

In the

Supreme Court of the United States

AMERICAN FOREIGN STEAMSHIP
COMPANY,

Petitioner,

v.

LILLIAN M. MATISE, etc.,

Respondent.

No. 74-966

Washington, D.C.
October 14, 1975

Pages 1 thru 43

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LILLIAN M. MATISE, etc., :
Respondent. :
:
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Washington, D. C.

Tuesday, October 14, 1975

The above-entitled matter came on for argument at
10:04 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

FRANCIS L. TETREULT, Esq., 1 Maritime Plaza, San
Francisco, California 94111; for the Petitioner.

ERIC J. SCHMIDT, Esq., 528 Mills Tower, 220 Bush
Street, San Francisco, California 94104; for the
Respondent.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in No. 74-966, American Foreign Steamship Company against Matise.

Mr. Tetreault, you may proceed whenever you are ready.

ORAL ARGUMENT OF FRANCIS L. TETREAULT, ESQ.,

ON BEHALF OF THE PETITIONER

MR. TETREAULT: Mr. Chief Justice, and may it please the Court:

This case involves the imposition against the ship owner of penalties in excess of \$35,000, and this amount, mind you, is in addition to an award in favor of the seaman or the seaman's estate of the sum of \$510, plus interest, which amount had been thought by the ship owner, found by the District Court in the first instance, to have been an amount which was in fact paid to the seaman as part of the ship owner's obligation to pay his wages in full.

Throughout the handling of the case in the District Court, in the Court of Appeals--and I think there is no question of the law on the subject--the ship owner--the money was paid in Vietnam under circumstances where US dollar currency by the local law was not permitted to go into circulation. I assume the reason was simply that there was a great disparity between the black market rate and the

official rate.

The seaman was discharged for cause. There is no question about that. That has been conceded throughout the case. It also has been held, even by the Court of Appeals, whose opinion imposed this penalty, that the cost of repatriation following a discharge for cause was as between the ship owner and the seaman the obligation of the seaman.

We thus have a situation which quite literally is one in which the penalty of \$35,000 has been imposed; and if we apply the maximum of the law, that we will assume to have been done which should have been done, if everything had been followed literally, even in accordance with the plaintiff's desire and wish, the \$510 representing the cost of buying air transportation back to this country would immediately upon the seaman's return to this country and the payment of the remainder of his wages, have been returned by the seaman to the ship owner.

So, one has, may I say, either absurd or outrageous, depending upon the point of view, a situation in which we have a penalty in excess of \$35,000 imposed for the theoretical deprivation, taking the plaintiff's case at its best.

Q You say it is conceded that the sailor, the seaman, owed the ship owner for the airline?

MR. TETREULT: Whether counsel conceded it or not, he did concede it in the District Court; in the Court of Appeal

there was a holding that the cost repatriation was the seaman's obligation, not the ship owner's.

Q Even though the ship was obligated to get him out of Vietnam under the law, nevertheless, that did not mean that they had to pay his way home?

MR. TETREAULT: May I say this is true, but before I say it is true, may I say that the Court of Appeal refers to Vietnam treaties and obligations of the ship owner to bring him home.

Q They had to get him out of Vietnam, but that does not mean that they have to get him out at their own expense. At least the Court of Appeals said it was the seaman's obligation, the money.

MR. TETREAULT: The Court of Appeal said the money was the seaman's obligation. I went further and had some discussion about Vietnam treaties and ship owner's obligations.

Q It did not seem to make any difference to the Court of Appeals whether it was his obligation or not; whether it was or whether it was not, this penalty was to be imposed.

MR. TETREAULT: That is correct, Your Honor.

Q Also under treaties it might have been the ship owner's obligation to get him out of Vietnam; there was nothing in that treaty that required the ship owner to send

him to the United States of America. It was just to get him out of Vietnam.

MR. TETREAULT: If one assumes there was a treaty obligation, that is correct.

Q It could not have gone beyond an obligation to get him out of Vietnam.

Q Why is not the payment for the air fare made in Saigon treatable as a partial payment of wages?

MR. TETREAULT: This is exactly the ship owner's position, Your Honor, exactly.

Q Why is it not? You say it is. It was decided that it was not. Why?

MR. TETREAULT: I have spent many hours attempting to understand the Court of Appeals first opinion. I believe in good conscience and the best that my study can come forward with, that the explanation lies in a misreading of this Court's opinion in Isbrandtsen v. Johnson. I assume that the Court has some familiarity with that. That is a case in which the ship owner offset or attempted to offset against the seaman's wages the costs of deviating the ship to provide medical treatment to a seaman who had been, without justification, stabbed by the seaman plaintiff who was suing for his wages and penalty wages.

The holding in Johnson v. Isbrandtsen in its express terms, and I quote, is that the--well, three dots, if you will,

before that---that the ship owner, and here is the quote, so far as "deductions for derelictions in the performance of duty," is limited to the specific fines and penalties that are provided in Section 701 or a few other miscellaneous provisions of the statute. The heart and the basis of the misunderstanding by the Court of Appeals in this case and some of the trouble in the other circuits relates to the extrapolation of the carrying beyond the holding of this Court, which related to penalties, into the subject which we have here where there is in fact an attempt, with the consent of the seaman, with all sorts of official watchdogging, if you will, of a payment in kind of an attempt to actually make the full payment to the seaman.

