HARRIS V FITZHERBERT: CUSTOMARY RIGHTS OF LABOUR ON A SHORE WHALING STATION

Stuart Anderson*

This note considers an early adaptation of common law to conditions on New Zealand whaling stations, made relatively easy by the law's prior acceptance of local custom or usage as a determinant of legal rights. The case, Harris v Fitzherbert *from 1843, is significant also for the jury's acceptance of a manual workers' construction of the rule over financiers'.*

A bare description of the legal claim in *Harris v Fitzherbert*,[1] decided at Wellington in April 1843, gives no hint of its interest; actions to enforce a bill of exchange, as this was, must have arisen dozens of times that year in English and colonial courts and the sum at stake was little more than £25. It was the circumstances in which the bill had been obtained, however, that gave the case its importance, with manual workers aligning on the one side and merchants on the other. Had Harris extorted the bill, as Fitzherbert and his merchant witnesses would interpret the story? Or had he had a customary legal right prior to Fitzherbert's, which Fitzherbert was properly obliged to buy out? By allowing the right to be grounded on custom – this in a colony barely three years old concerning a business practised for not much more than a dozen – Martin CJ gave the jury responsibility of confirming or denying the existence of the rule Harris claimed.[2] The case required their most serious consideration, he said, as it would establish a precedent in a matter involving the interests of many, among them, indirectly, several of the witnesses they had heard.

* Professor, Faculty of Law, University of Otago. This case came to light during the New Zealand Lost Cases Project funded by the New Zealand Law Foundation.

1 *Harris v Fitzherbert* Supreme Court Wellington, April 1843 *New Zealand Colonist and Port Nicholson Advertiser* (Wellington, 14 April 1843) at 3 [*Harris v Fitzherbert*]. This case is reproduced in the Appendix to this paper. There is uncertainty over the correct date of this case; the report says it was Wednesday 4th, however the 4th was a Tuesday.

2 For the origins of New Zealand shore whaling see Harry Morton *The Whale's Wake* (University of Otago Press, Dunedin, 1982) at 230.

The bill was for the balance of Harris's wages as cooper on Alexander Antonio's whaling station at Kapiti for the 1842 whaling season.[3] It had been drawn by Antonio's clerk on William Fitzherbert, a Wellington merchant, after, Harris said, Fitzherbert had explicitly promised to honour it. Fitzherbert had reneged. He had been financing Antonio that year and was the man who supplied the station's food on credit (and gear and clothing perhaps), and who would buy the produce at a pre-arranged price at the season's end. But Harris and some others of Antonio's men had prevented Antonio shipping the final consignment of oil to Fitzherbert unless they were either first paid off for the season or guaranteed their pay. The question was whether they had that right. If not, their conduct would have been unlawful and Fitzherbert could disown the order for lack of consideration.[4] Nothing is said about Harris having a written contract, though very likely he did, but instead his counsel, Alfred Hanson, founded the men's right to treat the produce as security for their pay on custom. The case's interest lies partly in that way of conceiving the issue, partly in the consequence that doing so divided responsibility for the new rule between judge and jury, and partly just in the result (that Harris won). However contingent that victory, it can be seen, and probably was seen, as a victory for labour over capital.

The dispute itself was most likely the collision of a novice whaling operator, a financier making his first whaling investment, and a poor year for whaling. That picture emerges less from *Harris v Fitzherbert* than from *Fitzherbert v Antonio* the previous day, in which Fitzherbert recovered judgment for debts of some £474, his loss on the 1842 season.[5] Casual evidence in that case suggests that Antonio had not had his own station before 1842, in that Fitzherbert is shown to have paid Captain Mayhew to allow Antonio to use the trypots and other whaling gear formerly belonging to John Medares, deceased. Antonio is not mentioned in any of the whaling or local histories. Mayhew, a well-known man among the early whalers and farmers on Kapiti, American vice-consul and the administrator of Medares's estate, had offered Medares's stations at Kapiti and Cloudy Bay for sale in the previous October. The inference from this evidence is that the Kapiti station had not sold, perhaps a sign that cannier minds than Fitzherbert's thought the island had more stations than the declining resource could sustain.[6] Mayhew himself was soon to leave the island.

---

3 It is called an order in the case and may not have been negotiable. In law it would still be a bill, however, because it was drawn on a third party.

