COMMERCIAL LAW ON THE BEACH: SHORE WHALING LITIGATION IN EARLY COLONIAL NEW ZEALAND – *MACFARLANE V CRUMMER* (1845)

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During the 1844 whaling season John Sangster Macfarlane supplied provisions to a new shore whaling station at Wairoa which, unusually, had been established by whaling hands themselves. In probable breach of contract their chief headsman sold some of the station's produce to a passing trader, Thomas Crummer, whom Macfarlane then sued for conversion. The litigation in the Supreme Court at Wellington in 1845 established a baseline rule for the benefit of mercantile outfitters of whaling stations. The special jury of merchants heard evidence from other merchants about local custom and probably based their decision upon that, reaching a conclusion not otherwise open to them under the general rules of common law. But they tempered their verdict to acknowledge that the custom deeming Macfarlane to own the station brought responsibility too. The episode illustrates one way of adapting common law to local circumstance in a young colony, and is congruent with an earlier shore whaling case, Harris v Fitzherbert, *where custom played a similar role.*

A jury verdict from 1845 can be called a leading case in only a qualified sense, especially one in print just as a newspaper report comprising mostly a précis of evidence.[1] It cannot rank alongside a reserved judgment delivering a considered exposition of the law, far less an authoritative appellate restatement. But *Macfarlane v Crummer* is significant, first, for establishing a ground rule for the business of shore whaling, which was economically important at the time. Shore whaling was

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1 *Macfarlane v Crummer*, Supreme Court Wellington, 13 September 1845 per Chapman J, reported in the *New Zealand Spectator and Cook's Strait Guardian* (Wellington, 27 Sep 1845) at 3. In this paper unreferenced statements about the facts are taken from Chapman J's notes of the evidence: HS Chapman "Notebook entitled 'Civil trials no 6' 1845-6", Hocken Library, Dunedin [HL] MS-0411/007 at 40-91 [Chapman "Notebook"].

whaling conducted from a base on land, and in New Zealand historiography it is seen as displacing bay whaling, where ships anchored just off shore provided the accommodation and the platform for processing the catch into oil.[2] Shore whaling was still vigorous enough in the mid '40s to attract investment by merchants, predominantly from Wellington, though it was already declining in some localities. Second, *Macfarlane v Crummer* is significant for deploying custom as a legitimate supplement to common law concepts of property and contract, enabling an adaptation of the common law to local conditions in a very young colony. Third, the means by which the dispute was resolved were significant too. Essentially the rule was constructed by representatives of the interest group it would most affect, and though it favoured the wealthier the jury tempered it in the circumstances with a nice display of even-handedness. There was a precedent for some of this in one of the six previous cases directly concerning shore whaling litigated in Wellington. That case, *Harris v Fitzherbert*, and its relation to *Macfarlane v Crummer*, form the minor theme of this paper.[3]

The story begins in September 1844, when Thomas Crummer took a trading trip southwards down the East Coast in a cutter called *Odd Fellow*.[4] He was about twenty-six years old, and had been in the colony just eighteen months.[5] Among the goods he carried were some he could barter for others for resale in Auckland. On the 25th or 26th *Odd Fellow* put into Waikokopu, at the northern corner of Hawke's Bay, where there had been a whaling station probably continuously from 1837.[6] There Crummer met a man named Dyke, who told him about a new whaling station at Wairoa, some fifty kilometres south along the Bay. Dyke led *Odd Fellow* to Wairoa; the vessel stood off while he fetched George Morrison, the station's principal man; and over the course of an evening and the following morning Morrison delivered to Crummer one ton and seven hundredweight of whalebone (baleen) in exchange for clothing, tobacco, soap, flour, tea, sugar, calico and more, estimated to be worth not far short of £100. For Morrison the cargo must have been as a gift from heaven, because the fledgling station had struggled. The blubber from two whales had been lost because the station's supplier had not delivered casks in time. That caused some of the

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2 It began in 1827 or 1828, growing quickly in the early 1830s (when it operated from Sydney): Nigel Prickett *The Archaeology of New Zealand Shore Whaling* (Department of Conservation, Wellington, 2002) at 3 and 77; Don Grady *Guards of the Sea* (Whitcoulls, Christchurch, 1978) at 41.

3 *Harris v Fitzherbert* Supreme Court Wellington, 4 April 1843 per Chapman J, reported in the *New Zealand Colonist and Port Nicholson Advertiser* (Wellington, 14 April 1843) at 3.

4 I identify him as Thomas from the general fit with what is known about him and the absence of any other Crummer known to be trading in the colony at the time.

5 "Arrived" *New Zealand Colonist and Port Nicholson Advertiser* (Wellington, 6 January 1843) at 2; he became licensee of the Victoria Hotel, Auckland (owned with Williamson, below n 13): *Daily Southern Cross* (Auckland, 22 April 1843) at 3; age taken from death notice, *Daily Southern Cross* (Auckland, 5 October 1858) at 3.

6 Prickett *Archaeology*, above n 2, at 113.

whaling hands to decamp, and others seem to have drifted away as provisions began to run out. However, as *Odd Fellow* pulled away from Wairoa she came within shouting distance of an incoming schooner, *Aurora.* What was shouted and what was heard was subsequently disputed in court, but the gist of it was that *Aurora's* owner and master, John Sangster Macfarlane, considered himself the owner of the whalebone and Morrison as having no right to sell it.[7] Macfarlane subsequently sued Crummer for conversion of the whalebone.

The action was heard in the Supreme Court at Wellington in September 1845. The venue itself was quite possibly important to the result. The Wairoa River happened to be the jurisdictional boundary between the Northern District, which was the domain of Martin CJ in Auckland, and the Southern District presided over by Chapman J in Wellington.[8] Archaeologists do not know the whaling station's exact site, but believe it to have been to the south of the river.[9] The blubber lost from the two whales was on rafts in the river when it was swept irretrievably out to sea, so the station would probably not have been far from the bank. A few hundred metres north, and we would have had a different case. As it was, Wellington provided the litigants with counsel very experienced in shore whaling litigation: Richard Hanson for Macfarlane, Hugh Ross for Crummer. Each man had appeared in five of the six previous cases directly concerning shore stations. There would be a knowledgeable tribunal too, because one of the parties had called for a jury composed of special jurors rather than the more plebeian and more varied common jurors. Special juries were not unusual at that time, but there may have been an additional reason for one here because of what happened in *Wallace & Wallace v Guard*, at the very first session of the Supreme Court at Wellington, in September 1842.[10] Counsel there (including Hanson, but not Ross) had been ready to argue substantially the same issues that now arose in *Macfarlane v Crummer*, but Martin CJ (who was then the colony's only judge) had thought them unsuitable for a jury and had narrowed the case to a single point that was not available in the present case. Now ten of the twelve men who would decide Macfarlane and Crummer's dispute were drawn from Wellington's mercantile community,

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7 I identify Macfarlane largely by his association with *Kate* and Captain Salmon, which helps to eliminate other Macfarlanes active in the colony. In particular Captain DS Macfarlane was sailing *Eleanor* between New South Wales and Port Nicholson at the time, and John Macfarlane, an Auckland merchant, was not a sea-going man: *Sydney Morning Herald* (Sydney, 14 June 1844) at 2; (16 July 1844) at 2; (13 September 1844) at 2; (29 November 1844) at 2; Anthony G Flude *Henderson & Macfarlane's Circular Saw Line* (AG Flude, Auckland, 1993) see especially at 31 and 93.

