

sions; (3d Ed. pp. 111, 112.) I give him no special directions for estimating the damages suffered by the Rumball, except to make corresponding allowance of interest.

Decree of the district court modified; both vessels at fault; each to pay one half of all damages, and of the costs in each court; and William M. Bradley is appointed commissioner to assess the damages on the principles of this opinion.

MIGNANO et al. v. MacANDREWS et al.

CALIFANO et al. v. SAME.

(Circuit Court of Appeals, Second Circuit. February 7, 1893.)

SHIPPING — CHARTER PARTY — REPORT TO CUSTOMHOUSE — RIGHT TO INWARD BUSINESS.

A clause of a charter party providing that the vessel is to be "reported at the customhouse" by the charterers' agents or their appointees, is not equivalent to a consignment to them, and does not give them the right to do the inward business of the ship. 49 Fed. Rep. 376, affirmed.

Appeals from the District Court of the United States for the Southern District of New York.

In Admiralty. Libels in personam by Andrea Mignano and another against Robert MacAndrews and another, composing the firm of Robt. MacAndrews & Co., and by Gaspere Califano and another against the same, to recover a balance of charter hire of two vessels. Decrees were rendered for libelants. 49 Fed. Rep. 376. Subsequently, on application by libelants, money deposited on tender was paid to them. 51 Fed. Rep. 300. Respondents appeal from decrees. Affirmed.

Mr. Adams, for appellants.

Harrington Putnam, for appellees.

Before LACOMBE and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. These are appeals by respondents from decrees of the district court for the southern district of New York, entered February 4, 1892, in favor of the libelants for the full amount of their respective claims. Two Italian vessels—the Teresina Mignano and the Francesco R.—were chartered by respondents under their firm name of Robt. MacAndrews & Co. to bring each a cargo of licorice from Smyrna to New York. The form of charter party was one prepared by respondents, and in use by them about 15 or 16 years. It contained the following clause:

"The vessel is to be reported at the customhouse, New York, by Messrs. MacAndrews and Forbes, 55 Water street, charterers' agents, or by whom they may appoint, or pay £20, and which sum is hereby agreed upon, not as a penalty, but as liquidated damages."

Upon arrival in each case the captain received written notification from respondents, requiring him to "deliver his papers to Mr. John C. Seager, who will enter the vessel in the customhouse for our account," etc. Before complying with this request, the captain communicated with Seager, informing him that for such service he would "only pay the regular custom brokerage of \$3." In reply Seager stated that his charge for "doing sailing vessels' inward business is the usual five cents per register tonnage;" insisted that the ship was "consigned to Messrs. MacAndrews & Forbes, whose representative he was;" and notified the captain that "if he refused to follow out their instructions they would collect fine as per charter party." The master thereupon in writing and personally tendered three dollars, with the ship's papers, to Seager, who declined the offer, and refused to enter the ship, unless he were given her inward business. Thereupon the master caused the vessel to be entered in the customhouse in respondents' names by another broker, paying three dollars therefor, which was in fact the regular fee for such service. The inward business was attended to by Funch, Edey & Co. Respondents deducted £20 in each case from the amount of freight they tendered, claiming the right to do so as liquidated damages for breach of contract. The tender was refused, and actions brought for full amount of the freight in each case, with the result above indicated.

The entire dispute in the case arises upon the interpretation of the above-quoted clause in the charter party,—appellants insisting that it is equivalent to a consignment of the ship to respondents; the appellees insisting that it means simply what it says, and no more. Certainly there is no ambiguity on the face of the paper. The Revised Statutes provide that within 24 hours after arrival the master of a vessel from any foreign port shall report the arrival of the vessel, "and he shall, within 48 hours after such arrival, make a further report in writing to the collector of the district, which report shall be in the form and shall contain all the particulars required to be inserted in and verified like a manifest." Rev. St. U. S. § 2774. It is difficult to see how words more apt for expressing the discharge of this particular function could have been selected than those used in the charter party,—"vessel to be reported at the customhouse." Being a document prepared by the charterers, and the clause being manifestly inserted for their benefit, ambiguities, if any there were in its phrasing, should be resolved against them. Any suggestion that the phrase "vessel to be reported at the customhouse," etc., was, in the mind of the draughtsman, the equivalent of the phrase, "vessel is consigned to," etc., is shown to be clearly untenable upon inspection of the document itself. When chartered, the vessels were lying one at Castellamare, one at Naples, and were to proceed thence to Smyrna to receive cargo. For their disposition at that port the charter provides: "Vessel to be consigned to charterers' agents at her port of loading." Had it been the intention to consign her to charterers' agents at port of discharge, the inference is irresistible that similar language would have been used.

