

## ***Clift v Kane*, (1870) 5 Nfld LR (en banc)**

**Hoyles CJ.** (Hayward J. concurring) —

[1] This was an action in trover brought to recover the value of a thousand seals, alleged by the plaintiffs to have been wrongfully taken from the crew of their vessel, the Brothers, at the ice in the spring of 1869, by the defendants, Kane and his crew, and subsequently sold by Kane to the other defendants, Baine, Johnston & Co.

[2] The facts of this case, so far as it is necessary to refer to them for the determination of the questions now under consideration, are as follows:

[3] On Saturday the 17th of April last plaintiffs' vessel, the Brothers, Barbor, master, lay jammed in the ice in Green Bay, a few miles from the land, and, seals being numerous between the vessel and the shore, the crew were sent out to kill them. Defendants' (Kane's) vessel, the only one then in sight, was also jammed in the same ice and lay about eight miles S. S. E. of the Brothers. Plaintiffs' crew killed, as they computed, about 3,000 seals, of which some were sculped and piled, some were cut open, and others were left round. One hundred and fifty were taken on board in the course of the day, and a flag was set up to mark the place where the rest were to be found, which was about two miles from the vessel. On the following Sunday, Monday, Tuesday and Wednesday, plaintiffs' crew continued to haul their dead seals, bringing on board about three hundred each day; but, upon Wednesday, the ice and the vessels shifted their positions so as to remove the seals further away from the plaintiffs' vessel and to bring them much closer to Kane's. On Wednesday Kane's men did not interfere with the dead seals, but on Thursday, the Brothers being then about four miles from them and Kane's vessel being in their midst, the crew of the latter vessel occupied themselves all day in hauling them on board their own ship. The crew of the Brothers also went to the seals on that day and brought one small tow on board, but, partly on account of the distance and the difficulty of hauling, and partly because, as they supposed, Kane had secured what remained, did not return for a second tow. On the next day, Friday, there occurred a change of wind and an opening of the ice, which would have enabled the Brothers to reach the pans where they had left their seals, but her captain did not proceed thither, being under the belief that none remained on the ice, and shortly after both vessels returned to St. John's.

[4] The defendant (Kane) admitted having taken, on Thursday and Friday, about six hundred and forty dead seals on the ice in question, but contended that some of these had been killed by men from the shore, and that what he had taken of those killed by Barbor's crew were for the most part round and scattered, and could not have been recovered by the plaintiffs' men, and that he, the defendant, had, therefore, the right in law to take them and appropriate them wholly to his own use.

[5] The jury were directed by the court to say: *first*, whether the plaintiffs'

servants had killed any seals, and by taking measures to identify and recover them by the use of flags, by sculping, piling, cutting, marking or such like means, had reduced them into possession; *secondly*, if so, whether defendant (Kane) and his crew had taken any of these seals. If they had, the jury should find a verdict for the plaintiff—1st, for their whole value if taken unnecessarily, that is, wrongfully, the plaintiff's crew having the power of recovering them if not meddled with; or, 2ndly, for the whole value, less salvage, if taken necessarily, that is, to save them from total loss, the plaintiff's crew having no power to recover them.

[6] To this ruling, Mr. Pinsent, for the defendants, excepted that the jury should have been told that if the plaintiff's crew had no power to recover the seals their right of property in them had been lost and the verdict should be for the defendants; that there was no proof of a joint conversion as against the defendants, Baine, Johnston & Co.; that the present plaintiffs were entitled to sue for half the seals only; and that there was a misdirection in telling the jury that the only custom proven applied to a scattered round seal, and in not directing the jury that the valuation should have been estimated in relation to the circumstances, and that if there were a mixture or confusion of the plaintiffs seals with those of others without distinguishing them, there would be no right of property as against the defendants.

[7] The jury found for the plaintiffs for \$952 by a special verdict, by which they declared that in their opinion the plaintiffs had not the power of recovering the seals at the ice.

[8] A rule *nisi*, founded on the above exceptions, was heard and argued during the present term, and of this rule we have now to dispose.

[9] As regards all of these exceptions after the first the judges are *unanimous* in holding that they cannot be sustained. The sale of the seals by Kane to Baine, Johnston & Co. was a joint act of the defendants, inasmuch as there could be no vendor without a vendee, and this joint act being an illegal dealing with the property of another, was a joint conversion—*see Roscoe, 612*; the evidence of custom, except so much as established what was not disputed, that a seal abandoned at the ice might be taken possession of by the finder, only went to show the illegal and conflicting practice of two or three sealing masters—the value of the seals was rightly estimated as that which prevailed at the time of the conversion—*Read vs B. Fairbanks, 16 B, 692*; there was no evidence to raise the question of loss of property by intermixture, and the plaintiffs being the absolute owners of one-half of the seals and having a special property in the crew's half, and a right of present possession of the whole, if only for the purpose of distribution, had a right of action for the recovery of all that were taken.