Q If the seaman had gone with him to the airline office and they had given him the cash, the seaman the cash, and said, "This is part of your wages," and the seaman had bought his own ticket, there would not have been any problem, I guess.

MR. TETREAULT: There should not have been.

Q They might have violated Vietnam law giving him the cash, having the currency there; but, nevertheless, there would not have been any problem, I do not suppose. The real problem is paying a third party, what the plaintiff claims what the seaman owed him.

MR. TETREAULT: I think there is no question under

the record we have in this case that the seaman in fact did go to the airline office, accompanied by the agent; the money was paid to the airline.

Q But they paid it directly to the airline?

MR. TETREAULT: This could be. And here we have the problem that the ship owner faces, that if he had given the cash to the seaman one second before he gave it to the agent, theoretically there on that side you have a technical violation.

Q If you do not prevail on your submission that it was wages that were paid when he got the airline ticket, is there then any doubt he would be liable for the penalty per day dated from the day when the wages should have been paid, assuming now they were not?

MR. TETREAULT: Assuming that this did not constitute legal payment, then we come to the question of the quantum of the penalty; is that correct, Your Honor?

Q Yes.

MR. TETREAULT: I think there is a very, very serious question, and here we have--I do not intend this as a digression, but this brings I think into play the entire subject of this group of statutes and how they are being handled and what is to be done in fairness on both sides. The enforcement section of more than one hundred sections of Title 46, which are designed for protecting seamen, particularly in

their wage relationships. The enforcement section is this Section 596, which is directly before the Court, and which, as the Court is aware, provides that there shall be a penalty of two days pay for each day that goes by where the master or owner who refuses or neglects to make payment without sufficient cause.

It has been held by this Court, so far as I am aware, consistently in the opinions of this Court, since Pacific Mail Steamship v. Schmidt, that the "without sufficient cause" language should be read as including within the statute a rule of reason so that if the ship owner is acting reasonably at any stage of the process in which payment is not made, the penalty is not triggered, and this is true even though there may be a technical legal failure on the ship owner's part in having either made payment in the wrong manner, in the wrong medium, or having made an improper deduction.

In the Schmidt case it was held by this Court that the ship owner had a valid--let us say by valid I mean a colorable and arguable, a good argument from appealing from the District Court opinion and during the course of the appeal, this Court reversed the Court of Appeals decision which had imposed the penalty during the course of appeal, saying in effect that the ship owner was entitled to pursue his rights, that is, to inquire whether he was right at any

event. In this case, in my view of it, we have the strongest possible situation where we not only thought in good faith that we had made payment; we complied with the requirements of the statutes and the regulations which have set up a very, may I say, extensive infrastructure of bureaucracy, in the good sense of the word, to enforce the seaman's rights. These were complied with in Vietnam. The vice consul was present and members of the Coast Guard.

The Court of Appeals with, may I say, no reason and no justification in the record, stated that the presence of the United States vice consul and the Coast Guard officers-- that they were not acting within their official capacity. There was simply nothing in the record and no justification for that.

Q Does the record indicate how it was that they were present?

MR. TETREAULT: The record does not indicate who called whom, but that record does indicate the vice consul was inquiring into the circumstances of the discharge, into the loggings, that he performed all the duties which the statute requires him to perform, including the issuance of a certificate of discharge to the seaman, the assuring that he had received a wage voucher, the participation in the determination that the seaman wanted to be repatriated by air and consented to this procedure.

What occurs to me as the only possible explanation

is that in this mass of statutes--and there are more than 100 sections and detailed regulations---it simply may have well escaped the attention of the Court of Appeals that this procedure was one that was called for by statute, and that the vice consul was not just simply acting gratuitously.

Q The Coast Guard?

MR. TETREULT: The Coast Guard, I suspect---and the record does not disclose except that they all came--as far as I am aware, the Coast Guard was an attempt, presumably at the request of the vice consul because presumably the Coast Guard officers had had some experience in the shipping commissioning capacity and had greater familiarity with the signing on and off of seamen.

Q Let us assume it was determined after studying whatever laws or treaties there are that it really was the ship owner's duty and also his financial obligation to return him to the United States, that it was to be out of his pocket, not the seaman's, and that he just made a mistake, he had just been wrong. You would still say there was a good faith defense, I understand from your answer to Justice Brennan, as far as the penalty was concerned?

MR. TETREULT: I did not, I believe, give adequate or proper answer. What I think is very strong or outstanding in this case is the fact that we not only went through all of those procedures, there was a trial in the District Court in

which the District Court found that we had in fact made payment. So, we would think that the ship owner, so far as the question of sufficient cause is concerned, or a rule of reason or an entitlement to--assume, if you will--among other things, should have been, at least so far as the calculation of the quantum of the penalty is concerned, entitled to, may I say, rely on the--after a full contest, there was no default procedure--decision of the District Court after a trial that payment had been made.

Q That may be so, but what about the penalty up to that time? Assume you are wrong that it was really the ship owner's cost to send him home. Assume you are wrong. How about the penalty up to the date of the trial?

MR. TETREAULT: I would think that up to the date of the trial--

Q You are still under the understanding that you were paying him, that you had paid him, and you were advised that you had paid him and that it was his cost, not yours.

