had established sovereignty over Spitzbergen and its bowheads. For the legal disputes over Svalbard which, since 1920, has been under Norwegian control, see Torbjørn Pedersen, "The Svalbard Continental Shelf Controversy: Legal Disputes and Political Rivalries," *Ocean Development & International Law*, Vol. 37 (2006), 339-358.

10. But if a fish be made fast to the shore, or moored near the shore by means of a grapnel or anchor, with a buoy, a flag, or other mark attached to it, signifying that it is not deserted, – the person who left it there, shall still be considered the sole proprietor, though no person may be with it.

The Dutch law reflects the mid to late seventeenth century transition from shore based to pelagic whaling. Both provisions govern situations involving a whale that has been killed, but for some reason cannot be immediately taken back to the ship or shore to be rendered. The burden was on the successful whaler to demonstrate to other hunters their control over the carcass. Unless the whale was anchored close to shore and marked with a flag or some other sign of possession, a crew member must remain with the body. Marking a whale that was fast to the ice with a buoy or flag was not sufficient. The requirement that a whale attached to ice have a human companion was perhaps an acknowledgement that drifting ice may prevent the boat that inflicted the mortal blow from finding and reclaiming the animal. The logic was likely that it was better that the efforts of one whaler go unrewarded than that a valuable commodity go unclaimed by a second whaler who, seeing a flagged whale at sea, allowed it to drift off. The presence of a crew member was, in effect, insurance that a boat would return for both man and whale. The anchoring of a dead whale near the beach – a common practice in shore based whaling – required no such assurance of the captor's return. In the shallow water near to whaling stations there was no danger that an anchored whale would escape

utilization by whalers who retained a strong sense of territorial possession of particular bays and harbors.<sup>18</sup>

The Dutch provisions did not cover the familiar situation at sea where two or more ships were actively pursuing a live whale. The resolution of such disputes in the late seventeenth century appears to have been framed in the terms of the ancient debate between Roman lawyers over ownership of wild animals. Roman authorities such as Trebatius and Gaius agreed that the mere pursuit of a wild animal did not confer ownership. The pursuer must possess the creature. Scholars differed, however, as to what constituted possession. Gaius argued that nothing less than the actual physical possession of the beast was required to gain title. Trebatius, on the other hand, asserted that possession vested prior to capture if the first pursuer inflicted a severe wound and maintained a pursuit that left the animal little chance of escape. In such a situation the creature was deprived of its “native freedom” and brought within the power of the hunter. James Dalrymple, the first Viscount of Stair, illustrated his 1681 discussion of *ferae naturae* with the observation that the notion of possession advanced by Trebatius prevailed in the Greenland whaling industry. Stair explained that the Greenland whalers who “woundeth a whale so that she cannot keep to the sea for the smart of her wound, and so must needs come to land, is proprietor, and not he that lays first hand on her at land.”<sup>19</sup>

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<sup>18</sup> William Scoresby, *An Account of the Arctic Regions With a History and Description of the Northern Whale-Fishery*, 2 volumes, (Edinburgh: Archibald Constable and Co., 1820), vol. II, 316-317, reprint, Newton Abbot, England: David & Charles Limited, 1969.

<sup>19</sup> Stair, James Dalrymple, Viscount of, *The Institutions of the Law of Scotland, Deduced from its Originals, and Collated with the Civil, and Feudal-Laws, and with Customs of Neighboring Nations* (Edinburgh: G. Hamilton and J. Balfour, 1759), Book II, Title I,

Stair's discussion of possession in the Greenland fishery was not limited to whales that drifted ashore. He indicated that a similar custom was applied to whales that were pursued out at sea. A whalermen in sole pursuit of a whale with "a probability to reach his prey" was awarded the prize even if another vessel ultimately captured the animal. Stair illustrated Greenland custom by reference to a recent case decided by the Court of Session in Scotland. During the Anglo-Dutch Wars, an English frigate and an allied French vessel captured a Dutch privateer in possession of three prizes. When two additional Dutch ships attempted to rescue their countrymen, one of the prize vessels, the *Tortoise*, attempted to make its escape. Having chased the Dutch interlopers away, the English and French frigates turned their attention to recovering the *Tortoise*. A Scottish privateer intervened, however, and captured the *Tortoise*. The resulting 1677 litigation over the prize was decided by the Court of Session in favor of the Scottish privateer. Stair explained that the Scottish high court – applying Trebatius' rationale concerning possession of a wild animal – determined that despite its damaged condition the *Tortoise* would have made good its escape if not for the actions of the Scottish privateer. Had the evidence shown that the English frigate was in position, absent interference, to capture the prize, the result would have been different.<sup>20</sup>

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Section XXXIII, 179-180. For a wide ranging discussion of the law and wild animals, see Steven M. Wise, "The Legal Thinghood of Nonhuman Animals," *Boston College Environmental Affairs Law Review*, Vol. 23, Issue 3 (Spring 1996), 471-546

<sup>20</sup> Stair, *The Institutions of the Law of Scotland*, Book II, Title I, Section XXXIII, 179-180. *The King's Frigate against a Scots Caper*, Advocates' MS. No. 535, folio 273 in M. P. Brown, editor, *Supplement to the Dictionary of the Decisions of the Court of Session* (Edinburgh: W. & C. Tait, 1826), Vol. III, 125.

The custom of the Greenland whalefishery, as explained by Stair, was not entirely clear. How certain, for example, must the capture of a whale by the first striker be before ownership would be awarded? Stair indicated at one point in his discussion that a mere probability was sufficient, yet he also related that the Scottish privateer prevailed because the English frigate failed to prove – an apparently higher standard – that absent interference it would have captured the *Tortoise*. Issues of the applicable standard of proof aside, Stair also suggested that a whale need not be seriously injured by the pursuing first striker in order to gain possession prior to the actual capture of the animal. The pursuit of a whale, coupled with the probability of success, appeared – in some circumstances – sufficient to secure ownership.