In paragraph 10, Justice Hoyles for the majority gives a succinct overview of the issue and his conclusions. In effect, that issue is: *what acts of control are necessary to bring a wild animal into legal possession?*

Be careful to note how Justice Hoyles describes the salient acts of control here:

“killing, seizing and dealing with the seals”.

[10] The first exception, as involving a principle of great practical importance in the prosecution of the seal fishery, and as one upon which a diversity of opinion appears to exist, requires a more particular consideration. It maintains that the jury should have been told, in opposition to the ruling at the trial, that if, after killing the seals and dealing with them in the manner described, the crew of the Brothers had, by the shifting of the ice or the chances of wind or weather, been prevented from finally getting them on board their vessel, the seals returned to the common stock and became the property of the first finder who chose to appropriate them. To this position I am unable to subscribe as it is, in my opinion, unsound in principle and unsupported by authority, and I am constrained to hold, after much consideration and some research, that the direction given to the jury on this point is the only one that can be sustained. This direction was in effect that by killing the seals and reducing them into possession in the manner described, the plaintiffs, through their crew, had obtained an absolute property in them, and would be entitled, subject in a certain event to the payment of salvage, to recover them from any person into whose hands they might afterwards come. This statement, comprises two positions: first, that the killing, seizing and dealing with the seals by piling, sculping, etc., in other words, reducing them into possession vested an absolute property in them in the party so killing and dealing with the seals; and secondly, that the property once absolutely vested could not lie divested out of the owner without his consent, except by certain exceptional causes having no application here.

[11] For the first position I cite the following authorities. In *2 St. Com. p 81*, it is said:—“With regard to animals *ferae naturae*, all mankind had by original grant of the Creator a right to pursue and take any fowl or insect of the air, any fish or inhabitant of the waters; and this natural right still continues in every individual, unless when it is restrained by the civil laws of the country. By the laws of this realm accordingly, all persons may on their own lands or *in the seas* in general, exercise this right, and when a man has once seized animals of this description they become, if reclaimed or confined according to the doctrine laid down in a previous chapter, his *qualified* property, or *if dead are absolutely his own*, so that to steal them or otherwise to invade this property is, according to the nature of the sometimes a criminal offence, sometimes only a civil injury.” So in *Blackstone, vol. 2, p 403*, “and when a man has once so seized them, (i.e., animals *ferae naturae*) they become while living his *qualified* property, or *if dead* are absolutely his own”—*5O, 2 Tomlin’s Law Dictionary*, citing under the head “Property,” *Dalton 371-Finch 176-11 Reports, 50 Raym, 16*—“one may have an absolute property in things of a base nature, as dogs, but not in things *ferae naturae*, unless dead,” and in *Bacon’s Abridgement, vol. 4, p. 1, Title “Game,”* it is laid down generally, that animals *ferae naturae*, belong to the parties taking and killing them in the same manner as any other chattels.

[12] 2ndly,—As regards the divesting of the property, once absolutely vested—to

contend that a person would lose or be deprived of his right of property in dead seals which he had piled on the ice, while awaiting an opportunity to take them on board his vessel, by a whirl of the ice or a change in the wind or the weather, carrying them out of his reach, is to say that any accident which may happen to deprive him of the *possession* of his property will deprive him of all *right to it*. For such a position I venture to think no authority can be found in the books. If a man lose his purse or his coat (and I have shown that as regards the *right of property*, no difference exists between one inanimate chattel and another) he is thus deprived of the possession, the profitable use, and beneficial enjoyment of it, but his right of property in it remains unaltered, and any one who finds it must restore it. Where is the authority which declares that with the possession, or the power of recovering possession, the right of property also departs? On the contrary, the authorities are the other way, thus in *2 Bl. p. 9 & 1 St., Co. p. 149*, it is thus laid down: "Property both in lands and moveables being thus originally acquired by the first taker it remains in him by the principles of universal law, till such time *as he does some other act which shows an intention to abandon it*, for then it becomes *publici juris* once more. So if one is possessed of a jewel and casts it into the sea, or a highway, this is such an express dereliction that the property will be vested in the first finder—not so if he hides it and it is discovered, there the finder acquires no property, and if *he loses* or drops it by accident, it cannot be collected from thence, that he designed to quit the possession, and, therefore, in such a case, *the property still remains in the loser, who may claim it against of the finder*."