4 John Bernard Byles *A Practical Treatise on Bills of Exchange* (3rd ed, S Sweet, London, 1839) at 72–73.

5 *Fitzherbert v Antonio* Supreme Court Wellington, 4 April 1843 *New Zealand Colonist and Port Nicholson Advertiser* (Wellington, 11 April 1843) at 2.

6 For Mayhew, see Chris Maclean *Kapiti* (Whitcombe Press, Wellington, 1999) at 122 and 159–161. For Medares's estate, see *New Zealand Gazette and Wellington Spectator* (Wellington, 25 September 1841) at 1 and also *New Zealand Gazette and Wellington Spectator* (Wellington, 2 July 1842) at 1; there is phonetic variation in spelling his name – 'Medaris' in the *Australasian Chronicle* (Sydney, 24 December 1840) at 3, but 'Medary' in the *New Zealand Gazette and Wellington Spectator* (Wellington, 10 October 1840) at 2, and 'Madiera' in the *New Zealand Gazette and Wellington Spectator* (Wellington, 24 July 1841) at 3. This

Fitzherbert, whose ambitions had earlier run to medicine or a college fellowship, was a reluctant merchant arrived in the colony in September 1841. His arrival had been driven by anxiety for the progress of his partnership, the original intention being that Fitzherbert would handle only the English end of the business.[7] Finding few openings he turned to whaling, where he would have to have threaded a way between operations already well established. The season developed so poorly, however, that after a few months Antonio had had to renegotiate his agreement with Fitzherbert. This resulted in tying himself into a three-year contract and mortgaging his boats, but allowing him to roll his first year's debts over to the next – a concession, however, which Martin CJ would ultimately find worded too imprecisely to shield Antonio from Fitzherbert's suit just eight months later.[8]

Fitzherbert did take one cargo of oil and bone off Antonio's station in October 1842, but when his vessel returned for the remainder the men held some back as security for their pay. That crisis was eventually resolved by Fitzherbert writing to Antonio undertaking to honour bills Antonio might draw on him, one of which was then made out to Harris. We do not know which if any of these Fitzherbert paid, whether he singled Harris out for non-payment, and if so why. Nor do we know anything about Harris, save that he was reputable enough to be hired, apparently, by Robert Jillet (or Jillett) as a cooper for the 1843 season.[9] Jillet, who was both whaler and farmer on Kapiti, was consolidating whaling there, quite likely attracting headsmen from other stations to his service, a successful operator for a few years until the whaling finally gave out.[10] Whatever reasons Fitzherbert had for not paying, however, he rested his legal defence on a distinction between the general run of whaling hands, who were paid a lump sum calculated as a share of the station's produce (largely contingent, therefore, on the season's success), and Harris, who was one of the station's few employees paid by a monthly wage. Only the former, his counsel Hugh Ross argued, had an interest in the oil, hence, perhaps, a lien over it until paid; wage earners must look to their employer in the ordinary way.

---

suggests he may be "Mr John, the Portuguese" recounted in Edward Jerningham Wakefield *Adventure in New Zealand* (J Murray, London, 1845) vol I at 108.

7 David Hamer "Fitzherbert, William" (2010) Dictionary of New Zealand Biography <www.teara.govt.nz>. The partnership was promptly dissolved: *New Zealand Gazette and Wellington Spectator* (Wellington, 20 October 1841) at 2.

8 After losing the case (see above n 5), Antonio tried unsuccessfully to nonsuit Fitzherbert on the ground that this agreement barred the action: *Fitzherbert v Antonio* Supreme Court Wellington, date unknown (July/August 1843) *New Zealand Gazette and Wellington Spectator* (Wellington, 2 August 1843) at 3.

9 *Harris v Fitzherbert*, above n 1, evidence of Joseph Burrell.

10 Nigel Prickett "The Archaeology of New Zealand Shore Whaling" (National Historic Heritage Workshop, Wellington, September 2002) at 86 and 96; "Oil" *New Zealand Gazette and Wellington Spectator* (Wellington, 13 January 1844) at 2; see also "7 Robert Jillett (1812–1860), Shore Whaler" (2010) Jillett Family <jillettfamily.com>.

At least, that is probably what he argued. The newspaper report, though detailed, is mostly a transcription of evidence exactly like one finds in a judge's notebook. But the few sentences it attributes to Martin CJ indicate that he perceived the dispute to concern a lien between merchants and coopers, not whaling hands generally, and that it was to be resolved through inquiry into custom. That short analysis reinforces the impression to be gained from the report of the evidence, where the terms *lien* and *custom* appear more frequently as the case progresses, and where the strategy of counsels' questioning appears to be, on the one side, to separate Harris from a general right or, from the other, to include him within it. Of course, if Hanson could not establish that the general right existed Harris would have no chance; but Fitzherbert would have abandoned any hope of that on hearing his own witnesses, who agreed with Harris's that whalers on shore stations usually did have a lien.[11] Harris's success therefore entailed a success for all whaling hands.

