No. 3614

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

T. S. VINCENT, A. RAMSTED, J. M. JOHANSEN, A. B. EKLOV, K. J. LINDSTROM, V. KUKUSKIN, G. REIN, PHILIP NORRISON, A. H. RAYMILLER, L. DEPPMAN, W. B. RICHARDS, C. W. INGEBRETSEN, W. CLAY, A. KRISHLAUK, J. BIGGINS, E. V. KAJASLAMPI, ANTONIO MULET, J. ANDERSEN, JAMES W. OREE, AND GEORGE WILLIAMS,

Appellants and Cross-Appellees,

vs.

THE UNITED STATES OF AMERICA, AND PACIFIC MAIL STEAMSHIP COMPANY, a corporation,

Appellees and Cross-Appellants.

BRIEF OF APPELLEE AND CROSS-APPELLANT

UNITED STATES OF AMERICA

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division in Admiralty.

FRANK M. SILVA,
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Special Assistant U. S. Attorney in Admiralty.

Proctors for Appellee and Cross-Apellant,
United States of America.

Neal, Stratford & Kerr, S. F. 11521

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Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division in Admiralty.

STATEMENT OF THE CASE.

On the 30th day of April, 1920, the Appellants and Cross-Appellees, who will be hereinafter referred to as the libelants, filed a libel *in personam* in the Southern Division of the United States District Court for the Northern District of California, First Division, in Admiralty, against the Appellees and Cross-Appellants, who will hereafter be referred to as the defendants, claiming to be entitled to recover from the defendants the statutory penalty of wages for two days for each of the days from the 4th of March, 1920, to the 26th of April, 1920, at double pay, because of an alleged failure to pay wages due them on the 4th day of March, 1920, as members of the crew of the Steamer "Jacox." The libelants also claimed the sum of $244.00 each by reason of the alleged failure of the defendants to furnish them transportation from Manila, the port of final discharge of the vessel, to the port of San Francisco; the sum of $71.50 each for food and lodging while at Manila awaiting transportation to San Francisco, and $1.00 per day each for each of the days they claim they were short of potatoes and bread, for a period of twelve and ten days respectively, during the voyage of the "Jacox". The libelant George Williams claimed an additional amount of $17.40 for overtime while serving on the vessel. (Tr. p. 8.)

The libel alleged that the "Jacox", during the period covered by the libelants' claims, was an American vessel engaged in the merchant service of

the United States, and was owned either by the United States Shipping Board or the United States Emergency Fleet Corporation, and operated jointly by one of said bodies and the Pacific Mail Steamship Company, and that on the 13th of December, 1919, the libelants were hired and employed by those operating the vessel, at the port of San Francisco, California, to serve as seamen on the "Jacox" on a voyage from that port, described in shipping articles signed by the master of the vessel and each of the libelants before the United States Shipping Commissioner at San Francisco, 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 libel further alleged that attached to and forming a part of the shipping articles was the following:

> "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."

The libel also recited that each of the libelants went on board and into the service of the vessel as members of her crew on the 13th of December, 1919, and that thereupon the vessel proceeded first to Honolulu, thence to Sydney, and thence to Newcastle, Australia, all in violation of the shipping articles, and then from Newcastle to Manila, at which port

she arrived on February 28, 1920. That on the 29th of February, 1920, their term of service having expired, the libelants each left the vessel and each demanded wages up to that time; that the vessel was then in a position of safety, but the master refused to pay such wages, and thereafter and on the 3rd of March, 1920, the operators of the vessel paid to each of the libelants sums which, with what had theretofore been paid them, equalled one-half of what each had earned up to February 29, 1920, and thereupon demanded of each of the libelants that they proceed on the vessel, in their various capacities, from Manila to Hongkong, China; that the libelants each refused to so proceed on the vessel, and no other or further sum was paid to them at Manila, or at all, until April 26, 1920, at San Francisco, California. That the operators of the vessel hired and employed other men to take libelants' places thereon on the 4th day of March, 1920, and with such other men the vessel left Manila for Hongkong on March 6, 1920. The libel further set out that the master and operators of the "Jacox" refused to furnish transportation for any of the libelants from Manila to San Francisco, the cost of which was $244.00 for each of the libelants, but that libelants were sent from Manila to San Francisco by the customs authorities at Manila, as destitute seamen, upon the United States Army Transport "Thomas", and were each compelled to work as a seaman on such passage. The libelants remained in Manila twenty-three days awaiting transportation to San Francisco, and