Confirmation that the fast-fish, loose-fish requirement that a physical connection be maintained between whale and boat or crew was not universally observed since the origins of the Greenland fishery was provided by a 1778-1779 geography text and a 1792 ruling by the Scottish Court of Session. Both sources further revealed that the practice of iron holds the whale was also observed in late eighteenth century Greenland and was not, as Ellickson speculates, an adaptation to hunting swifter and more combative sperm whales. Charles Theodore Middleton in his 1778-1779 work explained that in the Greenland fishery whales occasionally break free from an attached line. “When this happens, however, if he is afterwards taken by the crew of another ship,” Middleton revealed, “he is returned to those who first wounded him, as that is known by the harpoon, which is always distinguished by a peculiar mark.” In

*Addison v. Row*, the *Priscilla*, an English ship in the Davis Strait, struck a whale and raised a flag to signal that it was fast. A nearby Scottish vessel, the *Caledonia*, lowered four boats to assist the *Priscilla* in capturing its prey. When the seriously injured whale emerged from its dive, the *Caledonia* promptly killed the animal that still bore the *Priscilla*'s harpoon. Rather than return the whale as the crew of the *Priscilla* expected, the *Caledonia* kept the animal, arguing that it had broken free from its original attacker prior to being dealt the fatal blow. The *Caledonia*'s claim was a clear invocation of the fast-fish, loose-fish rule that whales not in contact with its pursuers were free for the taking. The Court of Session did not concur, advancing, instead, a rule very much akin to iron holds the whale. Lord President Campbell proclaimed that pursuant to the "general rule" the whale "belongs to the first occupant, being naturally *res nullius*. But if I once seize upon the animal, and it breaks away from me, and I still continue in pursuit, I do not thereby lose my right as first occupant, so long as there are hopes of recovering it. There is no custom proved which can derogate from this general principle. . . . The boats of the *Priscilla* would have taken the whale if the *Caledonia* had never interfered."<sup>21</sup>

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<sup>21</sup> Charles Theodore Middleton, *A New and Complete System of Geography. Containing a Full, Accurate, Authentic and Interesting Account and Description of Europe, Asia, Africa, and America* (London: J. Cooke, 1778-1779), 2 volumes, II: 22. *Addison v. Row*, in Thomas S. Paton, editor, *Reports of Cases Decided in the House of Lords upon Appeal from Scotland, from 1753 to 1813* (Edinburgh: T. & T. Clark, 1853), III:334-340, 338. In Roman law, a thing was *res nullius* if it was subject to ownership, but was not, at present, owned. Although the Davis Strait separates Baffin Island from the west coast of Greenland, British whalers and government officials considered it part of the Greenland whaling fishery. Government bounties for Greenland whaling included the waters between Davis Strait and Spitzbergen. Eighteenth and nineteenth century keepers of British whaling statistics frequently combined the fertile grounds of Spitzbergen and Davis Strait into a single Greenland fishery. Other compilations separate entries for Davis Strait from a Greenland fishery defined as the area east of

The *Priscilla's* victory was short-lived. The House of Lords, to which Scottish cases since the Union of 1707 had been subject to appeal, viewed the law in starkly different terms. Lord Thurlow stated, "It is a settled point, that a whale being struck, and afterwards getting loose, is the property of the next striker who continues fast till she is killed." Applying fast-fish, loose-fish to the evidence adduced before the Scottish court, the House of Lords ruled that when the *Caledonia* struck the whale it was loose and free for the taking. The case of *Addison v. Row* thereafter joined *Littledale v. Scaith* and the 1786 decision of Justice Buller in establishing in the minds of British jurists and lawyers fast-fish, loose-fish as the universally accepted custom of the Greenland fishery. Subsequent decisions such as the 1805 ruling in *Gale v. Wilkinson* which was cited by Scoresby and Melville solidified this perception. The question thus arises as to whether Lord Campbell was mistaken in finding that fast-fish, loose-fish had not supplanted what he viewed as the general rule of honoring the rights of a first striker that remained in pursuit with reasonable prospects for success? Middleton clearly established that Lord Campbell was not mistaken in recognizing that at least some Greenland whalers in the late eighteenth century did not believe that a physical connection to a whale was required to constitute possession. It is impossible, of course, to know the degree to which particular norms were practiced in Greenland. It is, however, possible to understand why Lord Campbell determined that fast-fish, loose-fish was not

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Greenland. For a reliable general introduction to British whaling, see Jackson, *The British Whaling Trade*. For Ellickson's speculation as to the importance of the type of whale hunted and the applicable custom, see his "A Hypothesis of Wealth-Maximizing Norms," 89-92 and *Order without Law*, 197-201.



binding in Greenland and why the House of Lords disagreed. The power of the House of Lords to overturn the Scottish decision established the ascendancy of fast-fish, loose-fish and quickly erased the legal memory of iron holds the whale as a custom once observed in the Greenland fishery.<sup>22</sup>

The conflicting decisions rendered by the Scottish Court of Session and the House of Lords in *Addison* are indicative of some of the important differences between Scottish and English law in the late eighteenth century. While a contentious debate between legal historians as to the degree to which Scottish law is a mix of the civilian tradition and English common law persists, it is beyond peradventure that Roman law shaped the way courts north of the River Tweed viewed the creation of law. Roman law was never accepted, in full, as constituting the common law of Scotland. It did, however, form an intellectual foundation and a structure for Stair, George Mackenzie, John Erskine, and the

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<sup>22</sup> *Addison v. Row*, 339. For a discussion of the House of Lords hearing appeals from the Court of Session after 1707, see David M. Walker, "Some Characteristics of Scots Law," *The Modern Law Review*, Vol. 18, No. 4 (July, 1955), 321-337. For *Gale v. Wilkinson*, see *The Times*, London, 24 December 1805, p. 3; Melville, *Moby-Dick*, 433-434; and Scoresby, *An Account of the Arctic Regions*, II: 323-324, 518-521. Scoresby supplied a report of the case of *Gale v. Wilkinson* as an appendix to his book. In *Gale*, a boat from the *Neptune* struck a whale at the edge of an ice field in the Spitzbergen fishery. The harpoon line being soon fully extended, the crew abandoned the boat for the safety of the ice and allowed the whale to carry it under the surface. When the whale reappeared with the boat still attached, a second ship, the *Experiment*, arrived and, with the assistance of the *Neptune's* boats, captured the whale. The *Neptune's* expectation that the whale would be returned was dashed when the captain of the *Experiment* refused to even return the attached harpoons, lines, and boat. In the ensuing litigation in England, Lord Ellenborough ruled that the *Neptune* had lost possession of the whale when its crew abandoned the attached whaleboat. It did not matter what was attached to the whale. The crucial issue was the contact between the whale and the crew of the *Neptune*. Lord Ellenborough did direct that the boat be returned to the *Neptune's* owner. In the most famous part of the decision, the line and the harpoon were retained by the *Experiment* pursuant to the theory that the whale had obtained a sort of property right to this equipment that was transferred to the *Experiment* upon capture of the animal. The law, while often lacking a sense of humor, is frequently amusing.

