No. 3614

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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T. S. VINCENT et al.,
*Appellants and Cross-Appellees,*
vs.
THE UNITED STATES OF AMERICA et al.,
*Appellees and Cross-Appellants.*

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## BRIEF FOR APPELLANTS AND CROSS-APPELLEES.

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PERRY-WALSH PRINTING CO.

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## BRIEF FOR APPELLANTS AND CROSS-APPELLEES.

### I.

#### STATEMENT OF FACTS.

The libel in this case was filed by 20 seamen who shipped on the S. S. Jacox, owned by the United States of America, and operated for it by Pacific Mail Steamship Company, the shipment taking place in San Francisco, on the 13th day of December, 1919, for a voyage described in the shipping articles entered into before the U. S. Shipping Commissioner as follows:

> "From the Port of *San Francisco, California, to Manila, P. I., for final discharge,* for a term of time not exceeding *six* (*6*) calendar months."

The shipment was upon a usual printed form, the above parts in italics being written in.

Attached to the shipping articles was a typewritten slip which read as follows:

> "Officers, including steward and radio operator, shall receive first-class transportation, and wages, remainder of crew second-class transportation, and wages, to San Francisco, upon termination of the voyage."

Instead of going direct to Manila, the vessel went first to Honolulu; from there to Australia, thence via ports to Manila, where she arrived on the 28th day of February, 1920. The voyage then being up, the men demanded their pay and left the service of said vessel. A cargo of coal was taken from Australia and discharged in Manila, the vessel shipped another crew on March 4th, and sailed from that port on March 6th. The allegations of Paragraph VII of the libel (Trans. pgs. 6-7) in that behalf are not denied.

The master of the vessel insisted on the men going to Hongkong. Libelants, however, refused to go, claiming their voyage terminated at Manila, which it undoubtedly did. The men, however, said they would go to Hongkong if new articles were prepared as they were afraid that they would lose transportation home if they went to Hongkong on the same articles (Trans. pgs. 26, 32, 34-35 and 36). The master of the vessel claimed the men were deserters for not taking the vessel to Hongkong. The Shipping Commissioner in Manila said, as far as he

could see, the men had a right to be paid off in Manila (Trans. pgs. 36 and 46). The whole matter resulted in one-half of the wages earned being paid March 3rd, the men kept in Manila 24 days and then sent back to San Francisco as destitute seamen, having to work on the way back. In San Francisco they were paid wages to the time of arrival, that was taken under protest, and this action was brought to recover the cost of second-class transportation, stipulated to be the sum of $222.50 for each passage, and double pay per day for each day subsequent to March 3rd, 53 days in all, that wages were withheld from payment in Manila.

The lower court first found that the men were entitled to double pay per day for the days delinquent, but denied the claim for transportation, then reduced the double pay to one day's pay, and a decree was entered for that amount. Both sides appeal.

## II.

### ARGUMENT.

This voyage ended in Manila. The shipping articles provided for a voyage direct to Manila, the duration of the voyage not to exceed 6 calendar months. No other possible construction can be placed on the shipping articles and this court has so decided in

Northwestern S. S. Co. v. Turtle, 89 C. C. A. 236.

See also

The Falls of Keltie, 114 Fed. 793;
The Hermine, 3 Sawyer 80;
The Disco, 2 Id. 476;
Hamilton v. The United States, 268 Fed. 15.

Subdivision First, Section 4511, of the Revised Statutes requires that the shipping articles shall contain the *nature* and, as far as practicable, the duration of the intended voyage or engagement. The time is merely put in as an estimate—not as the time of service. Shipping articles are construed strongly against the owner.

The Catalonia, 236 Fed. 557.

It is clear, beyond room for argument, that this voyage ended in Manila and the lower court so found.

Independent of the agreement the men would have had the right to leave by reason of the deviation of the vessel in going to Australia and the ports intermediate between there and Manila, without considering Honolulu.

The question then arises

## III.

### WHAT WERE THE CONTRACTUAL RIGHTS OF THE MEN?

Their contractual rights were as follows:

"Officers, including steward and radio operator, shall receive first-class transportation, and wages, remainder of crew *second-class transportation, and wages,* to San Francisco, upon termination of voyage."

The voyage having terminated at Manila, each man was entitled to receive wages earned *at least,* and a second-class ticket, or arrangements for second-class transportation to San Francisco. It will probably be urged that the wages could not be computed as it could not be then determined when the men would arrive in San Francisco. In reply to what we anticipate, we say, that in these days of steamer travel, it is not at all difficult to determine what the date of arrival will be in any port. Steamers run with almost the regularity of railroad trains.

