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COMMENTS

ADMIRALTY—SEAMEN UNDER THE LAY PLAN

INTRODUCTION

Today the lay plan is a "shadow" of its ancient self. This scheme which once engulfed a large portion of the maritime industry has been confined almost exclusively to the sphere of fishing. At present, in many seaport areas of the United States, the lay plan is an obscure and unfamiliar term.

To the fisherman, however, who is most often the "lay-seaman," this lay plan is an important one, since it provides him with a schedule of remuneration for his services. This comment will attempt to analyze the respective positions, i. e., rights, privileges and powers of the lay-seaman, his master and owner who operate under this plan.

THE LAY PLAN DEFINED

The lay plan is an agreement whereby the seamen, master, and/or owner of a particular venture each receive a stipulated percentage in the freight, profits, or catch. Usually, under this system, the shipowner furnishes the ship, the seamen furnish the labor, and out of the earnings each receives a lay or share. This lay is similar to agricultural sharecropping, where the landowner furnishes the land, equipment, and supplies while the cropper furnishes the labor. Out of the fruits of this undertaking, the cropper and the landowner each receive an agreed share minus the necessary expenses.¹

Early in maritime commerce, the method of compensating seamen by the share plan was established to benefit both the owner and the crew working the vessel². Its use was adaptable particularly when carried on in a small way by small vessels, since neither the owner nor the crew severally could afford the risk of the contemplated venture.³ As an ancient practice it was held in great favor with respect to all manners and types of navigable commerce. In modern times, however, fixed pecuniary wages have replaced the lay plan except in whaling, fishing, and sealing voyages.⁴

Many types of lays have been devised to meet particular situations. The following are illustrative of the most widely used and accepted plans:

half lay—The owner furnishes, equips, and maintains the vessel. The expenses are deducted from the gross catch and the balance is divided one half to the owner and one half to the crew. Under this lay, all maritime necessities furnished are chargeable to the vessel and may give rise to a lien thereon.⁵

1. *Payne v. Trammell*, 29 Ga. App. 475, 115 S.E. 923 (1923).

2. *The Phebe*, 19 Fed. Cas. 424, No. 11,064 (D. Me. 1837).

3. *Marshall v. Boardman*, 89 Me. 87, 35 Atl. 1024 (1896).

4. 1 *BENEDICT, ADMIRALTY* 249 (6th ed. 1940).

5. See *The American*, 1931 Am. Mar. Cas. 197, 202 (D. Mass. 1930).

quarter lay—The owner furnishes, equips, and maintains the vessel as in the half lay. The gross catch is divided, one quarter to the owner and three quarters to the crew and then the expenses are deducted out of the crew's share. Under this lay, all maritime necessities furnished are chargeable to the crew and, therefore, will not give rise to a lien on the vessel.⁶ Another case⁷ refines this lay and states that only necessities are taken out of the crew's share while stipulated expenses are deducted from the gross catch.

fifth lay—This is similar to the quarter lay in most respects, except that the owner receives one fifth and the crew receives four fifths of the catch.⁸

forty-sixty lay—This is similar to the quarter and fifth lay in most respects except that the owner receives forty percent while the crew receives sixty percent of the catch.⁹ Under this lay, payment for the necessities furnished is not uniform. In some instances the master handles the money and pays the bills while in others the owner or his agent makes the payments.¹⁰

broken forty lay—The necessary expenses are deducted from the gross catch. The owner receives forty percent of the balance while the crew receives the remaining sixty percent.¹¹

Italian lay—All expenses are deducted from the proceeds of the catch. The balance is distributed one share to each member of the crew and six shares to the owner of the vessel.¹²

In retrospect, the lays are substantially the same; the main differences being:

- (1) which party is responsible for the expenses,
- (2) whether a lien against the vessel can arise for those expenses,
- (3) when the expenses are to be deducted, and
- (4) the respective percentage paid the owner and crew under each type of lay.

INTEREST UNDER THE LAY PLAN

Contract of employment

The courts are divided as to the label or nomenclature a crew's lay interest represents. The majority view considers this interest as wages,¹³ while a small minority holds that it is a tenancy-in-common.¹⁴ Under the first view, the seaman is considered an employee¹⁵ and, therefore, cannot

6. *Ibid.*

7. See *The Elk*, 1938 Am. Mar. Cas. 714, 716 (D. Mass. 1938).

8. See *The American*, 1931 Am. Mar. Cas. 197, 202 (D. Mass. 1930).

9. See *The Helen M.*, 1932 Am. Mar. Cas. 587, 593 (D. Mass. 1930).

10. See *The Juneal*, 1932 Am. Mar. Cas. 1284, 1292 (D. Mass. 1932).

11. See *The Helen M.*, 1932 Am. Mar. Cas. 587, 593 (D. Mass. 1932); *The Fannie F. Hickey*, 1931 Am. Mar. Cas. 794, 799 (D. Mass. 1931).

12. See *The Josephine & Mary*, 1940 Am. Mar. Cas. 1628, 1629 (D. Mass. 1940).

13. See *U. S. v. Laflin*, 24 F. 2d 683, 685 (9th Cir. 1928); *Reed v. Hussey*, 20 Fed. Cas. 440, No. 11,646 at 444 (C.C.S.D.N.Y. 1836); *Lewis v. Chadbourne*, 54 Me. 484, 485 (1865).

14. *The Columbia*, 6 Fed. Cas. 173, No. 3,035 (E.D.N.Y. 1877); *The Mary Steele*, 16 Fed. Cas. 1003, No. 9,226 (D. Mass. 1873).