8 (20 January 1844) *New Zealand Government Gazette* vol IV at 14.

9 Prickett *Archaeology*, above n 2, at 113.

10 Four out of nine cases at this session had special juries: *New Zealand Spectator and Cook's Strait Guardian* (13 September 1845) at 2; six out of 14 in the second Wellington session of 1844 had special juries: *New Zealand Spectator and Cook's Strait Guardian* (Wellington, 7 December 1844) at 2; *Wallace and Wallace v Guard*, Supreme Court Wellington, 5 October 1842 per Martin CJ, as reported in *New Zealand Gazette and Wellington Spectator* (Wellington, 15 October 1842) at 3.

and one of the remaining two had also once been a merchant.[11] Much of New Zealand's shore whaling, south at Queen Charlotte Sound, Port Underwood, Kaikoura and Banks Peninsula, and north up the west coast to Kapiti, had come to be financed by Wellington merchants.

Neither litigant was yet well established in the colony. *Odd Fellow* was small – only a cutter, not a schooner; and Crummer sailed on her as a passenger, possibly as charterer, but not as her owner or master.[12] He did not yet have a vessel he could call his own, as a well-provided merchant would. He was in partnership with James Williamson in Auckland, but the land purchases that eventually made them comfortable did not bear their fruit until well into the future, and in between lay some loss-making speculations in San Francisco.[13] Macfarlane, who was also aged about twenty-six, liked to be thought of as the partner of Captain John Salmon, ten years his elder, who had become established as a merchant along the East Coast, based in Auckland.[14] When Macfarlane first appeared off Hawke's Bay it was as master of Salmon's 62-ton schooner *Kate*.[15] But though Macfarlane may possibly have owned a share in *Kate*, and certainly liked people to think so, and though his association with Salmon was to last a further decade, when it collapsed in acrimony he was unable to prove a partnership.[16] The 38-ton *Aurora* was his first independent venture into ship

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11 Their names are in Chapman "Notebook", above n 1, at 40; occupations in Jurors' List, *New Zealand Spectator and Cook's Strait Guardian* (Wellington, 8 February 1845 (supplement) at 1; only HS Knowles seems never to have been a merchant. The sheriff would make a sub-list of all "esquires or persons of higher degree, bankers or merchants" then the parties would reduce that list to 18 by striking off names alternately; the 18 would be summoned and 12 empanelled: *Rules and Orders touching the Practice of the Supreme Court of New Zealand* (Auckland, 1844) at 27.

12 She was registered as a 36 ft, 16 ton smack: Morris Netterville Watt *Index to the New Zealand Section of the Register of All British ships* (HL, microfiche) [*Index*].

13 Kaaren Hiyama *High Hopes in Hard Times: a History of Grey Lynn and Westmere* (Media Studies Trust, Grey Lynn, 1991) at 10-11; GH Scholefield (ed) *A Dictionary of New Zealand Biography* (Department of Internal Affairs, Wellington, 1940) vol II at 518 (James Williamson) (not wholly accurate); death *Daily Southern Cross* (Auckland, 5 October 1858) at 3.

14 Obituary (Macfarlane) *New Zealand Herald* 3 February 1880 at 5 (inaccurate in some respects); Obituary (Salmon) *New Zealand Herald* 28 March 1873 at 3 (again not wholly accurate). For lively accounts of Macfarlane see: Lisa Truttman, Timespanner a journey through Avondale, Auckland and NZ history <http://timespanner.blogspot.com> [Timespanner]. For the uncertainty of his relationship with Salmon see Chapman "Notebook", above n 1, at 45-46 (Taylor), and below n 16.

15 From June 1842 at the latest: "Port Nicholson Shipping list" *New Zealand Gazette and Wellington Spectator* (Wellington, 1 April 1843) (supplement) at 2, which also records the movements of a different *Kate*.

16 Salmon bought *Kate* in partnership with Hay & Machattie in 1842, whereupon Macfarlane became her master: *New Zealand Gazette and Wellington Spectator* (Wellington, 5 February 1843) at 2; (23 February 1842) at 1. It is possible that Macfarlane acquired a share when the Hay & Machattie partnership dissolved six months later: *New Zealand Gazette and Wellington Spectator* (Wellington, 10 August 1842) at 2 – some of the evidence in our case speculates about that. For the aggressive notice announcing Macfarlane's breach with Salmon see *Daily Southern Cross* (Auckland, 12 December 1854) at 2. Correspondence published by Sydney merchant, ME Murnin *Explanatory statement in respect of the late proceedings in the Supreme*

owning.[17] By the end of 1844 Macfarlane had sold her and soon afterwards he reverted to captaining vessels for Salmon, or perhaps Salmon & Co.[18] When he came to own his next small coastal schooner, in 1848-9, it was only briefly and in a different partnership.[19] In due course he made money from timber, may have married well, became a substantial shipowner and something of a substantial litigant too.[20] But, as with Crummer, all that lay well into the future. Salmon was known in the 1840s as a supplier of whaling stations on the Coast, but I have not found any similar contemporary references to Macfarlane.[21]

Court, Macfarlane against Murnin (Reeding and Wellbank, Sydney, 1860), shows the collapse of Macfarlane's relationship with Salmon, his failure to prove a partnership by arbitration in Auckland, and his attempts to procure someone to sue Salmon in Sydney on a debt incurred by Macfarlane, so that he could litigate the partnership there. It also discloses a business relationship with a Sydney merchant, "Mr Browning", whose arrival in Auckland Macfarlane was expecting in 1856. In 1853 Macfarlane had married Marianne Browning of Upper Fort Street, Sydney, the same street in which a Samuel Browning, merchant and shipping agent, lived: *Sydney Morning Herald* (Sydney, 25 January 1853) at 1 (for Samuel); (17 January 1853) at 2 (for the marriage, which, curiously, omits family detail) A man of that name relocated from Sydney to Auckland and did sue Salmon there as outlined above, but lost: *Browning v Salmon* Supreme Court Auckland, 18 June 1856 per Stephen CJ, reported in *Daily Southern Cross* (Auckland, 20 June 1856) at 2.