What was done? The master designated the men as deserters without a shadow of a reason and his actions must have been for the purposes of coercing the men into going to Hongkong, as he paid them one-half of their wages, entirely negativing the idea that he considered them deserters. If deserters, they would not have been entitled to anything. Upon arrival in San Francisco they were paid the balance, thus showing that if they were ever thought deserters, the thought was abandoned.

Their legal rights were as follows:

Section 4529, Revised Statutes, as amended March 4th, 1915 (S. L. 38 pg. 1164):

> "The master or owner of any vessel making * * * foreign voyages shall pay to every seaman his wages * * * within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens; and in all cases the seaman shall be entitled to be paid at the time of his discharge on account of wages

> a sum equal to one-third part of the balance due him. Every master or owner who refuses to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court. * * *"

The men were entitled to one-third of what they had earned, at least, on February 28th. The shipping articles say to "Manila P. I. for final discharge". The arrival itself constituted a discharge and if any act was required to be performed by the master he could not withhold that act and take advantage of his own wrong. The law will regard that as done which should have been done.

1920 was a leap year, and on March 3rd, four days afterwards, the men were entitled to the whole of the money and a second-class ticket. The whole of the cargo was discharged, that also gave them the right to their money.

The only defense would be that there was sufficient cause for withholding the payment. In this case there was no cause at all. The Shipping Commissioner at Manila so said (Trans. pgs. 36 and 46):

The decisions on the subject are as follows:

This court, in Schmitt v. Pacific Mail S. S. Co.:

> "We are of the opinion that no sufficient cause was shown for the refusal of the appellant to pay the libelant his wages upon his discharge from the service. * * *

> The further contention is made that it has been uniformly held that the penalty will not be imposed in any case where there is a fair ground of despite. Conceding the justice of the rule, we are of the opinion that the evidence in the present case does not show any such fair ground of despite."

In that case a custom to charge men for lost silverware was pleaded. In this case we have nothing.

The George W. Wells, 118 Fed. 761:

> "The phrase 'without sufficient cause' should rather be construed as equivalent to 'without reasonable cause'."

The Express, 129 Fed. 129:

> "The statute is a penal statute, intended to punish masters of vessels who, without any *just* excuse, arbitrarily refuse to pay seamen their wages when due."

The City of Montgomery, 216 Federal 673:

> "The meaning of the articles is by no means free from doubt,"

farther down the page we find.

> "If, therefore, the seaman had carried out his agreement so far as duration of service was concerned, the next question is whether the provision postponing the payment of wages is lawful." (then follows the law which has been amended from one to two days pay) "It is claimed that the provisions of this statute may be waived and in support of this view claimant cites (cases cited) I think these cases are distinguishable from that at bar, but, in any event, I am of the opinion that the master and seaman, cannot, by contract, abrogate the provisions of Section 4529, without enlarging on the history

of legislation of this character, it may said that Congress has long regarded seamen as words whose rights must be safeguarded. The requirement to pay them promptly is not to be overrided. If, in the practical conduct of a responsible steamship company, such a provision is found inconvenient or otherwise unsatisfactory, the remedy is by appeal to the legislative body, but the courts must construe such a statute, not merly by its letter, but in sympathy with its object."

(Page 676.) "It remains to determine whether claimant must pay the penalty prescribed by the statute where the master or owner neglects to pay 'without sufficient cause', I can readily imagine occasions where the master refuses or neglects to pay for 'sufficient cause'. Such an instance is illustrated in The Amazon, (D. C.) 144 Fed. 154.

"In George W. Wells, (D. C.) 118 Fed. 761, it was not necessarily to be expected that a master would know that an outstanding assignment of wages, was void as a matter of law. But, in the case at bar, the failure to pay is because of the articles themselves, and the fault is clearly attributable to the owner. But, whether in such instance the fault is of the owner or master, the result is the same.

To hold that an owner or master may escape the penalty prescribed in the very statute which he seeks to avoid is to strip the statute of the precise purpose for which, in that particular, it was enacted. However debatable a question arising under a statute may be, *it is no excuse that one has made an honest error in the interpretation of that statute.*"

In the case of The Sadie C. Sumner, 148 Fed. 611-613, it was held there was a fair ground for controversy.

