Robert C. Deal
Doctoral Candidate
Department of History
Temple University

Fast-Fish, Loose-Fish: How Whalemen, Lawyers, and Judges Created the British Property Law of Whaling

Abstract

Anglo-American whalemen in the eighteenth and nineteenth centuries used customs largely of their own creation to resolve disputes at sea over contested whales. These customs were remarkably effective as litigation was rare and violence even rarer. Legal scholars such as Robert Ellickson have correctly pointed to these customs as an example of how close knit communities settle disputes without recourse to formal legal institutions or even knowledge of the applicable law. Ellickson's belief, however, that these whaling customs were universally followed at sea and were – in turn – adopted by courts, is not entirely accurate. While courts often deferred, in part, to whaling practices, judges and lawyers were also active participants in creating the property law of whaling. British courts at the turn of the nineteenth century did much to advance one whaling custom over a competing practice. In the 1820s, British lawyers and judges applied the emerging action of interference with trade to whaling disputes and thereby reintroduced aspects of the custom their predecessors had previously rejected.

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Project Summary

This paper is the first chapter of my dissertation. The second chapter looks at how Americans resolved disputes over contested whales. Beginning with municipal regulations and colonial legislation in the seventeenth century governing dead whales that drifted ashore, the second chapter follows the growth of American whaling into the sperm whale fisheries of the South Pacific at the beginning of the nineteenth century. Although American whalemen followed the custom of iron holds the whale by the middle of the eighteenth century, nineteenth century American legal scholars – in the absence of reported decisions from domestic courts – continued to rely on British cases and treatises and thereby failed to recognize that their countrymen had abandoned fast-fish, loose-fish. The American whalemen who dominated the sperm whale fisheries off the coasts of South America continued the practice of iron holds the whale that they had followed in the bowhead and right whale grounds of the North Atlantic. They did not, as Robert Ellickson argues, develop iron holds the whale in response to the challenges of catching swift and notoriously ornery sperm whales. Chapter 3 traces the course of American whaling into the North Pacific bowhead fisheries of the Sea of Okhotsk and the Arctic by the middle of the nineteenth century. A close reading of the depositions preserved in the case file of the first nineteenth century American whale property dispute to be litigated – *Taber v. Jenny* (US Dist. Ct., D. MA, 1856) – shows that while iron holds the whale was still the prevailing norm, American whalemen were also governed by

an unwritten code of fairness that required honesty when providing information to competitors as to the location of whales. Chapters 4 and 5, which are still being developed, look at the court files of the four other litigated nineteenth century American whaling property disputes. These chapters will highlight the improvisational nature of whaling customs and demonstrate that whalemen never really developed a universal law of whaling. The final chapter answers the question of why American whalemen after 1850 and only in the Sea of Okhotsk suddenly lost their ability to settle arguments among themselves at sea or through arbitration. The Sea of Okhotsk – like the Greenland bowhead fishery – presented whalemen with a number of unique environmental challenges that overwhelmed their ability to resolve disputes without involving lawyers and courts.