The employment structure at Antonio's station seems to have followed the usual pattern.[12] The headsmen and pulling hands were paid by a share of the produce (at a pre-arranged price); a two-boat station would employ about a dozen of them, a couple more if using seven-oared boats.[13] The two essential craftsmen, being the cooper and the carpenter, were on monthly wages, as was the clerk, who would manage the stores, keep the men's accounts and write the station's letters.[14] At the other end of the pecking order the cook too was on wages – sometimes cooks also acted as station interpreter and were paid the oil from the tongue of each whale caught. This does not appear to have been the case at Antonio's. Ross's argument, suggested most explicitly by his witness John Howard Wallace (a Wellington merchant), would be that these men were part of the establishment, in some sense a fixed cost of the station like its rent, differing from the whale catchers who, as part of the venture side of the enterprise and subject to its risk, might plausibly have established a lien vis-à-vis the merchant/financier. Men on the establishment side, however, should be regarded as an operator's cost. Accordingly Fitzherbert's witnesses, all of them merchants or working within mercantile circles, said that they had never heard of coopers having a lien over produce. However Wallace, who was part of that unanimity, may rather have rather spoiled it by volunteering that coopers may have had a lien before law and courts came to New Zealand, a point to which we will return.

---

11 See further, Stuart Anderson "Commercial law on the beach: Shore Whaling Litigation in Early Colonial New Zealand: *Macfarlane v Crummer* (1845)" (2010) 41 VUWLR 453 at 466–467 [Stuart Anderson *Macfarlane v Crummer*].

12 Ibid, at 465; see generally Harry Morton *The Whale's Wake*, above n 2, at 225–239.

13 "Oil" above n 10.

14 For clerks see Edward Jerningham Wakefield *Adventure in New Zealand*, above n 6, at 308; *Burrell v Toms* Supreme Court Wellington 3 October 1843 *New Zealand Gazette and Wellington Spectator* (New Zealand, 18 October 1843), evidence of Daniel Henry Sheridan at 3; *Fitzherbert v Fyfe* in HS Chapman "Notebook entitled 'Civil trials No 7' 1846–1847" (Hocken Library, Dunedin, MS-0411/008) 121, evidence of Joseph Henderson at 141–144; *Macfarlane v Crummer* in HS Chapman "Notebook entitled 'Civil trials No 6' 1845–1846" (Hocken Library, Dunedin, MS-0411/007) 40, evidence of Joseph Carroll at 88.

A plausible case could be made that coopers ranked apart from the rest of a station's labour force. True, all the casks needed for wet work were at that time imported, so the skilled business of making them, which required a long apprenticeship, was already over.[15] But often casks would be supplied knocked down into shooks, and their reassembly itself needed skill. Poor cooperage lost the Weller brothers more than half their shipment of oil from Otakou to London in 1835 through leaks, and their contracts with coopers for two of their southern stations a few years later seem designed to ensure that at least all necessary equipment would now be to hand.[16] The stations themselves would supply a little, duly stipulated in the agreements, but the coopers themselves supplied the rest – a traditional hallmark of the independent craftsman. The list appended to one of those contracts suggests that that the cooper would be providing nearly all the tools sufficient for assembly and serious repair of casks to hold oil and also for construction and repair of at least the smaller forms of white cooperage designed to hold solid goods.[17] Further, these men had individual contracts, albeit only for a season, separate from the general articles that share-earning men signed. While that would not always be the case it would be unexceptionable, whereas there are no indications of ordinary pulling hands doing anything other than signing the general agreement.[18] But provided that a judge is unwilling to label an alleged custom unreasonable, its existence and scope are questions of fact, so the issue was not whether this distinction could be made but whether or not it was acknowledged in the behaviour of whaling hands generally.