15. *U. S. v. Laflin*, 24 F. 2d 683 (9th Cir. 1928); *Reed v. Hussey*, 20 Fed. Cas. 440, No. 11,646 (S.D.N.Y. 1936); *Lewis v. Chadbourne*, 54 Me. 484 (1865).

join in a suit instituted or defended by the owner.¹⁶ In the event an action at law is brought by the owner against a third party, the seaman under the tenancy-in-common or partnership view can join or defend as a co-party.¹⁷

There are cases that hold the lay is not a wage as such, but rather is in the nature of a wage.¹⁸ Although used in this sense, the seaman's agreed shares of the profits of a voyage are recoverable either by an *in personam* or an *in rem* action.¹⁹ The right to such wages, however, is contingent upon the *existence* of a profit or share to be divided.²⁰ In a recent case²¹ adjudicated in the Fifth Circuit, Court of Appeals, it was held that members of the crew were not merchant seamen entitled to seamen's wages. The court stated:

Libellants were specifically employed to ship on shares, no compensation being due them until the earnings of the vessel were ascertained and liquidated. They were participants in a joint venture, their earnings being contingent upon the outcome.²²

The lay, then, is a way of determining the seamen's compensation, substituting the uncertain returns of the business for a fixed rate of wages. The wages are "fixed" in the sense that there is a catch and, further upon the liquidation of that catch.²³ This principle applies equally to the master when he is engaged under the lay plan.²⁴

The fixed share is usually determinable by a written contract which defines the extent, length, and nature of the employment.²⁵ The share contracted for, although contingent, is assignable before the commencement of the voyage.²⁶ A lay fisherman contracting only for a share in the tuna catch is not entitled to a share of the sardine catch caught on the same voyage while he was convalescing from an injury incurred during the tuna catch.²⁷ Neither is he entitled to a share of the freight earned by the transportation of any cargo.²⁸

Certain statutes²⁹ regulating the duties and rights of seamen usually do not apply to lay seamen,³⁰ and a statute which specifies that seamen's con-

16. *Taber v. Jenny*, 23 Fed. Cas. 605, No. 13,720 (D. Mass. 1856); *Grozier v. Atwood*, 21 Mass. 234, 4 Pick. 243 (1826).

17. *The Columbia*, 6 Fed. Cas. 173, No. 3,035 (E.D.N.Y. 1877); *The Mary Steele*, 16 Fed. Cas. 1003, No. 9,226 (D. Mass. 1873).

18. *Reed v. Hussey*, 20 Fed. Cas. 440, No. 11,646 (S.D.N.Y. 1836).

19. *U.S. v. Laflin*, 24 F.2d 683 (9th Cir. 1928).

20. *The Dirigo First*, 60 F. Supp. 675 (D. Mass. 1945).

21. *Sigurjonsson v. Trans-American Traders*, 183 F.2d 760 (5th Cir. 1951).

22. *Id.* at 762.

23. *Reed v. Hussey*, 20 Fed. Cas. 440, No. 11,646 (S.D. N.Y. 1836).

24. *The Miss Nassau*, 53 F.2d 919 (5th Cir. 1932).

25. *The Blue Sky*, 131 F.2d 858 (9th Cir. 1942).

26. *Osborne v. Jordan*, 69 Mass. 277 (1855); *Gardner v. Hoeg*, 35 Mass. 168 (1836).

27. *Luksich v. Misetich*, 140 F.2d 812 (9th Cir. 1944).

28. *The Sarah Jane*, 21 Fed. Cas. 449, No. 12,348 (S.D.N.Y. 1833).

29. 18 STAT. 64 (1874), 46 U.S.C. § 544 (1946) enumerates sections that do not apply to lay seamen:

§§ 201-203 (log books);

§§ 541-543 (shipping commissioners);

§§ 545-549 (shipping commissioners);

tracts are to be in writing does not apply to lay seamen unless the statute expressly says so or if the voyage itself falls within the scope of the statute.³¹ In certain instances, then, there can be an oral contract for the services of a lay seaman.³² Where a seaman is discharged before commencement of the voyage, the statute³³ conferring the right to one month's wages is not applicable to a lay fisherman under an oral or written contract.³⁴ By statute,³⁵ a lay fisherman, unlike a seaman under oral contract, cannot recover the highest rate of pay out of the port of shipment,³⁶ but because of the peculiar circumstances involved, he may be so entitled.³⁷ Failure of a lay seaman to sign the ship's articles as required by statute³⁸ will not preclude him from collecting his share or wages.³⁹

The provision of the Fair Labor Standards Act, requiring a minimum wage, stipulates that it shall not apply to any "employee employed as a seaman,"⁴⁰ thereby precluding a lay seaman from benefits under the act.

Mutual termination of service

The contract, whether written or oral, determines the lay recoverable.⁴¹ If there is no contract the lay will be computed according to *quantum meruit* based on the existing custom or usage.⁴² Under a fisherman's lay, each trip or voyage is a separate venture and each constitutes the term of the seaman's employment.⁴³ The seaman who terminates his contract by mutual consent of the master or owner is entitled to his share of the catch, caught up until the termination, but *not* until the consummation of the voyage,⁴⁴

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- 561 (apprentices);
 - 562 (indenture of apprentice);
 - 564-571 (shipping articles);
 - 574 (shipping articles of vessels in coasting trade);
 - 577 (posting of articles);
 - 578 (right to leave service of ship and wages of employment);
 - 591-596 (wages of seamen);
 - 600 (agreements about liens and wages);
 - 621-628 (deceased seamen's effects);
 - 641-645 (discharge);
 - 651 (protection and relief);
 - 652 (protection and relief);
 - 662-669 (water, provisions, & medical treatment);
 - 701-709 (offenses and unishments);
 - 711 (recovery of penalties);
 - 713 (definitions, schedules, and tables).
30. *Burdett v. Williams*, 27 Fed. 113 (D. Conn. 1886).
 31. *The American Beauty*, 295 Fed. 513 (W.D. Wash. 1924).
 32. *Ibid.*
 33. REV. STAT. § 4527 (1878), 46 U.S.C. § 594 (1946).
 34. *Old Point Fish Co. v. Haywood*, 109 F.2d 703 (4th Cir. 1940).
 35. REV. STAT. § 4523 (1878), 46 U.S.C. § 578 (1946).
 36. *The Comelia M. Kingsland*, 25 Fed. 856 (S.D.N.Y. 1885); *The Ianthe*, 12 Fed. Cas. 1145, No. 6,992 (D. Me. 1856).
 37. *Rice v. Spencer*, 2 Hawaii 502 (1862).
 38. REV. STAT. § 4391 (1878), 46 U.S.C. § 531 (1946).
 39. *The Grace Darling*, 10 Fed. Cas. 895, No. 5,651 (D. Me. 1878).
 40. 52 STAT. 1067 (1938), 29 U.S.C. § 213 (a), (3) (1946).
 41. *The Hunter*, 47 Fed. 744 (D. Cal. 1886).
 42. *The S. L. Goodall*, 6 Fed. 539 (D. Conn. 1881).
 43. *The Emma Marie-Magellan*, 1933 Am. Mar. Cas. 432 (D. Mass. 1933).
 44. *The Hunter*, 47 Fed. 744 (D. Cal. 1886).

