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<hr style="width: 100%;"/> ADDISON, &c. v. ROW.	ADDISON & Sons, Owners of the Whaler Ship Caledonia of Borrowstonness, -	} <i>Appellants ;</i>
	Wm. Row of Newcastle, Owner of the Whaler Ship Priscilla, - - -	} <i>Respondent.</i>

House of Lords, 3d March 1794.

PROPERTY—FIRST POSSESSOR—RULE IN WHALE FISHING.—Held it to be a settled point, that a whale being struck, and afterwards getting loose, is the property of the first striker who continues fast until she is killed ; and that, from the evidence in this case, it appeared that the whale, when struck with the harpoon of the appellants' ship, had got free from the harpoon of the respondent's, and therefore that the whale belonged to the appellants.

This was a dispute about the property of a whale between the owners of the whaling ship *Caledonia*, and the owners of the *Priscilla*, both engaged in the whale fishery at Davies Straits.

Wm. Row's ship *Priscilla*, commanded by Captain Frank, was the first striker, and brought action before the Admiralty Court in Scotland against Addison and Sons, the owners of the *Caledonia*, who were the takers of the fish. The Judge Admiral, after a proof, sustained the defences founded on the fish being a loose fish at the time the *Caledonia's* boats came up and struck her with the second harpoon. But of this sentence the respondent brought a reduction and declarator, setting forth the following facts: That both vessels being engaged in the whale fishing, the *Caledonia's* boats harpooned and got fast to a fish on the 27th May 1789, near to where the *Priscilla* then lay, whereupon Frank, the captain of the latter, ordered out his boats manned to assist the *Caledonia* in killing the fish. Accordingly, when the whale came up to blow, after being struck, it was harpooned a second time by the *Priscilla's* boats, by which means the fish was killed, and became the property of the *Caledonia*, the first striker. The captain of the *Caledonia*, in return for the gratuitous assistance so rendered, promised the captain of the *Priscilla* that when he got fast to a fish, he would render the same assistance in return during the season.

Accordingly, two days after this (29th May) the *Priscilla's* boats struck a whale, which immediately took down, and,

on hoisting his signal to the other boats and vessels of his being fast, the defender, James Pottinger, captain of the Caledonia, lowered, manned, and ordered out four boats to assist the Priscilla in killing the fish: That while the boats were on the watch for the rising of the fish, she came up to the surface, after being three quarters of an hour down, at a great distance, and in a different direction from what was expected, and nearer to the Caledonia than any of the boats, with the Priscilla's harpoon sticking in her back, blowing very hard and thick as a wounded fish, and lay on the water sometime, whereupon two other boats were let down, manned, and ordered out from the Caledonia, in one of which William Robertson, mate, acted as harpooner, who rowed up to the fish, and struck a harpoon into her, after which she again took down, at which time the line of the Priscilla's boat seemed fast, as the boat's crew continued to let it out, when, in a few minutes thereafter, it appeared loose, and came home: That when the fish again came to the surface, she was struck with a third harpoon from the Priscilla's boat, and from a boat belonging to the ship Kitty, and was killed; yet notwithstanding this, and in breach of his promise of assistance, and on pretence that the fish was a loose fish at the time the Caledonia's boats struck her, the whale was taken possession of and cut up by the captain of the Caledonia, against the remonstrances and prior claim of the Priscilla: That the line attached to the Priscilla's harpoon struck first into the fish had the appearance of being cut cross-over with a sharp instrument near the splice, and almost close to the hose for the shaft used at striking the harpoon into the fish; that this must have been done by Robertson with the intention of defeating the Priscilla's right of first striker. In defence, the appellants admitted the facts as to the promise of assistance, but stated that this only extended to a fast fish, but positively denied that when the Caledonia's boats came up that the fish was fast: On the contrary, finding that the fish had got loose, he harpooned it on his own account, in virtue of the practice and law prevailing in all such fisheries. That the fact of the fish being a loose fish was supported by many presumptions; 1. From the unexpected turn the whale took; 2. From the great distance to which it ran from the Priscilla's boats, nearly ten lines, whereas the Priscilla's rope was no longer than five lines in length; and offered to prove that she was a loose fish at that time.