Two of Harris's witnesses on that issue were whaler coopers – their evidence likely to be as self-interested as the merchants', as Martin CJ was to caution the jury. One of them was Charles Samuel Cave, a swindler and serial bigamist who had been transported to Botany Bay.[19] More recently as

---

15 The first shipment of whale oil in New Zealand-made casks was in 1845: *New Zealand Gazette and Wellington Spectator* (Wellington, 3 July 1844) at 3 and also (Wellington, 17 July 1844) at 2; *New Zealand Spectator and Cook Strait Gazette* (Wellington, 12 July 1845) at 2. For skills and apprenticeships see Kenneth Kilby *The Cooper and his Trade* (Linden Publishing, California, 1977).

16 Mark Howard "Coopers and Casks in the Whaling Trade 1800–1850" (1996) 82 The Mariner's Mirror 436 at 446; *Employment agreements for Thomas Purnell and Peter Legge, employed by Weller Brothers as coopers at Muscle Bay Beach and Coleluck Bay 1840* (Hocken Library, Dunedin, MS-0438/073) [*Agreements for Purnell and Legge*].

17 *Agreements for Purnell and Legge*, above n 16; for the usual kit of coopers' tools see Kenneth Kilby *The Cooper and his Trade*, above n 15; see also, RA Salaman *Dictionary of tools used in the woodworking and allied trades c 1700–1970* (George Allen & Unwin, London, 1975).

18 Compare *Harris v Fitzherbert*, above n 1, evidence of Andrew Brown. But *Agreements for Purnell and Legge*, above n 16, obliged them to pull an oar if accident or illness left the station short-manned.

19 For his trial at Carlisle assizes see *The Times* (London, 30 August 1824) at 3, and the colourful account drawn from local newspapers in Nicholas Corder *Foul Deeds and Suspicious Deaths in Cumbria* (Wharncliffe Books, Barnsley, 2008) at 25–32. He and his latest (and most permanent) wife Sarah Dockrell (various spellings), can be traced from time to time in the Sydney newspapers until they left for New Zealand in December 1837: see *Sydney Herald* (Sydney, 14 December 1837) at 2; see also Katherine W Orr "Boyce, Ann" (2010) Dictionary of New Zealand Biography <www.teara.govt.nz>.

chief headsman of the Wallaces' Cloudy Bay station he was said to have wrecked the season by prematurely and unlawfully selling produce in exchange for smuggled liquor; his word may not have been worth much – though the jury may not have known his history.[20] Ross did not bother to cross-examine him on the custom. Nor did Ross cross-examine the other cooper, nor, more surprisingly, did he question Harris's witness George Young on this issue. Now a Wellington publican, once a whaler, Young had for one season at least partnered another man as owner/operator of a Kapiti whaling station, so he had a status and neutrality most other witnesses lacked.[21] Instead, Ross seems to have picked whaler Charles Redford as his target, though we can only infer that from Redford's responses.[22] If Ross hoped to upset Redford's testimony that the custom extended to coopers he was to be disappointed; Redford cemented the solidarity that Harris' witnesses had uniformly asserted. His statement – more likely to be his words than Ross's – that "the cooper is always paid and must be by the rules"[23] is the strongest support in the case for the proposition familiar to historians of labour in English workshops, mines and factories that "custom and practice" was experienced as obligatory.[24]

Wallace's suggestion, described above, was directly opposed to that construction. Expanded, it would be that a custom securing payment on the beach was obsolete now that there was a court within half a day's sailing distance. That court should treat the relationship between master and men as contractual, in the full sense that terms should be implied only if the contract could not otherwise function; so far as possible the written agreement should be treated as exclusive. Ross may not have gone that far, for when Martin CJ addressed the point he attributed it to Wallace. It was right that the jury should know, Martin said, that the law adopted and followed the custom. Responsibility for denying, legitimating, or delineating the lien would be theirs, and, as usual with juries, we do not know whether they did treat the issue as factual or whether they saw themselves as deciding what the better rule should be. We know nothing of the jury's composition either, save that in April 1843 it would have to have been a common jury; special juries drawn exclusively from esquires, bankers

---

20 *Wallace & Wallace v Guard* Supreme Court Wellington (date unknown) *New Zealand Colonist and Port Nicholson Advertiser* (Wellington, 13 September 1842) at 3; Supreme Court Wellington (4 October 1842) *New Zealand Colonist and Port Nicholson Advertiser* (Wellington, 18 October 1842) at 2.

21 His partnership with James Daymond is mentioned in *Sydney Monitor and Commercial Advertiser* (Sydney, 3 October 1840) at 2; for its dissolution see *New Zealand Spectator & Cook Strait Gazette* (Wellington, 16 January 1841) at 1.