other so-called Institutional writers of the seventeenth and eighteenth centuries in their attempts to set forth the nature of Scottish law. The authority enjoyed by Roman law was, in large part, a product of the type of legal education open to aspiring Scottish lawyers prior to 1750. Educated mostly in France and later Holland, generations of Scottish law students returned home with a deep appreciation of Roman law and the civil law tradition. Erskine asserted in the posthumous 1805 edition of *An Institute of the Law of Scotland* that of “all systems of human law which now exist, the Roman so well deserves the first place, on account of the equity of its precepts, and the justness of its reasonings.” Erskine illustrated the extent to which his view was shared by his countrymen with the observation that the pre-1707 Estates of Parliament frequently justified legislation by declaring it conformable to Roman law. Roman law also provided guidance for situations not clearly governed by statutes or custom. The paucity of Scottish legislation, Erskine explained, further magnified the influence of Roman law.<sup>23</sup>

The importance of the civil law tradition in the development of Scottish law was not limited to substantive Roman law. Scottish legal scholars also imbibed on the continent a particular way of thinking about law and the

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<sup>23</sup> John Erskine, *An Institute of the Law of Scotland, in Four Books. In the Order of Sir George Mackenzie's Institutions of that Law* (Edinburgh: Bell & Bradfute, 1805), 2 volumes, I: 1-22, 9. For an introduction to some of the differences between Scottish and English law in this period, see W. D. H. Sellar, “Scots Law: Mixed from the Very Beginning? A Tale of Two Receptions,” *Edinburgh Law Review*, Vol. 4 (2000), 3-18; J. T. Cameron, “Custom as a Source of Law in Scotland,” *Modern Law Review*, Vol. 27 (1964), 306-321; John W. Cairns, “Attitudes to Codification and the Scottish Science of Legislation, 1600-1830,” *Tulane European and Civil Law Forum*, Vol. 22 (2007), 1-78; and Walker, “Some Characteristics of Scots Law.” For the education of Scots lawyers, see Cairns, “Attitudes to Codification and the Scottish Science of Legislation,” 4-5.

resolution of legal problems foreign to those schooled in English common law. The civil law tradition – of which Roman law is the primary component – encourages its practitioners to grasp the large, foundational principles behind what might otherwise appear to be a jumble of disconnected statutes and customs. The law, understood in this way, is about deducing answers that advance, in Erskine’s words, “an equal distribution of justice, on which the happiness of every society depends.” As the legal system deemed most steeped in justice, Roman law naturally provided an invaluable guide to moving from broad principle to a particular application.<sup>24</sup>

English common law, on the other hand, gains much of its authority from immemorial usage. Provisions that make up the common law are, by definition, customs the origins of which must date to a “time whereof the memory of man runneth not to the contrary.” Evidence as to the customs that make up the common law of England is found in the reports of previous decisions rendered by generations of learned judges who, in their study of precedent, are “living oracles” of English law. An English judge is duty bound to follow precedent in deciding a case even if the logic of the established custom is not immediately apparent. Blackstone indicated that only a precedent that was flatly absurd or unjust need not be followed. The truth, of course, is that the theoretical rigidity of custom has always encouraged a rather elastic application of the concept. English jurists in the late eighteenth century – like judges in all common law jurisdictions – were adept at distinguishing the facts in the case at bar from

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<sup>24</sup> Erskine, *An Institute of the Law of Scotland*, I: 2.

those in a troubling precedent to avoid an unfortunate result. Judges were also willing to consider as custom practices of decidedly recent origins.<sup>25</sup>

The problem of strictly applying the English common law notion of custom in a whaling dispute is well illustrated by the 1808 Common Pleas decision in *Fennings v. Lord Grenville*. In 1805, two English ships, the *William Fennings* and the *Caerwent*, were hunting for whales in the vicinity of the Galapagos Islands. The *William Fennings*, while killing a whale, struck a second whale. A small buoy, or drogue, was attached to the second whale to slow its progress and mark its position for later capture. The *Caerwent* subsequently took up the chase and killed the whale. All agreed that pursuant to fast-fish, loose-fish, as practiced in the Greenland fishery, the *Caerwent* would clearly be entitled to possession of the whale as it was not attached to the *William Fennings* and was, therefore, a loose fish. Testimony, however, was adduced by the owners of the *William Fennings* that in the Southern fishery – as the area around the Galapagos Islands was known – a different custom prevailed. Since its inception, the Southern fishery awarded one half of the whale to the party that affixed a drogue and one half to the whaler that killed the animal. Counsel for the *Caerwent's* owners acknowledged that this had once been the custom of the Galapagos, but argued that since 1792 the custom of most captains was to

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<sup>25</sup> For Blackstone's discussion of custom, precedents, and judges, see William Blackstone, *Commentaries on the Laws of England* (London: T. Cadell, 1793), 63-85, 67, 69. Cambridge professor Edward Christian countered in his comments appended to the 1793 edition of Blackstone's *Commentaries* that even flatly absurd or unjust provisions must be followed as properly constituted English law so long as they were in general accord with the long standing principles of English law. The remedy in such situations must be had in Parliament. Blackstone, *Commentaries on the Laws of England*, 70.

award the entire whale to the ship that actually captured it. It was further shown that the captain of the *Caerwent* was one of six masters who had agreed upon his arrival in the Galapagos in 1805 to follow the emerging custom that eschewed the sharing of whales. Chief Judge Mansfield determined that as the captain of the *William Fennings* was not a party to that agreement, the Southern fishery custom of dividing the whale must be followed. Judge Chambre advanced in his concurrence the importance of following custom in an area of commerce engaged in by the subjects of many nations. Failure to abide by established customs would result in a sort of warfare between ships that might eventually extend to the nations of those involved.<sup>26</sup>

While much of the discussion of the judges in *Fennings* concerned whether the action was properly brought in trover, the arguments of counsel illuminated the gap between custom in theory and in how it was used to shape English substantive law. Counsel for the *Caerwent* argued that the practice of splitting whales in the Southern fishery did not constitute “a custom of a particular trade as to be binding in law” or, in the alternative, that if it was a custom, it was no longer followed. Given the apparent disagreement between captains plying these waters as to established practice, the *Caerwent* suggested that the common law rule of *ferae naturae* be applied. Not surprisingly, the

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<sup>26</sup> *Fennings v. Lord Grenville*, 1 Taunt. 241. Drogues used in the Southern fishery commonly consisted of pieces of wood attached to the lines. Granville Allen Mayer, *Ahab's Trade: The Saga of South Seas Whaling*, (New York: St. Martin's Press, 1999), 350. The agreement referenced in *Fennings* has not survived, but for an example of an agreement by Galapagos whalers from many nations providing that the first striker was not entitled to a portion of the whale from the vessel that ultimately dealt the fatal blow, see Edouard A. Stackpole, *Whales & Destiny: The Rivalry between America, France, and Britain for Control of the Southern Whale Fishery, 1785-1825* (Amherst: University of Massachusetts Press, 1972), 388-389.

