

Case No. 1,075.

BARTLETT ET AL. V. BUDD ET AL.

{1 Lowell, 223.}<sup>1</sup>

District Court, D. Massachusetts.

Feb. Term, 1808.

ANIMALS—CONVERSION OF DEAD WHALE—SALVAGE SETOFF—DAMAGES.

1. A whale killed and taken into complete possession is the property of the taker, who may maintain an action against one who afterwards appropriates it, whether with or without knowledge of his title.
2. *Held*, that an alleged usage that a whale found adrift in the ocean is the property of the finder unless reclaimed by the owner before it is cut in, was not proved in this case. *Quaere*, whether such a usage would be valid?

{Cited in *Swift v. Gifford*. Case No. 13,696; *Ghen v. Bich*, 8 Fed. 160.}

3. Salvage cannot be given by way of setoff when the finder has throughout contested the title of the owner.
4. The measure of damages adopted in *Bourne v. Ashley*, [Case No. 1,699,] adhered to.

{Cited in *Guibert v. The George Bell*, 3 Fed. 585.}

In admiralty. Libel by [Ivory H. Bartlett and others] the owners of the bark *Canton Packet*, of New Bedford, against [John Budd and others] the owners of the ship *Emerald*, of Sag Harbor, for the value of a whale. [Decree for libellants.]

The first officer of the libellants' vessel killed several whales one afternoon in July, 1856, in a bay of the Okhotsk sea, and one of these he anchored in five fathoms of water, with an anchor which he borrowed from the mate of the *Brunswick*, and attached to the body what whalers call a waif, that is, some article belonging to a whale-boat which may serve as a signal; in this case, a paddle and sail, and went on shore at some distance, for the night. The next morning two boats of the *Emerald* found the whale and towed it to their ship where it was cut in and boiled down. The witnesses on behalf of the respondents testified that they found the whale adrift, the anchor not holding, the cable coiled round the whale's body, and no waif or Irons attached to it. The original taker swore that he notified them on the spot that the whale was his. This they all denied.

T. M. Stetson, for libellants.

J. C. Stone, for respondents.

LOWELL, District Judge. A whale, being *ferae naturae*, does not become property until a firm possession has been established in the taker. But when such possession has become firm and complete, the right of property is clear, and has all the characteristics of property. Upon the evidence, the right to this whale appears to stand on the same footing as the right to the anchor attached to it, which was very properly restored to its owner: *Taber v. Jenny*, [Case No. 13,720.]

The respondents here, as in *Taber v. Jenny*, set up a usage that a whale found adrift in the ocean is the property of the finder, unless the first taker shall appear and claim it before it is cut in. To this the libellants' witnesses reply that the usage only applies to whales found with no marks of appropriation excepting harpoons or "irons." And they give the very plausible reason for this distinction that irons are not in fact sure signs that the whale has ever been captured; because it may, and often does, escape after being wounded, and die at a very considerable distance of time and place from that of its being struck. These witnesses go farther, and affirm that the usage does not obtain at all in bays and harbors, but only off soundings. Without deciding the last point, I find the preponderance of evidence to be very strong in favor of the libellants' version of the usage in the matter of the definite marks by an anchor, or other sure sign of actual capture. And if it were not so, there would be great difficulty in upholding a custom that should take the property of A. and give it to B. under so very short and uncertain a substitute for the statute of limitations, and one so open to fraud and deceit. I do not, however, here pass upon the limits within which usage may reasonably vary, whether upon the one side or the other, the strict law of the pursuit and capture of whales and their appropriation, but decide that this whale was the property of the libellants.

This is not a case of salvage, because the conduct of the finders was inconsistent with the idea of a saving for the benefit of the true owners. *Taber v. Jenny*, *ubi supra*. A libel for a conversion of the whale is the true remedy, and that has been adopted.

For the reasons given by me in another case, I am unable to adopt the rule of damages which Judge Sprague followed under the peculiar circumstances of *Taber v. Jenny*, but pronounce for the value of the whale in the Okhotsk sea in July, 1856, to be ascertained in the mode laid down in my former decision [*Bourne v. Ashley*, Case No. 1,699] with interest and costs.

<sup>1</sup> [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.]