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A proof was ordered to both parties, which was conflicting in its nature; the crew of the Caledonia's boats deposing that the fish was loose, and detached from the harpoon, although the harpoon still remained fast in its body: That at this time the whale was ten lines from the Priscilla's boat which had first harpooned it: That immediately thereafter the fish went down, dragging their line along with it. They also proved, by a great many witnesses experienced and employed in whale fishing, the practice in the Greenland and Davies Straits fisheries to be, that when an assisting ship finds the whale loose, if he strikes and follows up the chase until he kill her, the fish belongs to him; but, if the harpoon of the ship who struck the whale first be found in her after she is loose, and they can prove that the line was cut by the harpoon of the second ship who strikes into her, the fish will belong to the ship which first struck; but, if they cannot prove that the harpoon of the second ship cut the line, then the fish belongs to the second or assisting ship: and, finally, that the whale commonly belongs to the first striker whose boat or line continues fast until the fish is killed. That the line may be cut, and sometimes is cut, by running through foul ground, by rubbing on the ice, or being cut against a rock. On the other hand, the (pursuer) respondent, besides objecting to the credibility of the appellants' evidence, consisting chiefly of Robertson, the harpooner, and his boat's crew, (Robertson was charged with being guilty, in a former case, of cutting the line, where, in consequence, the fish was divided between the two vessels), he proved, 1. That the whale was fast to the Priscilla's boat at the time she was struck a second time by Robertson—that after being struck by Robertson she ran out line from the Priscilla's boat to the extent of 30 or 40 fathoms, a fact inconsistent with the supposition of her being a loose fish when Robertson so struck. 2. That the foreganger of the Priscilla's harpoon, which was afterwards discovered to be loose, had the appearance of being cut by a sharp instrument close by the splice, instead of being broken accidentally. 3. That Robertson had been guilty before of cutting out the harpoons and lines, in order to found such claims. 4. The promise to assist, and that on this occasion they were only performing that promise, and not with the view of interfering as they afterwards did with their wounded fish, ought to silence their claim. One of their own wit-

nesses belonging to the first four boats, deposed that they were ordered to go and assist in killing the fish.

The general argument of the appellant was, that by the general principles of law, actual apprehension was necessary to secure the property of animals, *ferae naturae*; and consequently, the moment the Priscilla's harpoon got loose, the fish became the property of the first that should afterwards strike.

The respondent maintained that this did not follow, if the fish has been already harpooned, and still in pursuit: That some weight and effect were due to the first harpoon, and some right to the first wounder: That if the wound is such as must force the fish to seek the shore, or, as in this case, the harpoon remains fast in the fish, she belongs to the first wounder: That this is the modern rule of acquiring property in *ferae naturae*: And though in an early state of society the occupancy or actual apprehension and detention of a wild animal, might appear necessary to constitute a claim of property, yet when the idea of property came to be better understood, a slighter connection was deemed sufficient, and property was more considered an act of the mind: That though a difference subsisted among the Roman lawyers upon the question: Whether the wounding of a wild animal did not create a latent property so long as the pursuit was continued? Yet it seemed to be agreed by later authors, that it was unlawful for any person to interfere with another in the pursuit of the animal that had been once wounded, especially where the wounding was attended with the apprehension of the animal by getting fast to it, though afterwards got loose, and a wound which would necessarily lead to its capture: That at all events the Caledonia's crew were barred from claiming the fish in consequence of their promise of assistance, even supposing the Priscilla's foreganger had been accidentally broken previous to her being struck by Robertson.

The Lord Ordinary, of this date, found, "That under all the circumstances of this case, the whale libelled must, in justice, be considered to have been the property of the owners of the ship Priscilla; and, in respect thereof, sustains the reasons of reduction; and finds that the defenders must account to the pursuers for the full value of the said whale: but in respect that the parties have not hitherto been heard upon the amount thereof, remit to enquire into this."

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L. 41, Tit. 1,
§ 5, De acq.
rer. Dom.

Nov. 13, 1792.

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On reclaiming petition the Court adhered.*

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Against these interlocutors the present appeal was brought.

Pleaded for the Appellants.—Upon all the principles of law which govern such cases, and upon the usage and custom of the fishery in Greenland and Davies Straits, the property of the whale is the appellants, the owners of the Caledonia. Because, 1. Although the Priscilla's boat and crew first struck the fish, and she immediately went down, and was below three quarters of an hour, taking an unexpected turn or direction, and rose at a great distance from the boat that struck her; yet, as it was equally well proved, when she again rose to the surface, nearer to the Caledonia than any of the other boats, the foreganger of the Priscilla's harpoon was broken, and the fish a loose fish, whereupon the Caledonia's crew having struck into her, and continued fast until she was killed, the fish by law, and by the established custom and usage of the fishery, was the property of the Caledonia. Because, 2. This being the rule as to a fish struck with the harpoon from whose line she has got loose, the whole doctrine as to the first wounder of the fish having a right of property in it goes for nothing; because, 3. It is proved that the line which the Priscilla had on board of her striking boat was only four lines and a half, while it has been proved, that when she rose, after being under water, she was more than ten lines from the boat, which at once proves that the fish was a loose fish, and that the line had been cut by the ice or the rocks, which is further confirmed by the difficulty in hauling in the lines, it having taken the