*Caerwent* – as a second striker – asserted that the common law honored the claim of the party that gained actual physical possession of the prey. Given the strict definition of custom as being synonymous with common law, a reader might be excused for wondering what counsel meant when he suggested that, in the case of the Southern fishery, a custom was not always binding.

Furthermore, if this treatment of *ferae naturae* was the common law and, therefore, custom, why were other practices even under consideration?<sup>27</sup>

The reason for this confusion can be found in the difficult position imposed on English judges and lawyers by strictly declaring the common law to be custom. How did the common law evolve to accommodate new problems and rethink old issues if courts were bound to follow practices that date back into the misty English past? The solution was to pay homage to the theory that there was no such thing as a new general custom, while recognizing the existence of fresh, limited customs that were subject to a different set of rules. A local custom was one that supplanted a general custom in a particular region through observance from time immemorial or, at least, for a long time. The theory appeared to be that such local customs shared with general customs the same hoary past that demanded recognition as law. Unlike customs general

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<sup>27</sup> *Fennings v. Lord Grenville*, 1 Taunt. at 242. . Despite the court's determination that the existing custom favoring the *William Fennings* was applicable, a nonsuit was entered dismissing the action brought by its owners. Pursuant to English law, the owners of the two ships were deemed tenants in common in the whale. Tenants in common were often said to have a unity of possession. Joint tenants enjoy an equal right to possess the entire property held in common. The mistake made by the owners of the *William Fennings* was to bring this action in trover. An action in trover between tenants in common was only permitted when the common property had been destroyed. It was determined that killing a whale at sea and rendering its remains into oil constitutes preservation, rather than destruction. In other fisheries where the custom did not call for the sharing of a whale trover was the preferred cause of action.

throughout the realm, it was possible for courts to recognize local customs that, despite their antiquity, had not previously come to the attention of courts or legal scholars. The acknowledgement of local custom was not by itself, however, a sufficient mechanism for change. What status should be given to the often dynamic and ever evolving practices observed in particular trades or businesses that were essential to the British economy? Such recent norms and practices were termed usages and while denied the power of custom to change law, they were allowed to be read into and interpret contracts between participants in a particular trade so long as they did not run counter to established law. The recognition of local custom and usage was useful, but did not allow courts the desired room for innovation.<sup>28</sup>

The ultimate solution was a blending of the concepts of general custom, local custom, and usage. Courts grew accustomed long before *Fennings* to permitting even usages to create law. Counsel for the *Lord Grenville* reflected a degree of frustration with the traditional common law theory as to how laws come into being with the observation – supported in true English fashion with applicable precedent – that in resolving the case at bar it was immaterial whether the practice in the Southern fishery “be called an universal agreement in the trade, or an usage, or a custom.” The important issue was whether “this practice as in the nature of a law, . . . possesses the quality so essential to that character, of being highly reasonable.” Judge Chambre’s opinion shared much

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<sup>28</sup> Cameron, “Custom as a Source of Law in Scotland.” For an example of how an English court viewed a recently developed usage in a particular business as altering the terms of an insurance policy, see *Noble v. Kennoway*, 2 Dougl. 510, 99 Eng. Rep. 326 (1780).

of counsel's pragmatism in his concern that whatever rule was adopted it best be one that prevented the international cast of participants in the Southern whalfishery from sparking warfare at sea. "The greatest of all legal fictions," E. P. Thompson has concluded, "is that the law evolves, from case to case, by its own impartial logic, true only to its own integrity, unswayed by expedient considerations." To Thompson's observation might be added that the core explanation for how law is created in English common law is also a fiction motivated by a healthy dose of expediency.<sup>29</sup>

To understand how differently Scots law viewed custom as a mechanism for change, the arguments of counsel before the Court of Session and President Judge Campbell's ruling in *Addison v. Row* are illustrative. Counsel for both ships presented an argument straight out of Justinian's *Digest* that would have been immediately recognizable to anyone who had studied Roman law since its revival in eleventh-century Bologna. Drawn from Book 41, title 1 of the *Digest*, the issue was at what point in the pursuit of a wild animal was a first striker deemed to be in possession of its quarry. Counsel for the *Caledonia* asserted that fast-fish, loose-fish was the custom of the fishery and should be honored because it accorded with the general principles of the Roman law concept of *ferae naturae* that gave ownership to the party that gained actual possession of the beast. The *Priscilla* countered that the requirement of physical control was an antiquated position, suitable to a more primitive notion of property rights. The modern rule, favored by more recent Roman lawyers, credited the first striker

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<sup>29</sup> *Fennings v. Lord Grenville*, 1 Taunt. at 244. E. P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (New York: Pantheon Books, 1975), 250.



and was based on the advanced notion that the possession of property was more properly an act of the mind than a race to hold an animal. President Judge Campbell, in explaining his decision, first considered which view of possession represented “the general rule.” Citing from the *Digest*, Campbell agreed with the *Priscilla* that the recent trend was to loosen the degree of possession needed to secure a wild animal. “There is no custom proved,” Campbell continued, “which can derogate from this general principle.”<sup>30</sup>

The reader is, thereby, left to wonder if Campbell was saying that the *Caledonia* failed to demonstrate that fast-fish, loose-fish was the custom of Greenland or that no custom was competent to overcome a general principle of Roman law. The likely answer can be found in the Scottish approach to custom. Erskine explained, following the Roman model, that Scots laws were either written or unwritten. Written law as set forth in statutes clearly carried the express authority of the duly constituted officials. The unwritten law of Scotland was customary and derived its binding status from the tacit approval of the legislature. This customary law – also referred to as the common law of Scotland – consisted of “ancient usages . . . , whether derived from the Roman law, the feudal customs, or whatever other source.” Erskine indicated that some usages such as primogeniture or the widow’s terce were so ancient and accepted that no proof of their status was necessary. Other customs, of a more recent accretion, required evidence of the “antiquity and universality” of their usage. When Scots lawyers, however, spoke of a custom being of immemorial usage they did not, like their English brethren, imagine a practice so old that its

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<sup>30</sup> *Addison v. Row*, 338.

origins could not be discerned. Instead, a custom in Scots law could slowly gain acceptance requiring no particular length of existence or number of usages to be deemed valid. As Erskine explained, “some things require in their nature longer time, and a greater frequency of acts, to establish them, than others.”<sup>31</sup>