17 Watt *Index*, above n 12.

18 Ibid, and for example *New Zealand Spectator and Cook's Strait Guardian* (Wellington, 11 October 1845) at 2; *New Zealander* (Auckland, 24 January 1846) at 2. After a gap he reappears captaining Salmon's *Joseph Cripps*: *New Zealander* (Auckland, 30 August 1849) at 2.

19 '*Neptune*': Watt *Index*, above n 12; the other registered co-owner was George Read, a mariner from the Bay of Islands.

20 For his marriage see above n 16. Watt, *Index*, shows his shipowning becoming steady from about the same time. His obituary notice remarked upon his penchant for litigation. For some of it see *Macfarlane v Murnin*, Supreme Court, Sydney, 15-21 April 1857 per Dickinson CJ reported in *Sydney Morning Herald* (Sydney, 18 April 1857) at 6; (21 April 1857) at 2; see also (15 May 1857) at 1; *Macfarlane v Murnin* Supreme Court Sydney, 9-11 November 1857, reported in *Sydney Morning Herald* (11 November 1857) at 5; (17 January 1860) at 5, and (28 January 1860) at 6, the materials collected by Timespanner, above n 14, and his own account (as mortgagee) in John Sangster Macfarlane *Craig's Troubles; or Our Antipodean Courts and Laws* (Reed and Brett, Auckland, 1871). I have been unable to access his riposte to Murnin: *Supreme Court; Macfarlane v Murnin: correspondence etc from the public journals* (Hanson and Bennett, Sydney 1860).

21 "Sketches of Hawke's Bay and the East Coast, by an Old Colonist" *Hawke's Bay Herald* (Napier, 9 June 1868) at 3, records "Messrs Macfarlane and Salmon" as the principal persons in the Bay's early fisheries after a man called Mayo left; that is possibly an extrapolation from the newspaper report of *Macfarlane v Crummer* but more likely to be from an independent oral tradition. See also, below n 55. So far as Wairoa was concerned Chapman "Notebook", above n 1, at 85, is emphatic: "Capt. Salmon supplies the station this season [1845]" (Templeton).

The voice of the drama's third main actor, George Morrison, is the hardest to hear. He was just a year older than the other two, and unlike them he was not a European.[22] In the language of the day he was a Tasmanian half-caste, son of an aboriginal woman and an Irish convict. He and six other men had started making the whaling station at Wairoa in September 1843, the inference being that they were leaving other Bay stations to strike out on their own.[23] Some of these men, and another who worked at the station but was not a partner, can be glimpsed through into the mid 1860s in the Hawke's Bay histories. Some had children there; two, at least, married Māori women.[24] They become part of a mixed Māori/immigrant economy and culture that existed in some places from the 1830s until swamped by British settlers and their ways from about 1860.[25] Morrison himself is more elusive. It is significant that the others chose him as their principal man, and he had a second, more successful, season leading the Wairoa station in 1845.[26] But then he moved back to being more unequivocally someone else's man, becoming chief headsman for Captain Perry at Waikokopu.[27] Still, by 1849 he had enough money to become registered owner of a small schooner, *Neptune*, recording his occupation simply as 'mariner'.[28] Not a lucky man, one feels, his vessel was wrecked off Mahia Peninsula, at the northern extremity of Hawke's Bay, just a few months later.[29] He was

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22 Nigel Prickett "Trans-Tasman stories: Australian Aborigines in New Zealand Sealing and Shore whaling" in Geoffrey R Clark, Foss Leach and Sue O'Connor (eds) *Islands of Inquiry* (Canberra, ANU E-Press, 2008) 351 at 357–358.

23 Chapman "Notebook", above n 1 (Campbell) at 79: "Geo. Morrison, Dyke, Smith, Beattie, Morling, Christie & myself".

24 For Campbell and Joseph Carroll (a whaler and witness but not a partner) see "Sketches of Hawke's Bay", above n 21; Thomas Lambert *Story of Old Wairoa and the East Coast of New Zealand* (Coulls, Somerville, Wilkie, Dunedin 1925) reprinted by (Reed, Christchurch 1998) at 365, 369 and 459; and *Campbell v Morell* Peace Court Napier, 24 November 1857 per Full Bench, CRD Ward, Chairman, reported in *Hawke's Bay Herald* (Napier, 28 November 1857). Both married Māori. Lambert (at 372) records a Ned Beattie as a whaler who settled (and had a son), who may be Campbell's Beattie, and Lambert's Joseph Dyke (at 370) may be our man, or perhaps his son. A Joseph Dyke died in Napier in 1861, having been confined in the Native Hostelry for insanity: *Hawke's Bay Herald* (Napier, 25 May 1861) at 5; (31 August 1861) at 1; (5 October 1861) at 7; (1 November 1861) at 1. If Campbell's Smith, who was also headsman of one of the boats, is Lambert's "John Smith, 'Hake' Mete' (at 370) he too had permanent ties with the area.

25 Ian Smith "Maori, Pakeha and Kiwi" in *Islands of Inquiry*, above n 22, 367 at 371-373; James Belich *Making Peoples* (Penguin, North Shore, 2007) at 247-272.

26 Chapman "Notebook", above n 1, at 83 and 91 (Templeton, Matthews); *New Zealand Spectator and Cook's Strait Guardian* (Wellington, 6 December 1845) at 3.

27 Prickett "Trans-Tasman stories", above n 22, at 358. But later the *New Zealand Spectator and Cook's Strait Guardian* (Wellington, 23 August 1848) at 2; (27 September 1848) at 3, list both "Perry's" station and "Morrison's" so his role becomes unclear again.

28 Watt *Index*. One of the twists in this tale is that this is the vessel Macfarlane had bought the previous year with George Read. She sometimes shipped oil to Auckland: *New Zealand Spectator and Cook's Strait Guardian* (Wellington, 22 November 1848) at 2.

29 *New Zealand Spectator and Cook's Strait Guardian* (Wellington, 18 August 1849) at 2.

not captaining her at the time, all hands were saved, but thereafter Morrison disappears from the historical record.[30] In 1845 Crummer had a subpoena served on Morrison to appear as a witness, but Morrison ignored it; and when Crummer subsequently sued him in Auckland he did not appear.[31] The jury's interpretation of his status at Wairoa would be central to the litigation between Macfarlane and Crummer.

We have no pleadings from *Macfarlane v Crummer*, and care is needed when reading Chapman J's notes of the evidence.[32] He did not record counsels' questions to which the witnesses were responding, though sometimes they can be guessed, nor can one always be sure from his punctuation when one answer stops and another starts. The contemporary newspaper report contains an occasional important detail that Chapman did not record but which must have come out in the evidence.[33] The newspaper also briefly reported counsels' addresses to the jury and Chapman J's summing up. Just a fortnight later, however, the newspaper announced that it would accept no more law reports from the correspondent who had been supplying it, worried, it said, about 'complaints of general inaccuracy and, to say the least, occasional unfairness.'[34] We have no third source to triangulate Chapman's notes and what turned out to be the correspondent's last trial report so all we can do is proceed with caution, on both sides. There are occasional slips of the pen in Chapman's notes, and if there were differences in understanding exactly what a witness meant there is no knowing which version a juryman may have held. For counsels' addresses and the judge's summing up we have nothing but the newspaper.

