The Judicial Invention of Property Norms: Ellickson’s Whalemens Revisited

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Introduction

The law governing nineteenth century disputes at sea over whales claimed by competing vessels remains largely unexamined. Yet, the handful of matters litigated in Anglo-American courts have been cited repeatedly to advance various arguments about how property law is created. Is property law produced by legislators and judges or does it develop from the practices and customs of involved individuals? Robert C. Ellickson, has argued that whalemen developed norms to settle arguments over contested whales. These norms, Ellickson explained, were largely adopted by courts as the property law of whaling. Ellickson’s point is that whaling norms “did not mimic law; they created law.” Legal scholars have generally accepted Ellickson’s understanding that “judges regarded themselves as bound to honor whalers’ usages that had been proved at court.” Henry E. Smith has, for example, recently cited Ellickson’s discussion of whaling norms as evidence of the judicial tendency in property disputes to accept
“wholesale the customs developed by communities that stand in a special relationship to use conflicts.”

Ellickson is certainly correct that the close-knit community of nineteenth century American whalemens managed to settle disputes in ways which maximized group welfare. What Ellickson has failed to recognize is that the means by which whalemens resolved disputes without violence or frequent involvement of courts was built not upon widely accepted norms, but rather upon the application of some rather general maxims that were often poorly understood even by experienced captains and crews. Whaling disputes were, in fact, most often settled through compromises grounded in inchoate notions of what constituted honorable behavior arising out of the particular situation and parties involved.

That whaling practices would appear to Ellickson and other legal scholars as fairly well established is not surprising. The academic understanding of how whalemens resolved disputes is gleaned almost entirely from a dozen or so Anglo-American judicial opinions. In seeking to settle the cases at bar, judges drafted opinions that suggested a level of agreement among whalemens as to prevailing norms that never existed at sea. This scholarly acceptance that judges accurately stated whaling customs explains the mistaken belief that whalemens – as Ellickson and Smith assert – created the American property law of whaling. Instead, judges and the lawyers who represented ship owners

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were to a large degree responsible for creating much of what came to be memorialized in legal treatises by the end of the nineteenth century as the property law of whaling.

While the legal profession of the nineteenth century did much to obscure actual whaling customs, it has been the misreading of Herman Melville’s discussion of whaling law in *Moby-Dick* that has enshrined the idea in the minds of most historians that whalemen avoided litigation and violence by a strict adherence to universally accepted norms. Melville proclaimed that without such universal laws “vexatious and violent disputes” would frequently arise between ships claiming ownership of a whale. The rule followed by all American whalemen, Melville explained, was dubbed fast-fish, loose-fish and awarded the prize to the first ship to attach a harpoon which remained affixed to a whale and connected to a rope in control of the crew at the moment the whale died. Having proclaimed the universality of this rule, Melville proceeded to introduce two additional standards which whalemen, on occasion, also honored. The practice of iron holds the whale honored a ship’s right to a whale even if its harpoon had drawn loose or its line had snapped so long as the vessel remained in pursuit with reasonable prospects of killing the animal. Melville also explained that a standard of fairness was sometimes invoked when an application of the other rules would dictate an unfair result. Legal scholars and whaling historians have largely deferred to Melville’s expertise and accepted his statement that whaling laws were universal without recognizing that his explication of these practices revealed the jumble of competing rules followed at sea.²

A close examination of two of the five whaling disputes from the Sea of Okhotsk that were litigated in the nineteenth century reveals the vagaries of whaling norms and the problems in using judicial opinions to recover such practices. In *Heppingstone v. Mammen*, it is impossible to draw from the testimony of crew members and expert witnesses anything resembling a norm upon which battles over contested whales could be resolved at sea or in court. *Swift v. Gifford* – which Ellickson cited as an example of judicial adoption of whaling customs – illustrates that judges and lawyers often had a very limited understanding of how whalemen went about their business. The court’s misunderstanding in *Swift* of whaling practices was, in turn, quickly accepted by legal scholars as definitive evidence that the whaling fleet in the North Pacific had adopted a single standard for determining when an interest in a fleeing whale ripened into ownership.3

I. *Heppingstone v. Mammen*

Most of the ships whaling in the icy waters of the Sea of Okhotsk in the middle of the nineteenth century hailed from New Bedford, Massachusetts or a few other ports in Southern New England or on Long Island. Legal actions involving possession of a whale or other disputes arising out of the industry were generally filed in Boston. The United States District Court in Massachusetts was not, however, the only court in which American whalemen sought recourse for disputes that arose in the Pacific Ocean over possession of whales. Beginning in the 1840s, the growing community of English and

American merchants in Hawaii started to bring commercial disputes before the local courts. The burgeoning western influence is reflected in the speed with which the Hawaiian legal system largely adopted American commercial law during the middle decades of the nineteenth century. Therefore, in 1863, when American whaling captain John Heppingstone fell into a dispute with John Mammen, the master of the German whaler Oregon, concerning a bowhead killed near Jonas Island in the Sea of Okhotsk the Supreme Court of Hawaii provided a logical forum for his action seeking recovery of the contested cetacean. The Supreme Court of Hawaii permitted a speedy resolution of the dispute while observing a body of laws that would have been, in substantial part, familiar to any lawyer standing before the federal bench in Boston.4

On 29 May 1863, boats belonging to the Oregon spotted a whale and gave chase. They succeeded in striking the bowhead and for the next two hours were dragged by the whale through floating ice. The Oregon was forced to cut its line when the whale disappeared beneath thick ice. When the whale unexpectedly rose again a few minutes later, one of the Oregon’s boats again managed to strike and attach itself to the bowhead. That boat was stoved, but three other boats took up the chase and secured lines to the whale. Another boat was stoved and a second crew cut loose to pull their comrades out of the water. The harpoon of the Oregon’s third boat came