While the absence of a prescribed period of time before a practice could become a custom might seem to indicate an easier path to establishment in Scotland, the opposite was, in fact, true. Recall that in England only a local custom could create a new law. All general customs were already part of the common law. If a local custom was clearly at odds with the universal custom, an English legal theorist was not troubled as both practices had been blessed with the imprimatur of immemorial usage. Scots law, permitting both universal and local customs to slowly evolve, required that its customs be tested for accordance with the core principles of the law. Antiquity could not save a custom that violated the accepted common law of Scotland which, as we have seen, was heavily dependent upon Roman Law. The differences between Scottish and English practice in this regard could be seen in the latter’s embrace of the principle – set forth in the maxim *communis error facit jus* – that a long held mistake as to the substance of the common law should be permitted to stand even after its discovery. The Scots, pledged to a common law that best reflected the aspirations of society, would quickly act to correct any such errors. The practical result of this distinction was that Scots jurists such as Campbell were reluctant to look to customs or usages for guidance. Why risk adopting a

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<sup>31</sup> Erskine, *An Institute of the Law of Scotland*, I: 10, 16. Cameron, “Custom as a Source of Law in Scotland.”

new way of looking at a problem when the situation was already covered by Roman law? Despite the theoretical acceptance of custom as a source of new law, there exists, as legal historian J. T. Cameron has remarked, “no single clear case of a customary rule being accepted as law by a Scottish court.”<sup>32</sup>

Accordingly, when Judge Campbell was faced with the facts in *Addison v. Row*, he turned to the well established Roman law discussion of *ferae naturae*, not the norms of the whaling industry. It was, of course, true that fast-fish, loose-fish and iron holds the whale embodied the competing arguments set forth in Justinian’s *Digest*. Although Judge Campbell undoubtedly recognized the similarities, his inclination was not to find a new custom, but to determine which rule of whaling was, in principle, the most just. That he chose to use the language of the Roman law and not that of immemorial usage is not surprising. Confronted with the exact same situation, although framed by counsel in accordance with English common law, the House of Lords sought to determine how whalemens resolved such arguments. For the House of Lords, the stakes were not particularly high. Whaling was a very particular industry. Despite its importance to the British economy, a whaling practice given legal approval would have little role in shaping the law in other areas of commerce. To a Scottish judge the issue was not just how whalemens operated in a remote part of the world; it was about a higher principle of justice.

Having been declared by the House of Lords to be the custom of Greenland whaling, fast-fish, loose-fish enjoyed a long run in British courts and

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<sup>32</sup> Cameron, “Custom as a Source of Law in Scotland,” at 313. For a brief discussion of *communis error facit jus*, see Herbert Broom, *A Selection of Legal Maxims, Classified and Illustrated* (London: A. Maxwell & Son, 1845), 51.

legal treatises as the largely unchallenged law of whaling. The competing idea of iron holds the whale appears to have died out among Greenland whalers after 1800 with the establishment of fast-fish, loose-fish as the legal standard. Yet, the idea that a first striker in pursuit deserved some consideration abided in the icy waters of the Greenland fishery. As Scoresby made clear, there was something unseemly about a first striker, in active pursuit, losing a whale to an opportunistic interloper.

### III

On 21 September 1826, the *Old Middleton* spied a whale while standing off the coast of Greenland in company with the *Andrew Marvel* and the *Resolution*. A boat dispatched from the *Old Middleton* succeeded in affixing a harpoon and the whale – as was often the case – swam off at a fast rate of speed with the attached boat in tow. Later explaining that it believed the whale to be loose, the crew of the *Andrew Marvel* took up the chase, managing to strike and kill its target. Whether the *Andrew Marvel* had been in a position to observe the *Old Middleton's* original assault is unclear. It is likely, in any event, that what began as an attempt to assist the *Old Middleton* changed when it became apparent to the *Andrew Marvel* that its competitor's line had come loose from the harpoon. In the London Court of Common Pleas, counsel for the *Andrew Marvel* cited *Fennings v. Lord Grenville* for the time honored proposition that a whale remained fast only so long as the connection between the first

striker's boat and the affixed harpoon remained intact. The *Old Middleton* countered that the custom of fast-fish, loose-fish had evolved in the nearly twenty years since *Fennings* was decided. The evidence presented at trial proved to the court and forced the *Andrew Marvel* to concede that in the Greenland fishery a whale was now considered fast – even absent an attached harpoon – if it was entangled in the line which remained in control of the original striker. The jury found that the whale had remained fast and rendered a verdict for the *Old Middleton*.<sup>33</sup>

While the change in custom set forth in *Hogarth v. Jackson* - as this case was captioned – was slight and a reasonable accommodation for a common occurrence that did little to change the basic tenor of the practice, it reveals a fluidity in whaling customs not readily apparent in many scholarly treatises that continued to cite *Fennings* as the prevailing standard long after the British had abandoned the trade. The impetus for this incremental alteration in the custom was likely the feeling of most whalers that making the continued attachment of the harpoon determinative was, as Scoresby would have agreed, unfair to the first striker. That English courts – always concerned with following the lead of whalers in setting the customs in an international industry – would have been sensitive to changes at sea is not surprising. What is curious is the degree to which trial judges and lawyers seemed to be leading the whalers, pushing the

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<sup>33</sup> For the various sources for *Hogarth v. Jackson*, see 2 Car. & P. 595, 172 Eng. Rep. 271; 1 Moo. & Malk. 58 (1827); *The Times*, London, 2 March 1827, p. 3; and *The Morning Chronicle*, London, 2 March 1827. It is not clear if the *Resolution* involved in this matter was the same ship captained by Scoresby in 1811 and 1812. Scoresby served as the master of other vessels beginning in 1813. Jackson, editor, *The Arctic Whaling Journals of William Scoresby*, xxiii.

law towards a standard that honored a first striker that remained in pursuit of a detached whale. Although it may be that jurists were simply reacting to evidence adduced from whalers that was not preserved in the reported decisions, the evidence from other trials in the same period does not indicate that whalers were moving in this direction.<sup>34</sup>

This fundamental uncertainty as to what precisely transpired at court is endemic to Anglo-American law in this period. Reports of cases were produced privately for profit and were not subject to court approval. Although the reporters were members of the bar, the quality of their work varied greatly. Only a small percentage of trials were reported and the criteria for inclusion in the published volumes were rarely made clear. One early nineteenth century reporter, John Campbell, famously remarked in his autobiography that he suppressed decisions of Lord Ellenborough that he deemed “inconsistent with former decisions or recognised principles.” Whether Lord Ellenborough should have been grateful – as Campbell bragged – is unclear as the “bad Ellenborough law” has not survived. The problem of selective and possibly incompetent reporting