claimed that by agreement the operators of the vessel were to pay them $2.75 per day each for board and lodging during this period, but that the operators of the vessel had refused to pay any of this amount. The libelants further alleged that while serving in their respective capacities on the "Jacox" on her voyage from Newcastle to Manila, no potatoes were furnished to any of the libelants for twelve days because there were none on board, and no sift bread was furnished for ten days, and no substitutes given therefor. It was further alleged in the libel that the libelant George Williams worked twenty-nine hours overtime on the "Jacox" by order of her steward, his superior officer thereon, for which the operators of the vessel agreed to pay at the rate of 60c an hour, but for which overtime no payment had been made. (Tr. pp. 4-8.)

The answer of the United States alleged that the United States is and was the owner of the "Jacox" on all of the times mentioned in the libel, and that the vessel was being operated and managed by the defendant the Pacific Mail Steamship Company at all of such times as the agent of the United States. The answer also alleged that notwithstanding the contents of the shipping articles as set forth in the libel, it was contemplated by all of the parties concerned, including the libelants, that the voyage of the vessel was to be for a period not to exceed six months, and was to include the ports of Sydney and Hongkong, that the crew of the vessel were to be finally discharged at Manila, and that the shipping

articles contemplated the return of the crew from Manila to San Francisco after her final discharge, and after a voyage to Hongkong had been completed. The answer denied that the vessel proceeded in any manner in violation of the shipping articles, and that the term of service of libelants expired on February 29, 1920, or expired before June 13, 1920. The answer alleged that if the voyage had been completed as contemplated, libelants would have been furnished transportation to San Francisco, and denied that the cost for transportation for libelants from Manila to San Francisco was $244.00 for each of them; that they were compelled to work as seamen on such passage; and that the operators of the vessel agreed to pay libelants for board while they were awaiting passage to San Francisco at Manila; and denied the allegations of the libel as to the failure to furnish potatoes and bread. The answer also denied, because of lack of sufficient information and belief in regard to the matter, the allegation that George Williams worked overtime on the "Jacox", and demanded full proof thereof, and denied also the allegations of the libel upon which were based the claim of the libelants for two days wages each for each of the days from the 4th of March, 1920, to the 26th of April, 1920. (Tr. pp. 11-14.)

As a separate answer and defense to the libel, the United States alleged that on April 21, 1920, before the United States Shipping Commissioner at San Francisco, California, all of the libelants, each for himself, by his own signature, released the owner

of the "Jacox" from all claims whatsoever by signing a mutual release to the following effect:

"Mutual Release

Form 713

Department of Commerce
Bureau of Navigation
Shipping Service.

"We, the undersigned, seamen on board the S. S. 'Jacox' on her late voyage from San Francisco to ...., do hereby, each one for himself, by our signatures herewith given, in consideration of settlements made before the Shipping Commissioner at this port, release the master and owners of said vessel from all claims for wages in respect of the said past voyage or engagement, and I, master of said vessel, do also release each of the seamen signing said release from all claims in consideration of this release signed by them.

Dated: April 21, 1920.

PACIFIC MAIL STEAMSHIP CO.

By W. E. Stanton.

"Attest as to said master and the..........., whose signatures appear below.

Signed S. W. TIBBS,
Deputy Shipping Commissioner."

The separate answer and defense also set out that at the time of signing the mutual release each of the libelants were paid full compensation for services rendered by them up to and including the date of such signing. (Tr. pp. 14-15.)

By way of answer to interrogatories propounded by the libelants to the defendants, the United States set out that the libelants were not paid their wages in Manila for the reason that they had been declared deserters by the United States Shipping Commissioner at that port; that the "Jacox" carried a cargo of coal from Newcastle, New South Wales, to Manila, consigned to Macondray & Company at Manila; and that transportation was not furnished libelants from Manila to San Francisco, for the reason that they had been declared deserters by the United States Shipping Commissioner at Manila and therefore were not entitled thereto. (Tr. pp. 15-16.)