[13] Further, in the second vol. of the same work, where it treats of the various modes by which property may be acquired, I find none enumerated except such as depend upon the will of the owner (assignment, for instance), and those already referred to as inapplicable, namely, by operation of law, as by forfeiture, seizure under process, sale in market overt, etc. I find no head of title by finding, except in cases of abandonment,—abandonment not, be it observed, of the search or of the hope of recovery, but of the right of property. In the present case, however, there was not only no evidence of abandonment, but the whole of the plaintiffs' case went to show there was no abandonment. The only questions, therefore, for the jury, as regards the plaintiffs' right of recovery, were: 1st—had the property in these seals vested in the plaintiffs, a compound question of law and fact, to be determined by the application of the law as stated by the court to the facts, of killing, sculping, piling, etc., if found by the jury; and 2nd—had the defendants taken them? If so, the probability that the plaintiffs could not have recovered them from the ice became immaterial except in considering the amount of damages where it received full effect, in the direction to allow salvage, and this exception, consequently fails.

[14] In his argument on the rule *nisi*, Mr. Pinsent seemed to contend that the means mentioned in the charge "killing, sculping, etc." did not form or constitute that reduction into possession which is necessary to create property in animals *ferae naturae*, and that it was also necessary for this purpose that the first taker should be in a position to secure and continue the possession he had originally

obtained, by taking the seals on board his vessel, or, at least, by having the ability to do so, the accidents of the sea notwithstanding.

[15] Neither of these conditions, however, are prescribed as essential by the authorities which I have cited, and with the exception of two local decisions, to which I shall presently refer, none of those mentioned by Mr. Pinsent sustain his position, as they all relate to *living* animals, as to which it is not denied that they can only be the subject of a qualified property which terminates with their escape.

[16] Thus, the passage in *2 Bl., p. 14*, “all these things, so long as they remain in possession, every man has a right to enjoy without disturbance, but if once they escape from his custody, etc”, plainly applies to the live animal having the power within itself of escaping, and not to the dead carcass which may be lost but cannot escape; so with the passage in *Tomlin*, “If a swarm of bees light upon a tree they are not the owners of the tree till covered with his hive”; so with the whale cases in *1 Taunton*. And the analogy attempted to be drawn between bees once hived flying away and escaping though pursued by the owner, who thus loses his qualified property in them, and dead seals, floated away by the ice, fails on the same ground. In the live animal the possessor had a *qualified property* only, which ceased when it escaped. In the dead seal, an inanimate chattel, he had an *absolute property* which accidental loss or wrongful deprivation of his possession could not affect. The case of *Young vs. Hickens, 6 Q B.*, is one in which the plaintiff had neither property nor possession in the fish the subject of the action, they being not only alive but at liberty; and the injury done consisted, not in depriving him of property already obtained, but in preventing him from acquiring it.

[17] The only conditions required by the authorities for the acquisition of an absolute property in animals, *ferae naturae*, are *killing and seizure*—to insist further that the taker should have the power of permanently continuing in possession, or should not be subject to accidental loss, or should take the property on board his ship, seems to me to be requiring conditions unknown to the law, conditions purely arbitrary, since with as much reason might it be required that the seals should be brought into port as that they should be taken on board ship, as they are exposed to the perils of the sea and the chances of loss in one case as well as in the other.

[18] It by no means follows, however, as Mr. Pinsent further contended, that under shelter of the principle excepted to by him, it would be competent, for any person to go upon the ice, and by “slaughtering right and left,” establish a property in the seals he killed, thus depriving others of them while he could not retain them for himself. Merely killing without seizing, that is, taking possession, would not avail to establish a property; one cannot obtain the property in a flying gull by simply shooting it from the deck of a ship, nor in a seal by shooting it on a pan to which he cannot obtain access; but if in addition to the killing, he expend time and labor in obtaining corporal possession of the dead animal, he will then have acquired an absolute property in it, which it would be hard that

he should be deprived of by accidental loss.

[19] The same principles would, of course, govern the case put during the argument of the whale supposed to be killed off the Western Islands, and subsequently picked up in St. Mary's Bay. If the whale was killed merely, and not seized or taken into possession, the killer would have no claim on the finder, but if in addition to the killing he had, taken possession of it, its accidental loss would not deprive him of his property, but he would be entitled to claim it, subject to salvage, in like manner as he could claim a bale of goods washed off the deck of his ship or cast overboard in a storm—2 *Bl.* (557 *Abbott*, 8*k.* 410).

[20] Much reliance was placed by Mr. Pinsent upon the alleged fact that in actions heretofore brought in our courts for the recovery of seals wrongfully taken at the ice, the plaintiff's right to recover was made by the judges to depend upon the probability of his recovering his seals had they not been interfered with, and that this circumstance was generally made an important point in the plaintiff's case.