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<sup>34</sup> For post-*Hogarth* legal treatises that continued to state the law of whaling as set forth in *Fennings*, see, for example, George Lyon, *Elements of Scots Law in the Form of Question and Answer: With a Copious Appendix Containing Forms of Writings for the Purpose of Reference and Illustration* (Edinburgh: Thomas Clark, 1832), 3-4; and J. H. A. Macdonald, *A Practical Treatise on the Criminal Law of Scotland* (Edinburgh: W. Patterson, 1867), 24. For two other whaling cases from this period, see *Hutchison v. The Dundee Union Whale Fishing Company* reported at Alexander Peterkin, *Whale Fishery: Report of the Trial by Jury, John Hutchison, Esquire, and others, Against The Dundee Union Whale Fishing Company* (Peterhead, Scotland: P. Buchan, 1830) and also at Joseph Murray, *Report of Cases Tried in the Jury Court, at Edinburgh, and on the Circuit, From November 1828 to July 1830, Both Inclusive* (Edinburgh: G. A. Douglas, 1831), 162-165; and *Nicoll v. Burstall* covered in *The Times*, London, 27 February 1834, p.4; *The Morning Chronicle*, London, 27 February 1834; *The Hull Packet*, Hull, England, 7 March 1834; and *North Wales Chronicle*, Bangor, Wales, 11 March 1834.

was not new. Blackstone lamented that since the early sixteenth century private reporters “through haste and inaccuracy, sometimes through mistake and want of skill, have published very crude and imperfect (perhaps contradictory) accounts of one and the same determination.” The reports produced for the trial of *Hogarth v. Jackson* illustrate this problem of interpreting competing reports that confronted contemporaries and has vexed later scholars.<sup>35</sup>

The discussion of *Hogarth* presented in *Carrington & Payne’s Nisi Prius Reports* was brief and unequivocal. The custom of fast-fish, loose-fish set forth in *Fennings* had, it was explained, been changed so that a whale remained fast “whether the harpoon continues in the body or not, if the fish is attached by any means, such as the entanglement of the line, or other cause, to the boat of the party first striking it, so that such party may be said to have power over it [the line], . . .” It was also reported that Chief Judge Best opined that this new custom represented an improvement in that it was not always easy to determine in the water whether a harpoon remained affixed. A perceptive reader of *The Times* blessed with a good memory might well have reviewed Carrington and Payne’s report of the *Hogarth* trial with some confusion. *The Times* account, carried the day after the trial, explained that the custom had long been that when a whale is “struck by a boat, in such a manner that there shall be little doubt of the crew being ultimately able to kill it, it is considered the property of that boat.” The custom of fast-fish, in *The Times’* telling, sounded very much like the law

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<sup>35</sup> For John Campbell’s quotes and a discussion of trial court reports, see James Oldham, “Law-making at *Nisi Prius* in the Early 1800s,” *Journal of legal History*, Vol. 25, Issue 3 (December 2004), 221-247, 223. Blackstone, *Commentaries on the Laws of England*, 71.

advanced by Judge Campbell in *Addison v. Row*. While it is tempting to dismiss *The Times* account as the product of a reporter unskilled in the ways of the law, the version of *Hogarth* contained in *Moody & Malkin's Nisi Prius Reports* suggests that the newspaper's coverage of the case – while misleading as to the custom of the fishery – was not entirely inaccurate.<sup>36</sup>

William Moody and Benjamin Heath Malkin framed the argument between the parties in different terms than that presented by their competitors, Carrington and Payne. In Carrington and Payne's account, the *Andrew Marvel* argued in favor of the *Fennings* custom, while the *Old Middleton* convinced the court that a new standard no longer required that the harpoon remain in the whale and attached to an entangled line. Moody and Malkin, on the other hand, indicated that the *Andrew Marvel* conceded that the harpoon's position was not determinative and that the dispute between barristers centered on the degree of control the first striker must retain over the line in which the whale was entangled. The *Old Middleton*, as first striker, maintained that a whale was fast if the rope remained in the control of the boat and "was anyhow attached to the fish." The *Andrew Marvel* countered that a whale was not – pursuant to the new custom – entangled "unless she [the whale] were so fast in the rope as to give the first strikers the same power over her as if the harpoon remained fixed." The difference in how the competing reporters presented the argument may be the result of Carrington and Payne providing the initial arguments of counsel. As Moody and Malkin indicated, the *Andrew Marvel* at some point conceded that

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<sup>36</sup> *Hogarth v. Jackson*, 2 Car. & P. at 595; 1 Moo. & Malk. 58; and *The Times*, London, 2 March 1827, p. 3. *The Morning Chronicle*, London, 2 March 1827, is alone among the accounts in viewing the case as being decided according to *Fennings*.



the custom had changed. Perhaps, it was at this point that the defendant's position changed to reflect the obviously compelling evidence of a new practice and came to be that presented by Moody and Malkin. The most interesting difference between the two reports, however, was in the role assigned to Chief Judge Best. In Carrington and Payne's account, Best simply gave his imprimatur to the change in custom. The judge, however, emerges in Moody and Malkin's telling as a full participant in shaping custom into law. Best expressed his view that the *Old Middleton* was fast if the custom was "understood to extend to all cases where the whale was so far *entangled* in the rope of the first strikers, that they might thereby have a reasonable expectation of securing her." (italics in the original) The judge appeared to have simply decided that the test should include an assessment of the first striker's prospects for capturing the whale.<sup>37</sup>

Given the concordance between the accounts of *The Times* and Moody and Malkin, it is highly likely that Chief Judge Best did, indeed, interject the idea that the likelihood of the first striker completing capture of a whale – absent intervention – was relevant to deciding such disputes. As reporters, Moody and Malkin appear to have not only recorded Judge Best's legal analysis, but also relaxed the initial boat's burden of proof. In the printed marginalia common in legal reports of this era, Moody and Malkin characterized the custom as entitling the first striker to a whale "though his harpoon be detached from the line when the second striker strikes, if the fish be so entangled in his line that he might probably have secured her without the interference of the second striker."

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<sup>37</sup> *Hogarth v. Jackson*, 2 Car. & P. 595-597; and 1 Moo. & Malk. 58-60.

Moody and Malkin’s “might probably” would seem to require a lesser probability of success than the “reasonable expectation” ascribed directly to Judge Best. The role of Moody and Malkin in shaping – or at least attempting to shape – whaling law can also be seen in their decision to include as part of their *Hogarth* report a description of another matter involving a disputed whale.<sup>38</sup>

In *Skinner v. Chapman*, heard at the 1827 York Lent Assizes, a whale fast to the *Harmony*’s harpoon and line was lanced by a boat belonging to the *Phoenix*. While the lance did nothing to assist in the capture of the whale, it did agitate the animal to the extent that it broke free of the harpoon. The *Phoenix* argued at trial that it subsequently harpooned what was then a loose target. The first striker countered that the second boat’s harpoon was friendly in that it had been affixed prior to the moment when the whale’s violent movements sundered the connection with the harpoon and line. Judge Bailey, as stated by Moody and Malkin, charged the jury that if they determined that the first striker’s harpoon had already come loose when the second iron was affixed, they must then decide “whether the plaintiffs [first striker] could have secured the fish if the lance of the defendants had not been struck.” To this instruction, Judge Bailey added that it was his belief that if a whale had been successfully struck and an unsolicited party “does an act which prevents the first striker from killing it, and then kills it himself, he kills it, not for his own benefit, but for that of the first striker.”<sup>39</sup>

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<sup>38</sup> *Hogarth v. Jackson*, 2 Car. & P. 595-597; and 1 Moo. & Malk. 58-60.