A hearing upon the issues thus made was had on August 6, 1920, at which time the cause was argued and submitted. (Tr. pp. 17-22.)

On August 18, 1920, the District Judge rendered a memorandum opinion in which the following conclusions were set forth:

First: That the voyage terminated at Manila and that the respondents had failed to show sufficient cause for failure to pay the seamen the wages due them and had therefore incurred the penalty imposed by law.

Second: That the libelants were entitled to transportation, second-class, from Manila to San Francisco, and not to the cost of such transportation, and that as they were, in fact, transported free of charge on a Government transport and received the same treatment as was accorded to American soldiers,

working only one hour every other day to secure certain privileges or better treatment, they were not entitled to recover the cost of transportation.

Third: That the testimony fairly established the fact that the libelants were not furnished potatoes for a period of ten days but that there was a failure of proof as to the failure to furnish bread, the testimony on the latter point being uncertain, and the complaint seemingly going to the quality of the bread furnished rather than the failure to furnish bread at all.

Fourth: That the maintenance furnished libelants while awaiting transportation at Manila was satisfactory and paid for by the defendants, so that there was no basis for the recovery of 75c per day, the difference between the amount paid and the amount of maintenance agreed on; and

Fifth: That there seemed to be no defense to the claim for overtime on the part of the libelant Williams. (Tr. pp. 48-51.)

By a supplemental memorandum filed on August 31, 1920, the District Judge, in passing upon a claim made by counsel for the libelants that the libelants should be awarded double wages from the 4th of March, 1920, to the 25th of April, 1920, notwithstanding the fact that they had already been paid single wages for the same period, it was held that under the terms of the shipping articles, the libelants were entitled to wages to San Francisco upon the termination of the voyage, and that such wages had

been in fact paid; that if they were now awarded double pay for the same period, the result would be that they would be paid thrice, and that equity and justice required no more than the payment of double wages in all covering the period of default. (Tr. pp. 51-53.)

On September 9, 1920, a final decree was rendered in the cause based upon the opinions theretofore filed, and from such final decree both the libelants and the defendants appealed to this Court. (Tr. pp. 53-55.)

In the notice of appeal filed by the libelants, the questions upon which they desire a review were limited to the action of the District Court in fixing the amount of the penalty for the non-payment of their wages when they should have been paid in Manila, on March 4, 1920, to one day's pay per day for fifty-three days instead of two days' pay per day for fifty-three days, and the action of the District Court in deciding that libelants were not entitled to judgment for the sum of $222.00 each, the cost of a second-class passage from Manila to San Francisco.

SPECIFICATIONS OF ERRORS RELIED UPON BY THE DEFENDANTS.

1. That the Court erred in entering its decree awarding to each of said libelants the penalty provided for non-payment of seaman's wages by Section 4529 of the Revised Statutes of the United States, from and including the 4th day of March, 1920, to and including the 24th day of April, 1920.

2. That the Court erred in awarding to each of libelants the further sum of ten dollars ($10.00) for shortage of potatoes for ten (10) days.

3. That the Court erred in awarding to libelant George Williams the sum of seventeen dollars and forty cents ($17.40) for overtime work.

4. That the Court erred in awarding the costs to said libelants.

BRIEF OF THE ARGUMENT.

The argument may be conveniently divided into five parts, embracing the following propositions:

First: The evidence does not establish that there was any failure to furnish libelants with sustenance in accordance with the statutes, or that the libelant Williams was entitled to any compensation for overtime.

Second: Under the Shipping Articles, libelants were entitled to second-class transportation from Manila to San Francisco, and were not entitled to be paid its cost or value.

Third: The release executed by the libelants at San Francisco on April 21, 1920, constituted a waiver of all claims and demands by reason of the withholding of wages.

Fourth: The libelants were deserters and therefore were not entitled to recover the statutory penalty because of the alleged withholding of wages, and were not entitled to transportation from Manila to San Francisco.

Fifth: Assuming that libelants were not deserters, no penalty for withholding wages should have been awarded by the Court under the circumstances of the case.

I

The evidence does not establish that there was any failure to furnish libelants with sustenance in accordance with the statutes, or that the libelant Williams was entitled to any compensation for overtime.