unless there is an agreement to the contrary.⁴⁵ However, an agreement to renounce wages for a share in the catch is disregarded where it is unequal and unjust.⁴⁶ In fact, the courts of admiralty, long recognizing the ineptness of seamen in business matters, have accorded them a peculiar protection, and such releases are presumed to be obtained unfairly, since the seamen are, theoretically, at the mercy of the master.⁴⁷ Justice Story in *Harden v. Gordon*⁴⁸ said that seamen:

. . . are emphatically the wards of admiralty; and though not technically incapable of entering into a valid contract, they are treated in the same manner as courts of equity are accustomed to treat young heirs . . . and *cestuis que trustent* with their trustees . . . if there is any undue equality in the terms, any disproportion in the bargain, any sacrifice of rights on one side, which are not compensated by extraordinary benefits on the other, . . . the bargain is unjust and unreasonable, that advantage has been taken of the . . . weaker party . . . the bargain ought to be set aside as inequitable . . .⁴⁹

A contract for a proportional division of the earnings among the owners, officers and crew has been adjudged binding. This form of contract is not considered inequitable and seamen generally are considered competent to so contract.⁵⁰

Desertion

By statute,⁵¹ a lay fisherman engaged for a voyage or for the season, who signs an agreement therefor, and who deserts from such vessel shall be liable to the same penalties as deserting seamen in the merchant service. All costs of process and apprehension shall be deducted out of his share of proceeds of any fishing voyage.⁵² Every fisherman who neglects or refuses to do his duty which results in damage to the vessel or the anticipated catch shall forfeit his share of the catch commensurate with the damages inflicted.⁵³ This statute⁵⁴ has been interpreted in various ways. The misconduct of a seaman on a lay will either inflict an absolute forfeiture of his entire share or some part of it, according to the discretion of the court.⁵⁵ Damages caused by intoxication have been held to be so deductible.⁵⁶ Desertion, on the other hand, presents a more complex problem. Judge Story opined that desertion effects an absolute forfeiture,⁵⁷ while in some cases a recoupment of the resulting damages by the owner was held to be

45. *Jenks v. Cox*, 13 Fed. Cas. 537, No. 7,277 (D. Mass. 1872).

46. *Somerville v. The Francisco*, 22 Fed. Cas. 791, No. 13,171 (D. Cal. 1870).

47. *Garrett v. Moore-McCormick Co.*, 317 U.S. 239 (1942).

48. 11 Fed. Cas. 480, No. 6047 (D. Me. 1823).

49. *Id.* at 485.

50. *The Atlantic*, 2 Fed. Cas. 121, No. 620 (S.D.N.Y. 1849).

51. REV. STAT. § 4392 (1878), 46 U.S.C. § 532 (1946).

52. *Ibid.*

53. *Ibid.*

54. *Ibid.*

55. *Flynn v. The Nereid*, 67 Fed. 602 (D. Mass. 1895).

56. *Ibid.*

57. *Coffin v. Jenkins*, 5 Fed. Cas. 1188, No. 2948 (C.C.D. Mass. 1844).

sufficient.⁵⁸ Members of the crew of a fishing vessel who deserted in order to carouse on shore and consequently were left behind by the vessel were subjected to a corresponding loss from their failure to perform their duty.⁵⁹ However, a fisherman who contracted for a full season was held to forfeit his entire share upon desertion after the first voyage of the season.⁶⁰ The desertion was to the *entire* contract and not only to the remainder of the season.⁶¹ A fisherman inadvertently left behind while attempting to induce recalcitrant deserters to return to the ship was entitled to his entire share of the catch.⁶² Where the master forfeited a minor's share who had deserted, the court held that the father could recover the forfeiture⁶³ at the same rate a regular lay seaman would recover.⁶⁴ A seaman convicted and sentenced for mutiny was nevertheless entitled to his share of the prize money earned prior to his mutinous misconduct.⁶⁵

Rights, privileges and powers of owner, master and seaman inter sese

It is the duty of the owners of a vessel to recompense the seaman for his share either by the division of the catch itself or the liquidated proceeds thereof.⁶⁶ Where the contract stipulates the payment is to be made in cash it is the duty of the owner or master of the vessel to sell the catch as soon as reasonably possible.⁶⁷ The measure of compensation in such a situation is the market price at the port of sale.⁶⁸ If there is no market for the commodity (whale-bone) in one port then the value must be fixed upon the selling price at the market where it is actually sold, with the proper deductions for the expense of preparation for sale and transportation.⁶⁹ When the lay seaman is not working under a contract and the rate of payment differs by custom in the eastern and western waters, the compensation is to be determined by the recognized usage in the waters being worked.⁷⁰

Where the seaman sues for his wages, the extent of damages is necessarily the measure of the lay.⁷¹ The lay need not be reduced to a certainty to maintain a cause of action, as long as the damages are reasonably ascertainable.⁷² However, in a sealing voyage which was interrupted the court held the gross probable earnings were too uncertain and dismissed the libel.⁷³ The owner of a vessel out on a lay need not furnish supplies

58. *The Walrus*, 261 Fed. 676 (1st Cir. 1919).

59. *Flynn v. The Nereid*, 67 Fed. 602 (D. Mass. 1895).

60. *Brothers v. Dunphy*, 165 Newfoundl. Rep. 1904.

61. *Ibid.*

62. *Flynn v. The Nereid*, 67 Fed. 602 (D. Mass. 1895).

63. *Bishop v. Shepard*, 40 Mass. 492, 23 Pick. 492 (1839).

64. *Lowrein v. Thompson*, 15 Fed. Cas. 1005, No. 8,557 (D. Mass. 1857).

65. *Luscomb v. Prince*, 12 Mass. 576 (1815).

66. *Hazard v. Howland*, 11 Fed. Cas. 929, No. 6,280 (D. Mass. 1863).

67. *Ibid.*

68. *Ibid.*

69. *Da Crouz v. The Cape Horn Pigeon*, 49 Fed. 164 (N.D. Cal. 1888).