* Opinions of Judges :

LORD PRESIDENT CAMPBELL.—“ This is a question about the property of a whale. In my opinion the interlocutor is right. The general rule is, that game 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. See title in Pandects, “ De Acquirendo Rerum Dominio, Lib. xli. tit. 1. There is no custom proved which can derogate from this general principle. The specialities are in favour of the pursuers. The boats of the Priscilla would have taken the whale if the Caledonia had never interfered. Robertson's testimony is contradicted in some particulars by the defender's own witnesses.”

President Campbell's Session Papers, vol. 67.

crews of five boats to do so, from being entangled with the ice or rocks at the bottom; because, 4. There is positive evidence that the foreganger was seen broken before the Caledonia's boat came up, so that the fish could not be fast, as is alleged, at the time its crew struck into her; and because, 5. As to the promise of assistance, that was amply redeemed, by its being admitted by the Caledonia's crew that his first four boats were sent out immediately upon observing a signal of a fast fish from the Priscilla's boat, to render assistance in killing her; but the fish having rose very near the Caledonia, and it appearing a loose fish, he manned two more boats, and harpooned her as a loose fish: That his promise of assistance ceased the moment he saw the fish loose, as upon that event a new right arose to him, and as his promise never extended beyond assistance in killing a fast fish, and not to finding fish for the respondent, the fish was the property of the appellant.

Pleaded for the Respondent.—The appellants have failed in proving that when the Caledonia's boat came up the whale was a loose fish before she was struck by Robertson, their harpooner, a second time; but as, on the contrary, there is the strongest possible reason to believe that the foreganger of the Priscilla's harpoon was cut designedly by the Caledonia's crew, the whale was the property of the Priscilla. Even supposing the foreganger to have been broken by accident, and the fish a loose fish, yet as it is clearly proved the fish was so wounded and disabled that she might have been killed by the Priscilla's crew without any aid whatever; and as the Priscilla's crew were in pursuit, it was contrary to the principles of law, and the practice of the fishing, for the crew of the Caledonia to interfere, except for rendering assistance. That the promise in particular bound them to this course, and the assistance being rendered after the fish was struck by the first harpoon, they were barred by their covenant from taking advantage, even if the fish was loose when Robertson came up.

After hearing counsel,

“ LORD THURLOW :

“ MY LORDS,

“ 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; and the special circumstances relied on by the respondent, could not vary the general rule. This was a mere ques-

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 ———— free from the harpoon of the respondent's ship when struck by the
 CAMPBELL, & C. appellants? Having gone carefully over the whole evidence, I am
 v. quite free to say, that the evidence of the fish being loose at that
 RUSSELL, & C. time preponderated over that given on the part of the respondent;
 and therefore I move to reverse the judgment of the Court of Ses-
 sion, and affirm that of the Judge Admiral."

The LORD CHANCELLOR concurred with Lord Thurlow in this judgment.

It was ordered and adjudged that the interlocutors be *reversed*; and that the reasons of reduction of the sentence of the Judge Admiral be repelled.

For Appellants, *F. Erskine, W. Grant.*

For Respondent, *Sir J. Scott, J. Anstruther.*

NOTE.—This appears to be the case noticed by Professor Bell, and in Ivory's Erskine (note), under the name of Rose, 24th Nov. 1792. Vide Ersk. b. ii. tit. 1, § 11, note. Bell's Pr. § 1289, and Illus. vol. i. p. 374.

JOHN CAMPBELL and Another, Underwriters, *Appellants*;
 FRANCIS RUSSELL and Co., Saltcoats, *Respondents.*

House of Lords, 4th March 1794.

INSURANCE—CONCEALMENT—DEVIATION. — Held, where a vessel was insured on her voyage home from a foreign port, that the concealment of two letters of advice, which represented the vessel to be unseaworthy, and weakly manned, and that she had been boarded in a sinking state, were facts material to the risk, and not having been communicated, the policy was voided. Also, that the delay of the vessel at Elsinore and Stromness amounted to deviation.

The brigantine Russel, belonging to the respondents, being then at Stockholm, and loading iron there for Dublin, the captain wrote home of his being clear and ready for sea; and in another letter to the same effect, without making any allusion to insurance. After proceeding to sea, the vessel encountered a storm, and put into Airtholm, near Elsinour, in a