The Court below found that there was a failure of proof as to the neglect to furnish bread to the libelants as alleged in the libel, and in view of the limited review requested by counsel for the libelants in his notice of appeal, that finding is not now open for consideration. The Court below, however, did find that the libelants were not furnished potatoes for a period of about ten days and therefore awarded to them the statutory penalty. The evidence in support of this finding is extremely meager, and is based entirely upon the deposition of Andrew G. Ramsted, one of the libelants, who testified that putting all the meals together upon the whole trip of the "Jacox", there was the equivalent of about ten days, counting three meals a day, when the libelants were without potatoes. (Tr. p. 43.) The vessel he said pulled into Balak Papen, Batavia, for provisions, and her Master got some potatoes there, but sent them ashore again because they were too small to eat, and got about a basketful from some American ship lying there. (Tr. p. 31.) It was stipulated during the hearing that there was an abundance of

food on board the "Jacox" when the vessel left San Francisco. (Tr. pp. 21-22.) It nowhere appears in the record that there was no proper substitute furnished for the potatoes, or that they could have been obtained when needed while the vessel was on her voyage. In *The Silver Shell,* 255 Fed. 340, it was held that under Sections 4612 and 4568, of the Revised Statutes, the owner of the vessel is not liable for poor cooking where good food has been provided, or for the substitution of wholesome equivalents for provisions which could not be obtained in foreign ports.

So far as the claim of the libelant George Williams for overtime is concerned, paragraph X of the answer of the United States denied the allegations of the libel covering that claim, and demanded full proof thereof. No legal proof was offered by libelants in support of the claim, but there were offered in evidence by libelants upon the taking of the deposition of the libelant Ramsted, "for what they were worth," two sheets, stated by counsel for libelants to be overtime sheets apparently signed by the steward of the vessel. (Tr. p. 32.) These sheets were never properly authenticated and were not incorporated in the Apostles on Appeal, and there is nothing in the record to show what they contained. The District Judge awarded the libelant Williams compensation for overtime upon the theory that there was no defense to his claim, and not because of any evidence supporting it. That theory overlooked the fact that paragraph X of the answer specifically

denied the allegations upon which this claim was based, and demanded full proof thereof.

II.

Under the Shipping Articles, libelants were entitled to second-class transportation from Manila to San Francisco, and were not entitled to be paid its cost or value.

The shipping articles provided that the crew should receive second-class transportation, and wages, to San Francisco, upon the termination of the voyage. It was stipulated between the parties that the cost of a second-class passage from Manila to San Francisco at the time of libelants leaving the "Jacox" in Manila, during the month of March, 1920, was the sum of $222.50. (Tr. p. 61.) There is no competent evidence in the record as to the value of the transportation actually furnished the libelants aboard the Army Transport "Thomas" upon their return to San Francisco. The witness Ramsted testified that he heard from the ship's crew that the passage for each man from Manila was $22.50. This testimony, however, was mere hearsay, and there is nothing in the record to indicate that the libelants were not furnished second-class passage, or its equivalent, aboard the "Thomas". They were transported free of charge on the transport, and received the same treatment as was accorded to American soldiers, working only one hour every other day to secure certain privileges, and the Court below so held, and found that, under these circumstances,

they were not entitled to recover the cost of transportation. The shipping articles are specific that the libelants were to receive transportation, and there is nothing in the articles from which it can be gathered that they would be entitled to its cost or value under the circumstances existing in this case.

III

The release executed by the libelants at San Francisco on April 21, 1920, *constituted a waiver of all claims and demands by reason of the withholding of wages.*

The mutual release signed by the libelants and the Master of the "Jacox" before the Shipping Commissioner at San Francisco on April 21, 1920, purported to release the Master and owners of the "Jacox" from all claims for wages in respect of the voyage or engagement. Such a release, properly attested, as this was, and given without fraud or coercion, by seamen upon the payment to them of their wages for a voyage, is conclusive upon them as a settlement of all claims on account of such wages. *The Pennsylvania,* 98 Fed. 744, 111 Fed. 931. While it is true that in the case of *Billings vs. Bausback,* 200 Fed. 523, 528, it was held that a release signed by seamen on their discharge at the end of a voyage, releasing the Master and owners from all claims for wages in respect of the voyage or engagement, did not debar them from the right to sue under Section 4568 of the Revised Statutes, to recover for a reduction of allowance, or for the bad quality of the provisions