From the newspaper report it is clear that the pivotal issue was whether Macfarlane rather than Morrison was, or should be deemed to be, the owner of Wairoa station. The law of evidence as it then stood made answering that rather an indirect exercise. Macfarlane, as a party, could not give evidence. Captain Salmon had also come and gone from Wairoa on *Kate* during that season, but it was an important part of Macfarlane's strategy that he and Salmon be treated as partners, in a sense at least. So Salmon would not have been able to give evidence either.[35] Morrison was subpoenaed but did not turn up. Macfarlane had a signed agreement with Morrison, but Chapman J ruled it to be inadmissible. The first time Hanson proffered it, at the beginning of the plaintiff's case, Chapman ruled it out because Crummer was (of course) not a signatory – so the document was tantamount to

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30 *Nelson Examiner and New Zealand Chronicle* (Nelson, 8 September 1849) at 110.

31 Chapman "Notebook", above n 1, at 90 (Matthews); *Morrison v Crummer*, Supreme Court Auckland, 7 September 1847 per Martin CJ, reported in New *Zealander* (Auckland, 12 September 1846) at 3.

32 Chapman "Notebook", ibid.

33 *New Zealand Spectator and Cook's Strait Guardian* (Wellington, 27 September 1845) at 3.

34 *New Zealand Spectator and Cook's Strait Guardian* (Wellington, 11 October 1845) at 2.

35 Thomas Starkie *A Practical Treatise of the Law of Evidence* (3rd ed, V and R Stevens and GS Norton, London, 1842) vol 1 at 107-109.

a declaration by the plaintiff in his own interest. Then at the very end of the defendant's case Chapman ruled it out again, this time, it seems, because it was irrelevant. I infer that that was his reason from a remark he made in directing the jury. What Macfarlane had to prove, Chapman J told the jury, was that the whalebone had been his from the moment the whales were effectively captured. A mere agreement by Macfarlane to buy the bone would not disable Morrison from passing title to Crummer. So Macfarlane had to show ownership of the station and derive his ownership of the bone from that. It is this element that gave the case its general importance.

Though shore whaling stations' foothold on the coastline had often been precarious, in the early 1840s the notion that they were property in ownership was common. The Wellington newspapers produced tables of oil and bone garnered each season, organizing the stations geographically but always listing an owner for each. We know that stations were sometimes leased, and that sometimes they were sold.[36] There is a rare advertisement for a public sale:[37]

> IMPORTANT SALE AT CLOUDY BAY.
>
> MESSRS. J. and G. WADE have received instructions from W. Mayhew, Esq., Vice-Consul of the United States of America, to Sell by Public Auction, positively without reserve, at Cutter's Bay, Underwood's Harbour, Cloudy Bay, on Thursday, the 30th September, 1841, at one o'clock precisely; the whole of a whaling establishment, appendages, and other property of the late John Medares, deceased, consisting of —
>
> 100 tuns oil (more or less,)
>
> 6 tons bone (more or less,)
>
> 6 boats (or thereabouts,)
>
> A quantity of whaling gear,
>
> A choice assortment of slops.
>
> ALSO, All the right, title, and interest of the late John Medares to the whaling establishment.
>
> ALSO, ON MONDAY, OCTOBER 4, 1841, At the establishment of the late John Medares, at Kapiti, at one o'clock precisely; all the property of the said estate there, consisting of the whaling establishment, oil, bone, slops, boats, whaling gear, &c &c &c.
>
> Public attention is particularly invited to the above sale as it may be the first and last opportunity in this Colony, for parties desirous of engaging in the lucrative business of whaling, to possess themselves of a station in full operation, and all the appendages on the spot. These stations have been proved to be

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36 Lease: Edward Jerningham Wakefield *Adventure in New Zealand* (J Murray, London, 1845) vol I at 308 (Thom's station at Paremata, Porirua Harbour).

37 *New Zealand Gazette and Wellington Spectator* (Wellington, 25 September 1841) at 1.

> second to none in Cook's Straits. The fine fast-sailing barque Bright Planet, and the clipper schooner Susannah Ann, will be prepared to take passengers to the sale, should a sufficient number offer, at very moderate rates. For passages apply to the Auctioneers.

The legal nature of those titles and establishments would not have been obvious nor the tenure secure. Two years later the then Sydney merchant, Johnny Jones, managed to retrieve his New Zealand whaling stations from the wreckage of his insolvency in New South Wales on the grounds, it is said, that his titles were merely informal.[38] As often as not the name recorded as 'owner' in the newspapers' tables was the station's chief headsman, its operational manager.[39] Nonetheless, often there would have been somebody who made something approximating to a land purchase from the tangata whenua, and who employed a gang to build accommodation, erect sheers, a capstan and a ramp for hauling whale carcasses out of the ocean, and construct a try-works – which was a set of fittings for the iron try-pots and associated vessels in which the blubber was rendered down into oil. In the purest form of ownership that person would also supply the whaling boats and all that went with them, ship the gang in, supply them throughout the season, provide the casks for the oil, and ship the produce and the gang out again at the end. When shore whaling first evolved from bay whaling all of that might be conducted from Sydney. Later some of the Wellington merchants stepped into that role: the partnership of Wallace and Wallace had such a station at Cloudy Bay, and John Wade, the auctioneer of the Medares estate, believed at least part of his own puffery, being in 1842 the owner, as he described himself, of a whaling station called Wyderop in Palliser Bay.[40] Wade subsequently acquired so-called ownership of other stations further south, and there are many other examples.

In such cases four elements coincided: property in the soil, tenuous though it was; property in the fixed infrastructure; recruitment and management of the men; and provisioning during the season. That concentration of roles would encourage a direct employment relation between the owner on the one hand and everyone else, whatever the hierarchy into which those others were arranged. There are descriptions and partial documentation enough from various stations to suggest that that legal structure was common. For example there was litigation concerning Wade's station at Wyderop arising out of Wade's dismissal of the chief headsman, where the language throughout is

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38 Diana Harris *Johnny Jones, a Colonial Saga* (Reed Publishing, Auckland, 2007) at 114 (unreferenced).

39 Compare, for example, the table supplied to the *Spectator* by 'W.F.' [William Fitzherbert?], which lists several owner/suppliers, and the corrected version a few months later, which substitutes chief headsmen: *New Zealand Spectator and Cook's Strait Guardian* (Wellington, 12 October 1844) at 3, (22 February 1845) at 2.