MR. TETREAULT: And so far as the calculation of a period of time is concerned, I would think that certainly through the decision--there were two decisions of the trial court, of course. The first found that we had paid. I would say that through that one we are affirmed in the sufficiency of our cause in persisting in our, we are assuming, a wrongful belief. And I would say that certainly in applying the rule of reason

that the courts have applied and, I would say, that this Court applied in the Schmidt case, we were entitled to persist in this assumed erroneous course, certainly through up to the time of the opinion of the Court of Appeals, and I would suggest through the--up to the time of the second judgment of the trial court which was entered in response to the mandate and injunction of the Court of Appeals, based not only on the opinion of the Court of Appeals in this case but on the intervening opinion of the Court of Appeals for the Ninth Circuit by a different panel in Escobar.

Q If you were right about that, assuming you had some penalty to pay, how much would the penalty be?

MR. TETREULT: The penalty calculates at the rate of approximately \$29 per day, and presumably the--I am sorry. I do not have at the moment the date of entry of the trial court judgment. I would say that would have been last June. It would be approximately \$8,000, I would think, Your Honor.

Q As against \$35,000?

MR. TETREULT: That is correct, Your Honor.

On the subject of discharge and this mass of statutes that I was touching upon, although the amount here was \$510, under the statute it of course would be triggered by any failure to pay if it were willful, even though it were a matter of just a few cents. And among the mass of statutes and the question of airline versus other repatriation, there

is a statute, 46 USC, Section 683, and this must be the one that the consul and the Coast Guard were addressing their attention to even though the master had not, that the master, in case of a discharge abroad, shall provide any seaman so discharged with employment on a vessel agreed to by the seaman or shall provide him with one month's extra wages, if it shall be shown to the satisfaction of the consul that such seaman was not discharged for neglect of duty, incompetency, or injury incurred on the vessel.

This is not our case. He was discharged for misconduct, and there is no question on that, and that is conceded.

Q I gather your first position is that he was paid full wages and therefore there is no penalty involved.

MR. TETREAULT: That is correct.

Q If you are wrong about that, your second argument is that in any event you have a good faith defense and you still owe no penalty; is that it?

MR. TETREAULT: That is correct, Mr. Justice, and the statutory provision that I just adverted to I think points up the absurdity of the result because if the ship owner in this case, as it did not, had discharged the seaman wholly without cause, the ship owner's obligation would have been to pay one month's wages or to find him a work away job on another ship. There is no requirement for air transportation home so far as

the statutes are concerned.

Q Mr. Tetreault, if you take a look at page 5 of the tan appendix where there is the statement, apparently furnished by your client to the respondent, of deductions and look down in the lower half of the page where it says first in caps "DEDUCTIONS TRANSPORTATION SAIGON TO SAN FRANCISCO \$510," and then right below that it says, "Advances, such and such," and then beyond that it says, "Slop Chest, \$51." I take it that is a kind of canteen that the man goes into and gets cigarettes and that sort of thing?

MR. TETREAULT: That is correct, Your Honor, and I am glad--

Q What is the authority? Is there a statutory authority for deducting slop chests, or is that just a process of consent by the seaman?

MR. TETREAULT: I believe the statute is 46, Section 670. It requires the ship to maintain a slop chest. It says the seaman can buy from it. And the reason that I am delighted at the question is that there is no statutory provision for sales on credit, that is, for deducting from the seaman's wages the amount of slop chest purchases.

Incidentally, the form, may I say, although it has American Foreign Steam on it, essentially follows the forms that the Coast Guard uses--it is a traditional type of form--they always have had provision for advances for slop chest.

And this is another one of those where the money is for the benefit of the seaman and has traditionally been done and never has been--

Q Consent is enough without specific statutory authorization.

MR. TETREAULT: This is the case in connection with the slop chest. Following today, I don't know. We may have a mass of slop chest suits; I don't know.

Q How about allotments?

MR. TETREAULT: Allotments are specific or statutory, and that is so specific in the statute that I would make no argument based on an allotment that was not justified by the statute.

Q What about fines?

MR. TETREAULT: Fines are also specific and fines, I believe, Mr. Justice, are exactly what was determined by this Court in U. S. v. Johnson. I am not aware of any instance, either in the course or otherwise, in which since U. S. v. Johnson there has been a penalty type of--

Q You mean Isbrandtsen?

MR. TETREAULT: Isbrandtsen v. Johnson, yes.

Q What were the fines imposed for, do you know?

MR. TETREAULT: In the Isbrandtsen case, Your Honor?

Q In this case.

MR. TETREAULT: There were no fines. No, I am sorry.

The fines are not in controversy for this case. Those were in connection with repeated episodes of misconduct in connection with which he was finally discharged. And there is no controversy concerning the fines in this case. It is only the \$510.

To conclude very briefly, essentially I believe where we now are is as a result of a misreading by the Ninth Circuit and some of the other courts of Isbrandtsen v. Johnson as reading it as going beyond the deductions in the nature of penalty.