furnished, yet, it is submitted, such a holding is distinguishable from the case at bar. The present case does not involve an action to recover a penalty because of the furnishing of inferior provisions, which is a matter having no relation to the matter of wages, but is one brought specifically to enforce the payment of a penalty equivalent to wages or pay from March 4, 1920, to the time the libelants arrived in San Francisco. In *The Charles L. Baylis,* 25 Fed. 862, the court held that Section 4529 of the Revised Statutes was designed to be enforced in favor of the seamen as compensation for delay in paying them their dues, and that the extra pay provided by the Statute was incident to their claim for wages proper, and ranked with their wages as a prior lien. It was evidently contemplated by Congress that where wages had been wilfully and wrongfully withheld without sufficient cause, the sailor, by reason of the very nature of his calling, would be compelled to lose time while attempting to collect the amount due him, and it was to reimburse him for the loss of this time that pay, in the nature of wages and as an incident to a claim for wages already earned, should be awarded.

IV

The libelants were deserters and therefore were not entitled to recover the statutory penalty because of the alleged withholding of wages, and were not entitled to transportation from Manila to San Francisco.

Upon the arrival of the "Jacox" at Manila on February 28, 1920, a controversy arose between the Master of the vessel and the libelants as to whether, under the shipping articles, the libelants could be required to proceed with the vessel to Hongkong, and be thereafter returned to Manila for final discharge. The witness Ramsted testified that upon arriving at Manila the Master of the "Jacox" stated that he wanted to take the libelants to Hongkong and then take them back to Manila, but that the sailors were not willing that this be done unless new articles were entered into, and that the crew told the Master that if it could be arranged to take the ship to Hongkong and then get transportation back to Manila and then to San Francisco, it would not make any difference to them. (Tr. pp. 34-35. This witness also testified that the libelants were told that if they went to Hongkong they would be brought back to Manila for final discharge. (Tr. p. 36.) The libelants, however, refused to continue the voyage. (Tr. p. 7.)

After the libelants had been in Manila for a period of about twenty-four days, according to the testimony of the witness Ramsted, they appeared before the Shipping Commissioner at Manila, who told them they would have to go back as deserters in the Transport "Thomas". (Tr. p. 28.) The Commissioner issued a Certificate, which was introduced by the libelants, "Libelants' Exhibit No. 2", (Tr. p. 66) to the following effect:

"The Government of the Philippine Islands, Department of Finance, Bureau of Customs.

Manila, March 24, 1920.

"To Whom it May Concern:

"I hereby certify: That the following members of the crew of the Shipping Board S. S. 'Jacox', which arrived at this port February 28, 1920, were considered as deserters therefrom for the reason that they refused to proceed with her to Hongkong where she had to be delivered. (Here follows the names of the libelants.)

"That the Pacific Mail Steamship Company at Manila, who are acting as agents for the said vessel, signified their willingness to bring the above named members of the crew back to Manila and here to make the final discharge after such delivery was effected if they desired.

"That notwithstanding the agent's statement, the said members of the crew of the S. S. 'Jacox' insisted on being discharged at this port without taking the said vessel to Hongkong, the port of delivery, on the ground that she completed her voyage and delivery was made; whereupon the Master thereof rated the said seamen as such deserters and this office so confirms.

"That the Master of the said vessel paid on March 3, 1920, or three days previous to her departure for Hongkong, to the above members of the crew, with the exception of John Cottrell, one-half of the wages which were then earned by them up to and including March 2, 1920.

(Signature illegible)

(SEAL) Insular Collector of Customs,

Acting as American Consul at Manila."