22 It must be remembered that what appear to be his words in the transcript are as likely to be counsel's, with which he merely agreed or not, and that before each response would come a question, which we must imagine for ourselves.

23 *Harris v Fitzherbert*, above n 1.

24 W Brown "A Consideration of Custom and Practice" (1972) 10 British Journal of Industrial Relations 42.

and (particularly) merchants became available only in the following year.[25] Fitzherbert may have rued that.

The very subject-matter of the dispute, a lien, may have encouraged Martin CJ in his opinion that custom was an appropriate source of powers and their correlative liabilities. We know that he began his summing-up by explaining liens and how they became established, although not his exact words. Law books of the time, however, all demonstrated a close relationship between trade usages and liens, although their contexts were not quite the same as Martin CJ's.[26] Usually they considered general liens where the claim was to retain property for payment of all debts owed, not just debts arising from the circumstances in which the possession was taken. That latter situation (particular liens) was more usually seen as a matter of general law. Further, the books were considering liens between tradesmen and their clients, not relations between master and men, internal to the trade. Neither distinction, however, was drawn clearly. One writer, a little later, found it useful to tell readers that by a lien he meant "one established or enlarged by the general usage of a trade or profession."[27] In colonial Newfoundland, where cod-fishers claimed against their masters and against merchants a suite of rights akin to a lien, they often cast its origin as customary. Although the whole question was highly political and long contested and although to the eyes of some participants (and modern historians) the attribution was specious, some judges conceded that it was capable of being true in law. When the heat had finally subsided they pronounced that it was also true in fact.[28] Further, in the context of trade liens, usage could be created unilaterally, the other party becoming bound by it because he did not dissent from it by contract and was supposed to have known about it.[29] So although there was nothing exactly like *Harris v Fitzherbert* in the books, it was not so different that Martin CJ's treating the issue as one of fact seems outlandish.

---

25 An Ordinance to make Temporary Provision for the Constitution of Juries (1844) 7 Vict 2, s 6; *Rules and Orders touching the Practice of the Supreme Court of New Zealand* (Auckland, 1844) at 27.

26 John Cross *A Treatise on the Law of Lien and Stoppage in Transitu* (V & R Stevens and GS Norton, London, 1840); Basil Montagu *A Summary of the Law of Lien* (J & WT Clarke, London, 1821); Richard Whitaker *A Treatise of the Law relative to the Rights of Lien and Stoppage in Transitu* (W Clarke & Sons, London, 1812).

27 Whitley Stokes *A Treatise on the Liens of Attornies, Solicitors, and other Legal Practitioners* (H Sweet, London, 1860) at 2.

28 The relationships are well described in Gerald M Sider *Culture and Class in Anthropology and History: a Newfoundland Illustration* (Cambridge University Press, Cambridge, 1986), and there is much about the law in Sean T Cadigan *Hope and Deception in Conception Bay* (University of Toronto Press, Toronto, 1995). Good illustrative cases include *In re Insolvent Estate of James Sullivan* (1846) 3 Newf 1; *Moreen v Ridley* (1846) 3 Newf 4; *Hanrahan v Barron and Doody* (1849) 3 Newf 102; *In re Fishery Servants of Patrick Cashman* (1854) 4 Newf 11; and for the retrospect, *Parsons v Fox* (1898) 8 Newf 20.

29 *Kirkman v Shawcross* (1794) 6 TR 14; 101 ER 410 (KB).

In one sense, therefore, the jury legislated local usage into law with the blessing of the judge, though in another the law was left quite unchanged – once the rule exists that a lien may arise by local custom the rest could be seen as application. This part of the common law had an explicit adaptive capacity allowing insertion of local custom, useful in a new situation in a new colony but as readily available if the dispute had instead concerned herrings in Newbiggin or pilchards in Newquay. Hanson and Ross may have taken the broader view, however, for two years later, with less judicial encouragement, they framed a different dispute on a whaling station as custom,[30] producing a rule with potentially wider ambit than that in *Harris v Fitzgerald*. It may therefore have been a precedent in a broader sense than Martin CJ had in mind.