4 For an introduction to the Hawaiian legal system in the nineteenth century, see Wendie Ellen Schneider, Contentious Business: Merchants and the Creation of a Westernized Judiciary in Hawaii, 108 Yale L.J. 1389 (1999), 1389-1424; Sally Engle Merry, Colonizing Hawai'i: The Cultural Power of Law (2000); and Jonathan Kay Kamakawiwo'ole Osorio, Dismembering Lahui: A History of the Hawaiian Nation to 1887 (2002). For the development of nineteenth century ideas in Hawaii about ferae naturae and property rights, see Wayne Tanaka, Ho'ohana aku, Ho 'ola aku: First Steps to Averting the Tragedy of the Commons in Hawai'i's Nearshore Fisheries, 10 APLPJ 235 (2008).
loose and the whale disappeared. Confidant that the whale – spouting thick blood from
the combination of hand and bomb lance strikes – was seriously injured, the Oregon
decided to remain in the vicinity and renew the hunt at daybreak. To track the currents
and hopefully signal the location of the whale they expected to expire during the night, a
crew attached a waif pole to a block of floating ice.⁵

With daylight, the waif was recovered, but the whale had disappeared. The
Oregon was left with little option but to sail in the direction which the bowhead likely
made its surprising escape. Heavy fog which limited visibility to less than a mile lifted
by about 9:00 AM and mate Antoine Costa went aloft with a spyglass to survey the
water. After an hour, Costa finally spied a whale at a distance of about two to three
miles with what appeared to be harpoons in its back. The whale, however, was not
alone. Captain John Heppinstone’s bark, the Richmond, was, at a mile and a half or so
from the whale, also visible through the spyglass lowering its boats. Captain Mammen
sent three boats to join the chase for what he assumed to be his bowhead. Costa was
also ordered to inform the Richmond that the whale belonged to the Oregon and
request that they desist in their attempts to take the animal.⁶

⁵ Heppingstone v. Mammen, 2 Hawaii 707 (Supreme Court of Hawaii, 1863). Testimony of
Horace S. Allen, Antoine Costa, William Lipson, John Heppingstone, and John Mammen, Trial
Transcript, Heppingstone v. Mammen, Admiralty #56, Hawaii State Archives, Honolulu, Hawaii
(HSA). A hand lance has a wide blade attached to a wooden pole used to kill a whale. Bomb
lances came into use after about 1850 and were shot at the whale from a shoulder gun. Having
penetrated the whale, a delayed charge exploded. While an obvious improvement in that they
could be fired with accuracy from up to about sixty feet from the target, bomb lances were
extremely dangerous to use. John R. Bockstoce, Whales, Ice, and Men: The History of Whaling
in the Western Arctic 62-64 (1986).
⁶ Heppingstone v. Mammen, 2 Hawaii 707. Testimony of Horace S. Allen, Antoine Costa,
Mammen, Admiralty #56, HSA.
Heppingstone indicated that although he was aware of harpoons in the back of the whale as his crews lowered, he had no reason to believe that they belonged to the *Oregon*. There were several other ships in the vicinity and the *Oregon* – within lowering range of the whale – initially showed no signs of joining the chase. The bowhead, in addition, did not – in the estimation of Heppingstone and his crew – appear to have been significantly slowed by the attached irons. Closer to the whale and with a head start of ten to twenty minutes in lowering, the boats of the *Richmond* reached the whale first. With the whale having sounded, the *Oregon*’s third mate, Horace Allen, caught up with the boat carrying Captain Heppingstone and – indicating his claim to the animal – asked if the bowhead had several irons affixed to its back. Heppingstone acknowledged the presence of harpoons, but ordered his men to continue the hunt. When the whale surfaced a short time later, the boat commanded by the *Richmond*’s third mate attached a harpoon and commenced lancing the animal. Gravely injured, the bowhead managed to find cover under nearby ice, forcing the *Richmond*’s crew to cut the line. The whale came up for air in a patch of open water and was quickly dispatched by the *Richmond*.7

Negotiations over the whale between Heppingstone and the mates of the *Oregon* began even before the bowhead was killed. According to witnesses from the *Oregon*, Heppingstone initially stated that if the irons in the whale were from the *Oregon*, the animal belonged to them. Heppingstone denied making this statement, but the trial judge – Justice George Robertson of the Supreme Court of Hawaii – indicated in his

opinion that the evidence showed that the captain of the *Richmond* had, indeed, said something to this effect. With several ships in the vicinity, Heppingstone perhaps felt that Costa was mistaken or was attempting to trick the *Richmond* into breaking off its pursuit. Once the whale was killed, Heppingstone suggested, as a compromise, that they “go halves.” Costa insisted, however, that the matter be resolved by cutting the irons out of the whale. When the first iron proved to be unmarked, Heppingstone proclaimed “ah, you haven’t got that whale yet and you shan’t have that iron.” The second iron bore the marks of a third ship. Heppingstone was not convinced by the explanation that the *Oregon* had acquired the irons from the other vessel and repeated his taunt that his rival had not demonstrated its right to the whale. Costa insisted, despite Heppingstone’s reluctance, that a third iron be removed. Heppingstone cut out another iron, glanced at the marking, covered it with his hand, and proposed three times “what do you say halves.” Horace Allen, the *Oregon*’s third mate, looked at the iron and announced that it belonged to his ship. Heppingstone proclaimed that he did not know if by law he was entitled to half the whale, but that for all his trouble he should be granted a share.⁸

When Costa indicated that it was not for him to decide, Heppingstone prepared to board the *Oregon*, calling Captain Mammen “a damned Dutchman” and declaring that most American ships would willingly share the whale. Heppingstone’s parting comment was that “if the captain is not man enough to give me half of it I would just as have tell him to kiss my arse as not.” Negotiations on board the *Oregon* ended with Mammen