We also have, perhaps not directly involved in this case but if I may touch on it, the statutory scheme, which is very complex, which obviously has caused the Court of Appeal for the Ninth Circuit in this case some difficulty, perhaps compounded by the accident in the Ninth Circuit of published opinions, of which this is one, unpublished opinions by other panels dealing with exactly the same subject matter, reaching opposite results and which we apparently under injunctions or rules of the Court are not permitted to use as precedent or authority. So, we have some difficulty in telling what the law in the Ninth Circuit is. But we do have the situation in this case which represents the difficulty that it had in dealing with the complex statutory and regulatory schemes, and one is left with the thought, although it may never surface simply because of the difficulty of another case in which it will be

presented, of this Court perhaps taking another look at its decision in US Bulcarius v. Arguelles in 400 US 351, which dealt with the subject of arbitration of this type of thing under the collective bargaining agreement.

Q I imagine in your argument you could prevail without reference to Arguelles, could you not?

MR. TETREAULT: Yes. This is a total digression, Your Honor.

May I reserve five minutes?

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Schmidt.

ORAL ARGUMENT OF ERIC J. SCHMIDT, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. SCHMIDT: Mr. Chief Justice, and may it please the Court:

This proceeding this morning challenges two of the most important basic rights belonging to American seamen. The first one became a seaman's right at the same time that all American citizens acquired it, the Constitutional right to due process before being deprived of his property.

The second right is a very important one that makes enforcement of the first possible. My respected opponent has just referred to Section 596 as the enforcement section. The ship owner's position in this proceeding this morning attempts to render useless this very important enforcement

section.

I prepared a statement to explain the respondent's position here, and I do not want to take up a point by point refutation or discussion of the statement that has just been made by opposing counsel.

However, on the repatriation point, I am going to deal with that first. At the trial--I will summarize by saying that there has been error carried consistently through this litigation with respect to the repatriation aspect, the contract implied on the part of the seaman to repay the vessel.

At the trial the Court spoke to the seaman's counsel and said, "The proposed findings of the defendant indicate that the shipowner had no obligation to bear the expense of the plaintiff's return to the United States. Do you dispute that?"

Counsel replied: "I dispute it emphatically, Your Honor, but I say it is irrelevant. It is not at issue in this trial."

Court: "All right, all right, proceed."

In the Court's findings of fact and conclusions of law, trial court's findings--

Q Where are you referring to?

MR. SCHMIDT: They appear in the transcript at page 44, line--

Q The transcript or appendix? Are you looking at the appendix?

MR. SCHMIDT: Yes, Your Honor.

Q Forty-four?

MR. SCHMIDT: I will have to give you the correct page. It is page 8 of the appendix. Two-thirds of the way to the bottom of the page: "From the evidence it's undisputed that the obligation to repatriate the plaintiff was not upon the shipowner, but was rather the personal responsibility of the seaman."

The Appellate Court simply accepted that and because, even down to today, the question of the validity of the obligation, of the existence of any obligation, on the part of the seaman to reimburse the ship owner is not actually an issue in this case. The question presented by this proceeding is whether or not the statutory rights given to a seaman by Congress to ensure that he would not be overreached by recoupments and repayments asserted unilaterally by his employer, his employer being historically and today in a position to produce proofs from foreign places, to obtain the assistance of consular officials, its own agents in foreign ports, locally. There is simply no fair contest between a nomad who worked on a ship for a while and the corporation that owns and operates those ships.

Q So, you suggest that we're entitled to decide

this case on the assumption or accept the finding that it was the seaman's obligation to pay his airfare home. You say it is perfectly all right to proceed on that basis.

MR. SCHMIDT: Your Honor, I want to say that I consider that to be completely erroneous but that this Court's decision would be the same in either event.

Q So, we may proceed on that basis.

Q Let us move to the top of page 9 following the paragraphs you were talking about. "The plaintiff consented to and approved the purchase of an airline ticket for his purposes with his money under circumstances that were arranged by the master and the vice consul with the special permission of of the South Vietnamese customs officials. The purchase of that ticket under those circumstances constituted the equivalent of payment of monies over to the seaman."

That is certainly as explicit a finding as we can have on the subject, is it not?

MR. SCHMIDT: Yes, Your Honor. And I think that it is completely erroneous, and I say that without resorting to hyperbole. It is completely erroneous in view of the statutory protections which Congress established for a seaman in order to prevent precisely this kind of finding being made by a court.

Q Does it bear on a good faith defense aspect

of this case?

MR. SCHMIDT: I am sorry?

Q Does it bear on the good faith defense issue in this case?

MR. SCHMIDT: I think that it definitely does. I think that the law with respect to the fact that seamen cannot contract and cannot enter into any kind of an agreement that would diminish their rights to wages at the time they are paid off before a shipping commissioner, the knowledge on the part of ship owners, which they certainly are required since 1872 down to the present time to have acquired, the knowledge that they cannot repay themselves unilaterally from a seaman's earned wages goes right to the good faith of the entire transaction.

If a ship owner claims that a seaman owes it money, it must do what everyone else must do in our society who says that a seaman owes it money. It must resort to a judicial process.

Q What if a seaman agrees, as in the case of a slop chest, that he has bought so much and agrees to have it deducted consensually; does the ship owner stip owner still have to sue him?

MR. SCHMIDT: No, Your Honor. The statutes create the slop chest, and it has historically been the procedure when a seaman purchases something from a slop chest to sign his name and the date of the purchase in the official log book. The log

books are printed by the government, and they carry pages labeled for the specific purpose of keeping track of a seaman's purchases from the slop chest. So, on the day that he purchases, he signs his name or initials opposite the amount. That is statutory.

Q But the statute does not authorize a deduction from wages for the slop chest purchases.

