1925
Nov. 27.

JORGENSEN ..... PLAINTIFF;

VS.

THE *CHASINA* ..... DEFENDANT.

Shipping—Seaman—Maritime Lien—Watchman—Jurisdiction

The S.S. *Chasina* was purchased by the A.P.S.S. Co. and was put on the ways of the Marine Repair Co., Ltd., at Vancouver for the purpose of being made ready as a freighter for coastwise service. Upon his own showing, plaintiff remained on the *C.* during the repairs, in the capacity of watchman and caretaker, as part owner on behalf of his "associates and owners to care for her and to oversee her reconditioning, etc." The repairers claimed that they provided all the necessary care and watching during this time. Later plaintiff had the vessel arrested for a claim as watchman and for wages as rigger. Upon motion to set aside the writ and warrant of arrest.

Held, that upon his own showing the the plaintiffs could not properly be deemed to be a seaman, that the services rendered did not entitle him to claim a maritime lien, and that the said motion should be allowed.

2. That, as regards the claim for a lien for wages as rigger, the amount thereof being for less than $200, this Court had no jurisdiction to entertain and hear the same.

MOTION by defendant to set aside writ and warrant of arrest on the ground that the services rendered did not create a maritime lien in favour of the plaintiff.

The S.S. *Chasina* was purchased by the Alaska Pacific Steamship Co., Ltd., from the Union Steamship Co., Ltd., and was put on the ways of The Marine Repair Co., Ltd., at North Vancouver for the purpose of being made ready as a freighter for coastwise services. While the ship was being repaired the plaintiff who was a shareholder in the Alaska Pacific Steamship Co., Ltd., acted as watchman and slept on the vessel.

In November, 1925, he had the vessel arrested for a claim as watchman and also for wages as rigger and on the 27th of November a motion was made before the Honourable Mr. Justice Martin to set aside the writ and warrant of arrest.

E. C. Mayers for the motion.

J. A. Russel contra.

The facts are stated in the reasons for judgment.

MARTIN L.J.A., now this 27th day of November, 1925, delivered judgment.

1925

JORGENSEN v. THE *Chasina*.

Martin L.J.A.

This is a motion to set aside the writ and warrant of arrest to answer the plaintiff's claim for a lien for wages as a rigger and also as watchman, but as to the claim in the first capacity it fails because it is below $200 and therefore excluded from the jurisdiction of this court. Sec. 191, Canada Shipping Act, and *The St. Alice* (1). As to the claim in the second capacity it is beyond question that the services of a mere watchman are not maritime service—*Brown* v. *The Flora* (2), wherein the services claimed were at a time when the vessel was dismantled at the dock in the winter and, in addition to a daily visit, " the duties performed were keeping the vessel clear of snow and pumping out any water that accumulated in the hull "; the vessel was not in commission nor even preparing for a voyage. A number of American authorities are cited to which may be added *The Brig. E. A. Barnard* (3), wherein a claim for services as " watchman and shipkeeper " was disallowed as not giving a maritime lien.

In the *Jane and Matilda* (4), the claim of a woman as cook and steward on board that vessel was allowed by Lord Stowell, she having been shipped and hired in those capacities for the voyage in question even though it was unusual to employ a woman for that work, yet nevertheless she was under the captain's orders as a mariner and employed by him, and had in fact upon occasion creditably discharged some of the ordinary duties as a seaman. She also made a claim in another capacity, p. 190:—

> . . . . that of shipkeeper for a long space of time, in which the vessel remained in dock or harbour, during all which time she had the business of keeping the ship clean by frequent washing, and of looking to the safe custody of the stores left on board.

and it appeared this was based on a hiring by the captain for wages " so long as she should remain on board," p. 191, as cook and steward, and during the time the vessel was in the London Docks, being seized when upon the point of sailing for Spain. The captain, visited it occasionally, and it would appear that at all times he had employed her on behalf of the owners in the usual way—195; in these special circumstances her claim was allowed in both capac-

(1) [1915] 21 B.C.R. 540.
(2) [1898] 6 Ex. C.R. 133.
(3) [1880] 2 Fed. Rep. 712.
(4) [1823] 1 Hagg. Adm. 187.

1925

JORGENSEN v. THE *Chasina*.

Martin L.J.A.

ities and I see no reason for questioning that decision; Lord Stowell, p. 195:—

> It was said that the co-owners were ignorant of all this employment of a female. That may be their fault, or their misfortune, in giving their confidence to an unworthy person; but be it one or the other, it would not destroy the legal claim of a third person, who has acquired it.