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refusing Heppingstone’s request and the latter’s declaration that the matter would be revisited when they returned to Hawaii.⁹

The bargaining continued in Honolulu on the day after the Oregon returned to port. On 14 November 1863, Mammen and Heppingstone met in the store of Captain P. S. Wilcox. It appears from Mammen’s testimony that Wilcox, who served at trial as an expert witness for the Richmond, was attempting to mediate the dispute on Heppingstone’s behalf. Wilcox asked Mammen if there was some sort of settlement that could be reached that would save the expenses of litigation. Mammen was adamant that he would not be a part of any arrangement that would divide possession of the whale. Declaring that he was through dealing with Mammen, Wilcox asked the Oregon’s captain for the name of the ship’s agent. Mammen proclaimed that if the agent, Mr. Thomas, “gave a drop of oil from that whale,” he would resign his position. Whether Wilcox pursued the matter with Thomas is unknown.¹⁰

A couple of weeks later, Heppingstone testified at trial that he knew of no custom governing a whale that is struck by one ship and then killed by another vessel. He did indicate, however, that if he saw that the first striker remained in pursuit of a whale bearing three of its irons he would not join the hunt. Heppingstone suggested that the Oregon – rather than making a verbal claim – should have attempted to kill the disputed bowhead which, prior to its slaying, was free for the taking. If Heppingstone seemed to advocate iron holds the whale as advisory and, in any event, applicable only when the

first striker was clearly in pursuit of a whale struck several times, Captain Wilcox presented on Heppingstone’s behalf a strict version of fast-fish, loose-fish. There exists, Wilcox explained, no rule to prevent the party that kills a whale from claiming it. Wilcox indicated that it was common to kill and unremarkable to claim a bowhead wounded the previous day by another ship. Third mate Jonathan Rogers of the Richmond opined that pursuit of a wounded whale with attached irons holds the animal, but that in the absence of such pursuit the prize was commonly shared. When Heppingstone boarded the Oregon to speak with Captain Mammen, Rogers expected that the whale would be divided as “the practice is to give half without any grumbling where I have been.” Captain Thomas Williams – an expert witness called by the Richmond – provided a particularly convoluted explanation of the applicable customs. He declared that a ship that strikes a whale, but claims it the following day is only entitled to the return of its craft from the slayer. While a first striker’s claim to a whale struck the previous day is more compelling if he warned the second vessel of his claim before the latter affixed its first harpoon, the slayer is still entitled to the whale if he was the first to lower his boats. The outcome would be different, in Williams’ estimation, if the two ships lowered about the same time. In that scenario, the whale should be divided.\footnote{Testimony of John Heppingstone, Thomas Williams, Jonathan Rogers, and P. S. Wilcox, Trial Transcript, Heppingstone v. Mammen, Admiralty #56, HSA.}

The Oregon’s sole expert witness, Captain F. W. Wilbur, stated that there is no custom or usage that prevents the first striker from claiming a whale bearing the ship’s irons. Wilbur revealed how his ship once willingly relinquished a whale it had killed when another vessel made a claim based on its affixed irons. “It is,” Wilbur intoned,
“customary with me to give up any thing that belongs to another man.” Wilbur concluded his testimony with the apparent caveat that he had stated the custom among German masters and that “I don’t know what it may be elsewhere.” If German captains did, indeed, uniformly honor a single standard, their American brethren showed no immediate sign of following their example.12

Two additional expert witnesses called by Heppingstone – Captains J. Sowle and John Dexter – seemed to call into question the existence of what could even be considered customs in the Pacific concerning the pursuit of live whales. Captain Sowle, noting that he would take a whale struck the day before by a ship whose harpoons remained affixed, observed that “by the custom I can not say to whom it belongs.” Sowle elaborated that he knew of no custom that would favor a first striker even if he provided notice of his claim prior to the whale’s death. As with Heppingstone’s explanation of custom, Sowle depicted customs as being, if not personal, limited in scope. He revealed when asked about a particular usage: “I know of nothing of the custom any more than hearsay. I can not say what other captains minds might be.” Captain Dexter shared his colleague’s uncertainty in replying hesitantly to a similar query, “that is what I understand to be the custom.”13

If these witnesses expressed divergent views and, perhaps, even doubt as to the existence of custom concerning living whales, they were unanimous in describing practices regarding dead cetaceans. Heppingstone, Wilcox, Rogers, and Williams stated with great certainty that a discovered whale carcass is split between the finder

12 Testimony of F. W. Wilbur, Trial Transcript, Heppingstone v. Mammen, Admiralty #56, HSA.
13 Testimony of J. Sowle and John Dexter, Trial Transcript, Heppingstone v. Mammen, Admiralty #56, HSA.
and a claimant whose irons remain affixed. Wilcox explained that “there is a distinction between a dead and a live whale on the whaling grounds. If I picked up a dead whale I would have held on to all I had cut in and let the balance below the plankshear go to the person who claimed it. If I had cut in the whole whale I could keep the whole whale.”

Upon the conclusion of testimony, counsel for Heppingstone argued that the matter should be resolved by application of the common law doctrine of *ferae naturae*. Two cases from the Supreme Court of Judicature of New York were cited for the proposition that property in a wild animal is acquired by occupancy. In *Buster v. Newkirk*, a hunter was said to occupy – or possess – a deer if he deprived it of its “natural liberty” by bringing the animal within his “power and control.” The facts in *Buster* were, as Heppingstone’s counsel likely argued, particularly on point with the case at bar. The deer was wounded but managed to run off with Newkirk, the hunter, in pursuit. Although darkness forced Newkirk to temporarily abandon the chase, his dogs continued on the trail of the bleeding deer. During the night, a third party fired and struck the deer which, with one of Newkirk’s persistent hounds closing in, ran onto the property of Buster. The deer’s six mile dash for safety ended when Buster slit its throat. With the morning light, Newkirk resumed pursuit which ended at Buster’s home with a rebuffed claim of the hide. The court ruled that the abandoned pursuit and the ability of the deer to run six miles after being wounded demonstrated that Newkirk had not deprived it of its natural liberty. The second New York case cited by Heppingstone, *Gillet v. Mason*, held that the mere discovery and marking of a tree containing a swarm