MR. SCHMIDT: I believe that it would be reasonable to say that a statute that creates a slop chest limits the percentage that the captain can charge in terms of profit, specifies those items that the slop chest must carry under penalty of fine. When the log book carries pages devoted to keeping that record, it certainly comes close to being statutory. It is a formal procedure that is subject to close scrutiny, and it requires the seaman's signature in exactly the same manner that wage advance is made to him in foreign places requires his signature, in the official log book.

Q Mr. Schmidt, are you arguing that under no circumstances could a seaman consent to payment in kind? Suppose a seaman on his own initiative in Saigon, for example, had come to a ship owner, putting all currency problems and regulations aside, and said, "I would rather you buy the ticket for me. I'm not really very smart at figuring out how to get home on the airlines. Will you go down and buy the ticket for me." Are you saying that under no circumstances

does consent relieve the ship owner?

MR. SCHMIDT: Absolutely yes, Your Honor.

Q Under none?

MR. SCHMIDT: Under the statutes enacted in 1872, Shipping Conditions Act of June 4, 1872, a seaman cannot agree--

Q What are the US Code citations to the statute you are relying on?

MR. SCHMIDT: Contracts are forbidden by Section 600 of Title 46. It is fairly brief. Section 600: "No seaman shall by any agreement, other than is provided by Title 53 of the revised statutes, forfeit his lien upon the ship or be deprived of any remedy for the recovery of his wages to which he would have otherwise been entitled. And every stipulation in any agreement inconsistent with any provision of Title 53 of the revised statutes and every stipulation by which any seaman consents to abandon his right to his wages in the case of the loss of the ship or to abandon any right which he may have or obtain in the nature of salvage shall be wholly inoperative."

Q That does not say, it does not seem to me, what you said it said. That certainly does not say that the seaman may never consent to receive his wages in some other form or to have some other payment made such as was made in this case. What language of Section 600, what particular phrase in it, do you think supports your contention?

MR. SCHMIDT: "No seaman shall by any agreement, other than is provided by Title 53 of the revised statutes, forfeit his lien upon the ship or be deprived of any remedy for the recovery of his wages to which he would otherwise have been entitled."

Q That is talking about remedies for the recovery of wages, not the substantive question of whether the wages are due and owing or not.

MR. SCHMIDT: Your Honor, the cases have--I can cite I believe Schulman offhand--the cases have interpreted this language to mean that a seaman cannot contract.

Q Cases from this Court?

MR. SCHMIDT: I do not think Schulman--

Q Contracted or not, that section does not answer the question were the wages paid in this case.

MR. SCHMIDT: That is true.

Q The issue is, Were the wages paid by buying an airline ticket? That is the question.

MR. SCHMIDT: I would like to invite the Court to note Section 644, Rules for Settlement; the fourth section says: "In cases in which discharge and settlement before a Coast Guard official to whom duties of shipping commissioner have been delegated or required"--and that is all offshore ships, including this one, discharge and settlement is required before a shipping commissioner or the Coast Guard

official performing those duties--"no payment, receipt, settlement, or discharge otherwise made shall operate as evidence of the release or satisfaction of any claim."

Q Did you not have a Coast Guard official present in Saigon and a US commissioner present in San Francisco when these vouchers were signed?

MR. SCHMIDT: To answer, Your Honor, there were two Coast Guard investigating officers present at the time that the man was discharged in Saigon. There was no disposal made of his wages there. The ship owner at the time of the payoff in San Francisco said, "I am keeping back \$510 of the wages which I admit you earned to repay myself for an airline ticket that was bought for your benefit." And the cases have been clear. Gonzales, for example; the man was put in jail. He signed a written agreement to repay from his wages the amounts the captain let him have in order to buy a mattress, to buy some food, and to procure legal help. The captain knew that such an advance--presumably he knew it--was illegal because he put down the sums that he had given to this seaman as fines. And the court held that this was not a deduction permitted by statute, and the double wage penalty was applied.

Q That is a district court case?

MR. SCHMIDT: Gonzales was an appellate court case, I believe.

Q What if the employer pays in advance to the

seaman in cash? What if the seaman comes to him and says, "I want a pittle prior payment. I had bad luck at the table and I need \$100," and the employer gives it to him in cash?

MR. SCHMIDT: The usual situation of that kind would involve the seaman signing an entry in the official log book that he had received in advance of his wages.

Q Then when they finally pay him off in San Francisco, they will deduct that advance?

MR. SCHMIDT: That is correct.

Q That advance is quite all right, you say, but an advance to buy an airline ticket is not?

MR. SCHMIDT: Yes, that is what I am saying. That an advance made pursuant to Section 597 requiring it to be entered in a log book and signed by the seaman is a statutory, legal, and enforceable payment of wages.

Q That is the way to do it. If they had entered that in the log book, this case would not be here, if they had entered this \$500 in the log book as an advance to the seaman? You would not be here?

MR. SCHMIDT: And the seaman had signed it. If it had observed the procedures for paying men wages in advance, there would be no contest.

Q Is that advance an agreement?

MR. SCHMIDT: Pardon?

Q Is signing that an agreement, because you say

he cannot make an agreement? He did make it in your case.

MR. SCHMIDT: The law permits him to obligate wages for allotments to be sent to his family for slop chest purchases and for wages.