[21] Had the question now under consideration ever been formally raised, argued and determined before the full court, and decided as Mr. Pinsent contends it ought now to be, it would even in such case, having regard to the important effect such a decision would have on the right of property in one of the great staples of our industry, be a very grave question whether if clearly erroneous it ought not to be over-ruled, as in a matter of such moment, where a sound *ratio decidendi* would be of more importance than uniformity in error, it would certainly be our duty rather to correct than follow the mistakes of our predecessors, if such they were.

[22] No such decision of the full court, however, can be cited, and I am of opinion, judging from my own experience, which though differing I believe from my learned brother judge, Robinson's, seems to me to be confirmed by the only reported cases I have been able to see, that Mr. Pinsent's statement in this respect was much too broad.

[23] Assuming, as Mr. Pinsent contends, that the *power* of recovering the seals at the ice was a condition precedent to the plaintiff's *right* of recovering in the action, it ought to have been expressly put by the judge to the jury in every case; but if, as Mr. Carter contends, and as I think rightly, this power was of importance only in relation to the damages, it would only be put by the judge when expressly raised on the defence. In the former view the question would always arise, in the latter for a different purpose very frequently, for the contest in seal cases having been almost invariably as to the taking by the defendant (a charge denied by him and affirmed by the plaintiff), the power of recovery would naturally be mooted in the course of the trial, not merely in relation to the damages, but because the fact of the seals having been taken by some one would best be established by shewing that the plaintiff's crew recovered the pan on which they had been piled, a piece of evidence which would for the most part establish the power of recovery.

[24] The cases to which I have had reference, with the exception of *Power v. Jackman*, and *Noel v. Warren*, cited by Mr. Pinsent seem to me to support this distinction.

[25] Thus, in *Stone and Dwyer*, two questions only were sent to the jury by Chief Justice Brady. 1st, Were they satisfied the plaintiff's crew killed and piled the seals in question; and 2ndly, Did any of the defendants take any of these seals? Nothing was said by the judge as to the plaintiff's power of recovering the seals, nor was it made a point of by the defendants, whose sole defence was a denial of the taking. In this case the pan was recovered by the plaintiff's crew.

[26] In *White v. McBride* before the same judge, the seals appear to have been shot and left on the ice, and on a motion for a non-suit the question was raised as to the plaintiffs having reduced the seals into possession and so as to obtain property in them, which was reserved for further discussion, but the jury finding that the defendants did not take the seals, the question raised was not of course brought up again, and nothing was said at any time as to the power of recovery.

[27] In *Power v. Jackman* the position for which Mr. Pinsent now contends was distinctly raised (as would appear) by him as a ground of defence. In his charge Mr. Justice Little, although in the first instance laying it down in accordance with the authorities, that by killing the seals, sculping and piling them, the plaintiff had reduced them into possession, certainly put the ability of the plaintiff to recover his seals to the jury as a condition precedent to his right to recover in the action. Several exceptions were taken to the charge, but what these were does not altogether appear. It must not be overlooked that if the plaintiff, who alone would be interested in excepting to the charge upon the point now in debate, did take such exception, the finding of the jury in his favor for £133 would of course supersede it.

[28] In *Noel v. Warren*, before the same judge, it does not appear whether any exception was taken or point raised on the ruling, which was as follows: "If a party had killed, sculped, piled and marked, or done such acts as to establish ownership in the seals, and had not abandoned them, any person taking them would be liable in this action, but if he left them scattered about without reasonable hope of recovery it would not be so."

[29] In this case also the plaintiff had a verdict, and therefore no further proceeding was taken; and it is also conceivable that in any similar case the facts might render such ruling unimportant, by establishing beyond doubt the ability of the plaintiff to regain his seals, in which event exceptions to the charge might not be taken.

[30] These two cases, subject to the observations I have thought it right to make upon them, certainly go to support M. Pinsent's position, and as judicial decisions they are doubtless entitled to much respect, but being cited with the object of influencing our judgment in the matter we have now to decide, it is our duty, particularly if they are questioned, to test them by the application of legal

principals, and after, for myself, applying this test, I am unable for the reasons I have detailed to concur in them.

[31] Whether the other judges, both cases being in the Supreme Court, approved of this direction does not appear. If they did, it would seem to have been without hearing counsel upon the principles involved in it, and under the disadvantage insuperable from trials at *nisi prius* of being obliged to come to a hasty conclusion upon perhaps difficult points of law, without reasonable time or opportunity for reflection or investigation.

[32] The present case then, being the first within my experience, in which the defendant, avowing the taking of the seals, rests his defence upon this ground, and brings it before the full court for deliberate determination, comes to us as one *primae impressionis*. It has been well argued at the bar, and after full consideration I am clearly of opinion that in an action of trover for seals taken at the ice, it is in law no defence to say that if not taken by the defendants the plaintiff in all probability could not have secured them.