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of bees does not constitute possession. It is the hiving of the bees which reduces the insects to private property.\textsuperscript{15}

Mammen countered that as his voluntary abandonment of the chase was necessitated by the exigency of saving his crew, the court should deem his pursuit of the whale continuous. The \textit{Oregon}, having inflicted a serious injury the previous day, was able to overtake the whale prior to the first strike of the \textit{Richmond} and would have certainly killed its prey were it not for the interference of Heppingstone’s vessel. The warning provided to Heppingstone that the whale belonged to the \textit{Oregon}, in addition, placed the \textit{Richmond} on notice that any actions taken in pursuit of the whale would be on Mammen’s behalf. The remainder of Mammen’s arguments asserted that Heppingstone’s claim on the whale should be estopped by his statements and actions at sea. Mammen argued that prior to removing the harpoons Heppingstone conceded that the whale belonged to the \textit{Oregon} should the irons bear its mark. Heppingstone’s decision to allow the \textit{Oregon} to render the bowhead was, in Mammen’s estimation, a clear indication that he recognized that the whale belonged to the \textit{Oregon}. Mammen further contended that any recovery by Heppingstone be limited to the one half of the whale’s value he claimed in the heat of the dispute.\textsuperscript{16}

Presented with a common law governing wild animals that was far from settled on the crucial point of what constituted sufficient occupancy for ownership and the contradictory statements of whaling custom, Justice Robertson was left without clear guidance as to the applicable law. Robertson commenced his discussion of the law by

\textsuperscript{15} Trial Transcript, \textit{Heppingstone v. Mammen}, Admiralty #56, HSA. \textit{Buster}, 20 Johns. 75, 75. \textit{Gillet v. Mason}, 7 Johns. 16 (New York, 1810).

\textsuperscript{16} Trial Transcript, \textit{Heppingstone v. Mammen}, Admiralty #56, HSA.
observing, without explanation, that English common law applied only to events transpiring in the Kingdom of Hawaii. Disputes at sea were, on the other hand, to be decided by the applicable dictates of maritime law. In the absence of any provisions in maritime law governing this situation, Robertson relied on the guidance of what he termed “equity and natural right.” While Robertson never identified any particular provisions of either equity or natural right in his opinion, he used whaling custom analyzed through the lens of fairness to render a verdict. Robertson reduced the welter of conflicting testimony as to whaling custom to a pair of basic principles. A dead whale belongs entirely to a finder who can cut in prior to a verifiable claim made by the slayer. A wounded whale belongs to its slayer if that ship lowers and kills the animal before the first striker joins in the pursuit. While Robertson’s explanation of whaling norms as to a dead whale was supported by the evidence adduced at trial, his declaration of a custom governing living whales was not.17

The problem in the case at bar was, as Robertson explained, that the Richmond was placed on notice prior to striking the bowhead that the Oregon claimed the whale based upon an identification of the affixed harpoons. The Oregon was, in addition, also in position at the time of its claim to take the whale. Although Robertson acknowledged that testimony was presented that even under these complicating circumstances the custom followed by American whalingmen would award the whale to the Richmond, the

17 Opinion, Trial Transcript, Heppingstone v. Mammen, Admiralty #56, HSA. Heppingstone v. Mammen, 2 Hawaii 707, 711. There is some evidence that the lowering of the first boat was, on occasion, used to determine which ship was entitled to a whale. John Bockstoce believes that whalingmen in the Western Arctic agreed to honor the claim of the ship which was able to put the first boat into the water. Bockstoce, Whales, Ice, and Men, supra note 5 at 61. Ellickson has rightly questioned Bockstoce’s reliance on a single childhood memory recorded many years later. Ellickson, Order without Law, supra note 1, at 196.
justice explained that he found such a usage unreasonable. Perhaps, Robertson’s disinclination to follow this usage was a reflection of his unease at the degree to which it was the product of his own selective reading of the testimony. At this point, Robertson moved from custom and the common law as modified by usage and turned to fairness. ¹⁸

To explain why he found a custom that would give the entire whale to the Richmond unfair, Robertson posed a hypothetical. Suppose, Robertson queried, that the Oregon had relinquished the bowhead at sea to its competitor and thus Mammen – rather than Heppingstone – had brought this action. Robertson asked if, in this scenario, it would be unfair not to reward the Oregon for the danger encountered in disabling the whale and its persistence in renewing the chase and placing itself ultimately in a position to strike a fatal blow. Having answered this question in the affirmative, Robertson turned back to the matter at hand and asked if “in equity and good conscience” the Oregon should be allowed to retain the entire whale. The Oregon had, after all, been forced to cut its lines and the whale – though wounded – was free when killed by the Richmond. Had Heppingstone’s men not intervened, the bowhead would likely have evaded capture. The odds, Robertson offered in regards to the whale’s prospects for escaping the Oregon, “were rather in its favor.” Satisfied that the parties had each stated a compelling right to the bowhead, Robertson concluded that “under all the circumstances of the case, the whale may fairly be considered the joint prize of both ships.” ¹⁹

II. *Swift v. Gifford*

The 1872 case of *Swift v. Gifford* has been viewed by legal scholars as confirmation of the universality of iron holds the whale in the North Pacific and that the custom of allowing such claims to be made until cutting in was adopted to govern the troublesome issue of timeliness. A close reading of the case file reveals that the confusing way in which Judge Lowell stated the custom of whaling in his opinion has contributed to the mistaken view that norms in the Sea of Okhotsk were well settled. As the trial testimony in the Hawaiian case of *Heppingstone v. Mammen*, however, makes clear, whalemen in the Sea of Okhotsk were deeply conflicted as to the applicable standard for awarding disputed whales that had been chased and harpooned by competing vessels.\(^20\)