I note that there is an error in the judgment of Wills J. in the *Queen* v. *Judge, etc.* (1), wherein he says that the claimant in the *Jane* case "acted as caretaker" only, instead of in the conjoint capacities which are carefully set out by Lord Stowell and hereinbefore indicated, and this oversight has unfortunately created some misunderstanding, because it is clear from the whole case that the claimant was at all times on the ship's articles or if not a member of the crew, however small. In the *Queen* v. *Judge* case the claim of a mate was, after consulting the judge of the Admiralty Court, allowed, it appearing that after the vessel reached port and the crew was paid off the mate by direction of the owner and upon the same sea wages, with an addition for victualling money, remained on board superintending the discharge of the inward cargo and the loading of a fresh cargo for the outward voyage, and also superintend repairs, Wills J., observing, p. 343:

> It is, of course, a matter of common knowledge that one of the most essential parts of the chief mate's duty is to look after the cargo, and see that proper care is taken of it. I am of opinion that the services rendered by the plaintiff were maritime service, although the vessel was actually in harbour at the time.

The same element exists in *Connor* v. *The Flora* (2) wherein the claimant was hired and shipped by the owner direct to take charge of a confectionery stand on board an excursion and passenger vessel and as such the owner

> had to employ persons in various capacities to enable the ship to successfully carry on the line of business she had entered upon

and she was, for the ship's purposes and in the circumstances, just as necessary as, e.g., a stewardess. The learned judge concludes:

> There appears, therefore, to be no reason why this young woman should not rightfully claim a maritime lien for any wages due her. She was engaged by the owner of the boat to perform these services on board the boat, and to the extent of a just amount will be entitled to rank along with the other members of the crew.

(1) [1890] 25 Q.B.D. 339, at p. 342. (2) [1898] 6 Ex. C.R. 131.

1925

JORGENSEN v. THE *Chasina*.

Martin L.J.A.

On the other hand the House of Lords decided in *Macbeth* v. *Chislett* (1) that a dock labourer who had formerly been a seaman but was not on the articles or employed on board as one of the crew, but merely assisted while on board in the performance of a casual and temporary employment in working a vessel by external power from one berth to another in a large dock, was not a seaman because he happened to be a "person employed on board a ship" at the time he was injured, Lord Chancellor Loreburn said, p. 223:—

> I think the court must see, first, whether he is by vocation a seafaring man, and, secondly, whether he is doing work connected with his duties or vocation of a seafaring man. Both of these elements are to be considered. If it were otherwise, then on the one hand a painter painting a ship in a dock or a mechanic called in to mend a valve in a dock or in a harbour would be a seamen, which he obviously is not; but we should have to say he was a seaman, for the duties he was discharging are duties often discharged by sailors and engineers on board ship. On the other hand, if we did not regard both these elements, a seafaring man employed for some work, such as erecting a flagstaff on shore would have to be regarded as a seaman, for that is his vocation. The truth is you have to regard all the circumstances, particularly those to which I have adverted.
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> I think it is impossible to say as regards this man, who was a rigger and had not been to sea for five years, that his vocation was that of a seaman.

The latest decision is one in this court in its Quebec District, in *McCullough* v. *The Samuel Marshall* (2), and it was held therein that a person not on the articles nor a member of the crew but who lived on shore and acted there as shore agent of the owners in collecting freights, ordering supplies and performing the usual duties of a managing owner or ship's husband, had no right to proceed against the ship *in rem* as a seaman, and the court said, p. 112:—

> The claimant does not pretend that he had been engaged by the master of the ship one of whose duties is to enter into an agreement with every seaman whom he carries as one of his crew; "Canada Shipping Act," sec. 328. Calling himself purser employed by the owners does not give him the status of a seaman.

In the light of these authorities I have considered the evidence in the very conflicting affidavits before me with the result that in the circumstances I am of the opinion he cannot properly be deemed a seaman though he sets up useful services as watchman and caretaker but on his own

(1) [1910] A.C. 220.

(2) [1923] Ex. C.R. 110.

1925

JORGENSEN v. THE *Chasina.*

Martin L.J.A.

affidavit, which is loose and unsatisfactory, at most he was one who was on board of her in the said capacity as a part owner on behalf of "my associate owners to care for her and to oversee the reconditioning of the ship while she was being made ready as a freighter for coastwise service" by the Marine Repair Co., Ltd., the manager of which, however denies this and deposes that practically during all the times in question his company was in full control of the repair and reconditioning work and "did provide all necessary protection and watching" for the vessel while she was in their possession at their dock in an unseaworthy condition. Such being the case, I am of the opinion that upon the plaintiff's own showing the motion should be allowed with costs.

Judgment accordingly.