In the case of The Sentinel, 153 Fed. 564-566, the court found there was a reasonable ground for dispute.

In the case of The Amazon, 144 Fed. 153, 154, the men left and it was claimed they were deserters.

In the case of the Topsy, 44 Fed. 631, it was held there was a reasonable ground for dispute.

In the case of The Wexford, 3 Fed. 577, the vessel was sold and it was held there was fair ground for dispute.

The Shipping Commissioner did not decide that the men were deserters, he decided they were entitled to their money.

The Insular Collector of Customs did not decide the men were deserters. On March 24th, he wrote a letter stating that the master did as follows:

> "Whereupon the Master thereof rated the said seamen as such deserters and this office so confirms" (Trans. pg. 67).

That is simply a confirmation that the master had rated the men as deserters, not that the Collector of Customs so rated them.

It is true he threatened them with imprisonment if they did not go to Hongkong. That must be considered as an attempted coercion—not that he thought they were required to go.

We respectfully submit that there was no excuse for not paying the first one-third, then the whole of the balance of the wages on March 3rd and that the penalty should be imposed.

## IV.

### WHAT IS THE AMOUNT OF THE PENALTY?

The law is clear. It says *two* days' pay. The lower court first fixed it at two days' pay, then reduced it to one, on the theory that the wages paid to the time of return was a credit. We think the court was manifestly in error in so deciding as the wages to the time of arrival were stipulated in the contract, as follows:

> "and wages, to San Francisco, upon termination of voyage".

The wages were for time consumed. No one would work under any different rule. If the vessel had gone straight to Manila and the men had been able to get a vessel the day after her arrival to return, it is manifest it would have taken as long to return as it did to go out. Unless paid to the time of return the earnings would be reduced one-half. Who would wish to work under such a contract, particularly at that time when work was plentiful. The owner was not forced to sign a contract to pay until return. Common understanding, however, dictates that he could not have got a crew if it did not. The men were delayed 24 days in Manila. However, no one would leave San Francisco and take chances on such or any delay. They might have been detained there two months with a corresponding decrease in average monthly earnings. The lower court did not appreciate the difference between wages for time consumed and

double pay for non-payment of wages. They are entirely distinct and separate matters.

We respectfully submit that the decree should be reversed on that ground and an order for two days' pay be made, as per the first opinion.

## V.

### TRANSPORTATION.

The contract is clear. It reads:

> "remainder of crew second-class transportation".

That means but one thing, that the crew shall be sent home as passengers. Instead of that they were sent home as destitute seamen on a transport and had to work their way over (Trans. pgs. 40, 41).

The $22.50 is the amount the government charges on transports, when a man works. The men worked dishing out food for the soldiers, etc. (Trans. pg. 40). The law required them to work as destitute seamen (Sec. 4577, Rev. Stat.).

These men had earned the second-class ticket by proceeding to Manila. They should not be required to earn passage over again by working on the way back and thus earn their passage twice over. The owner was under contractual obligations to send them home as passengers and it profited to the extent of the difference between $222.50, what it would have cost if the owner had kept his contract, and $22.50, what it actually paid.

No one is allowed to profit by his own wrong and the men are entitled to the difference in value between what they were entitled to under their contract and what thy actaully received. They were damaged to that extent.

We know of no rule of law that allows any person to satisfy a debt of $222.50 by the payment or giving a thing worth $22.50 and that taken under protest (Trans. p. 28).

The rule of damages in a case such as this, is laid down in

*Rayner v. Jones,* 90 Cal. 78.

In that case a party had contracted to deliver certain land warrants and failed to do so. The court found that the true measure of damages was the market value of the warrants, less what was unpaid on the purchase price. We fail to see any difference between that case and where the obligor contracts to either deliver a second-class ticket or its equivalent.

If an attorney had been similarly situated, or a person in any other line of business was sent to Manila with a written contract to the effect that he should receive second-class transportation back, and was then sent home as a destitute seaman, no one would question his right to the difference in the value of what his contract called for and what he actually received. We cannot see why there should be any different rule for a seaman.

We respectfully submit that the court erred in deciding that the transportation furnished satisfied the contract.

## VI.

### RELEASE.

The release is for wages alone and the contentions of defendants in its behalf are completely met by the following decision of this court:

Billings v. Bausback, 200 Fed. 523.

Independent of that, the men were distinctly told when signing that the release was not binding as to other claims (Trans. pg. 30).