[33] In pursuing this inquiry I have had no regard to the supposed expediency or equity of either of the rule contended for, because considerations of that kind, although sometimes useful in aiding the construction of a doubtful statute by throwing light upon the intentions of the Legislature, are apt in other cases unduly to bias the mind of the judge, whose only duty it is to discover what the law is, whatever may be its character, and having found, to declare it.

[34] I cannot, however, accept the suggestion that the law, as I hold it to be, would be either inexpedient or unjust; on the contrary, I believe that it best accords with sound principles of public policy and with natural equity.

[35] Panned seals, drifted out of the possession of the owner, would *not* be left by third parties falling in with them to float away and become lost to the general wealth of the community, merely because the right of property was preserved to the original taker. The certainty of a liberal salvage, and the probability of their never being claimed, would always be sufficient inducements to the finder to bring them into port.

[36] Nor would actions at law be multiplied by reason of the original taker of lost seals instituting proceedings against every one who might bring in seals which he himself had not killed. The difficulty of identification in such cases, and the fear of costs, would sufficiently restrain such speculative litigation.

[37] On the other hand, by making the right to recover in an action dependent upon the probable ability to regain possession, the title to such property would be rendered precarious and uncertain by being based, not upon matter of fact, but upon matter of opinion; while at the ice a sense of insecurity and a feeling of suspicion and mistrust would be engendered on the part of its possessor, and the desire for the fruits of another's industry on the part of less fortunate neighbours which would not tend to promote those kindly feelings, and that respect for each other's rights which ought to actuate men engaged in the same pursuit,



particularly a pursuit so hazardous as the seal fishery; and a strong temptation would be held out to crews at the ice to appropriate panned seals under any circumstances, since if their possession were afterwards successfully questioned in a court of law, they would lose, besides costs, nothing that they ever owned, while their chance of retaining their plunder would be greatly increased, as it might easily be made contingent upon their being able to satisfy a jury that reliance should be placed upon their opinion of the inability of the plaintiff's crew to regain possession.

[38] It is true this temptation would also exist if the inability to regain possession could only affect the amount of damages, but it would exist in a comparatively trifling degree, and cases of wrongful taking and consequently actions on that account would be less numerous, and where resort was necessarily had to legal proceedings, the taking would frequently be admitted with a view to salvage, and much of that conflict of testimony which we sometimes find and which is so painful to witness would be avoided.

[39] As a matter of equity the plaintiff's better position cannot I think be questioned. The principle for which the defendants contend would altogether deprive the plaintiff's crew of valuable property, on which they had expended much time and labor, and about which they had incurred great personal risk, solely because by an accident beyond their control they were unfortunate enough to lose their possession of it, and would give it to the defendant who had not laboured for it, and whose whole merit consisted in taking it on board their ship when it was brought by the currents within their reach. The *true* principle regarding this property as a common fund created by one party and saved by the other, would recognize the just claims of both and give both compensation for their labor, by sharing the fund between them. What could be more just or reasonable?

[40] Judge Hayward concurring in opinion with me, this rule must be discharged.

**Robinson J.** (dissenting)—

[41] After the best consideration I can give this subject, I cannot arrive at any other conclusion than that the rule for a new trial should be made absolute on the ground of misdirection in two particulars, and on the ground that one of the principal issues raised by the pleadings, viz., whether the plaintiffs had property in the seals, was determined by the Court and was not submitted to the jury.

[42] The action was brought to recover damages for the wrongful conversion of the pelts of certain seals which the plaintiffs allege they had killed, and sculped, and left on the ice several miles from their vessel during the last seal fishery.

[43] The defendants filed two pleas, 1st, denying that they had taken the pelts; and 2nd, denying that such pelts were the property of the plaintiffs.

[44] Actions similar to the present have been common in our Courts. I have been engaged in the trial of many both as counsel and judge, and, up to the present, I do not remember and cannot find a report or record of a single one,

in which it was not the ruling of the Court that to vest in the plaintiffs such property and possession as would enable him to recover, he must satisfy the jury not only that he killed the seals, but that they continued under his control, that he had not abandoned the intention to return, and the hope to recover them, and that he had a reasonable prospect of being enabled to take them into his complete possession by putting them on board his vessel if the defendants had not interfered with him.

[45] Whether such direction was coeval with the seal fishery, or whether it arose after the usage thereat had been proved and established and therefore had become settled law which judges are bound to notice judicially, or when or how it arose I cannot say; this much I can assert, that during my experience at the bar and on the bench, embracing a period of forty years, such was the law invariably laid down by the Court. I do not recollect one instance in which it was questioned, no record of any exception to that ruling is produced (although in every case it was obviously the interest of one side or the other to have challenged it if erroneous) but the law has, up to the trial of this case, so far as I know and believe, been acquiesced in by judges, bar, and suitors, and has regulated the procedure of the Court.