At about 9:00 on the evening of 1 August 1867, George Silvey – second mate of the *Hercules* – was below deck when the call went out to lower the boats. It was still light in the North East Gulf of the Sea of Okhotsk as the crew scrambled to pursue a spouting whale spied moving quickly in the direction of the *Hercules*. The boat commanded by Silvey managed to cut the whale off, but the bowhead sounded and remained under water for the next twenty to thirty minutes. When the whale surfaced at a distance of about a half-mile, Silvey was able to quickly close the gap and affix a harpoon. The injured bowhead ran off with iron and rope still attached. It was at a distance of more than two miles and sixty to ninety minutes before Silvey’s boat hauled

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\(^{20}\) Ellickson cites *Mammen* and *Swift* for the proposition that cutting in was used to measure the timeliness of a first striker’s claim in disputes involving whales chased by two ships. Ellickson, *Order Without Law*, *supra* note 1, at 200.
up close enough to – with the assistance of other boats from the *Hercules* – administer
the fatal lance jabs. As the whale neared death, Captain Nehemiah Baker of the
*Rainbow* approached in a boat and claimed the bowhead. Baker explained that the
*Rainbow* had struck the whale a short time before and that it had escaped with the
affixed harpoon and about two hundred fathoms of line. Although Silvey had noticed an
additional rope about the whale, he had not realized that it was connected to a harpoon.
The whale, with death, rolled up revealing an iron. Removed at Baker’s request, the
harpoon bore the *Rainbow’s* mark.²¹

The negotiations that attended so many confrontations at sea over whales
commenced with Baker’s claim and *Hercules* first mate George Manchester declining to
state a position. Manchester indicated that he would leave the discussion to his
captain, Isaac C. Howland, who was on board the nearby *Hercules*. It was agreed that
Baker would take possession of the whale while Howland was consulted. Dissatisfied
with this arrangement, Silvey was not reluctant to express his opinion as to the proper
disposition of the whale. He argued with Baker and perhaps his own first mate that the
whale should be evenly divided between the ships. When Captain Howland arrived on
the scene about a half hour later, he took up Silvey’s position. Howland explained to
Baker that his officers claimed one half of the whale as the *Hercules* had foregone

²¹ Depositions of George Silvey and Robert D. Gifford, Case File, *Swift v. Gifford*, United States
District Court, Massachusetts, March, 1872, United States National Archives, Northeast Region,
Waltham, Massachusetts (National Archives, Northeast Region). Silvey’s name is also spelled
Silvia and Sylvia. Silvey has been used throughout as that is the spelling used by the notary
who took his deposition. The material in the case file from which to reconstruct the facts in the
dispute is limited to the depositions of Silvey and Gifford and the pleadings. As Silvey and
Gifford were both mates on the *Hercules*, the *Rainbow’s* version of the events must be gleaned
from its answer to the libel. Pleadings are not always particularly helpful in determining what
happened at sea. In whaling cases they were frequently drawn up by attorneys after discussing
the matter with owners who were not present at the dispute. In some cases, such as the libel in
*Swift v. Gifford*, pleadings were filed prior to return of a vessel to Massachusetts.
pursuit of another whale in taking the subject of the present dispute. In addition, Howland asserted, the *Rainbow* would not have been able to catch up with the whale but for the intervention of the *Hercules*. The *Hercules* had, in effect, done Baker a favor in returning to him his iron and line which would otherwise have been lost in the side of a whale quickly moving into the protection of a darkening sky. Baker was apparently not moved by Howland’s argument and the captains agreed to let their owners decide the matter at a later date.\(^{22}\)

The owners of the *Hercules*, the New Bedford firm of Swift & Perry, were obviously not satisfied by their discussions with Charles Gifford, the principal investor in the *Rainbow*. Wishing perhaps to expedite resolution of the dispute, Swift & Perry filed an action on 3 August 1870 in United States District Court in Boston, nearly eight months prior to the return of the *Hercules* from the Pacific. In legal argument at trial, John Dodge – counsel for Swift & Perry’s *Hercules* – asserted that the matter must be decided by an application of the common law principles of *ferae naturae*. Citing *Buster v. Newkirk* and *Pierson v. Post*, Dodge maintained that wild animals are reduced to ownership only when they are in the total control and possession of a claimant. Dodge was well aware that the customs of whalemens did not require a degree of possession necessary at common law to constitute ownership of a *ferae naturae*. His law partner, Charles Bonney, had, in fact, signed a stipulation that competent witnesses would testify that the uniform usage of New Bedford and Nantucket whalemens had long been that a whale escaping with an affixed harpoon belongs to the first striker so long as he can make a claim prior to the cutting in of the ultimate slayer. It is not entirely clear why

Bonney – presumably with Dodge’s concurrence – would admit to a custom which would, if accepted by the court as determinative, doom his client’s case. Given the facts in the case, Dodge and Bonney might have felt that any statement of whaling custom would result in a negative ruling. Bonney, present at a deposition of veteran whaling captain Abraham W. Pierce, might have, therefore, been willing to concede to any version of the custom. Trial attorneys will occasionally stipulate to unfavorable testimony as a way of mitigating the harm and potential for further damage presented by a persuasive witness. Bonney did not even bother to subject Captain Pierce to cross examination at the time of his deposition.  

