

HUTCHISON, &c.
v.
DUNDEE WHALE
FISHING CO.

PRESENT,

LORD CHIEF COMMISSIONER.

1830.
March. 8.

HUTCHISON & OTHERS v. DUNDEE WHALE
FISHING COMPANY.

Finding for the
pursuers in a
question as to
the value of a
whale.

AN action to recover the value of a whale as
wrongfully taken possession of by the defen-
ders.

ISSUES.

“ It being admitted that the pursuers, John
“ Hutchison and others, are owners of the
“ ship or vessel called the Traveller of Peter-
“ head ; and that the Dundee Union Whale-
“ Fishing Company, of which the defender,
“ John Blair Miller and others, are trustees
“ and managers, are owners of the ship or ves-
“ sel called the Thomas of Dundee :

“ It being also admitted that the said two
“ ships or vessels were employed in the whale-
“ fishery at Davis' Straits during the fishing
“ season 1829 :—

“ Whether, on or about the 23d day of
“ August 1829, a whale at Davis' Straits was

“ made fast to a boat in the employment of
 “ the pursuers ; and whether, while the said
 “ whale was fast as aforesaid, the defenders,
 “ by themselves or others, struck, and there-
 “ after wrongfully took possession of and car-
 “ ried off, the said whale ; and are indebted
 “ and resting owing to the pursuers in the
 “ sum of L. 1000, or any part thereof, as the
 “ value of the said whale.”

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Currie opened for the pursuers, and stated the facts, and that, when a fish is fast to one boat at the time it is struck from another, the fish belongs to the first boat. In the case of *Fennings v. Lord Grenville*, 24th May 1808, the Court recognizes the custom of the fishers as binding, and since then it has been better ascertained. We are ready to prove what *Scoresby* states, Vol. II. p. 319, that, when the whale is entangled in the rope, it is sufficient to fix the right ; and, as in this case, the fish took out line from the pursuers' boat after it was struck by the defenders, it must have been a fast fish.

1. Taunt. 243.

Hogarth v. Jackson, 2 Car. and Payne, 595.
Skinner v. Chapman, 1 Moody and Malkin, 59.

Jeffrey, D. F. for the defenders, said, The law was admitted and it was merely a question of fact, and he would prove the fish loose, and that the line of the pursuers was broken short, but admitted that it would be difficult to reconcile this with the evidence for the pursuers.

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Incompetent for
 defenders to
 prove a state-
 ment made at
 the time by one
 of the crew of
 their vessel.

A witness was about to prove a statement by one of the crew of the defenders, that he saw the line broken off before he struck, and it was said to be competent to prove the statement, though it did not amount to proof of the fact.

LORD CHIEF COMMISSIONER.—As this has been agitated, I must decide it, but cannot see how the declaration of a party can be evidence for him.

On his Lordship being requested by the Dean to note this decision, Mr Cockburn gave up the objection.

Cockburn in reply, said,—The case was simple ; and to get free of the contrary evidence, they might deduct the crews of both parties, and rest on the facts sworn to by others.

LORD CHIEF COMMISSIONER.—Cases of this kind are for the jury, and the question is, Whether *at the time* the fish was struck by the defenders, it was loose, and not whether it became so immediately after ? If it was loose then, you will find for the defenders, as the custom of this fishing is known over the world, that a fish remaining attached to the boat from which the first harpoon was thrown, at the time it is

struck by a second, remains the property of the first harpooner.

If you believe that the man of the defenders saw the end of the broken rope attached to the harpoon of the pursuer before he struck, then you must find for the defender, but before coming to this conclusion, you must consider the situation of these men at the time, and ever since the question arose, and that they might unintentionally change the time of breaking from *after* to *before* the striking. They may be mistaken as to the time, but those for the pursuer must be perjured if the line was broken, as they state that it was tight at the time; and you will say whether you think the explanation by the defenders will account for the facts proved to have taken place in the boat of the pursuers, and the fact, that a fish when it gets loose goes on rapidly, but when fast that it rolls. It is uncomfortable to have to do with a case of contradictory evidence, and I could not leave it with you without making these observations.

Verdict—“ For the pursuers, and that the
“ defenders are resting owing to the pursuers
“ in the sum of L. 600 Sterling.”

Cockburn and *Currie*, for the Pursuers.

Jeffrey, *D. F.* and *Maitland*, for the Defenders.

(Agents, *J. Kermack*, w. s. and *Ritchie* and *Miller*.)

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