1916
Feb. 25

BRITISH COLUMBIA ADMIRALTY DISTRICT.

MORRISETTE

v.

THE SHIP "MAGGIE."

Seamen—Fishermen—Lien for "lay" wages.

Persons employed on a small launch on a salmon fishing "lay" and performing work thereon in the double capacity of sailors and fishermen, though most of their time is occupied in fishing and though not having any sleeping quarters on board the vessel, are nevertheless "seamen" and entitled to their maritime lien for seamen's wages; but the lien will not attach if the use of the vessel is no part of the agreement on which the "lay" is based and merely allowed by the owner as a matter of convenience.

Swinehammer v. Sawler, 27 N.S.R. 448, followed; *Farrell v. The "White,"* 20 B.C.R. 576, referred to.

ACTION to enforce seamen's liens for wages.

Tried by Martin, L.J., at Vancouver, B.C., February 23, 1916.

Wintemute, for plaintiffs.

Brydone-Jack, for defendant.

MARTIN, L.J. (February 25, 1916) delivered judgment.

These are consolidated actions by Chief Julius, an Indian, of Sechelt, and his two sons for $726.50 for seamen's and fishermen's wages, to answer which the gasoline fishing boat "Maggie" has been arrested. The wages are claimed on a salmon fishing lay of the three Indians and one H. J. Cook whereby it is alleged that the four men were to work on a lay with George Bampton who was to furnish the said launch and fishing gear and skiff, and after deducting the expenses of provisioning and running the boat the proceeds were to be divided between all parties as follows: two shares to Bampton and one share to each of the four other, based upon the following prices for various kinds of salmon, *viz*, 25 cents for cohoes, 5 cents for dogs, 3 cents for humpbacks and 40 cents for sock-eyes, which fish were to be sold

to Sherman's cannery by George Bampton and a settlement made at the end of the fishing season, which ended with the closing of the cannery on September 16. Cook also joined in the action but at the trial it was announced that he had withdrawn his claim.

This subject of seamen's wages in the form of a lay has recently been considered by this Court in *Farrell* v. *The "White*[1]," a whale fishing case, and I have nothing to add to that decision except to say that it is in general accordance with the decision of the Supreme Court of Nova Scotia *en banc* in *Swinehammer* v. *Sawler*[2]. That case was cited in answer to the contention on behalf of the owner of the "Maggie" that on the facts here the three Indians were fishermen only and therefore could not have a seaman's lien. But I am of the opinion that upon the evidence before me it must be held that each of the four lay men not only fished but took part in the working of the boat as a seaman, *e.g.*, in steering, or tending her, while fishing or taking on or discharging her cargo of fish, or cleaning her as occasion arose, or as was otherwise necessary, though most of their time was occupied in fishing, and they did not sleep on board of her but on the shore or in the Indians' rancherie near by. Much stress was laid by the defendant upon this fact of not sleeping on the vessel, but that, while important, is not the sole or true test of the capacity in which men are acting on or about a vessel either temporarily, as *e.g.* in the case of seamen camped for weeks on an island trying to salve their stranded ship from an adjacent reef, or permanently, as *e.g.* in the case of a crew of a river bot or ferry which ran only in the day time and had insufficient sleeping accommodation for all her crew. It is only a question of degree, the principle is the same in the case of mariners on a big ship on a long whaling lay or a small launch on a short salmon lay. Such being the facts, the *Swinehammer* case above cited decides that where one is "employed in the double capacity of sailor and fisherman (he is) therefore clearly a seaman under the definition given in the sub-section"—now sub-sec. (*g*) of sec. 126 of the Canada Shipping Act, R.S.C. ch. 113, and *cf.* the definition of "ship" in sec. 2 (*d*), and also sec. 294 recognizing "contracts for wages by

[1] 20 B.C.R. 576. [2] 27 N.S.R. 448.

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the voyage or by the run or by the share." It would follow, therefore, in the absence of other objection, that these Indian seamen would be entitled to their maritime lien.

But two further objections are raised to their right to recover; first, that under this lay there was to be no payment till after the proceed had been received by George Bampton from the cannery; and second, that William Bampton, brother of George, was the owner of the "Maggie," on board of which he lived, and was also one of the lay men and as such allowed it to be used as a matter of personal convenience to himself and mere favour and friendly assistance to the others as his mates and fellow lay men, and therefore there could be no lien upon it as the use of it was *dehors* the contract with George Bampton who, it was alleged, did not agree to furnish the launch but merely the gear, skiffs, etc.

With respect to the first, it is to be noted that, as alleged, this is a different lay, in this particular, from that in *Farrell* v. *The "White"*, *supra*, wherein the wages were to be paid monthly, and according to the plaintiff's contention it is like that in *Swinehammer's* case, wherein they were to be paid on delivery to the market. But I must say I have much doubt on the point as to exactly what the lay was, the evidence being far from clear in several respects (particularly the price that was to be obtained from the cannery) and I think it better not to go into it fully now, because there are other similar claims to be tried in regard to two other fishing launches arrested in this action, the "Eva" and the "Echo." There is, however, something appreciable at least to support the defendant's contention that George Bampton was not to pay the claimants till he had been paid by the cannery, of which essential condition precedent no satisfactory evidence has been given, but as I have come to a clear decision on the second objection I do not, for the reasons above indicated, decide this point, as it is unnecessary. Then, as to the second objection, I find, as a fact, to put it briefly, after a careful consideration of the conflicting and unsatisfactory evidence, on both sides, that the plaintiffs have not discharged the onus cast upon them to prove that the use of the "Maggie" was part of the agreement on which the lay is based, and I am forced to the conclusion that, on the evidence, she must be held to be

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the property of William Bampton and to have been used by him personally, apart from the lay agreement, in the manner contended for, and therefore she is not subject to the lien from which she is hereby discharged, and also released from arrest, and the action as regards the claim of the three Indians and Cook is dismissed with costs.

Action dismissed.