The decision of Dodge and Bonney to rest the case for the *Hercules* on Judge Lowell ignoring custom and honoring common law was not as ill advised as it might seem. Dodge argued in court before Lowell and in a surviving brief that the custom to which he conceded was void as contrary to the clear statement of the common law. The authority for the position was impressive. In 1837, Joseph Story, a Supreme Court justice and a towering figure in Massachusetts legal circles, wrote in *The Schooner Reeside* of his dissatisfaction with “the almost indiscriminate habit, of late years, of setting up particular usages or customs in almost all kinds of business and trade, to

23 Complaint, Stipulation, and Deposition of Abraham W. Pierce. Case File, *Swift v. Gifford*, National Archives, Northeast Region. *Buster v. Newkirk*, 20 Johns. 75 (New York, 1822) and *Pierson v. Post*, 3 Cai. 175 (New York, 1805). The literature on *Pierson* is enormous. For some of the most recent scholarship, see Bethany R. Berger, It’s Not About the Fox: The Untold Story of Pierson v. Post, 55 Duke L.J. 1089 (2006); Andrea McDowell, Legal Fictions in Pierson v. Post, 105 Mich. L.R. 735 (2007); and Angela Fernandez, The Lost Record of Pierson v. Post, the Famous Fox Case, 27 Law & Hist. Rev. 149 (2009). Ellickson acknowledges that the stipulation in *Swift* which asserts a uniform American custom going back to at least 1800 was certainly inaccurate. Ellickson’s issue with the accuracy of the stipulation concerns the universality of the practice going back to the beginning of the century. He does not question the degree to which the norm was followed in the Sea of Okhotsk fishery of the mid-nineteenth century. Ellickson, Order Without Law, *supra* note 1, at 199.
control, vary, or annul the general liabilities of parties under the common law, as well as the commercial law.” The danger of admitting such customs was the confusion and the potential for abuse that would be created. Story explained that the proper use of custom was to “interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their contracts, arising not from express stipulations, but from mere implications and presumptions, and acts of a doubtful or equivocal character.” In the earlier whaling dispute of Bartlett v. Budd, Judge Lowell had, in addition, explicitly left open the question of the degree to which a usage could alter “the strict law of pursuit and capture.”

Reading the opening lines of Lowell’s opinion in Swift, counsel for the Hercules might well have judged their reliance on common law a successful strategy. Lowell began his opinion with the statement that common law – borrowing from Roman law – defined ownership of a wild animal as vesting only with “actual and complete possession.” The judge then noted the confusion in what he termed the “modern civil law” as to whether “fresh pursuit” combined with a reasonable prospect of ultimately capturing the animal was sufficient. If Lowell followed the stricter interpretation of ferae naturae, the Hercules would clearly prevail. If, on the other hand, Lowell believed that the case must turn on the likelihood that the Rainbow would – without the actions of its competitor – have taken the whale, the Hercules produced compelling evidence that without its intervention the animal would have escaped. Silvey testified that the Rainbow was at a distance of about eight miles when he struck the whale. Even Gifford conceded in his answer to the complaint that the Rainbow, while still in pursuit, was

24 The Schooner Reeside, 2 Sumner 567, 569 (U.S. Cir. Ct., 1st Cir., 1837). Bartlett v. Budd, 2 F. Cas. 966 (1868).
about six miles from Silvey’s boat. That Dodge and Bonney directed their argument and testimony at this issue was confirmed by the editor of the reported opinion who observed that the only issue contested at trial concerned the prospects of the \textit{Rainbow} catching up to the fleeing whale.\footnote{Swift v. Gifford, 23 F. Cas. 558. Bartlett v. Budd, 2 F. Cas. 966. Deposition of George Silvey and Answer, Case File, \textit{Swift v. Gifford}, National Archives, Northeast Region.}

Instead of applying the common law, Lowell, however, abruptly turned to the customs of whaling and – in the process – made a remarkable admission. Lowell revealed that he did not pursue the common law for the simple reason that it would be impossible to determine whether the \textit{Rainbow} “though continuing the chase, had more than a possibility of success.” It appears that Lowell abandoned what he suggested to be the governing law for the simple reason that it would be difficult to apply to the facts at bar. Judges are, of course, frequently faced with facts that – when applied to the pertinent standard – do not suggest an easy resolution to the dispute. The proper solution in such a situation would be to find that in the absence of evidence that the \textit{Rainbow} would have caught up to the whale, the animal must be awarded to the \textit{Hercules}. In abandoning the common law, Lowell took note of Story’s concern that customs would unsettle established legal principles, but determined that the application of whaling usage posed no such danger. Whaling practices, Lowell explained, were limited to such a discreet industry and too particular to attract and confuse those engaged in other branches of commerce. Adherence to whaling custom rather than the laws of a particular nation would – as Judge Chambre stated in an oft cited portion of
the 1807 British case of *Fennings v. Lord Grenville* – prevent confrontations at sea between whalenmen hailing from around the world.\(^{26}\)

In turning to custom to decide the case, Lowell did not, however, apply the usage which Bonney had – on behalf of the *Hercules* – agreed would be testified to by competent witnesses. Bonney stipulated that such witnesses would establish that a whale that escapes with the harpoon of a ship and is subsequently killed by another vessel belongs – at least in part – to the first striker if it claims the animal “before it is fully cut in by the second ship.” While the stipulation stated that it applied to a live whale pursued by two ships, Lowell correctly recognized that the custom that honored a claim made prior to completion of the cutting in process pertained exclusively to dead whales found adrift in the water. As Lowell explained, a dead whale drifting in the current belongs to the finder so long as it can be cut in prior to a claim being made by the ship whose harpoon the cetacean bears. That Lowell viewed this as a separate, but certainly related, custom was indicated by his use of the word contrary to describe its relationship to the rule that iron holds a living whale. Ignoring the stipulated custom, Lowell, instead, proclaimed the applicable usage for a living whale to be “that he who first strikes it so effectually that the iron remains fast should have the better right, the pursuit still continuing, . . .” The source for this custom was the oral decision rendered by Judge Sprague in the 1863 matter of *Bourne v. Ashley*. While counsel for the *Hercules* argued that the failure of the *Bourne* decision to be published was likely the product of Sprague’s dissatisfaction with its contents, the real reason may well have been that it was never reduced to writing. Lowell indicated that his source for the

opinion were the notes taken by one of the attorneys in the matter. Having assured the parties that he had examined the *Bourne* case file and found the purported opinion to be consistent with its contents, Lowell determined that the *Rainbow* had maintained pursuit and should be awarded the whale.27