[46] Mr. Pinsent, in his able argument, has referred to the reports of two trials similar to the present, that were published in 1858, and they are conformable with my experience of the law heretofore administered in such cases, whilst none have been cited to the contrary.

[47] On the trial of this cause, last term, I proposed to adhere to the ruling thus established, and to deliver to the jury the following direction, which I wrote at the time:

Plaintiff entitled to recover if he reduced into full possession any seals which Kane afterwards took, and plaintiff reduces seals into such possession by

1st. Killing them.

2nd. By taking measures to identify and recover them by sculping, cutting, marking, piling or such like means.

3rd By not abandoning the hope of recovering, and intention of returning to them, and

4th. By being able to get them on board if not prevented by Kane.

First question.—Did Kane take any seals of plaintiffs so circumstanced? If yea, verdict for plaintiff for their value. Second question.—If none, verdict for defendants.

[48] My learned brethren, however, were of opinion that from the elements which constituted the plaintiffs' property, should be excluded their intention to return, their hope to recover and their power to secure the seals on board; holding that their property became absolute by merely killing the seals; and

they also determined that the jury might, under a certain contingency, allow the defendants salvage.

[49] Such being the opinion of the majority of the Court, the direction to the jury was given in the words written by the Chief Justice, as follows:

First question is: Did plaintiff kill and reduce into possession, by taking measures to identify and recover them by the use of flags, by sculping, piling, cutting, marking, or such like means?

Second.—If so, did defendant take any of these seals?

Third,—If both questions answered in the affirmative find for plaintiff.

1st, for whole value if taken unnecessarily, i.e., plaintiff having power to recover.

2nd, for whole value, less salvage, if taken necessarily, i.e., plaintiff having no power to recover.

[50] The jury, on this direction, found a verdict in favor of the plaintiffs for \$952, adding, that in their opinion the seals had been lost by the plaintiffs, and were taken by the defendants when the plaintiffs had not any power to recover them at the ice, and that the jury had made in their verdict, an allowance to the defendants on account of salvage.

[51] To unsettle the law which a long and uninterrupted series of decisions had established, can hardly fail to occasion confusion and injury in a commercial community, and the present case furnishes a striking instance of the effect of such disturbance. Under the former ruling of our Courts, the facts here found by the jury would have resulted in a verdict for the defendants, whereas in consequence of the new interpretation of the law, they result in a verdict for the plaintiffs.

[52] In my judgment the former ruling was correct, and it is the latter interpretation that is erroneous, not only by reason of the Court ignoring the usage of the seal-fishery which had ascertained the facts requisite to constitute ownership of seals at the ice, without taking the opinion of the jury as to what other facts are requisite, but also by reason of the Court introducing the question of salvage in relation to damages.

[53] To dispose of this last point first—

[54] It is observable that the defendants did not prefer any claim in the nature of a set-off for salvage, such a claim has never been recognized in seal cases before, and in an action of trover a set-off is not admissible at all. There is only one way in which a claim for salvage could, in such an action, properly arise, namely, as a bar to the plaintiff's right to recover, but that was not the way in which it was here put to the Court, if it had been the result must have been different, for a plaintiff cannot recover in trover, unless he had, at the time of conversion, the right to immediate possession, as well as the property—*Roscoe 638*; but the plaintiffs here had no such right to possession by reason of the

defendant's claim upon the seals for salvage—"an action of trover will not lie to recover wrecked goods before tender of expenses."—*Hartford v. Jones, Lord Ray, 393*)—the action therefore was premature, and the defendants were entitled to a non-suit, or to a verdict—*2 Sel. Np. 1353*, instead whereof, the verdict is for the plaintiffs, but for a sum less than they are entitled to, if they are entitled to any, and the defendants are condemned in the whole costs of suit for not delivering up property which they had a lien upon and a legal right to retain.

[55] It may be said that this was a short method of doing justice, to speak colloquially, a rough and ready mode of effecting an equitable arrangement between the parties. I am quite convinced that such an arrangement was contemplated, but I doubt the success, and I question the correctness of the proceeding; it is not one which could properly have been introduced in the present case, because the Supreme Court of Newfoundland is bound to administer justice on the same principles that prevail in Westminster Hall; the defendants in an action at law are restricted to legal pleas, they must shape their course by established practice, and expect to have their rights disposed of by the rules of law. It has been seen how a departure from strict law has operated to the prejudice of both parties, and it seems to me that the importation of hypothetical equity does not mend the matter, for I am unable to discover any equity in making one sealer—who secures animals *ferae naturae* found adrift upon the ocean abandoned by the killer, and lost to all the world,—pay any portion of their value—to another sealer who, although he killed them, had failed, through the ordinary casualties of the fishery, to secure the possession of them, and was obliged, however involuntarily, to abandon the pursuit of them.