Q I thought you said he could not make any agreement, what you read.

MR. SCHMIDT: This is provided for by statute. He cannot enter into any kind of agreement with the ship owner or anyone else--

Q Am I right that the statute you read said any agreement except those covered by revised statutes, some number?

MR. SCHMIDT: Yes.

Q Is advance in that statute?

MR. SCHMIDT: Yes, Your Honor, advances are provided for by Section 599, advances and allotments.

Q Of that revised statute that you are talking about?

MR. SCHMIDT: This is the number given it by the amendment I think of 1915.

Q I do not think we understand each other. What is the revised statute that is in there that says no agreements are binding except those provided in revised statutes? What is that revised statute number?

MR. SCHMIDT: The revised statute number--

Q Read the statute you just read us that said no agreement can be binding.

MR. SCHMIDT: That is 600.

Q What is the revised statute mentioned there?

MR. SCHMIDT: I believe it would be Section 31.

I am looking at the historical note.

Q You read the statute before. You did not read any historical note. You read the statute.

Q Section 600. Just read it again.

MR. SCHMIDT: All right. "And every stipulation in any agreement inconsistent with any provision of Title 53 of the revised statutes..."

Q Is advances in Title 53?

MR. SCHMIDT: I am not prepared to answer.

Q Why is not an advance blocked by that statute, 600? It is an agreement? Is it not an agreement--in quote and end quote?

MR. SCHMIDT: The statute permits certain specified deductions from wages, and the statute that permits deductions for advances is Section 599 and, given time, I could find the equivalent of it in the revised statutes because it is an old law. It is there. It provided that a seaman--

Q Then 600 says under Title 53 or any other one. It must say that for you to win.

MR. SCHMIDT: I can only say, Your Honor, that I am

under the impression that the seaman's bill incorporated a great amount of past law and give the sections new numbers. I have the numbers for the seaman's bill enacted in 1915. I know that the right to pay seamen advances existed before 1915 because prior to that time a seaman was entitled to demand one-third of his earned wages; and the La Follette Act or the seaman's bill changed that to one-half. So, I cannot answer--

Q That is only true if it is signed in the log book; otherwise it is not.

MR. SCHMIDT: With respect to wage advances, that is correct, Your Honor. That is the only wage advance money to a seaman under the law.

Q Certainly the first sentence of Section 599, talking about advances and allotments, would give the impression anyway that a seaman cannot assign wages not yet earned. It looks like a flat prohibition, does it not?

MR. SCHMIDT: 599 does completely prohibit the payment to seamen of wages in advance of the time that he has earned them.

Q And then it goes on to say that he can allot them. But the allotment would take effect after the wage has been earned, I would think.

MR. SCHMIDT: That is correct. So, that is a statutory provision for an employer to pay out of seamen's wages, after they have been earned, in advance of the payoff

before a shipping commissioner.

Q But I suppose that your opponent's contention here is that these were not assignments of unearned wages; this was a payoff of wages that had in fact been earned.

MR. SCHMIDT: For what it is worth, that argument can properly be made because the wages had been earned at the time that the ship owner spent this money. The man did not earn any more money after the time that he was discharged.

Q And if that had gone through the advances routine here in connection with this airline ticket, it would have been all right; you would not be here.

MR. SCHMIDT: That is correct, Your Honor.

Q Will you point out to me, Mr. Schmidt, where is it that it says that an advance is to be treated as an advance only if the seaman signs the log book that you mentioned; is that in the statute?

MR. SCHMIDT: I believe that specific language is in the statute, Your Honor.

Q Where does that come from? If I understand you correctly, if a seaman came to the ship's captain and said, "I want to go ashore. I want to buy some things but I am broke. Would you give me \$100," and the captain gives him \$100 and puts it down as advance but does not get the seaman to sign the log book, I gather in that situation the seaman would still be owed the \$100; is that right? He would not

have had an advance of wages.

MR. SCHMIDT: I think your facts included the captain making a record of it as an advance.

Q No, no record. Just forget it. He goes to the safe and he gives the seaman \$100, and they don't take out the log book and go through the formality you suggested has to be completed before there is an advance.

MR. SCHMIDT: I think that is correct.

Q Even though the seaman later says, "Sure, I got the \$100 but you owe it to me anyway."

MR. SCHMIDT: Yes, I think that is correct. And the historical explanation of it is obvious. It is very easy for knowledgeable people like masters and ship's agents and paymasters to either procure a seaman's genuine consent wrongfully, and it happens in daily life where consent to frauds happens regularly and seamen are notoriously ill-equipped to deal with these things; on the other hand, consent need not have been given by the seaman at all. He can have been exceedingly angry about it and for purposes of litigation he is lost because the captain, the company, will provide affidavits from abroad. They will provide letters. They will muster witnesses. Ship's officers have to keep in mind their relationship with the company. And a seaman attempting to prove that he did not consent to a wage deduction does not have much of a chance.

Q This is more or less a prophylactic rule. You cannot hold the seaman as having received wages unless he has signed a log book stating that he has received wages.

MR. SCHMIDT: I think that is completely correct, Your Honor.

Q Incidentally, Mr. Schmidt, while I have you interrupted, I gather there is a second question here, and that is, assuming now that the payment for the airline ticket was not wages, nevertheless, under the statute that is under 596, a ship owner has a defense if the refusal or neglect to make payment of the \$510 of wages was without sufficient cause. Right? That is what the statute says. What interpretation do you give "without sufficient cause," only those things which are by statute expressly permitted as deductions?