The case of *Swift v. Gifford* captures, in many respects, the vagaries of whaling custom and the twisted application of those practices in the courtroom. This disconnect between practices at sea and how they were used in court was demonstrated by the conflation of the different approaches governing live and dead whales. While whalemen harbored many different ideas about what constituted possession of a live whale – as the discussion of *Heppingstone v. Mammen* demonstrates – the custom concerning a harpooned dead whale was, by whaling standards, well settled at sea. It was generally understood that a ship which discovered a dead whale bearing the harpoon of another vessel was entitled to as much as it could cut in prior to a claim being made by the first striker. It was this custom that was extended by the expert witness and counsel in *Swift* to living whales. This broadening of the usage concerning dead whales appears novel and marks a clear departure from accepted practices. Even Judge Lowell chose to ignore this standard – despite of the stipulation of counsel – and followed a version of iron holds the whale that preserved the rights of the first striker so long as they maintained pursuit of their catch.

Francis Allyn Olmsted’s 1841 account of a whaling trip to the Pacific is typical in limiting cutting in as a test for timeliness to dead whales. As Olmstead revealed, the assumption was that a dead whale had been mortally wounded by the boat that

attached a harpoon. The slayer was entitled to the whale pursuant to iron holds the whale, but only if he was able to make his claim before the whale was cut in. This version of iron holds the whale as applied to dead whales protected the slayer who was able to quickly find its prey and it increased the likelihood of harvesting should the whale – as frequently happened – succumb to its wounds at some distance from the boat that dealt the fatal blows. Research to date has yet to discover a single use of the cutting in test for the timeliness of a claim applied to a living whale pursued by two ships.28

The decision of counsel for the Hercules to agree that competent witnesses would testify that cutting in marked the time within which a first striker must claim a whale killed by another vessel was, as previously indicated, likely made with little attention to the particulars of the stipulated custom. The strategy of Dodge and Bonney was, instead, to convince Judge Lowell that he must follow the common law of *ferae naturae* and not custom in rendering a decision. It is also probable that presented with a single expert witness who would testify as to the custom, counsel – believing Captain Pierce’s testimony as to the universality of this usage – saw no grounds for challenging his expertise. In accepting Pierce’s testimony, Dodge and Bonney contributed to an ongoing misunderstanding of whaling custom still evident in current explanations of nineteenth century practices. It was, however, the obscure structure and reasoning of Lowell’s opinion that must bear most of the blame for the subsequent confusion as to the holding in Swift. Almost immediately, legal commentators incorrectly interpreted Lowell’s ruling as measuring the timeliness of a first striker’s claim by the point at which

28 Francis Allyn Olmstead, Incidents of a Whaling Voyage. To Which are Added Observations on the Scenery, Manners and Customs, and Missionary Stations of the Sandwich and Society Islands, Accompanied by Numerous Lithographic Prints 158-159 (1841).
the eventual slayer cuts into a whale. In his 1881 *The Common Law*, Oliver Wendell Holmes, Jr. cited *Swift* for the proposition that American whalenmen plying the Arctic Ocean award “a whale to the vessel whose iron first remains in it, provided claim be made before cutting in.” Lost in Holmes’ account was Lowell’s holding that continuing pursuit – however that may be measured – was determinative of the rights of a ship that struck then lost a whale that was ultimately killed by another vessel. While cutting in might have been a reasonable and convenient measure of continued pursuit, whalenmen do not appear to have employed this test.29

Subsequent scholars in the late nineteenth and early twentieth centuries largely followed Holmes in conflating the customs for pursuit of living whales with that for carcasses discovered adrift in the water. The influence and importance of Holmes as an interpreter of the common law may well have led other commentators to simply repeat the justice’s assessment of *Swift* without further consideration of the case. In 1887, British barrister Whitley Stokes, for example, quoted Holmes – but not *Swift* – for the proposition that whalenmen honored the claim of a first striker made before cutting in. Stokes’ discussion was also one of the earliest declarations that American judges such as Lowell followed industry custom in deciding whaling property disputes. As with most analyses of whaling cases, Stokes correctly noted that custom, not common law, was used to settle conflicts over contested whales. Stokes was, however, also typical in misconstruing the custom used and, most importantly, accepting the statement of that usage as set forth in the judge’s opinion as an accurate assessment of how whalenmen operated at sea. Recent scholars have largely followed Holmes in accepting cutting in

as the test for timeliness when two ships pursued a live whale. Robert Ellickson, whose interpretation of nineteenth century American whaling custom has been uniformly accepted, offers the stipulation of counsel in *Swift* as evidence for the now venerable – but inaccurate – position that a form of iron holds the whale which employed the cutting in test for timeliness of a claim was followed in the Sea of Okhotsk.\(^\text{30}\)

**Conclusion**

Evidence of the negotiations in whaling disputes at sea and on land has survived primarily from matters that were litigated. There is no way to know to what degree such bargaining was common. The testimony in *Heppingstone* certainly suggests that it was. Various crew members and expert witnesses provided their understanding of the prevailing customs of whaling. They expressed such uncertainty as to the governing norms and provided such a welter of conflicting standards that it seems that ambiguity was the sole constant. Beyond a general statement that in certain circumstances an affixed iron in an injured whale might preserve some rights in the first striker, it is difficult

to draw anything resembling a rule. In an atmosphere where whalers appeared, at times, to be making things up as they went along, it is hard to imagine that such negotiations were not an accepted practice.