40 *Wallace & Wallace v Guard* Supreme Court, Wellington, 4 October 1842 per Martin CJ, as reported in *New Zealand Colonist and Port Nicholson Advertiser* (Wellington, 18 October 1842) at 2-3; *Watson v Wade* Supreme Court, Wellington, 5 October 1842 per Martin CJ, reported in *New Zealand Colonist and Port Nicholson Advertiser* (Wellington, 28 October 1842) at 2-3.

of master and servant.[41] An example of direct articles of employment survives in print from another of Wade's stations just a year later.[42] Similarly *Wallace & Wallace v Guard*, which concerned facts broadly similar to those in *Macfarlane v Crummer*, was decided on the basis that the chief headsman who had sold oil to a passing trader was articled as an employee of the Wallaces, who were the station's owners.[43] The point can be expanded, but is clear enough both on principle and from these examples. Were Macfarlane proprietor in that sense it would be easy to conclude that he had title to the bone; but he was not. Even his own first witness, John Taylor, mate of *Kate*, makes that clear. Chapman J recorded him as saying 'I know the plaintiff. I know a place on the East Coast called Wairoa. The place was fitted out by Mr Morrison.' Other witnesses show that the men signed articles at Wairoa with Morrison, not with Macfarlane. Macfarlane's claim therefore had to be that one could count as an 'owner' even without that concentration of roles.[44] Again, that is why the case was important.

James Belich estimates casually that it cost about £2000 to found a shore station and about £1200 annually to maintain it.[45] His estimate of capital outlay perhaps best fits stations planted on distant New Zealand shores by Sydney merchants, hence those with maximum transport costs and minimum local input. Wairoa represents a subsequent phase of whaling development. Crummer produced as his first witness John Campbell, a Hawke's Bay whaler who married a Māori woman and settled there in the way described above. Campbell describes how he and the other six founders clubbed money, how he went down from Mahia to Wairoa and told the natives to build a house, and how subsequently the whalers agreed with the natives for the natives to build and fence houses for them, to be paid for if the whalers caught a lot of whales. He does not say whether that would have been a capital payment or a rental.[46] One boat they bought from Captain Perry, but five others they made themselves.[47] Another witness said that they got one of the try-pots from up the Coast at

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41 *Watson v Wade*, ibid.

42 JM Sherrard *Kaikoura* (Kaikoura County Council, Kaikoura, 1966; reprinted by Cadsonbury Publications, Christchurch, 1998) at 321-322.

43 *Wallace & Wallace v Guard*, above n 40.

44 One theory of the case might be that what began as a partnership between the seven changed its nature. Suppose a new agreement subordinated the partners to Macfarlane, with Morrison as his chief headsman. That would explain why Campbell signed articles under Morrison. One would expect some evidence to be led of that, however, and other witnesses speak of "the partners" as an entity towards the end of the season. So it is unlikely.

45 Belich *Making Peoples*, above n 25, at 133. The £1200 might come from Sherrard, *Kaikoura*, above n 42, at 77, in which case it probably includes the cost of casks; see Alfred Eccles and AH Reed *John Jones of Otago* (AH & AW Reed, Wellington 1949) at 25, for Jones's estimate of £15,000 a year to service his seven stations from Sydney, casks included.

46 Lambert says rent was usual: *Wairoa*, above n 24, at 367.

47 For Perry see Prickett *Archaeology*, above n 2, at 104 and 113; and Lambert, ibid, at 366 and 368–369.

Maw[h]ai, and that the other 'had been there for years'. Probably it was a relic from an abortive station Sydney merchants planted at Wairoa in 1839.[48] Presumably Campbell and the others also made the try-works, the sheers and so forth, probably again with Māori assistance since permission to use local timber would have been needed.

So far, then, establishment of the Wairoa station had needed labour, know-how and local credit, but little money – much less than Belich's £2,000. Expenditure of local credit would have been real, because even after the station was established the European whalers were not integrated into a single community with the tangata whenua but lived alongside. There would have to be some sort of reciprocity, but at that time it would not necessarily express itself in money. There is a nice illustration of that separation recorded in the journal of the Reverend James Hamlin, a missionary. He was already experienced in New Zealand ways when he was posted to Wairoa in January 1845, but he never got over the unfavourable impression of the place and its people that he formed on his first day there.[49] He recounts how in April that year the whalers took, used, and damaged some wakas but refused to pay utu.[50] Thereupon the Māori stripped the station of its boats. Despite his doleful appreciation that none of the parties professed Christianity, Hamlin could not resist interfering, only to be rebuffed by the chief. The whalers, however, ostentatiously started packing up and sent for the Māori to take them away to a different place. Honour thus having been satisfied all round, a settlement was reached next day.

Boat building requires a good deal of ironmongery, some of it specialized, which would have to be bought, perhaps also rowing oars and the long steering oar each boat needed.[51] Ropes and lines of various characteristics would have to be acquired, anchors, axes, blubber spades, boat spades, bone spades, gaffs, irons, knives of various sorts, lances long and short, pughs, and so on. Captain Hempelman, who had the Peraki station at Banks Peninsula, costed out the equipment lost by his crews during the 1837 season at £111 (plus a boat).[52] Campbell, Crummer's witness, said that the founding partners at Wairoa already had some whaling gear when they started, but he said nothing about range and quantity. Did Macfarlane provide some too? He first took *Kate* into Wairoa in December 1843, some three or four months before the whaling season began. The ship's mate, Taylor, said that Macfarlane supplied all that was necessary for carrying on the station, but though repetitive and insistent he was generally unspecific. The generic term he used was 'supplies', and

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48 Lambert, ibid, at 365-366.

49 *Collected papers of and relating to Reverend James Hamlin, Journals 1835-1849*, HL MS-0068, entries for 28 and 30 January 1845.

50 Ibid 14 and 15 April 1845.

51 J Harris and I Smith *The Te Hoe Shore Whaling Station Artefact Assemblage*, Otago Archaeological Laboratory Report: Number 2 (2005) University of Otago <www.otago.ac.nz/anthropology>. Oars provided from outside the station are mentioned in *Wallace & Wallace v Guard*, above n 40.