MR. SCHMIDT: That is not entirely correct, Your Honor.

Q How far do you go then?

MR. SCHMIDT: That is the principal point here this morning. The statutes absolutely forbid the ship owner to repay itself for unilaterally asserted claims. It is a denial of due process. But there are other situations in the cases described--for example, Collie v. Fergusson--where the ship owner was insolvent.

Q You do not seriously assert any due process claim here, do you? The due process provisions apply to the

Federal Government, the state government, the local government. The ship owner is not part of the United States or a part of any state, is he?

MR. SCHMIDT: I believe that due process--and I might be wrong about this--I believe that a person who is deprived of his property in this manner can properly say that his rights under the Constitution with respect to due process have been invaded and ignored.

Q But at this stage the only person who has lost money is the ship owner. He lost the \$510. He needs a little due process, does he not.

MR. SCHMIDT: Your Honor, that is not true. The Court has been deceived on this particular thing. With respect to repatriation there has been an assumption throughout that there is a duty to repatriate the seaman. The seaman owes no duty to be repatriated or to repatriate himself. He does not in most cases want to be. And until ship owners introduced the practice in fairly recent times of always bringing men home whom they discharge or leave abroad, whether for illness or for cause, ship owners now engage in the practice of always bringing these seamen home.

Q Is that for the benefit of the ship owner? When a ship owner brings a sick seaman home to his family, that is for the benefit of whom?

MR. SCHMIDT: The ship owner has a legal duty to

perform it and is doing it as part of the duties owed to his crew members. The law has imposed that duty for a long time. The seaman is definitely the beneficiary of that. But when a ship owner takes back to the United States a seaman who was left abroad, he is performing an inescapable duty that is imposed on him by that local government.

Q No, the local government could not require anything more than the ship owner get him out of Vietnam.

MR. SCHMIDT: That is right.

Q He could not require the destination to which he was removed.

MR. SCHMIDT: That is true, Your Honor. But if he takes him to Manila, he simply creates the same situation.

Q Maybe so, but the local government could not require anything more than removal from that country.

MR. SCHMIDT: That is correct.

Q He could not require at all that he be taken back to the United States.

Q Mr. Schmidt, I do not think I have yet heard you say what it is "without sufficient cause" includes as a defense to the ship owner beyond deductions explicitly authorized by these statutes.

MR. SCHMIDT: Sufficient cause has been found to exist, Your Honor, by the court in situations where performance of payment was made impossible.

Q That is bankruptcy.

MR. SCHMIDT: Yes. Sufficient cause has been found to exist in a great many cases, more than insolvency, where it has been determined and decided by the court that there was a good faith dispute concerning whether or not the wages in question had ever been earned by the seaman, where the ship owner in good faith says he did not ever earn them.

Q How do you distinguish this case from Collie and McCrea? You had started mentioning these. I would like to have you follow through on it.

MR. SCHMIDT: I would be glad to, Your Honor. In Collie the excuse was based upon impossibility of performance. In McCrea the court did not label it in that way, but it is really clearly indicated that it was also impossibility, for the reason that the seaman made his application for wages. He was told by the captain to appear at the consulate the following day. The seaman appeared at the consulate before the time he was supposed to. He was not there when the captain arrived. And on the third day after his discharge, he disappeared entirely. And the court said this made it impossible--

Q I know what the facts are. I am just curious as to whether there is not an element of impossibility of performance here also.

MR. SCHMIDT: Your Honor, the seaman probably would have stayed out there if he had been given the opportunity.

Seamen go to the bottom of the shipping list when they are brought home. If they stay in a foreign port, they are in a very good position to go immediately to work.

Q Also was there not an impossibility of his staying in the foreign port here due to local law?

MR. SCHMIDT: There were thousands of Americans there and if the consul had not been prevailed upon to take an antagonistic attitude toward the seaman, as an American seaman he had a right to stay there; there were thousands of Americans and many, many American seamen in the hospital there. The circumstances of currency regulations is actually totally irrelevant here. If the ship owner wanted to send him home and the man did not object, then the ship owner was acting within his rights. But who should pay the bill is still not a relevant issue before this Court now.

Q You are faced with a finding of fact in the District Court that he consented to this whole procedure. You just stated that he was prevailed upon by the consul, in answer to Justice Blackmun's question. There is nothing in the record to support your statement, is there?

MR. SCHMIDT: Yes, there is. The captain's deposition was taken at Norfolk, and in it he made the remark-- the seaman had no one present at the deposition, but even so the captain made the remark that the Coast Guard had informed him that after five loggings, the seaman could be forced to

spend his money to send him home, which I think is a clear implication, a clear insight, into the existing relationships.

Q Is it not true, and correct me if I am wrong, by treaty and by South Vietnam law, was there not an obligation on the part of the owner to remove all persons he had brought to South Vietnam?

MR. SCHMIDT: I think that is absolutely correct, Your Honor.

Q Then is there not an impossibility of performance here that equates with Collie and McCrea and the impossibilities of performance there?

MR. SCHMIDT: The logical thing to do for a man in Mr. Matise's position was to keep him on the ship, disrate him, and keep him aboard the vessel, at least until a port that did not offer financial problems, but bring him home. He could have been imprisoned aboard the vessel. He certainly could have been denied his wages, but there was no requirement to put him off the vessel.