[56] It has been asked, would it not be fair to allow the man who killed the seal some benefit for his labour? Reading the present by the light of the past I venture to say, no. What he did was not for the benefit of another but of himself; he acquired no right whatever to these wild animals until he secured possession (except the right of uninterrupted pursuit). When he was compelled to abandon them they again became common property, open to all; he who lost them with them lost his labor; he who captured them took them free of all lien, for lien presupposes actual possession.—*Kinlock v. Craig, 3 S. R.; Taylor v. Robinson, 8 Saunt.*

[57] For these reasons I am of opinion that the direction to the jury, on the subject of salvage, occasioned a miscarriage of justice, and amounted to a misdirection of law.

[58] The other misdirection appears to me to have been in the judges undertaking to prescribe the facts necessary to constitute ownership in seal pelts drifting about upon floating ice.

[59] By the 2nd plea the fact of ownership was expressly denied, it is the province of a jury to find facts, and when found the judge must apply them to the law. Ownership is therefore a mixed question, compounded of facts and law, and in many instances it is settled by usage. The course pursued in English Courts

with reference to whale cases has been to leave a jury to ascertain what facts, by the usage of trade, constitute the right of possession in the whale; the like course ought in my opinion to have been followed in this case, since it was determined to abandon the usage that had heretofore been recognized; but instead thereof the Court assumed that certain acts would establish ownership of seals on the ice, rejecting what I understand to have been the ancient usage that had hitherto been our guide, and ignoring the province of the jury to find any other in its place.

[60] Ships from the United Kingdom, from the United States and Newfoundland are now engaged in the seal-fishery, and it is very desirable that the rule of law which governs the practice of such fishery should be well defined, and as I am so unfortunate as to differ in opinion from my brother judges, as they do from their predecessors, I wish to explain the ground upon which my judgment rests. It seems to me a radical error to place wild animals and domestic animals in the same legal category, because the distinctions between them are many and material, and arise from the fact that the latter are the absolute property of some person indefeasible except by his own act, whilst the former are, by nature's law, common to all, and are only the subject of a qualified property dependant for its acquisition upon special circumstances, and liable to be lost by accidental causes.

[61] I find the law upon the subject thus laid down in *2 Black C—389*, and adopted by the recent and very learned commentator Mr. Serjeant Stephen: "In animals of a tame nature such as horses, sheep, &c., &c., a man may have an absolute property as in any inanimate thing, but in animals *ferae naturae*, a man can have no absolute property," "he may be invested with a qualified, but not an absolute property in all creatures that are *ferae naturae*, by reclaiming or so confining them within his own immediate power that they cannot escape and use their natural liberty,"—*p. 390*. "These are no longer the property of a man than while they continue in his keeping or actual possession," and the author gives an example in the case of bees, "which are *ferae naturae*, but, when hived a man may have a qualified property in them," and Bracton adds it is occupation, i.e., hiving and including them that gives the property in bees, "though a swarm lights upon my tree, I have no property in them till I have hived them, a swarm which flies out of my hive is mine, so long as I can keep it in sight, and have power to pursue it." Substitute the word "seals" for "bees" and the word "vessel" for "hive" and we have the present case, *mutado nomine, de te fabula narratur*.

[62] Mr. Serjeant Stephen, in his commentary, *1 vol. p. 165*, whilst treating of the usufructuary property which a man has in light, air, water, goes on to say, "such also are the generality of those animals that are *ferae naturae*, which so long as they remain in possession every man has a right to enjoy without disturbance, but if once they escape from his custody—though without his voluntary abandonment, it naturally follows that they return to the common stock, and any man else has an equal right to seize and enjoy them afterwards."

[63] It is contended that the right is altered by the death of a wild animal, that

when once it is killed it becomes the absolute property of the killer, and for that contention a dictum in Blackstone, adopted also by Stephen, is quoted, but with all respect I do not think that such dictum refers to the seal-fishery, or has any relation in principle to the question now under consideration—to cleave to the letter without regard to the spirit of a quotation, is what Lord Coke condemns in the maxim, “qui haeret in litera haeret in cortice.” When Blackstone speaks of a hunter converting an animal *ferae naturae* into his absolute property by killing it, he simply means that the hunter thereby gets it into his full possession and control—he chiefly refers to the case of an animal on land, where its death would prevent the probability of its being lost to the killer, and to cases in which the death of the animal is the consummation of the enterprise but in the seal-fishery of Newfoundland every one knows that killing the seal is only one of several steps in the process of reducing its pelt into possession, no doubt it is the first, then follows sculping, then hauling over the ice, (in which act, the pelt is often lost) and finally securing it on board ship; but so long as the seal remains unshipped it is exposed to various casualties which may remove it beyond the power and possession of the killer as completely as if it were alive in the water, and may prevent him effectuating the object of his enterprise.