70. *The S. L. Goodall*, 6 Fed. 539 (D. Conn. 1881).

71. *Macomber v. Thompson*, 16 Fed. Cas. 337, No. 8,919 (C.C.D. Mass. 1833).

72. *The I. S. E. 2*, 15 F.2d 749 (9th Cir. 1926).

73. *U. S. v. Laflin*, 24 F.2d 683 (9th Cir. 1928).

at cost from his store, but can charge the full market price since he is entitled to his profit as a merchant distinct from his profit as a joint adventurer.⁷⁴ Where a seaman becomes separated from his ship without fault, he is entitled to the proportionate share of the whole catch while in actual service.⁷⁵ The remainder of his share is to be distributed pro rata between the other members of the crew.⁷⁶ This is equally true where a seaman is discharged at his own request with the consent of the master.⁷⁷ In the event the seaman is discharged or the voyage is necessarily broken up in a foreign port, the seaman is entitled to his share of the catch determined by the market value at the home port,⁷⁸ unless upon request he stipulates that his share is to be computed by the market value at the point of discharge.⁷⁹ A seaman, when released at his own request, is not disqualified from making a *fair* settlement of his wages even though the amount due him is uncertain and depends upon the future success of the voyage.⁸⁰ This, of course, will not preclude him from demanding in the alternative his stipulated share of the profit earned prior to discharge.⁸¹ If the seaman is wrongfully discharged he may recover damages for such a discharge based on the lay amount he would have received for the whole season, less the amount actually paid him.⁸² Where the seaman, however, is required to perform extra labor in connection with a trading venture not anticipated originally, he is entitled to share in the profits of that undertaking in the same proportion as his lay in the catch.⁸³

Recovery of the lay through fault of the owner

Where the ship is condemned in a foreign port and the master embezzles the proceeds of the catch, the owners are liable to the seamen for their respective lays.⁸⁴ The necessary corollary being, the crew is not answerable for the master's wrong to the owner.⁸⁵ Where the ship is lost, condemned, or sold abroad and the owners realize *some* profit from the cargo, they are held accountable to the shareholders, although their contract stated that payment was not to be made until the ship's return.⁸⁶ Neither will the sharesman suffer any loss created by bad debts contracted for by the owner in the sale of the catch.⁸⁷ The owner was also held accountable for the master's negligence in failing to procure salt, in consequence of which the voyage terminated twenty-five days before the

74. *The Mario Mariofel*, 253 Fed. 289 (S.D. Fla. 1918).

75. *Martin v. Carroll*, 181 Fed. 708 (D. Mass. 1909).

76. *Ibid.*

77. *Jenks v. Cox*, 13 Fed. Cas. 537, No. 7,277 (D. Mass. 1872).

78. *Ibid.*

79. *Hussey v. Fields*, 12 Fed. Cas. 1061, No. 6,947 (D. Mass. 1858).

80. *Green v. Swift*, 14 Fed. 877 (D. Mass. 1882).

81. *Tompkins v. Howard*, 24 Fed. Cas. 38, No. 14,089 (D. Mass. 1849).

82. *Fee v. Orient Guano Mfg. Co.*, 44 Fed. 430 (C.C.E.D.N.Y. 1890).

83. *Lopes v. Luce*, 84 Fed. 465 (D. Mass. 1897).

84. *Jay v. Allen*, 13 Fed. Cas. 386, No. 7,235 (D. Mass. 1846).

85. *Joy v. Allen*, 13 Fed. Cas. 1163, No. 7,552 (C.C.D. Mass. 1846).

86. *Ibid.*

87. *Crowell v. Knight*, 6 Fed. Cas. 910, No. 3,445 (D. Mass. 1874).

close of the season.⁸⁸ The men were entitled to an amount equal to the quantity of the fish caught in the twenty-five days preceding the termination.⁸⁹

If a fishing voyage is abandoned, because the vessel proves unseaworthy due to the owner's negligence, the seamen may recover in damages the equivalent of their lost shares in the expected catch.⁹⁰ A rather unique case reiterated this principle, and further stated that the seamen's knowledge of the vessel's unseaworthiness would not preclude the owner from liability.⁹¹ In this respect, however, the liability of the owner is not that of an absolute warrantor, but is predicated upon his failure to use due diligence.⁹² The owner is also answerable to the lay seaman for his share if the master forces him on shore without reasonable cause after the voyage has begun.⁹³ Of course, in all these situations, the seaman obtains no property right in the proceeds, in the usual interpretation of property right, but he does have a contract right of recovery.⁹⁴ Where a profit has been made and is lost during the voyage without any fault of the owner, the seamen absorb the loss pro rata.⁹⁵ This loss can entirely extinguish their lay and the seamen have no remedy to recover for such loss.⁹⁶ Where the seamen cannot join with the owners of a vessel in an action to recover for the wrongful interruption of a voyage by a third party,⁹⁷ they can still, however, recover from the owners their agreed share in any of the proceeds recovered by such owners.⁹⁸ Even though the owner fails to prosecute the wrongdoer, the lay seaman may recover his share from his employer.⁹⁹

Whenever a lay seaman contracts in writing for a fishing voyage and fish are caught and subsequently sold by the owner or his agent, the vessel, by statute,¹⁰⁰ is liable for the term of six months after such sale. The owner may, however, discharge a seized vessel by executing a bond in favor of each fisherman who instituted an action.¹⁰¹ The amount of the bond must be approved by the court.¹⁰² The seaman may not thereafter institute the same *in rem* proceeding against the vessel, but he will not be precluded from bringing an *in personam* action at common law for his share of the proceeds.¹⁰³

88. *The Page*, 18 Fed. Cas. 997, No. 10,660 (D. Cal. 1878).

89. *Ibid.*

90. *The Elk*, 1938 Am. Mar. Cas. 714 (D. Mass. 1938).

91. *Cricket S.S. Co. v. Parry*, 263 Fed. 523 (2nd Cir. 1920).

92. *The Concord*, 58 Fed. 913 (S.D.N.Y. 1893); *The Tawmic*, 87 F.2d 792 (5th Cir. 1936); *But. cf. The H. A. Leandrett*, 87 F. 2d 708 (2nd Cir. 1937).