<sup>39</sup> *Skinner v. Chapman*, 1 Moo. & Malk. 59. The account of the trial in *The Leeds Mercury*, Leeds, England, 7 April 1827 appears to be largely a recitation of the argument made by the *Harmony*’s counsel. The newspaper does support Moody and

There is, however, no evidence that whalers in Greenland were developing a custom in this period that included any such calculation of the first striker's likelihood of success. The arguments of counsel in the 1830 Scottish case *Hutchison v. The Dundee Union Whale Fishing Company* made, for example, no reference to the probability of capture even though *Hogarth* and *Skinner* were cited as precedent. The testimony of the witnesses in *Hutchison*, summarized in a 34 page pamphlet reporting the trial, makes clear that the questions of the advocates were not directed at the first striker's prospects absent the interference of another vessel. Similarly, in *Nicoll v. Burstall*, tried before the Court of Exchequer in 1834, the statement of the custom contained in *The Times* intimated that the rule in *Fennings* was still being followed in the Greenland fishery. "The rule of the whale fishery," reported *The Times*, "was, that if the crew of any ship fix the harpoon into the whale and fasten it by their line to their boat, the crew of other vessels are not allowed to interfere with that whale, excepting indeed with the view of offering assistance." While the *Nicoll* court pointed to the necessity of an affixed harpoon, it also added – reflecting, perhaps, the *Skinner* decision - that an intervener cannot gain from preventing a first striker from killing a whale to which it was fast.<sup>40</sup>

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Malkin's discussion of the finding of the jury; stating that the use of a lance to free the whale from the *Harmony's* harpoon was "a wrongful act" and that the *Harmony* would have taken the bowhead if the *Phoenix* had not interfered.

<sup>40</sup> *Hutchison v. The Dundee Union Whale Fishing Company*, Peterkin, *Whale Fishery: Report of the Trial by Jury, John Hutchison, Esquire, and others, Against The Dundee Union Whale Fishing Company* and at Murray, *Report of Cases Tried in the Jury Court, at Edinburgh, and on the Circuit, From November 1828 to July 1830*, 162-165. *Nicoll v. Burstall*, *The Times*, London, 27 February 1834, p.4; *The Morning Chronicle*, London, 27 February 1834; *The Hull Packet*, Hull, England, 7 March 1834; and *North Wales Chronicle*, Bangor, Wales, 11 March 1834.

If whalemens plying the waters of the Greenland fishery were not particularly concerned with the first striker's probability of capturing a whale, why were the judges in *Hogarth* and *Skinner*? The key to resolving this question can be found in Carrington and Payne's account of *Hogarth*. Whereas Moody and Malkin indicated that the cause of action was in trover, Carrington and Payne revealed that, in addition to trover, "the declaration charged the defendants with having interrupted the plaintiffs in killing a whale." To prevail in an action in trover, the plaintiff must prove "a property in himself" in the object of the dispute, "a right to the present or absolute possession of them," and that the defendant converted the property for his own use or refused a demand that the item be returned. Ownership or actual possession was not required. It was sufficient if the plaintiff had "a right of present possession, which the Plaintiff may immediately take if he pleases." Trover proved to be a convenient cause of action for whaling disputes where an attached first striker did not actually possess the whale, but had a present possessory interest that the law was willing to recognize.<sup>41</sup>

Trover was not, however, an action that could be maintained if the plaintiff's right was deemed to be one of future possession. In bringing the action in *Hogarth*, counsel for the *Old Middleton* likely reasoned that if the court

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<sup>41</sup> *Hogarth v. Jackson*, 2 Car. & P. 595-597; and 1 Moo. & Malk. 58-60. Isaac 'Espinasse, *Practical Treatise on the Settling of Evidence for Trials at Nisi Prius; and on the Preparing and Arranging the Necessary Proofs* (London: Joseph Butterworth and Son, 1825), 418, 432. The requirement in trover that a plaintiff be in a position to immediately take possession of a disputed object does not seem to have ever been strictly enforced in whaling cases where a first striker's ability to take immediate possession was often questionable. The concept of fastness seems to have been used as conclusive evidence of a right to immediate possession.

failed to accept the new custom which honored an entangled whale absent an affixed harpoon as fast, his client would not prevail. Accordingly, the *Old Middleton* needed to state a cause of action that was not based on the level of possession required in trover or by the custom of the fishery. As Carrington and Payne reported, the *Old Middleton* also claimed that the *Andrew Marvel* had “interrupted the plaintiffs in killing a whale.” What the *Old Middleton* had set forth was a claim based not on their present possession of the whale, but on their right to continue pursuit of the whale without the interference of another party. The *Old Middleton*’s rights, pursuant to this cause of action, were limited. It had the right to chase the whale without obstruction until it either succeeded in killing the animal or it no longer was in a position where capture appeared likely. This alternative cause of action – what British courts would later designate the tort of interference with trade, profession or calling – was not well established in the 1820s. In the first decades of the twentieth century, legal scholars argued whether the tort was a late nineteenth century development or one of more ancient standing. Without recounting the specifics of this scholarly tussle, which seems to have had more to do with contemporary British labor relations law than a conscientious dispute over the historical development of a cause of action, there were numerous cases available in the 1820s that at least suggested that a cause of action could be successfully brought to prevent interference with a plaintiff’s trade. The most famous of these cases was the 1707 matter of *Keeble v. Hickeringill*.<sup>42</sup>

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<sup>42</sup> *Hogarth v. Jackson*, 2 Car. & P. 595-597; and 1 Moo. & Malk. 58-60. For the dispute concerning the history of interference with trade and the relevant cases, see Sarat

In *Keeble v. Hickeringill*, the plaintiff, Keeble, had a decoy pond on his property that attracted ducks for capture. The neighbor, defendant Hickeringill, twice fired guns from his own property seeking to scare away Keeble's ducks. Keeble brought an action alleging that Hickeringill had interfered with his ability to gain a profit from his decoy pond. Hickeringill countered that Keeble did not own the ducks on his property and therefore did not have a cause of action. The court agreed that Keeble did not own the ducks, but pointed out that the action was not brought to recover property. Instead, the court held that Keeble had the right to enjoy the benefits of his decoy pond, free from the malicious interference of his neighbor. "He that hindreth another in his trade or livelihood," Chief Judge Holt explained, "is liable to an action for so hindering him." The court hastened to add that Keeble's rights would not have prevented Hickeringill from exercising his concomitant privilege of building a decoy pond on his own property. In the context of a whale capture dispute such as *Hogarth*, a first striker who was not fast to a whale, but had wounded his quarry, had a limited possessory interest in the whale so long as he maintained the chase with the prospect of success.