The evidence in *Heppingstone* and *Swift* also suggest that these negotiations were not, strictly speaking, exclusively about applicable customs, norms, or usages. When Heppingstone stated at sea that he believed that he was entitled to a share of the whale for his trouble, he acknowledged that his claim was not based upon law or custom. Similarly, in court, Heppingstone indicated that he was not aware of any custom governing the situation. The belief of *Richmond* mate Jonathan Rogers that the *Oregon* would readily hand over half the whale without complaint was also based on fairness. Heppingstone’s sense that effort should be rewarded – even in the absence of a compelling claim based on industry custom – was shared by Silvey and Captain Howland in *Swift*. Silvey and Howland argued that the *Hercules* should be granted half the whale as compensation for its decision to forego another whale and kill a bowhead they had no reason to believe belonged to another vessel. As with the arguments of Heppingstone and Rogers, principles of fairness – not custom – animated the claims of Silvey and Howland. The sense that each of these whalers was referring to a code of conduct or way of measuring rights to a disputed cetacean that was as much personal as it was communal was captured in the testimony of Captain Wilbur. “It is,” Wilbur
testified in *Heppingstone*, “customary with me to give up any thing that belongs to another man.”31

The terms custom, norm, and usage are often used somewhat interchangeably throughout the voluminous literature discussing socially approved behavior that is created and enforced outside the dictates and formal institutions of the state. Legal scholars, however, generally use the word norm when they attempt to rigorously define and examine the concept of rules of conduct that originate with participants in the involved business or community. While the offered definitions of a norm varies, the salient point in all characterizations of the concept is that a norm is not recognized as binding positive law. As legal scholar Lawrence Mitchell has observed, a norm is an “ought statement.” “Norms,” Mitchell explains, “tell us what we should do under a given set of circumstances and are therefore obligatory upon those who wish to participate in the society which is at least partly constituted by such norms.” Norms, of course, are not the only force that molds, directs, and coerces human behavior. Some people operate under a set of personal ethics which are self enforced by that individual’s desire to act in a way he or she deems proper. A self imposed code may be barely distinguishable from prevailing norms in the surrounding society or it may be highly idiosyncratic.32

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What distinguishes norms in the scholarly literature from personal ethics is that members of the community understand what behavior a norm requires. Absent such an understanding, a norm will not – at least in theory – function efficiently. The enforcement mechanism of a norm will break down if community members can not agree as to the sort of behavior to punish. In the case of nineteenth century whaling in the Sea of Okhotsk, the rules concerning dead whales discovered adrift were clearly norms. Whalemen were able to provide consistent statements as to who was entitled to a dead cetacean. The norm even provided a rather precise means for determining the percentage of the whale to be awarded based on the progress of the cutting in process at the time the claim was made. A captain who violated the norm for dead whales did so with the clear knowledge that he risked his good standing in the community of whalemen. The provisions governing live whales bearing the irons of a competing vessel were not, however, so easily expressed. As the testimony in *Swift* and *Heppingstone* makes clear, there were almost as many understandings of the governing rules as there were witnesses. While some of the explanations sound very much like statements of personal ethics, there were, nevertheless, common themes that run through the testimony. A first striker that maintains pursuit was, for instance, deserving


If the rules for taking wounded whales were not sufficiently clear to satisfy the definition of a norm, what were they? It is perhaps most useful to view the practices in the Sea of Okhotsk as a sort of hybrid between personal ethics and norms. Whalemen such as Heppingstone, Rogers, Silvey, and Howland each saw the code of conduct governing their behavior as both personal and communal. In the absence of a prevailing norm, whalemen in the Sea of Okhotsk were left with the guidance of their own personal ethics as refracted through the prism of old norms and the exigencies of the communal business of chasing whales in the company of a close knit brotherhood. This is precisely what Captain Sowle had in mind when he testified in \textit{Heppingstone} that his understanding of custom was based on hearsay rather than first hand experience of the usage in practice. Although Sowle could not state “what other captains minds might be,” he, nevertheless, had a notion of how other masters thought about and resolved disputes over wounded whales. That the rules in the Sea of Okhotsk were part personal ethic and part norm should not be surprising. Even in the Greenland whalefishery of the early nineteenth century the widely followed norm of fast-fish, loose-fish was tempered by what British captain William Scoresby called the “laws of honour,”
which were a mix of Christianity’s Golden Rule and the captain’s individual notion of proper behavior.\textsuperscript{34}

Yet, if whaling practices in the Sea of Okhotsk were confusing and not well understood by the men who hunted cetaceans, why were they so remarkably successful in keeping disputes out of court? The answer is likely multifaceted. The transaction costs of litigation were exceptionally high both in terms of the price of bringing or defending a cause of action and in the amount of time required before a verdict would be rendered. Compromise – given the high transaction costs and the unwillingness to engage in violent forms of self help – also made good economic and business sense. Whalemen had, in addition, a long history of sharing whales. When Heppingstone suggested to the mate of the \textit{Oregon} that they “go halves” he echoed a tradition that included seventeenth century regulations for splitting drift whales, the late eighteenth century Galapagos custom of dividing whales between first striker and slayer, eighteenth century New England usage of awarding a fractional share to a competitor who answered the call for assistance, and the widespread practice of mateship.

Ellickson is undoubtedly correct in insisting that close knit communities are often capable of managing their affairs without recourse to courts and other formal manifestations of the law. What he overestimates is the necessity for well understood norms in settling disputes. Whalemen in the Sea of Okhotsk proved adept at resolving controversies on a common sense, ad hoc basis without universal norms. The close

knit nature of their community, the intensely communal nature of their competition, and the economic pressure to settle disputes allowed Okhotsk whalemen to resolve contests without the aid of well settled norms.\textsuperscript{35}