93. *The Hibernia*, 12 Fed. Cas. 112, No. 6,455 (D. Mass. 1844); *Mahoon v. The Gloucester*, 16 Fed. Cas. 499, No. 8,970 (Admiralty Court Pa. 1780).

94. *Lewis v. Chadbourne*, 54 Me. 484 (1865).

95. *Joy v. Allen*, 13 Fed. Cas. 1163, No. 7,552 (C.C.D. Mass. 1846).

96. *Ibid.*

97. See *Contract of employment, supra*.

98. *U. S. v. Laflin*, 24 F.2d 683 (9th Cir. 1928).

99. *Ibid.*

100. REV. STAT. § 4393 (1878), 46 U.S.C. § 533 (1946).

101. REV. STAT. § 4394 (1878), 46 U.S.C. § 534 (1946).

102. *Ibid.*

103. *Ibid.*

Injuries

Usually a sharesman disabled in the service of his ship is entitled to his full lay.¹⁰⁴ Where he was injured in preparation for a voyage that was to begin that day he was entitled to his share of the catch for the entire season.¹⁰⁵ However, he cannot recover for a disability which occurred before the voyage began.¹⁰⁶ If the injury was caused by the seaman's gross negligence he will be precluded from any future profit.¹⁰⁷

Maintenance and cure

"Maintenance" has been interpreted to mean a reasonable allowance for the seaman's board and lodging during the period of his illness or injury.¹⁰⁸ Whether the word, "maintenance," is embodied in the contract of employment is not of the essence. The obligation of maintenance and cure has been consistently construed by the courts of this country as an implied condition of the contract of employment.¹⁰⁹ Seamen hired on shares are entitled to maintenance and cure¹¹⁰ whether they are fishermen employed on the lay¹¹¹ or seamen employed for a possible share in salvage monies.¹¹² Not only is a seaman entitled to his wages when he was injured on the second day of employment, but he is entitled to maintenance and cure also.¹¹³ A commercial lay fisherman was accidentally shot by a crew member shooting at sea lions¹¹⁴ and although he was only employed as a watchman he was still, theoretically, in the service of the ship and was entitled to maintenance and cure under the law.¹¹⁵ The injury must occur within the scope of employment, therefore, a lay fisherman who was injured while descending a ladder in answer to a telephone call from his wife was considered to be on a frolic of his own, thereby precluding recovery of maintenance, cure, and his agreed share of the future catch.¹¹⁶

Collision

The courts have differed in answer to the question of whether a lay fisherman can recover his anticipated profit when the voyage has been terminated by a collision. A fisherman employed on a lay vessel, colliding with another vessel, has no right of recovery against his master or owner unless they were at fault.¹¹⁷ Where the boat collided and the voyage was necessarily abandoned the owners were awarded damages for the injury to their vessel and to their interest in the prospective catch. The same court

104. *Welch v. Fallon*, 181 Fed. 875 (D. Mass. 1909).

105. *The Blue Sky*, 131 F.2d 858 (9th Cir. 1942).

106. *Ex parte Giddings*, 10 Fed. Cas. 336, No. 5,404 (C.C.D. Mass. 1814).

107. *Olsen v. Whitney*, 109 Fed. 80 (N.D. Cal. 1901).

108. *Fegan v. Lykes Bros. S. S. Co.*, 198 La. 312, 3 So. 2d 632 (1941).

109. *The J. H. Shrigley*, 50 Fed. 287 (N.D.N.Y. 1892).

110. *The Betsy Ross*, 145 F.2d 688 (9th Cir. 1944).

111. *Ibid.*

112. *The Buena Ventura*, 243 Fed. 797 (S.D.N.Y. 1916).

113. *The Betsy Ross*, 145 F.2d 688 (9th Cir. 1944).

114. *Sundberg v. Washington Fish & Oyster Co.*, 138 F.2d 801 (9th Cir. 1943).

115. *Ibid.*

116. *The President Coolidge*, 23 F. Supp. 575 (N.D. Wash. 1939).

ruled that the crew sustained only nominal damages.¹¹⁸ The case further stated that seaman cannot recover collision damages measured by the loss of anticipated earnings during the repair period.¹¹⁹ Recovery was allowed where the collision resulted in a loss of the catch on board, but was limited to the actual value of the catch lost.¹²⁰ Where the owner of the negligent vessel was also the owner of the damaged vessel, the crew was allowed to sue for the loss of the prospective profits¹²¹ plus the anticipated earnings during the period of lay-up for necessary repairs.¹²²

Some courts have adopted the contrary view. The probable earnings or profits lost as a result of a collision have been allowed as damages.¹²³ The court's basis for such recovery, however, seems to be ill-founded. The principle is well settled that no interest accrues to the seaman until a catch or profit has been shown. If the voyage cannot continue because of an unfortunate occurrence, not attributable to the owners, the seaman as a joint adventurer ought to share the loss pro rata.

Liens

Upon arrest of a fishing vessel by legal process, a lay fisherman is not entitled to a maritime lien for the estimated percentage of profits which he would have earned thereon.¹²⁴ A lien cannot exist under an anticipated lay¹²⁵ since the:

. . . very nature of the undertaking imported that the men might work out the whole period of their engagement without ever acquiring any privilege against the vessel. To charge her with wages could be in direct subversion of the agreement and intention of the owner. . . . Manifestly, . . . the obligation of the owner to the mariners was this only: that he, and . . . the vessel should be bound to give them their proportion of the earnings of this particular undertaking. The court cannot look out of this agreement, and frame a new one, that might be better calculated to protect or indemnify the men.¹²⁶

The share agreed on is not a wage in this sense and such share only develops the characteristic of a wage upon distribution of the catch.¹²⁷ The right to a lien does not attach until the catch has been ascertained or liquidated.¹²⁸ To satisfy the lien, a libel can be brought against the ship¹²⁹ or the cargo prior to the sale of such cargo.¹³⁰ A usage that the

117. *Ancich v. Marsha Ann*, 92 F. Supp. 929 (S. D. Cal. 1950).

118. *Boreich v. Anchich*, 191 F.2d 392 (9th Cir. 1951), *cert. denied*, 72 S. Ct. 293 (1952).

119. *Ibid.*

120. *The Mary*, 61 F. Supp. 329 (E.D.N.Y. 1945).

121. *Van Camp Sea Food Co. v. Di Leva*, 171 F.2d 454 (9th Cir. 1948).