Within its narrow context, however, its result should not be exaggerated. Hanson's cross-examination of Wade and Wallace would have enabled him to portray them and Fitzherbert as Johnny-come-latelies blundering into an established and rational mode of business. But custom between master and men is not *jus cogens*; parties may contract out of it. In a rather different context where custom was accepted as giving content to a consensual relationship, that of agricultural tenancies in England, juries would impose the norms of recent local usage on landlord and tenant alike, but not if the tenancy contained express covenants that ousted them.[31] So too with shore whaling: in legal logic a term allowing the lien could be implied into the contract between Harris and Antonio by usage, creating a property right binding Fitzherbert. However this was only if the contract said nothing to the contrary. We have no before-and-after studies to gauge the impact of *Harris v Fitzherbert*, but we do have one contract from 1846 showing either that the veteran whaler Jacky Guard took the point or perhaps that he knew it all along. It is clumsily written, because Guard was not an educated man, but the tenor is unmistakeable. The articles he wrote for his men designated 1 November as the season's end and continued: "It is to be further understood that oil and bone is to be shipped before payable, providing there are vessels to receive the same before the 1st of November."[32] That can only mean that his men signed away their lien, customary or not.

30 Stuart Anderson *Macfarlane v Crummer*, above n 11.

31 William Cornish and others *The Oxford History of the Laws of England* (Oxford University Press, Oxford, 2010) vol XII at 114–115 and see also 476–477.

32 Don Grady *Guards of the Sea* (Whitcoulls, Christchurch, 1978) at 119–123.

APPENDIX

Report of the trial[33]

SUPREME COURT.
APRIL SITTINGS.

Wellington, Wednesday, April 4,

(CIVIL SIDE, — BEFORE CHIEF JUSTICE MARTIN.)

HARRIS v FITZHERBERT.

Mr. Hanson appeared for the plaintiff and Mr. Ross for the defendant.

This was an action brought to recover the sum of 25*l*. 4s. 4d., the amount of an order drawn on the defendant by one Alexander Antonio. The circumstances out of which this action arose are as follows:—

The plaintiff, Charles Harris, was employed as cooper at Alexander Antonio's whaling station at Kapiti, at the rate of 7*l*. per month. The defendant agreed to purchase the oil and bone taken at Antonio's station, and, as the plaintiff alledged, promised to accept an order for the amount of his wages upon his allowing him to remove the oil and bone upon which, by the custom of whaling parties, he had a lien to the amonnt of the wages due. The promise, it was alledged, was contained in certain letters written by the defendant which were put in. The defendant removed the oil and bone but refused to accept or pay the order.

The defendant pleaded that he was not liable; that there was no such custom; and that he had not promised to pay.

Mr. Hanson opened the plaintiff's case and called

Joseph Burrell sworn. — Is clerk to Alexander Antonio's whaling party at Kapiti; remembers receiving from the defendant the letter produced; witness read the letter over to every one of the men separately; saw a letter written by the defendant to Antonio; the letter produced is the same; he told the cooper that he was not to be a party to detaining the oil and bone; that all just debts would be paid, and he consented to let it go immediately; the order drawn (by Antonio in favour of plaintiff upon the defendant for 25*l*. 4s. 4d.) produced was written by witness by the direction of Antonio.

Cross-examined by Mr. Ross. — Plaintiff is in Port Nicholson now, and not in the employment of Antonio; he is already engaged for the next season to Mr. Robert Gillet; the plaintiff is not going to whale at Antonio's station; no money has been paid on plaintiff's order to the knowledge of

33 *New Zealand Colonist and Port Nicholson Advertiser* (Wellington, 14 April 1843). This is an exact transcription from the newspaper; all errors appear in the original.

witness; cannot say what amount of goods the plaintiff had; perhaps to the value of 2*l*.; witness had not been paid, and was requested by the defendant to speak to the men about the oil and bone; he was requested by letter; plaintiff had the goods about six weeks after the order was drawn; defendant told witness to enter the things for him which plaintiff had in the book against his name; it was the book in which he made up the account of wages due.

Joseph Hippolite sworn. – Was carpenter of Antonio's party last year; knows plaintiff; he was cooper of the same party; remembers the *Richmond* coming to Kapiti for oil; she did not take all the oil and bone the first time she came; does not recollect when she came again; she took only a part of the oil the second time she came, because the people had no security for being paid; the plaintiff was one of those who were not paid; recollects the defendant sent a letter saying he would pay the orders; there was enough oil kept back to pay the people the second time the *Richmond* came; the oil was shipped on board the *Richmond*; witness saw it shipped; after seeing the defendant's letters they told Antonio he might ship the oil if he liked.

Cross-examined by Mr. Ross. – Witness was upon wages; the cooper was on wages; the last witness was on wages; the cook was on wages; the cook is not the tonguer; some men in their party were on lay, but in every party the cooper is on wages; no other men besides the four mentioned are upon wages.