Q But you are saying that having bought an airplane ticket for him and sent him back to San Francisco, the ship owner is to be penalized because he could have put him in the brig and carried him back in the brig--

MR. SCHMIDT: He could have. I think it would have been in abuse of the captain's power.

Q I thought you just said that that was one of the

options.

MR. SCHMIDT: To keep him aboard the vessel but not necessarily in confinement when a man's misconduct was simply failure to perform his duty from drinking. There used to be many times when seamen were brought home aboard vessels in a work away status or disrated. The practice has simply been adopted by ship owners to fly a man home immediately. It satisfies the local government's requirements. They prefer to handle the money, the payoff in San Francisco or in their home office; and it satisfies the requirements of Section 596. But it is definitely something that the ship owner wants done. You can see it from the Schwark case where the seaman did not have enough money to pay for the ticket, and the ship owner added its own money. It is a clear benefit to the ship owner and I think based on an inescapable duty to the local government to get that man out; and, practically speaking, taking him out means bringing him to the United States.

But the validity of the claim for the cost of the air fare is not an issue here.

Q Then it is irrelevant.

MR. SCHMIDT: It is irrelevant.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Do you have anything further, counsel?

REBUTTAL ARGUMENT BY MR. TETREAULT

MR. TETREAULT: Mr. Chief Justice, if the Court please, I would comment simply on a couple of technical things that may possibly cause a little confusion.

There was considerable discussion and exploration of the subject of advances and logging and how one handles advances and all in the general context of the complex problems that one has when one pays a seaman.

We have on pages 4 and 5 of the appendix a reproduction of the pay voucher. This is the document which was worked up, which was under consideration by the vice consul, the two Coast Guard people, Mr. Matise, and the master in Vietnam.

The technical thing that I wish to mention for the possible assistance of the Court is that the statutory routine for the recording and the making of advances against wages to which counsel adverted relates to advances against earned wages made during the time that the seaman is a member of the crew.

Q Can the ship owner legally make an advance before wages are earned?

MR. TETREAULT: No. No.

Q I thought Mr. Schmidt said he may actually if the seaman signs the log book.

MR. TETREAULT: I--there may--I--

Q There is a statute, there is a section, which indicates it is a crime to make payment of wages before they are earned.

MR. TETREAULT: It is my understanding that they cannot be made before they are earned. The word "advance" means advance against earned wages.

Q The slop chest is--

MR. TETREAULT: I think there is no statutory authority whatsoever for the advancing of credit on that.

Q There is a statutory requirement that a slop chest be maintained.

MR. TETREAULT: That is correct, and it requires that sales be made to the seaman from the slop chest. They can just as well be read as cash sales.

Q But it is a long-standing conventional practice to extend credit for the slop chest, and the credit might be extended on the first day of the cruise.

MR. TETREAULT: This is usually when it is extended.

Q Before any wages have been earned.

MR. TETREAULT: Exactly.

Q And that is done all the time.

MR. TETREAULT: I certainly assume so, yes. And counsel certainly presses the point.

Q So, if a seaman signs on and he goes to the captain and says, "I need some money. I am just broke. I

know I haven't earned it yet," and he says, "All right, I will give you \$200," he has committed a crime. And then when the seaman has earned the money and the ship owner is going to pay him off and he purports to deduct the \$200, the seaman can say, "Well, I know you gave me the \$200, but you have to pay me again under the statute."

MR. TETREAULT: This is my understanding, Your Honor.

Q The statute says in plain language that he has still got to pay him.

MR. TETREAULT: This is my understanding.

Q Do you think 599 says that? 599, certainly as I read it, makes it a crime to advance against unearned wages, but do you think it also says that they have to be paid again?

MR. TETREAULT: In the sense that the deduction for those unlawful advances is--since all ship owners understand this by this time, you would have a serious problem in presenting a good faith defense on that particular one, and then you would have penalties.

Q And it says these advances shall be no defense to a liable suit or an action for the recovery of the wages.

MR. TETREAULT: Yes, that is pretty clear. So, then one comes into 596 and one would have a very difficult situation in presenting it.

Q Are we dealing with any unearned wages here?

MR. TETREAULT: No. No. This is exactly the point

I wished to mention to the Court. The wage advances that counsel was mentioning were those to a person who is still a member of the crew. In this case the plaintiff had been discharged, was no longer on the crew. He no longer was a party to the articles or to the--he no longer was a working member to whom the official log would be a normal working document. He had been discharged and that is set forth in this document which is four and five, and what we have here is a question of whether he was paid the wages that he was entitled to following discharge. May I suggest that his signature on this form, which is a wage voucher, that the consul is required to administer, is certainly as far as anybody could have gone to accomplish the equivalent of the signature in the log book.

Q And he signed the second one, did he not, when he got back to San Francisco?

MR. TETREAUULT: The second one, may I point out, is done before the shipping commissioner here, signed by the shipping commissioner, signed by the man himself, and is the government form which is the release which the statute requires be signed before wages are paid.

Unless there are further questions--

MR. CHIEF JUSTICE BURGER: Thank you very much, gentlemen. The case is submitted.

(Whereupon, at 11:06 o'clock a.m. the case was submitted.)