122. *Ibid.*

123. *The Fannie F. Hickey*, 1931 Am. Mar. Cas. 794 (D. Mass. 1931).

124. *Old Point Fish Co. v. Haywood*, 109 F.2d 703 (4th Cir. 1940).

125. *Williams v. The Sylph*, 29 Fed. Cas. 1407, No. 17,740 (S.D.N.Y. 1841).

126. *Id.* at 1408.

127. *Old Point Fish Co. v. Haywood*, 109 F.2d 703 (4th Cir. 1940).

128. *Ibid.*

129. *Ibid.*

130. *Hussey v. Fields*, 12 Fed. Cas. 1061, No. 6,947 (D. Mass. 1858).

master is entitled to a lien upon the lays of the seamen for supplies furnished is reasonable and has been upheld.¹³¹ Supplies furnished on the Italian lay (where payment was to be made out of the gross stock) are the subject matter of a maritime lien on the credit of the vessel.¹³² A seaman is entitled to hold the master *pro hoc vice*,¹³³ the ship,¹³⁴ or the owner,¹³⁵ for his share of the lay.¹³⁶ An action at law¹³⁷ or in admiralty¹³⁸ can be maintained for recovery as long as equitable relief is not demanded.¹³⁹ Where the sharesman operated without a contract a lien arose against the vessel and catch, commensurate to corresponding seamen shipped for hire.¹⁴⁰

On most lays, it is customary to advance the seaman some part of his wages so his family can be provided for. Money advanced to pay fishermen on the lay plan creates a lien against the vessel.¹⁴¹ Fishing on shares:

. . . is a form of hiring, the wages being uncertain and contingent, but none the less wages, for which crew members are entitled to a lien against the catch and the vessel . . . and one advancing monies to pay these wages is subrogated to the lien rights of the crew.¹⁴²

The seamen will keep the entire advance even though the anticipated catch is less than the money advanced and the vessel will suffer the loss.¹⁴³ The one advancing money to the vessel to prepay these wages in part acquires no lien at that time because the wages are not earned, but after a settlement of the catch the requisites for a lien exist.¹⁴⁴

A lien for repairs, supplies and towage has been given preference over the lay fisherman's anticipated wage lien due to his wrongful discharge from the ship.¹⁴⁵ A strong dissent maintained that where the seizure of the vessel due to the lien of the suppliers resulted in the breaking up of the voyage, the lay seamen were entitled to a preferred lien for any amount previously earned and for damages due to the discharge.¹⁴⁶

If the ship owner becomes bankrupt, the lien of the lay seaman follows the proceeds of the catch into the hands of the assignees.¹⁴⁷ Customarily, a seaman is charged for interest and insurance on advances made to him in lieu of wages so as to indemnify the owner or vessel in case of a loss as a

131. *Barney v. Coffin*, 20 Mass. 115 (1825).
 132. *The Santina D.*, 1939 Am. Mar. Cas. 973 (D. Mass. 1939).
 133. *The Carrier Dove*, 97 Fed. 111 (1st Cir. 1899).
 134. *Ibid.*
 135. *Bishop v. Shepard*, 40 Mass. 492, 23 Pick. 492 (1839).
 136. *Ibid.*
 137. *The Crusader*, 6 Fed. Cas. 926, No. 3,456 (D. Me. 1837).
 138. *The I. S. E. 2*, 15 F.2d 749 (9th Cir. 1926).
 139. *Ibid.*
 140. *The Georgiana*, 245 Fed. 321 (1st Cir. 1917).
 141. *The Portaritisa*, 131 F.2d 362 (5th Cir. 1942).
 142. *Id.* at 365.
 143. *The Portaritisa*, 131 F.2d 362 (5th Cir. 1942).
 144. *Ibid.*
 145. *Old Point Fish Co. v. Haywood*, 109 F.2d 703 (4th Cir. 1940).
 146. *See Id.* at 707 (dissenting opinion).
 147. *In re Low*, 15 Fed. Cas. 1007, No. 8,558 (D. Mass. 1873).

result of a fruitless voyage.¹⁴⁸ Therefore, such seamen cannot maintain a libel to recover any part of the insurance money paid the owners.¹⁴⁹

INTER-RELATIONSHIP OF OWNER, MASTER AND CREW

The label or nomenclature of the persons involved in this section is important, since the title each person possesses will determine his relationship with its attendant rights, privileges, powers and their concomitant Hohfeld co-relatives.

Master: Owner pro hac vice or agent

There has been some doubt expressed whether, under modern fishing lays and conditions, the master acts as owner *pro hac vice* or charterer of the vessel.¹⁵⁰ Commonly, the physical maintenance of the vessel is the concern of the owner and not the master.¹⁵¹ Under the ordinary lays, the owner furnishes and maintains the vessel as his contribution to the adventure.¹⁵² If the master is engaged by the owner and pays a commission out of the owner's share, he is merely an agent of the owner for the purpose of the trip.¹⁵³ The owner, then, is obligated to the crew for the vessel's seaworthiness,¹⁵⁴ and for their injuries.¹⁵⁵

On the other hand, it has been maintained that under the usual form of fishing lay the master employs the crew and controls all the operations of the vessel.¹⁵⁶ Although the owner agrees to a share of the catch, for all outward appearances the master becomes the owner *pro hac vice*.¹⁵⁷ Various formulae have been devised to clarify this problem. When the master is given possession of the ship with *full* control and direction to the exclusion of the owner, the master is considered the owner *pro hac vice*.¹⁵⁸ In the absence of a contrary intention, such control is implied generally from the fact that the master takes or hires the vessel on shares.¹⁵⁹ In a situation where the master was an owner *pro hac vice* and his ship collided, the master's negligence was not imputable to the owner.¹⁶⁰ The court held there was no master-servant relationship and the laws of agency could not be implied where they did not exist.¹⁶¹ However, there are cases to the contrary even when the above requirements are met.¹⁶² It has been held that ownership remains in the owner when the vessel is let on shares

148. *Roberts v. Swift*, 13 Fed. 915 (D. Mass. 1882).

149. *Ibid.*

150. *The Elk*, 1938 Am. Mar. Cas. 714 (D. Mass. 1938).

151. *Ibid.*

152. *Ibid.*

153. *Id.* at 726.