If, as a matter of fact, the libelants were properly rated as deserters, such desertion would constitute a breach of their contract, and they would not be entitled either to transportation from Manila to San Francisco, or to the balance of their wages, or to any penalty for delayed payment of wages. Whether they were deserters or not depends upon the construction to be given to that portion of the shipping articles whereby the libelants agreed to serve on the vessel "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 contention of the libelants was and is that upon the first arrival of the "Jacox" at Manila their service under the shipping articles ended. The contention of the Master of the "Jacox" and of the defendants in this suit was and is that under the terms of the shipping articles the libelants obligated themselves to serve on the "Jacox" for a *"term of time"* not exceeding six months, provided there was a *final* discharge at Manila, and that the contract of the libelants was not, as contended for in the seventh paragraph of the libel, for a voyage direct from San Francisco to Manila under which calls at Honolulu, Sydney, and Newcastle, Australia, would constitute a violation of the shipping articles. The contention of defendants is borne out by the fact, among other things, that the "Jacox" is a steam vessel, and it could not have been within the contemplation of the parties that a period anywhere approximating six months would have been consumed in a direct

voyage between San Francisco and Manila. In fact, the witness Ramsted testified that when the articles were signed it was the understanding of the libelants that the vessel would proceed to Sydney and would be brought to Manila as a final port of discharge. (Tr. p. 39.) Although perhaps the shipping articles are somewhat ambiguous, all of the circumstances indicate that the service of the libelants was to be for a *"term"* rather than for a direct voyage between two ports, the words "final discharge", and "term of time", greatly aiding in this construction of the articles. In construing the words "final port of discharge", the Court in the case of *Schermacher, et al. vs. Yates, et al.,* 57 Fed. 668, said:

> "By the terms of the articles, the crew could only be discharged at 'a final port of discharge in the United States'. These words should be construed in view of the language employed in Sec. 4530 of the Revised Statutes, where it is provided that a seaman is entitled to his wages 'as soon as the voyage is ended and the cargo and ballast fully discharged at the last port of delivery'. So construed, the last port of delivery where either cargo or ballast was discharged, if within the United States, would be a final port of discharge within the meaning of the articles signed by the libelants."

In *United States vs. Barker et al.,* Fed. Cas. 14516, the mate and crew of a vessel signed shipping articles in Charleston, S. C., for a voyage "to two or three ports of discharge and lading in Europe, and

back to a final port of discharge in the United States". The vessel went to Europe, took cargo, and came to Boston as her port of destination. The Master was directed to proceed to Alexandria for final discharge, but the mate and crew refused to continue the voyage, and were indicted for an endeavor to make a revolt. Under this state of facts, Mr. Justice Story, said:

> " . . . . We are of the opinion that the shipping articles extended the voyage to Alexandria. The fact that the destination was by the original instructions of the owner to Boston does not necessarily make it a port of discharge. 'Port of destination' and 'port of discharge' are not equivalent phrases. To constitute a port of destination a port of discharge some goods must be unladen there, or some act done to terminate the voyage there. *But here the words are 'final port of discharge', so that the owner had the right to order the ship from port to port until there was a final discharge of the whole cargo."*

The shipping articles signed by the libelants in this case providing as they did for a "term" of service and not for a direct voyage between the two ports designated, the libelants, by refusing to continue with the vessel to Hongkong, under the assurance of the Master that they would be returned to Manila for "final discharge", became deserters, and under the provisions of Section 4522 of the Revised Statutes, as amended by the Acts of February, 27, 1877, and December 21, 1898, forfeited the wages or emoluments they had then earned, and no liability

on the part of the ship or her owner for failure to pay the forfeited wages or to return the men to San Francisco would accrue.

V

Assuming that libelants were not deserters, no penalty for withholding wages should have been awarded by the Court under the circumstances of the case.

Assuming that the Master of the "Jacox" erred in rating the libelants as deserters under the circumstances, and that the American Consul at Manila also erred in his adjudication that they were deserters, there is still no warrant for inflicting the penalty provided by the statute in cases where wages of seamen are wrongfully withheld. Section 4529 of the Revised Statutes, as amended by the Act of December 21, 1898, and the Act of March 4, 1915, contains the following provision:

> "Every master or owner who refuses or neglects 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";

Under this provision it is not every case of delay in the payment of wages that calls for the imposition of the statutory penalty. The refusal or neglect to make payment must be *"without sufficient cause"*,

and the cases in which this provision have been construed consistently hold that where the master or owner has refused in good faith to make the payment, or where the matter has been brought before a shipping commissioner or other person with apparent authority to pass upon the question and an adjudication by such means has been had, the penalty will not be enforced.