> "Q. Did the Shipping Commissioner tell you anything before you signed it?
> A. We asked him if this was a final discharge, and he said, 'No, you have a right to sue for anything you think you are liable to get, for anything you think you have against the company'. There were five of us there when he said that."

Defendant Pacific Mail Steamship Company had the same view. May 3rd it wrote the proctor for libelants as follows (Trans. pg. 20):

> "Subject S. S. Jacox.
> Replying to your letter of the 27th instant on above subject beg to advise that, in respect of this crew, that you are probably aware that we made a *partial* settlement and we now have the matter up with the Shipping Board, the owners of the vessel regarding the points mentioned in your letter, and hope to hear from them in a day or so, when we will immediately advise you."

That seems conclusive; but Section 4531 of the Revised Statutes, as amended in 1915, reads in part:

> "Notwithstanding any release signed by any seaman under section 4552 of the Revised Statutes any court having jurisdiction may upon good cause shown set aside such release and take such action as justice may require."

The purpose of that section was to enable a seaman to get money to live on while he litigated disputed items and not compel him to take less than was owing to keep himself from starving, and have that called final.

## VII.

### FOOD.

We respectfully submit that all of the testimony shows the food was insufficient and that the findings of the court in that regard are final. We say the same as to the overtime of Williams. The food alone would have warranted the crew in refusing to proceed further than Manila.

We respectfully submit that the decree of the lower court should be reversed and a decree ordered as follows:

For two days pay for fifty-three (53) days.

For the sum of $200.00 each difference in cost of transportation.

And the decree allowed to stand for the food and overtime.

Dated, San Francisco,
February 19, 1921.

H. W. Hutton,
*Attorney for Appellants and Cross-Appellees.*

## ADDENDA

There was a deviation and the men would have been justified in leaving the vessel at Sydney. This court decided in Northwestern S. S. Co. v. Turtle, 89 C. C. A. 236, where the articles were about identical, page 237,

> "To comply with those articles, the vessel, after leaving the port of departure, was bound to proceed directly by the ordinary route to Shanghai, and to touch at no intermediate port, unless the exigencies of the voyage required that she enter the same for coal, supplies, repairs, or other like reasons. Under those articles the vessel was not permitted to touch at any other or intermediate port for discharge of cargo before going to Shanghai."

In the recent case of Hamilton et al. v. the United States, 268 Fed. 15, decided by the Circuit Court of Appeals for the Fourth Circuit, July 6, 1920, the court says, on page 18:

> "on the other hand, seamen are entitled to their wages and discharge when the ship reaches the port of destination before the expiration of the stipulated time of the voyage." (Several cases cited).

His Honor, Judge Rudkin, decided that the voyage terminated at Manila (Trans., page 50).

There is nothing in the law that authorizes a consul to decide anything. A shipping commissioner may, when the controversy is submitted to him in writing, but not otherwise (Graves v. the W. F.

Babcock, 29 C. C. A. 524). Bad advice would not create a cause if none otherwise existed, and Sec. 4535 R. S. is conclusive against the right of a consul to forfeit a seaman's rights.

It was the absolute duty of the consul to see that the men received their pay in Manila (R. S. 4548, 4580, 4581).

It would have been unlawful for the men to have left Manila without a new agreement (R. S. 4515, 4517).

This vessel discharged her cargo of coal at Manila, so the cases cited on pages 21 and 22 of the brief of the United States have no application, if it were otherwise possible they could apply (Trans., 40-45). We can see no difference between this case as to the release and the case of Billings v. Bausbach decided by this court. The release reads the same, the release is for wages alone. As to short provisions, as in the case of Billings, the statute reads they shall be recoverable as wages. In the case of the statutory penalty it reads:

> "shall be recoverable as wages in *any claim* made before the court."

It would seem that Congress intended that the claim for the penalty could be asserted in *any claim,* and that nothing but payment would satisfy the demand if it had foundation.

The fact of the payment of one-half the wages in Manila, and wages for the full period of service at

San Francisco, is a complete refutation of the claim that the men were ever considered deserters.

As to the deduction of the penalty on account of wages paid for time consumed, we respectfully submit, that it is a matter of common knowledge, that when a man goes from the city of his residence to work for another, he is invariably paid wages to the time of his return unless it is stipulated to the contrary, in this case the stipulation was that wages should be paid to the time of return.

Respectfully,

H. W. Hutton,

*Proctor for Libelants, Appellants and Cross-Appellees.*