154. *The Elk*, 1938 Am. Mar. Cas. 714 (D. Mass. 1938).

155. *The Henrietta*, 65 F.2d 940 (1st Cir. 1933).

156. 2 NORRIS, *THE LAW OF SEAMEN* 326 (1st ed. 1952).

157. *Ibid.*

158. *Marshall v. Boardman*, 89 Me. 87, 35 Atl. 1024 (1896).

159. *Ibid.*

160. *Somes v. White*, 65 Me. 542 (1876).

161. *Ibid.*

162. *Scarff v. Metcalf*, 107 N.Y. 211, 13 N.E. 796 (1887).

although the master hires the crew and directs the employment of the vessel.¹⁶³

A partnership is not created by the mere fact of an agreement by the owner with the master wherein the latter sails the vessel and divides the earnings.¹⁶⁴ Neither is a partnership created where the master is considered the owner *pro hac vice*.¹⁶⁵ The title owner is therefore not liable *in personam* for supplies bought by the master,¹⁶⁶ nor for the crew's wages, if any,¹⁶⁷ nor for freighting contracts.¹⁶⁸

Crew: employees or partner

An agreement by seamen to receive a share of the freight or profits of a voyage does not constitute them partners with the owner.¹⁶⁹ These arrangements are contracts of hiring and not of co-partnership.¹⁷⁰

The men become directly interested in the fruits of the adventure, and depend for their remuneration on its success. But the fishermen are not in such cases considered as partners in the proper sense of the word. The shares for which they contract are in the nature of wages and an action of *assumpsit* lies at common law, or a libel may be brought in . . . admiralty for their share of the proceeds . . . of the adventure to be ascertained by final settlement of the voyage.¹⁷¹

Sharing profits, then, is not a conclusive test of the existence of a partnership and the seaman is usually considered an employee.¹⁷² A Massachusetts case timidly stated that the lay fisherman *could be found* to be employees under evidence that their lay was in the nature of wages.¹⁷³ Where the master is the owner *pro hac vice* and the lay stipulates that the master and crew are to pay all running expenses, the crew are not considered partners with the master in the enterprise so as to be liable with him for advances made to him by the owner for running expenses.¹⁷⁴ For the purpose of social security, the lay fishermen are considered employees of the corporation owning the vessel.¹⁷⁵ The corporation, employer, therefore, is not entitled to a refund on the ground that the men are partners and not employees.¹⁷⁶ Even where a master agreed to give the crew a co-charterer's share, this did not render them partners nor divest them of

163. *Ibid.*

164. *Bowman v. Bailey*, 10 Vt. 170 (1838).

165. *Thompson v. Snow*, 4 Me. 264 (1826).

166. *Winsor v. Cutts*, 7 Me. 264 (1826).

167. *Holden v. French*, 68 Me. 241 (1878).

168. *Boardman v. Keeler*, 2 Vt. 65 (1829).

169. *The Crusader*, 6 Fed. Cas. 926, No. 3,456 (D. Me. 1837).

170. *Ibid.*

171. *Id.* at 927.

172. *The Henrietta*, 65 F.2d 940 (1st Cir. 1933); *U. S. v. Laflin*, 24 F.2d 683 (9th Cir. 1928).

173. *Cambra v. Santos*, 233 Mass. 131, 123 N.E. 503 (1919).

174. *The Mettacomet*, 230 Fed. 308 (D. Mass. 1915), *aff'd*, 233 Fed. 261 (1st Cir. 1916).

175. *O'Hara Vessels v. Hassett*, 60 F. Supp. 672 (D. Mass. 1945).

176. *Ibid.*

their rights as seamen.¹⁷⁷ The fact that a crewman is a mate does not cloak him with the robes of partnership.¹⁷⁸

In an English decision, the fact that the master contracted for two-thirds of the freight with one-third going to the owner did not alter the employer-employee relationship.¹⁷⁹ So, also, where a partner was subsequently hired as master and was accidentally killed, a contract of employment was held to exist.¹⁸⁰

Generally, lay fishermen (those who are remunerated by shares in the *profits* or gross earnings) are not deemed workmen entitled to Workmen's Compensation.¹⁸¹ What constitutes profit sharing is a question of fact under the circumstances.¹⁸² Where an engineer was hired for wages, but promised a bonus out of the gross earnings, it was held that the bonus clause did not detract from his employee status.¹⁸³

In the following instances the seaman was not entitled to Workmen's Compensation: an owner *pro hac vice*;¹⁸⁴ a boatswain of a vessel hired at a fixed wage plus a share in the profits;¹⁸⁵ nor where the "profit" was never to be less than a certain amount of money each week;¹⁸⁶ and a person hiring on for shares rather than stipulated wages.¹⁸⁷

"When the fishing enterprise is a joint venture with the crew and the master all sharing in the benefits and losses, with no employer-employee relationship existing, then an action [for injuries] under the Jones Act cannot lie."¹⁸⁸ The elements of a joint venture are:

- (1) community of interest, and
- (2) equal rights to direct and govern each other's conduct, and
- (3) a share in the profits and losses if any, and
- (4) A fiduciary relationship between the parties.¹⁸⁹

In order to recover for personal injuries under the provisions of the Jones Act,¹⁹⁰ the seaman must first establish an employer-employee relationship.¹⁹¹ This is a question of fact for the jury.¹⁹² However, an interesting case held that although the crew and owners were partners this did not preclude a seaman from suing the owner for personal injuries sustained while

177. *The Carrier Dove*, 97 Fed. 11 (1st Cir. 1899).

178. *Coffin v. Jenkins*, 5 Fed. Cas. 1188, No. 2,948 (C.C.D. Mass. 1844).

179. *Jones v. The Alice & Eliza*, 3 B.W.C.C. 495 (1910).

180. *Sharpe v. Carswell*, 3 B.W.C.C. 552 (1910).

181. *Jamieson v. Clark*, 2 B.W.C.C. 228 (1909).

182. *Ibid.*

183. *Newstead v. The Labrador*, 1 K.B. 166, 9 B.W.C.C. 63 (1916).

184. *Boon v. Quance*, 3 B.W.C.C. 106 (1909).

185. *Costello v. The Pigeon*, 6 B.W.C.C. 480 (1913).