52 FA Anson (ed) *The Piraki Log* (H Frowde, Oxford University Press, Oxford, 1911) at 49, and see also at 57.

with two exceptions the commodities he detailed were either consumables or items used to barter for food. He said that Morrison, on the other hand, "fitted out" the station. This suggests a contrast parallel to one noted by Michael Pearson in his careful account of the nature and origin of whaling equipment in New South Wales, that advertisements and newspaper reports used the expression whaling "gear" to signify hardware, and whaling "stores" to signify food, clothing and the like.[53] Taylor's exceptions subtract only a little from that interpretation. One is surprising: *Kate* brought a whale gun to Wairoa, then an inefficient technology, according to Pearson, and rarely used in Australian waters at that time.[54] The other item of hardware was vital, but not part of the fixed stock of a whaling station: shooks, which were kitsets of ready-shaped staves for assembly into casks for holding the oil. All in all the evidence suggests that Macfarlane contributed little to the station's permanent capital.[55] To the contrary, both Campbell and Taylor attested that Macfarlane took away two of the boats made at the station, which suggests payment or barter rather than a step in a long-term engagement.[56]

As for manning the station, the *Kate* delivered some of the whaling hands there, but nobody suggests that they were under articles to Macfarlane. We are left with provisioning. Campbell testified that the partners originally intended that Morrison and another man would go to Wellington – whether to fetch supplies or to arrange for a supplier is unclear. The newspaper report adds, however, that they had only about £30. The inference seems reasonably clear that that intention was superseded by some arrangement with Macfarlane. Conceivably that may only have been that *Kate* would act as a mobile shop on a pay-as-you-go basis – taking the two boats is consistent with that. More likely it was an agreement that committed the station's produce to Macfarlane – the existence of a written document and Hanson's persistence in trying to get it admitted as evidence suggest that. Either way, between her initial delivery and Crummer's intervention the *Kate* landed supplies four more times, though the witnesses could not say whether that was on behalf of Macfarlane, Salmon, or a partnership of the two, the evidence on that aspect of the case not progressing beyond appearances, assumption, and rumour. Still, the quantity may have been substantial, depending on how much the station dwindled following the loss of the rafts of blubber, Salmon's tardy delivery of

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53 Michael Pearson "The Technology of Whaling in Australian Waters in the 19th Century" (1983) 1 Australian Journal of Historical Archaeology 40 at 51. Note also Anson *Piraki Log*, above n 52, at 144: "Mr Hempelman gone to the Chattoms after whaling gear and provisions."

54 Pearson "Technology of Whaling", above n 53, at 46-48.

55 Firmin Victor Martin, probably Macfarlane's least knowledgeable witness (being a former Wellington merchant fallen on hard times, a visitor to the Bay) said that Macfarlane "supplies or has some dealings with the Mawai station", from which one of the try-pots came: Chapman "Notebook", above n 1, at 53 and 59. The men may have acquired some of their hardware from other stations; Mahia, for example, from which Campbell came, may have been abandoned at about this time (Prickett *Archaeology*, above n 2, at 105-106).

56 Taylor denied knowing whether Morrison had paid Macfarlane money for the first supplies.

casks, and what may have been a more general dissatisfaction with the level of supplies available to the men – evidence on that point was conflicting.

Usually in the early 1840s the operator of a shore whaling station would depend on food, drink and clothing being shipped in from elsewhere, whether or not the agreement he had with his men obliged him to supply them. Whalers and their employers recognized two different forms their relationship could take. In one the employer was to find provisions for the men, in the other finding provisions was the men's own responsibility.[57] If the employer did provide keep he would also make a top-up payment to the men calculated as a share of the oil and bone harvested during the season. That was called a 'lay party'. If the men had to find their own provisions their pay would be calculated wholly as a share of the produce, which would therefore have to be larger than if they were getting keep as well – though the employer might also make a cash advance at the start of the season. This was called a 'share party', and it was not disputed that Wairoa was such a one. In practice, however, men agreeing to find their own provisions were just as dependent on the whaling station's store as those for whom keep was part of their wage.[58] There was no dairy down the road, and the men lived on credit until payday at the season's end.[59] The so-called *Piraki log*, which is a collection of journals written at that station from 1837 to 1842, shows the owner/operator scurrying back and forth to Akaroa and bartering potatoes with visiting ships to garner supplies, though it was the men's responsibility to find their own provisions.[60] He had to tolerate working days lost to enable the men to forage in the bush – when acquiescence or absence of local Māori permitted it – and when supplies ran low the men deserted.[61] The sample slop bills in the published edition of the log for three whalers who saw out the season in 1837 average a little less than £22 for their purchases of clothing, food, drink and tobacco, which may perhaps be Sydney prices, and will include a profit margin.[62] Nonetheless, they give some indication of the capital needed to stock a store. The agreement Robert Fyffe had in 1845 for his Kaikoura stations committed his supplier, Wellington merchant William Fitzherbert, to delivering food, soap and clothing costing about

57 Chapman "Notebook", above n 1 at 63 and 67-68 (Stuart, Jones); *Wallace & Wallace v Guard*, above n 40 (Fraser). Variants would be possible.

58 A canny station operator might insist upon this; Fitzherbert, Fyffe's supplier at Kaikoura, undertook not to trade with the men directly: Sherrard *Kaikoura*, above n 42, at 78.

59 Captain Mayhew's store on Kapiti, kept by Andrew Brown, may have been something of an exception: see Chris Maclean *Kapiti* (Whitcombe Press, Wellington, 1999) at 159-163, especially at 160, and Brown's evidence in *Harris v Fitzherbert*, above n 3.

60 Anson *Piraki Log*, above n 52, for example at 63, 66, 70, 72–73, 80, 84 and 127-128.

61 Ibid, at 127-144, which is a record of a station disintegrating.

62 Ibid, at 44-48 (Rogers, Porter, Siddle).

£850.[63] Wairoa had about 20 men at the end of the season, possibly more earlier, though probably some would have been local Māori with independent access to food.[64] Barter was probably easier at the Hawke's Bay stations than at many other whaling locations, and we know from the evidence in *Macfarlane v Crummer* that it was important at Wairoa, but even for that the men needed to buy the calico, prints, ribbon and other commodities acceptable for trading. The £30 the *Spectator* reports the station's founders having would not have stretched far.

If that establishes that a supplier would be critical to a station's success, and if we skate over the difficulty of separating Macfarlane from Salmon, and if we suppose that Macfarlane followed the usual pattern of undertaking to supply for the season in return for the station's produce at a predetermined price, we may still doubt that that constituted Macfarlane an 'owner'. Supply, however, had more to it than merely delivering the groceries; suppliers could find themselves drawn indirectly into the management of a shore station beyond their contractual relation with the operator. That arose from what no doubt began as a brute fact experienced at shore stations generally: the men would not let oil leave the beach until they had been paid. In *Harris v Fitzherbert*, litigated in Wellington in April 1843, the jury had transmuted that fact into a right, a customary lien that extended not just to share-earning whalers but also to the station's cooper, who was employed on a monthly wage.[65] Further, the lien reached beyond employers to bind also the supplier/purchaser who had come to collect the produce at the end of the season. One of Macfarlane's expert witnesses, Johnny Jones, said that even when, as owner/supplier, he had reached an operating agreement with someone for the season, and had left that man to conclude his own employment contract with the hands he, Jones, would be obliged to step in and pay the men before he got the oil off, even if the operator owed him money on the season. Hanson and Ross, the lawyers, would have known this, because they were counsel in *Harris v Fitzherbert*, and Fitzherbert himself turned up in *Macfarlane v Crummer* as another expert witness. The lien was doubtless well known. At Wairoa it led Macfarlane and Salmon into resolving a dispute between Morrison and his men.