George Young sworn. – Is a licensed victualler residing in Wellington; was formerly a whaler; it is 11 years since witness was first connected with whaling; it is generally the case for every man in a whaling party to have security upon the oil and bone; no man likes to see the oil or bone go off the beach until all the men are paid; the cooper in all shore parties is paid by the month; the practice is to pay at the end of the season, or at least when the oil is shipped; the security applies to the cooper; has known instances of the oil and bone being claimed by the cooper in default of payment, and by every man in the fishery; knows plaintiff; remembers his coming to him in October last; he brought an order with him; the order produced is the same; witness had it above a week in his possession; the defendant gave plaintiff an order upon witness payable when the oil and bone arrived from Kapiti; he objected to it, and the plaintiff returned and brought the defendant with him; he saw the defendant at that time; defendant said witness was to let plaintiff have what he wanted to the extent of 5*l*., and he would give witness credit for it, which he has done; he let plaintiff have 5*l*. in cash; the defendant told him to let plaintiff have that part, but he would not think of paying the men till he got the oil and bone from Kapiti; plaintiff was present when defendant said this; witness did not hear anything more; he let plaintiff have the 5*l*.

Cross-examined by Mr. Ross. – Gave 5*l*. to the plaintiff; got credit for that sum from the defendant; had no other order in his possession at this time; the defendant, said let him have that sum and he would pay the rest when the oil and bone came round; it was not till after the advance was made that witness had the order; the order was left with witness till the plaintiff came from Kapiti; he paid the 5*l*. on the 25th or 26th of October; has no interest in the order now; plaintiff has never drawn anything on the order; did not know the plaintiff before he came to his house with the

defendant; witness whaled at Kapiti and Queen Charlotte's Sound; he was six months whaling at sea; the order was put into his hands the same day, or the next day after he made the advance; had seen the order before.

Charles Samuel Cave sworn. – Is a whaler residing at Cloudy Bay; has been connected with whaling about 17 years in a vessel and in shore parties; if witness agrees for monthly wages he is of course paid before the oil goes off the beach; if he were inclined to stop the oil no one could hinder him; the custom is for every man to be satisfied before the oil is taken away.

Cross-examined by Mr. Ross. – Has been whaling 17 years; acted as cooper about 14 years both at sea and on shore; he means by the custom as far as his own experience goes; it depends upon the agreement; he never had any dispute about being paid.

Charles Redford sworn. – Is a whaler; knows defendant; remembers seeing him at Kapiti last year during the whaling season; was not present at any conversation between the defendant and a third person on the subject of the wages due to Antonio's party; has been connected with whaling 14 or 15 years; the custom with regard to coopers witness always understood to be that they were paid first; the cooper and the people employed on the oil are paid first; by the people employed on the oil witness means those who get it; the custom is that the cooper stands in the same position with regard to payment as those who are on lay; the cooper stands in the same position as the rest.

Cross-examined by Mr. Ross. – The men on the lay are paid according to the oil procured; if the cooper had 7*l*. per month it would not matter to him what oil was got; it is always a custom that the cooper should be paid with the rest; sometimes the cooper is on the lay; the cooper is always paid and must be by the rules; whether it is a bad or a good season the cooper would be entitled to his 7*l*.; if no oil is taken, the person who employed the cooper or who supplies the station must pay him.

This was the plaintiff's case.

Mr. Ross stated the defendant's case to the Jury and called the following witnesses.

John Wade sworn. – Is an auctioneer residing at Wellington; has been connected with whaling 3 years; is proprietor of some stations, and purchaser of the proceeds of others; is acquainted with other establishments besides his own; in a whaling party the cooper, carpenter, and cook are generally on wages; the other hands are on lay or share; the cooper is on wages; has no claim upon the oil; never heard of such a custom; no person on wages has any share; the cooper is not interested in the season; he is paid or entitled to be paid if there is no oil taken; never heard of such a custom as the cooper having a lien upon the oil; has been agent for Mr. Jones, of Sydney, who has very extensive fisheries; has been concerned for others.

Cross-examined by Mr. Hanson. – First became acquainted with whaling stations in 1840; had direct communication with them; was engaged in fitting out for Daymond of Sydney.