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Chandra Basak, "Principles of Liability for Interference with Trade, Profession or Calling," *Law Quarterly Review*, Vol. 27 (1911), 290-312; and Thomas Atkins Street, *The Foundations of Legal Liability: A Presentation of the Theory and Development of the Common Law* (Northport, NY: Edward Thompson Company, 1906), 1:347-364. *Keeble v. Hickeringill*, 3 Salk. 9, 91 Eng. Rep. 659 (King's Bench 1707). For a particularly helpful discussion of the place of *Keeble* and the British whaling cases in the development of economic torts, see Benjamin L. Fine, "An Analysis of the Formation of Property Rights Underlying Tortious Interference with Contracts and Other Economic Relations," 50 *University of Chicago Law Review* 1116 (1983). For other discussions of the history of the tort of interference of trade, see G. A. Owen, "Interference with Trade: The Illegitimate Offspring of an Illegitimate Tort?" 3 *Monash University Law Review* 41 (1976-1977) and Hazel Carty, "Unlawful Interference with Trade," 3 *Legal Studies* 193 (1983).

Similarly, Keeble had a limited sort of possession in ducks while they were on his property.<sup>43</sup>

While *Skinner* was, according to Moody and Malkin, brought in trover, it is very likely that there was an additional count of interference with trade. If the action was based solely on trover, Judge Bayley's instruction to the jury that they consider the likelihood of the first striker securing the whale absent the interloper's lance thrust would not be legally relevant. In trover, the first striker's possession and, therefore, legal right to the whale was conclusively established by the connection from the fish to the boat. Once this was established, the actual prospects of capturing the whale were irrelevant. It did not matter, for example, that at the moment after the intervener sank its harpoon into a whale the first striker's boat lost its line in a spectacular collision with ice that all witnesses agreed could be foreseen moments before its actual occurrence. The

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<sup>43</sup> Keeble v. Hickeringill, 91 Eng. Rep. at 659. Similarly, in *Tarleton v. M'Gawley*, the plaintiff prevailed against a defendant who fired weapons from a ship off the coast of Africa to scare away his potential trading partners. 170 Eng. Rep. 153 (K.B. 1793). In the celebrated case of *Young v. Hichens*, 115 Eng. Rep. 228 (Q.B. 1844), the plaintiff cast a seine around a shoal of mackerel. The fish were surrounded by the net with the exception of a seven to ten fathom opening at which was stationed two of the plaintiff's boats to rile the water and discourage escape. A boat belonging to the defendant took advantage of the opening, entered the enclosure, and successfully cast its own seine within that of its competitor. Arguing that he was in possession of the mackerel and would have, but for the defendant's actions, delivered the catch safely to shore, the plaintiff brought an action in trespass to recover the value of the fish. The court acknowledged that the plaintiff was on the verge of taking possession of the mackerel and that, absent the defendant's interference, "it was in the highest degree probable" that capture would have been completed. This was not, however, sufficient to constitute the requisite degree of "custodia or occupation" to prevail at trespass. The plaintiff's actual power over the fish must, instead, be shown. Lord Denman, as Benjamin Fine has recognized, opined that the plaintiff might have prevailed had a different cause of action been pursued. It seems likely that Lord Denman had an interference tort in mind. Fine, "An Analysis of the Formation of Property Rights," 50 *University of Chicago Law Review* 1116.

whale, in these circumstances, belonged to the first striker and the second boat's harpoon was deemed friendly.

In recognizing the Greenland fishery custom of fast-fish, loose-fish British courts simply adopted whaling custom in determining the moment and means by which possession vested in trover actions involving whales. The likelihood of capture was interjected by attorneys and discussed by judges only because it was relevant to another cause of action governed by principles different from those at work in fast-fish, loose-fish. Although British whalers in Greenland never abandoned the underlying principles of fast-fish, loose-fish, the idea that the prospects of a boat's ultimate success was worthy of some consideration was not entirely antithetical to the men who practiced the whaling trade.

Scoresby's belief that his father was entitled to the bowhead taken by the *Resolution* in the summer of 1812 reflected the same notion of fairness at work in the tort of interference with trade. It also explains the numerous times captains agreed among themselves at sea, without strict adherence to custom or law, as to the fairest distribution of a contested whale. Scoresby called it the "laws of honour" and Melville explained that "upright and honorable whalers" made allowances in situations where employment of custom would constitute "an outrageous moral injustice" as applied to a worthy party previously in pursuit of a whale taken by another vessel. Whalers in Greenland made custom that British courts adopted and fit into existing causes of action. Creative British lawyers and courts also looked at whaling disputes and found that desired results could be reached through use of a different cause of action. Whalers



likely never made any real adjustments in their custom to reflect the rulings in *Hogarth* and *Skinner* because Scoresby's "laws of honour" were already well established in Greenland. It would be for American courts to establish – or reestablish if seventeenth and eighteenth century practices are considered – pursuit of a detached wounded whale with the prospect of success as the standard that came to be known as iron holds the whale.<sup>44</sup>

The creation of British whaling law was not – as Ellickson might frame the question – either imposed from above or crafted by participants. It was a combination. Whalers developed a custom that fit well with the existing Roman and common law concepts of how wild animals come to be owned. The men who plied the whaling trade thought about property in the same manner as their contemporaries. Property rights, they believed as Locke explained, were created by an application of effort to an object that was not previously owned. Whaling disputes and the customs and laws established for their resolution were really just arguments about when a whaler has done enough to earn the right to claim a whale. Competing positions were points on a continuum from lowering boats upon sighting a whale to, at the opposite end, the physical possession of a dead whale. Having created these norms, Greenland whalers never hesitated to seek resolutions to particular disputes that ignored law and customs; favoring instead mutual agreements that likely were based, in part, on factors such as the history between ships and the group dynamics of numerous vessels sailing in company over the course of months. British courts,

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<sup>44</sup> Jackson, editor, *The Arctic Whaling Journals of William Scoresby*, 119. Melville, *Moby-Dick*, 433.

in turn, honored whaling customs, while, at the same time, changing the law as part of the ongoing nineteenth century evolution in the available causes of action.