In the case of *The George W. Wells,* 118 Fed. 761, the delayed payment resulted because of an assignment of wages by the sailor to another. The assignment was held by the Court to be insufficient in law, and although it had been honored by the ship owner, the sailor claimed the wages and the statutory penalty for the delayed payment. But the Court held that to construe the language so narrowly was contrary to its reasonable intent, and said:

> "Congress can hardly have intended that in every controversy, however doubtful, which finally results in the seaman's favor, he shall be entitled to additional compensation so large . . . . It is easy to perceive that the construction of the statute urged by the libelant would encourage seamen to speculate upon controversies between themselves and the ship. The phrase 'without sufficient cause' should rather be construed as equivalent to 'without reasonable cause'. In this sense there was reasonable cause in the case at bar for the delay in the payment."

In a recent case, *The Silver Shell,* 255 Fed. 340, there was an actual controversy between the sea-

men and the owner as to the owner's failure to furnish the required food, and as to the seamen's claim for extra compensation. It was held that the captain had the lawful right to have the question adjudicated by the Court and his refusal to pay the sums demanded by the seamen was not a wrongful withholding of their wages.

In *The Sadie C. Sumner,* 142 Fed. 611, the principle was announced that where there was fair ground for claiming the right to reduce the wages of a mate because of neglect of duty, the refusal to pay him the agreed wages in full on his discharge was not "without sufficient cause" so as to subject the Master or owner of the vessel to the statutory penalty.

In *The St. Paul,* 133 Fed. 1002, a fine had been imposed on a seaman for disobedience but the same was unavailable as a defense to an action for wages because of the failure of the ship's master to enter the offense in the ship's log book on the day it occurred, but it was held that the ship was justified in contesting its liability, and therefore was not liable to a fine on account of the delay in the payment of the seaman's wages.

The statute, said the Court in the case of *The Amazon,* 144 Fed. 153, must be considered as intended to secure justice, and not to penalize vessels for mere errors of judgment on the part of their masters, and should not be applied in a case where the seamen left their ship on account of a matter as to which there was reasonable ground for controversy.

The Supreme Court of the United States, in the case of *Pacific Mail Steamship Co. vs. Schmidt,* 241 U. S. 245, held that the penalty imposed by the statute was not incurred during a delay in payment occasioned by an attempt to secure a revision in a Federal Circuit Court of Appeals of doubtful questions of law and fact. In that case Mr. Justice Holmes said:

> "It is a very different thing, however, to say that the delay occasioned by the appeal was not for sufficient cause. *Even on the assumption that the petitioner was wrong,* it had strong and reasonable ground for believing that the statute ought not to be held to apply. So that the question before us is whether we are to construe the Act of Congress as imposing this penalty during a reasonable attempt to secure a revision of doubtful questions of law and fact, although its language is 'neglect . . . without sufficient cause'. The question answers itself. We are not to assume that Congress would attempt to cut off the reasonable assertion of supposed rights by devices that have had to be met by stringent measures when practiced by the states."

The facts in *The Express,* 129 Fed. 655, were that deckhands were hired on a steamer making daily trips between New York and another port at a monthly wage, and after working six days left the service without the consent of the master. The owner of the vessel contended, although erroneously, that the contract of the deck-hands was one from month to month, and that they had no right to abandon the

service before the end of the month. It was held in that case that the refusal of the owner to pay the deck-hands wages for the time they worked did not subject him to the penalty imposed by the statute, as there was reasonable ground at least for the owner's contention.

In *The Cubadist,* 252 Fed. 658, the Court in construing the statute in question said:

> "It has been contended that, whenever the seaman recovers his wages after a refusal of payment has been made by the Master, this recovery should have added to it double pay for the period following the demand and until the hearing. I can not agree with this contention for I do not think the words 'without sufficient cause' are intended to mean this. If this were the meaning intended, the words 'without sufficient cause' would have been omitted, and the language then used would have expressed this meaning. The inclusion of these words, however, negatives this idea."
>
> "What then is meant by the words 'without sufficient cause'? There are numerous instances where masters have been known to wilfully refuse to pay seamen their wages. In these cases I think it unquestionable that, if the seaman recovers, he should also recover double pay. There are, however, other cases where the Master may have just cause to doubt whether the seaman is entitled to demand his pay, or cases where there may be a very close question. I do not think that the statute was intended to penalize any master or vessel for exercising sound judgment

> and discretion, or require them to surrender such judgment under a penalty of double pay. I think the language used carries with it the idea that, where the Court finds that the master's refusal was willful and without justification or excuse, double pay should be given, but where the master was exercising a reasonable and proper discretion, and the question, was doubtful, it reserves to the Court the power to pass upon the question of the reasonableness or the sufficiency of the excuse of the master, and give or deny the double pay according as the Court may find the contention of the master to be honest and not only a pretext."