John Howard Wallace sworn. – Is a merchant residing at Wellington; has some experience in whaling transactions; has a station this season; the cooper is usually paid by wages; the other servants of the establishment are paid by wages; the whalers are paid by shares; does not know of such a custom as the cooper having a lien upon the oil; rather thinks there was such a custom before there were any laws or courts established here; during his experience the cooper has been paid by wages, and has not been considered to have any lien.

Cross-examined by Mr. Hanson. – Has been connected with whaling establishments during the two last seasons; indirectly connected for two seasons; the whalers are considered to have a lien; has never known a case where the coopers wages have not been paid; never knew any question raised as to the right of the cooper to detain the oil.

George Duke sworn. – Is clerk to Mr. Machattie of Wellington; is conversant with whaling establishments; has seen that business carried on for some years; the cooper is sometimes paid by the lay and sometimes by the month; sometimes partly one way and partly the other; has never heard of the cooper having a lien upon the oil and bone; the whalers have a lien upon the oil; there are agreements generally between the parties; a price is fixed in the articles and the whalers have the lay out of that; a fixed price is put upou the oil and the lay is out of that; the men are paid by an order for the amount due to them; they have a lien upon the oil when they agree at a certain price per ton; never heard of the cooper having a lien upon the oil.

Cross-examined by Mr. Hanson. – Never knew an instance where the cooper was not paid; has known instances where the oil was taken away before the season was ended; cannot say that he knows an instance of all the oil being taken away before the cooper was paid.

Andrew Brown sworn. – Is a farmer at Kapiti, and superintends a mercantile establishment to supply whalers; has been connected for four years directly or indirectly with every station at Kapiti except the one belonging to Mr. Jones; the cooper is usually paid by monthly wages by the master of the fishery; the cooper has no lien upon the oil according to the custom of those fisheries with which witness has been connected; never heard of such a custom as the cooper having a lien upon the oil.

Cross-examined by Mr. Hanson. – Remembers an instance where the cooper was not paid when the oil was removed; the fishery was Mr. Frazer's; the men having a claim upon the oil objected to the removal of it until their wages were paid; they applied to witness on the subject; the cooper made no objection to the oil being removed; this occurred during the season 1841; the headsman and pullers were the only parties who objected to the oil being removed; knows no other cases where a dispute arose; knows Frazer's station, Daymond's, Stinchmore and Jenkin's; Fraser is whaling on his own account, Daymond on his own account, Stinchmore on his own account, Jenkins on his own account.

Re-examined by Mr. Ross. – They have generally applied to witness to write out their articles; the cooper was never mentioned in those articles; has drawn up their agreements; their quarrels were

generally referred to witness; those referred to by witness were master whalers supported by some absentee; the cooper is paid by monthly wages; the labourers by lay.

Newton Levin sworn.[34] – Is the master of the *Susunnah Anne*; has been four years connected with whaling establishments; has visited most of the whɐling stations upon this coast; has been employed so latterly; witness never enquired particularly, but believəs coopers are generally employed by the month; he never had a claim to the lien made to him; remembers a season when he took the oil away before the close of the season and paid the cooper at the close; the cooper made no objection.

Cross-examined by Mr. Hanson. – Does not recollect hearing of a case where the cooper was not paid; it is the custom to advance slops to coopers as well as the others.

John Gun examined by Mr. Hanson. – Is a cooper; was cooper at the whaling station of Mr. Fraser in 1841; allowed the oil and bone to be taken before he was paid because there was ample property left to satisfy him, and he had confidence in Mr. Fraser that he would pay.

This closed the evidence.

The learned counsel having addressed the Jury, his Honor, in summing up, explained how the law regards liens, and how they became established; he said this was a case which would require their most serious consideration, as it would establish a president in a matter which involved the interests of many. It had been said by one of the wituesses, that the custom had existed before courts of law were established here, it was right that they should know that the law adopted and followed the custom. The evidence was conflicting; but in considering the evidence of the merchants and the coopers, they would remember their different interests. They would give the evidence their serious consideration, and then they would be able to decide whether the custom had been proved.

The Jury returned a verdict for the plaintiff for 20*l*. 4s. 4d., finding that the lien had existed.

---

34 More likely to have been Newton Lewyn than Nathaniel Levin, the former having a stronger association with the vessel *Susannah Ann*, though as owner not master: *Sydney Herald* (Sydney, 3 March 1842) at 2; and, for example, "Port Nicholson Shipping List" *New Zealand Gazette and Wellington Spectator* (Wellington, 1 April 1843) at 2. Intermediate spellings are common in the newspapers, making identification difficult.