At the season's end Salmon arrived in *Kate* for the oil, but some of the men refused to allow it off the beach. Macfarlane was there too, or nearby; the evidence about him is difficult to interpret. The dispute concerned the two lost whales: the men wanted an allowance for them but Morrison had refused, saying that entitlements arose only for oil produced and delivered on board. Salmon bargained with them, eventually agreeing that they should be credited with £2 each. It is unclear whether the men turned to him because they thought him the owner, or Macfarlane's agent, or because they held him responsible for the late delivery of the casks – a failure for which he

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63 Sherrard *Kaikoura*, above n 42, at 76-77 (deducting the costs of whalelines and estimating the keg of tobacco to contain perhaps 200 lbs. Slop bills for the three Piraki whalers, above, averaged 10 lb of tobacco each for the season.) Fyffe's name is spelled Fyfe in contemporary reports of his litigation.

64 *New Zealand Spectator and Cook's Strait Guardian* (Wellington, 22 February 1845) at 2.

65 *Harris v Fitzherbert*, above n 3.

apologized to them – or because he was the senior person present, or just because he was the one who wanted the oil. Salmon did add, however, that if the men had not allowed the bone to be sold he would have been able to meet their demand for £2. 10s. When this story was first presented in evidence Chapman J thought it significant enough to mark with a line in the margin. If all this accounting left the men in credit with Morrison then somebody would have to make the final payout to them. The evidence on that is less clear, but there are statements that in two cases it was Macfarlane who paid and in two cases Salmon.[66] The role of 'supplier' thus edged towards that of financier.

With only a few lines of newspaper report of Hanson's address to the jury and without direct knowledge of any of the questions he asked the witnesses care is needed in reconstructing his case for Macfarlane. Nonetheless it is striking that four of his eleven witnesses had had no personal involvement in the case. They were called to testify to the general organization of shore whaling and the customs that, Hanson said, determined the legal relations between those involved. It was an impressive array, beginning with Johnny Jones, whose 12 years experience of whaling included ownership of several southern stations plus one on Kapiti. He seems not to have been involved in any of the earlier whaling cases, but in one of them three witnesses used his name either to establish their own credentials or to demonstrate usual practice.[67] Hanson also called William Fitzherbert, whose experience supplying stations at Kapiti and Kaikoura has been mentioned already in this paper.[68] Then there was Charles William Schultze, who had taken over the Weller brothers' Otago whaling stations but was now a Wellington merchant, and George Young, now a Wellington licensed victualler but for ten years previously a whaler.[69] To avoid the impression that this was a chorus solely of Wellington merchants Hanson included a current Hawke's Bay whaler among his witnesses and questioned him about the custom of the business too.

Nonetheless, some members of the cast do seem to have engaged for the season. Fitzherbert, twice a litigant over the Kapiti station, was now an expert witness for Macfarlane. George Young, witness for Macfarlane, had been a witness for Fitzherbert on fact and custom.[70] In earlier cases both John Wade and John Wallace had first been litigants and then expert witnesses for Fitzherbert. Such is the incestuousness that Wallace was also a juryman in *Macfarlane v Crummer*, bringing a warning from Chapman J that the issue in that earlier case was different and memory of it must be

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66 Chapman "Notebook", above n 1 at 60, 82-83, 86 and 88 (Stuart, Campbell, Templeton, Carroll).

67 *Watson v Wade*, above n 40 (Raphael, Fraser, Guard).

68 For Kaikoura see Sherrard *Kaikoura*, above n 42, at 60, 63, 65 and 76-78; *Fitzherbert v Fyfe* Supreme Court Wellington, 19 September 1846 per Chapman J, reported in *New Zealand Spectator and Cook's Strait Guardian* (Wellington, 26 September 1846) at 3.

69 AH McLintock *The History of Otago* (Otago Centennial Historical Publications, Dunedin 1949) at 107. For Young's experience see *Harris v Fitzherbert*, above n 3.

70 *Harris v Fitzherbert*, ibid.

put aside. Schultze was later pricked for the jury when Fitzherbert fell out with Fyffe, but his name was struck out at the last minute, leaving the trial to proceed with a panel of only eleven.[71] This was not a party to which only Wellington merchants were invited, however. The losing defendant in *Wallace & Wallace v Guard*, the veteran whaler Jacky Guard, originator of New Zealand shore whaling, was a witness on custom for the successful cooper in *Harris v Fitzherbert*, and so too was the man who had made that improper sale in Guard's case, the Wallaces' employed headsman Charles Samuel Cave. These were small communities in a small colony making up their own rules, not without conflict of course – Martin CJ specifically warned the jury in *Harris v Fitzherbert* to consider the self interest of these expert witnesses – but able to use the court as a public and tolerably neutral venue to enunciate and confirm them.

Thus the plaintiff in *Watson v Wade* had based his action on a supposed custom, but lost to a defence built upon the master/servant relationship. One witness for the plaintiffs in *Wallace & Wallace v Guard* regarded custom as a justification for their claim, but the issue was not explored because Martin CJ had already ruled that the case should be decided on the basis that the headsman was the station owners' servant. A few months later, however, custom had been determinative in *Harris v Fitzherbert*, and now it emerged as central to Hanson's case for Macfarlane. The newspaper report has Chapman J struggling somewhat to fit it into his understanding of the common law. If Morrison were the station's owner, he ruled, no custom could be set up to divest him of property in the oil or bone. Since Chapman J also ruled that a mere contract to sell future bone would not deprive Morrison of the power to pass title to Crummer, if Morrison were the station's owner Crummer would win. On the other hand, Chapman J said, the jury might find that Macfarlane was the true owner, perhaps because he had the 'original ownership' – he would read the evidence over to them so that they could consider that. 'But', he added, 'the enterprise of whaling was of a peculiar nature, and it seemed to be such as to let in evidence of custom as to who was to be deemed owner of the property.' That was not quite what Macfarlane's witnesses had said. The custom they propounded was that the oil and bone belonged to the station's outfitter, by which they probably meant its supplier – Jones certainly did. But Hanson had also asked some of his witnesses who was reputed to be the station's owner, and to a man they had replied 'Macfarlane'. The impact of that might have been reduced somewhat by Fitzherbert, who said that it depended on whom you asked and for what purpose: his station would be 'Fitzherbert's' among merchants but 'Fyfe's' among whalers.[72] But the supposed usage enabled Chapman J to reconcile his view of the common law with a custom that seemed to contradict it: it might point to a custom that a monopoly supplier

71 HS Chapman "Notebook entitled 'Civil trials, no 7' 1846-7", HL MS-0411/008, at 121.

72 It seems not to have occurred to Campbell, a whaler, that counsel's question was which of Morrison and Macfarlane was commonly reputed owner; he took the choice to be between Morrison and the full partnership.

might be "deemed" to own the station, from which ownership of the produce would follow. Perhaps that is also what Hanson had in mind when he called Macfarlane 'the substantial owner'.