[64] In Bell’s principles of Scotch law, title “occupancy,” it is declared “that an act of appropriation to vest the property in animals *ferae naturae* is effectual only *when it is complete*.” Now of what avail is it that a sealing crew should kill their thousands, if they are unable—through the perils of the sea and the drifting of the ice—to secure the possession of them in their vessel? Then is all their labour in vain, and the object in view utterly defeated, the qualified property which alone they had whilst killing them is lost, and the event in the present case demonstrates that an absolute and *indefeasible* property had never vested, for the elements defeated it.

[65] It may be useful to reflect for a moment upon the consequences that will result from this new doctrine. I will put a suppositious case likely enough to occur. A man kills a number of seals and leaves them on the ice; before he can take them on board, his vessel is sunk by some accident of the sea, his crew are able to save their lives, but are powerless to save their seals; the ice and the seals drift away and are eventually found by a more fortunate sealer, who takes possession of what he finds thus afloat and unguarded, and appropriates to his own use what otherwise would be lost to all the world. By the doctrine now maintained by my learned brothers, the man who avowedly cannot get possession of these seals and save them for himself at the ice, may nevertheless recover them after they have been brought, by the industry of another, into port, and especially by an action of trover, which presupposes a right to possession, that is admitted to have been a physical impossibility.

[66] Or, suppose another case: A kills a number of seals which he sculps, marks and leaves on the ice; before he can secure them on board, the ice is carried away by wind and tides wholly beyond his reach and control, he afterwards is fortunate enough to fill his vessel with other seals; those first killed are found by

B, who takes possession of them and secures them in his vessel. By the doctrine now propounded the first lot became, by the mere act of killing and sculping, the absolute property of the killer, and although he had not means to secure them or bring them into port, he is nevertheless entitled to recover their value from the man who could and did save them.

[67] These startling consequences are the necessary result of the novel interpretation of the law now introduced, and of abandoning the ancient usage and simple rule hitherto administered in our Courts, which declared that the right of property in seals at the ice was dependent upon the ability to get them into full possession, by putting them on shipboard or on the shore, as is sometimes done.

[68] The case *Young v. Hickens*, 6 Q.B., 606, is to the same effect. The plaintiff had encompassed a shoal of pilchard by a net with the exception of a small opening, but had not actually secured them when the defendant interfered. Lord Denny held that the plaintiff had not sufficient possession to maintain trespass, because he “could not be said to have had possession of the fish till he had *actual power* over it.”

[69] The same rule prevails in the whale fishery. It has been established by various decisions from the year 1788 to 1827, that “the fish is the property of the first striker only so long as it continues under his power and management, and when the first striker loses his power and management over it, it becomes what is termed a loose fish and is the property of the person who afterwards secures it.”—*Littledale v. Scarth*. 1 Taun.; *Hogarth v. Jackson*, 2 C. & P.

[70] I cannot find in any of the whale cases a decision, or even an *obiter dictum*, that the mere killing the fish without the ability to get it into actual possession and power vests absolute property in the killer.

[71] It has been argued that the seal being dead cannot “escape,” and that such word must relate to a living animal. That may be grammatically true, but is it really a fact? Of course it cannot actively paddle away, but may it not passively be floated away? And what practical difference does it make whether the seal is lost by its own action, or by the action of the ice on which it floats? The substantial fact being that whether actively or passively the animal is lost to the man who killed it.

[72] The pernicious consequences to the trade likely to follow from this new interpretation, and the prolific source of litigation it will prove, have been well depicted by Mr. Pinsent; but perhaps such inconveniences are subject rather for the consideration of the Legislature than of the judges, who must administer the law irrespective of consequences.

[73] The grave question here is, what is the law? Is it what the Supreme Court has for the last forty years uniformly and unanimously declared, or is it what the Supreme Court of today by a majority of its judges declare, in opposition to the former ruling? And in the next case that shall arise, which ruling is to prevail?

[74] Such uncertainty in relation to one of the staple trades of the colony cannot

it seems be a voided, nevertheless it is to be regretted; for my part I feel it to be wise and safe “to stand upon the ancient ways,” which in the present instance I believe to be also the legal ways, and in my opinion the rule should be made absolute on the grounds to which I have adverted.