186. *Admiral Fishing Co. v. Robinson*, 1 K.B. 540, 3 B.W.C.C. 247 (1910).

187. *Erickson v. Swim Bros.*, 4 D.L.R., 650 (1936).

188. 2 NORRIS, *THE LAW OF SEAMEN* 326 (1st ed. 1952).

189. *Larson v. Lewis-Simas-Jones Co.*, 1938 Am. Mar. Cas. 1505 (D. Cal. 1938).

190. 38 STAT. 1185 (1915), as amended, 41 STAT. 1007 (1920), 46 U.S.C. § 668 (1946) Jones Act.

191. *Callan v. Cope*, 165 F.2d 703 (9th Cir. 1948).

192. *Southern Shell Sea Co. v. Plaisance*, 196 F.2d 312 (5th Cir. 1952).

employed on the vessel.¹⁹³ In this decision, the court embarked perilously when it held that lay seamen were partners and gave credence to their partnership, but it came safely into harbor when it dissolved the partnership for the purposes of the suit.

Owner: trustee

The title to the profits or catch is in the owners, but the interest in the proceeds belongs to the owner, master, and crew based on their stipulated lays.¹⁹⁴ The owners are impressed with a *quasi* trust; they are trustees to manage and dispose of the earnings for the benefit of all concerned.¹⁹⁵ They are not liable as common carriers, but are responsible for using ordinary care and diligence in selecting agents, carrying, liquidating, and dividing the catch.¹⁹⁶

WHEN IS A LAY-SEAMAN A "SEAMAN"

In early times, a seaman meant a person who could hand, reef, and steer.¹⁹⁷ He was a mariner in every sense of the word.¹⁹⁸ By statute,¹⁹⁹ however, a seaman has been construed to include every person employed in any capacity on board a vessel in navigation.²⁰⁰ Although seamen are primarily those who sign the ship's articles,²⁰¹ the term should be liberally construed to encompass anyone engaged in any capacity on board ship.²⁰² Everyone (except apprentices) employed on a vessel in the service of the ship is a seaman.²⁰³ An orchestra leader playing on board was considered a seaman entitled to a lien against the ship for his wages.²⁰⁴ The term seaman has been interpreted to include those who render the services customarily performed by seamen.²⁰⁵ Whether a worker is a seaman depends on the nature of his duties.²⁰⁶ If they are essentially maritime he is a seaman.²⁰⁷ Since the term "seaman" is flexible, it should be defined according to the particular circumstances to be adjudicated.²⁰⁸ Under one set of facts a worker may or may not be a seaman in construing the specific statute involved.²⁰⁹

Lay "... fishermen employed upon a share . . . basis are seamen and,

193. *Domandich v. Doratich*, 165 Wash. 315, P.2d 310 (1931).
 194. *Joy v. Allen*, 13 Fed. Cas. 1163, No. 7,552 (C.C.D. Mass. 1846).
 195. *Ibid.*
 196. *Ibid.*
 197. *The President Coolidge*, 23 F. Supp. 575 (N.D. Wash. 1939).
 198. *Ibid.*
 199. REV. STAT. § 4612 (1878), 46 U.S.C. § 713 (1946).
 200. *The President Coolidge*, 23 F. Supp. 575 (N.D. Wash. 1939).
 201. ROBINSON, HANDBOOK OF ADMIRALTY LAW IN THE UNITED STATES 282, (1st ed. 1939).
 202. *Evans v. Nicholson Transit Co.*, 58 F. Supp. 82 (N.D. Ohio 1945); *Gadsen v. U.S.*, 54 F. Supp. 151 (D. Md. 1944).
 203. *The Sea Lark*, 14 F.2d 201 (W.D. Wash. 1926).
 204. *Ibid.*
 205. *O'Donnell v. Great Lakes D. & D. Co.*, 318 U.S. 36 (1943).
 206. *Walling v. Bay State D. & C. Co.*, 149 F.2d 346 (1st Cir. 1945).
 207. *Ibid.*
 208. *Anderson v. Manhattan Storage Co.*, 148 F.2d 971 (2nd Cir. 1945).
 209. *Ibid.*

except as their rights are modified by their peculiar contracts, are protected by law as other seamen . . ."²¹⁰

In summary, then, a lay fisherman engaged in the business of commercial fishing on navigable waters is enough of a seaman to entitle him, in case of injury or sickness in the service of his vessel, to his wages according to the contract.²¹¹ He is entitled to the benefits of maintenance and cure.²¹² His rights are enforceable in admiralty like any other seaman's rights.²¹³ He is a ward of the admiralty court.²¹⁴ He is a seaman in practically every respect except that of a secured periodic wages and statutory enactments listed *supra*.

CONCLUSION

This lay plan which once dominated the shipping empire has now been relegated to the relatively small sphere of fishing. Although thousands of ships and fishermen are still affected by these lay principles there seems to be very little recent adjudication on the subject. The existing litigation, and the rules thereby promulgated, are largely of sparse and ancient vintage.

We submit this comment in the hope that it will, in some degree, systematize and clarify a rather complex and neglected field.

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ANTICIPATORY BREACH OF CONTRACT— EFFECTS OF REPUDIATION

INTRODUCTION

The man who wrongfully renounces a contract into which he has deliberately entered cannot justly complain if he is immediately sued for compensation in damages by the man whom he has injured.¹

One phase of contract law that has plagued the courts of both England and the United States for the last century is the doctrine of anticipatory breach. The problem involved is one of importance because where the theory has been accepted and applied, there has been an enlargement of the contractual obligation.² The rights of parties are affected by such a condition. Upon invocation, the doctrine causes a party to be held liable

210. See *The Montague*, 53 F. Supp. 548, 549 (W.D. Wash. 1943).

211. *The Montague*, 53 F. Supp. 548 (W.D. Wash. 1943).

212. See *Maintenance and cure*, *supra*.

213. *The Montague*, 53 F. Supp. 548 (W.D. Wash. 1943).

214. *Harden v. Gordon*, 11 Fed. Cas. 480, No. 6,047 (C.C.D. Me. 1823).

215. See note 26 *supra*.

1. *Hochster v. De La Tour*, 2 El. & Bl., 683, 118 Eng. Rep. 922, 927 (Q. B. 1853).

2. 5 WILLISTON, CONTRACTS § 1321 (Rev. Ed. 1937).