From the newspaper report Chapman J seems unenthusiastic about the custom. Did the witnesses really mean custom, he asked, or were they just describing contracts habitually made? There was plenty of evidence for the latter, he said. And though he is not reported as saying expressly that to be lawful a custom must be reasonable, that value may have underlain his suggestion that the jury consider where the risk lay. Mr Jones had said in evidence that the risk of a poor season lay with the operator, in which case, said Chapman J, the outfitter could hardly be deemed the owner, taking all risks. The jury had no such reservation, returning after an hour and a half's deliberation with a verdict for Macfarlane. Superficially their decision looks like an oligopolists' policy of the sort one might cynically predict from merchants worthy of a place on a special jury: new financiers could still enter the market, but only by undertaking the whole burden of supplying a station, which would be a high entry barrier. Hanson had told the jury that if they supported the right of a stranger to visit the stations on the coast and make such purchases there would be no security for the substantial owners. Fitzherbert said in evidence that if it were not for the custom he would not enter into the business. That conclusion, however, must be tempered by the rather small sum the jury awarded as damages.

No argument is recorded about the quantum of damages. The logic of suing for conversion was that Crummer should have to pay the value of the goods at the time of the conversion, recouping his loss from Morrison if he could. But how should that value be calculated? Jones said that in his supply agreements he usually paid £12 a tun for oil and £80 a ton for bone.[73] Fitzherbert said that the Wellington price for bone in October 1844 was about £130 a ton, less shipping costs from Hawke's Bay of about £3, but that if one shipped it right through to London, as he had done, it would net £200. On these estimates Crummer might have to pay £108, or £175, or £270 – we do not know what Macfarlane claimed. The jury awarded just £45. That may have come as a surprise, because the newspaper's correspondent felt it worth adding an explanation: "(apparently giving Mr Crummer credit for the value he had already paid in goods.)" If that does reflect the jury's thinking it is a gloss on the ownership analysis, but one rather different from the refinement that Chapman J himself offered. In his summing up the judge had noted that even if Macfarlane were deemed to own the station Morrison might have an implied or even customary authority to sell its produce in circumstances of necessity. In cross-examination Jones had conceded as much, and there was some evidence that Wairoa was short of supplies. But the proper conclusion then would be that Morrison's sale was not wrongful and Crummer would win. Instead the award of £45, if explicable as the *Spectator's* correspondent says, indicates a more holistic approach to the situation.

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73 Evidence of the price range for oil during a season was given in *Wallace & Wallace v Guard*, above n 40.

One way of expressing that would be to say that Crummer's purchase was wrongful but the goods he had supplied were necessaries in the sense that they were used for the ordinary purposes of the station.[74] If the monopoly supplier is deemed to be the owner he must give credit when someone else does some of his job for him. Crummer seems not to have pleaded his case that way; there is no mention of a set-off, but that is what it amounts to. Ross, his counsel, is reported as saying that 'Macfarlane had had all the benefit of his client's supplies and what he now sought was to make him pay twice over.' The whalers' evidence of how Morrison did use Crummer's goods is difficult to interpret; the questions they were answering are not recorded and they take it for granted that their listeners understand how the station was organized. But one of them has Morrison saying that if he could not get supplies he would sell oil or bone, which makes one causal connection. And he and two others indicate that goods from Crummer's delivery were used to barter for pigs for the fishery generally or for the headsmen, or were put in the store for the men to buy for their own bartering, which makes another.

The decision thus stopped at the minimum required to establish at least a prima facie rule safeguarding a supplier's monopoly acquisition of a shore station's produce. Merchants who made substantial annual commitments to 'their' stations could now sue another merchant who intervened, not just the errant operator. Crummer was a poacher who could be made to pay. Chapman J evidently thought common law would not achieve that result, and we can probably reconstruct his reasoning. Once concede that Morrison had been the bone's owner then at best title would have passed to Macfarlane by an executory contract for sale, perhaps when the bone had been cleaned.[75] But delivery of the goods and payment for them were reciprocal obligations, expressed at common law by saying that the vendor has a lien until payment. Hence at the time of Crummer's purchase Macfarlane would not have had the immediate right to possession that was a necessary precondition to an action in trover for conversion.[76] Morrison was not Macfarlane's servant, so the only route to holding Macfarlane to be the bone's original owner was through ownership of the station. As a question of fact Chapman J had to leave that for the jury, but at common law the evidence was slender, to say the least. Only by recourse to a different code of law could Macfarlane plausibly be called an owner, and thus it probably was necessary for the jury to recognize custom as that code. When they validated it – as they most likely did – it would henceforward carry the acceptance of as nearly a representative group of Wellington's natural rulers as could be gathered at the time, a group which had reached its decision having heard testimony from others of their ilk plus a whaler or two

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74 Contrast *Wallace v Guard*, where the spirits provided had ruined the season: *New Zealand Colonist and Port Nicholson Advertiser* (Wellington, 13 September 1842) at 3 (preliminary hearing).

75 George Ross *A Treatise on the Law of Purchasers and Vendors of Personal Property* (2nd American ed, JS Littell, Philadelphia 1836) at 22-23.

76 TC Morton *A Practical Treatise on the Law of Vendors and Purchasers of Chattels Personal* (V and R Stevens, London, 1837) at 310 and 314-319.

for balance. Nor was custom one-sided; the jury gave judgment for Crummer on a notional counterclaim, reducing the damages to £45, as earlier the decision in *Harris v Fitzherbert* upheld a customary lien for the station's manual workers against the mercantile interest. One can see elements of both efficiency and fairness in these principles. They are a nice example of law formation at the frontier.

A sequel and a postscript. The first I cannot explain. When Crummer sued Morrison in Auckland to recoup his loss he claimed not £45 but £400, being the original price he paid plus the damages he had had to pay Macfarlane.[77] That looks like double dipping, even treble. Morrison did not defend, and Crummer got a verdict for £287 15s. One could offer various explanations, but they would all be speculative. There are no surviving court papers. The postscript is more general. Shore whaling diminished as the whales were slaughtered faster than they could reproduce, and at the same time colonization brought shore stations a settled hinterland. They no longer needed to operate as plantations supported from outside, but, in their reduced form, could run as part-time seasonal work for local men, who could rely on local supply. Shipping would be needed for the produce to reach market, but it could be chartered; or local boats could be built or bought – perhaps that is what Morrison was doing with *Neptune*. A buyer for the oil would be needed, but that would be a straightforward contract for sale, perhaps with an additional obligation on the buyer to deliver casks ahead of time. 'Custom' could then fade away as the activity of shore whaling ceased to be peculiar, to use Chapman J's word, and became absorbed into the general commercial relations of a more integrated society.

77 *Crummer v Morrisson* Supreme Court Auckland, 7 September 1846 per Martin CJ, reported in *New Zealander* (Auckland, 12 September 1846) at 3.