The circumstances disclosed by the record in this case do not warrant a finding that the master of the "Jacox" willfully and without reasonable cause withheld the wages from the libelants at Manila. All of his actions show honesty of purpose. His offer to finally discharge the men at Manila after the trip to Hongkong had been made, his submission of the controversy to the American Consul at Manila, and the fact that the shipping articles themselves bear out, as we have shown, his claim, all tend to show that the master's acts were not mere pretexts for defeating a just claim, but were done in good faith.

The submission of the matter to the Insular Collector of Customs, acting as the American Consul at Manila, was done pursuant to statutory authority. The Act of July 1, 1902, c. 1369 Sec. 84, provides that the laws relating to seamen on foreign voyages shall apply to seamen on vessels going from the

United States and its possessions to the Philippine Islands, the Custom officers there being for such purpose substituted for Consular officers in foreign ports. Aside from the broad powers granted consuls generally in matters concerning seamen, Section 4600 of the Revised Statutes, as amended by the Act of June 26, 1884, and the Act of December 21, 1898, provides as follows:

> "It shall be the duty of all Consular officers to discountenance insubordination by every means in their power and, where the local authorities can be usefully employed for that purpose, to lend their aid and use their exertions to that end in the most effectual manner. In all cases where seamen or officers are accused, the Consular officer shall inquire into the facts and proceed as provided in Section four thousand five hundred and eighty-three of the Revised Statutes."

The American Consul at Manila clearly had jurisdiction under Revised Statutes Sec. 4600 to inquire into the facts connected with the accusation made that the libelants had deserted. His finding, supporting as it did the contention of the master, even though not to be deemed conclusive upon the question of desertion, is at least sufficient to prevent the attaching of the statutory penalty. In *The Silver Shell,* 255 Fed. 340, it was held that where a seaman's claim for additional compensation for extra work and compensation for insufficient food was submitted to the shipping commissioner of a port and decided in favor of the captain of the vessel, that of itself

established that the captain was making a bona fide contention that the amounts claimed were not due. And in the case of *The Alice B. Phillips,* 106 Fed. 956, where both parties went before the Collector on the discharge of a seaman, where a dispute had arisen as to the amount due him, and where the Collector decided in favor of the contention of the master, *it was held that although the controversy was not submitted by the parties by any agreement in writing, and although the decision the Collector made was erroneous, yet that decision constituted a reasonably "sufficient cause" for withholding the additional wages claimed and exempted the ship and her owners from the penalty* imposed by the statute for a failure to pay the wages promptly on discharge.

The libelants claimed what in effect would be triple wages for a delay of fifty-three days. The libelants have already been paid single wages covering substantially this period, and the Court's construction of the statute that the libelants would not in any event be entitled to triple wages, is undoubtedly correct. The period, however, is incorrectly computed. The vessel arrived at Manila on February 28, 1920, the balance of wages, if due at all, was payable four days thereafter, and the libelants arrived at San Francisco and signed the release there on April 21, 1920, as shown by paragraph XII of the Answer. These matters, however, are wholly immaterial in this case, in view of the fact that the libelants are not, under the construction given to the

statute under consideration by the Courts, entitled to recover any penalty whatsoever on account of the delay in paying them the balance of their wages.

It is the contention of the libelees that under a proper construction of the shipping articles the libelants deserted the "Jacox" at Manila. But even should it be held that the libelants were not deserters although they left the vessel immediately upon her arrival at Manila, though she did not then finally discharge there but proceeded to another port, yet such good faith has been shown on the part of the master of the vessel, and the circumstances surrounding the withholding of the wages are such as not to entitle the libelants to the statutory penalty.

It is respectfully submitted that the decree of the District Judge should be reversed and the libel dismissed.

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