Very clear and positive evidence of controlling custom, or of practical construction by the parties, or of failure by them to express their true intent in the document they signed would be required to convince that a written instrument so plainly expressed is really ambiguous, and to resolve that ambiguity in favor of the party who prepared it. We do not find sufficient evidence in this case to warrant such a conclusion. The fact that with the assent of charterers' agents, or at their request, Funch, Edye & Co. had on former occasions acted as consignees of ships under similar charters, attending both to their reporting at the customhouse and to their inward business, is not sufficient to establish a practical construction of the clause such as appellant contends for. The assent of charterers' agents was necessary to the selection of that firm as agents to report, and it does not appear that their selection on these occasions as agents for the inward business was not as much the act of the ship owner or his representative, the master, as it was of the charterers or their agents. The circumstance that, as soon as the charterers' agents selected some one else to do the reporting, the master insisted on putting his ship in the hands of Funch, Edye & Co., certainly warrants the inference that the selection of a consignee of the ship on former occasions had not been abandoned by the owner, and that said firm had acted before in that capacity, not because the ship owner assented to the strained construction of the clause which appellants seek to establish, but because he himself selected the consignee, either personally or through the master.

The new evidence taken on appeal shows only that when, in former charters, the representative of the owner had inserted a clause, "and to Guinio Erminto's agents for ship's assistance," etc., the charterers were solicitous that it should be distinctly understood not to supersede the "printed clause as to ship being reported inwards by [their] own firm or [their] agents." If the clause really meant more than it says, it would seem natural that the charterers would have expressed solicitude for the preservation of all the rights they claimed it secured to them.

The decree of the district court is affirmed, with costs.

GATES v. BUCKI.

(Circuit Court of Appeals, Eighth Circuit. January 27, 1893.)

No. 161.

1. APPEAL—REVIEW—INJUNCTION.

The question of the jurisdiction of the circuit court in foreclosure proceedings cannot be considered in the circuit court of appeals, where the only decision given and order made below was on an application for an injunction to restrain proceedings in the state court concerning the same subject-matter, as in such a case the foreclosure is still pending in the circuit court.

2. APPEAL—JURISDICTIONAL QUESTION—FINAL JUDGMENT.

When a plea to the jurisdiction of the circuit court has been overruled, the case must proceed to final decree upon the merits before any appeal can be taken on the jurisdictional question, appellant then having the right to go to the supreme court on the question of jurisdiction, or to bring its entire case before the circuit court of appeals. *McLish v. Roff*, 12 Sup. Ct. Rep. 118, 141 U. S. 661, followed.

3. FEDERAL COURTS — JURISDICTION — FORECLOSURE — LANDS IN CUSTODY OF STATE COURT.

Where an attachment is levied on realty in a suit in the state court, and proceedings in equity to cancel an alleged fraudulent conveyance of the attached property are also instituted therein, the United States circuit court cannot acquire jurisdiction as to the land for the time being, so as to enable it to enjoin the litigants in the state court from proceeding therein, at the instance of a party to such equitable suit, who has filed a bill in the federal court to foreclose a mortgage upon the land in question.

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

In Equity. Suit by Charles L. Bucki against Victor Meyer and others to foreclose a mortgage upon realty, to which Ferdinand Gates was made a party defendant by amendment of the bill averring that he claimed a lien upon the mortgaged realty by an attachment thereof in proceedings by him in the state court. Thereafter an interlocutory injunction was granted by the circuit court restraining said Gates from applying to the state court for an injunction against the prosecution of the foreclosure suit by complainant. Defendant Gates appeals. Reversed.

Statement by SHIRAS, District Judge:

On the 15th day of June, 1889, Victor Meyer and Evelyn K. Meyer, residents of the city of New Orleans, La., executed a deed of conveyance of certain realty situated in Jefferson county, Ark., known as the "Corinne Place," to the Farmers' Land & Loan Company, a corporation created under the laws of the state of Louisiana, for the expressed consideration of \$40,000, of which amount \$24,000 were to be paid in certificates of the capital stock of said corporation, and for the remaining \$16,000 the said corporation was to issue coupon bonds for \$1,000 each, payable to bearer, and coming due July 1, 1909, and to secure the payment of the bonds, principal and interest, the said Victor Meyer reserved in the deed a vendor's lien upon the property conveyed, and the Farmers' Land & Loan Company also signed said conveyance, thereby making the same, on its behalf, a mortgage to secure the payment of the bonds representing the \$16,000 of the purchase price. This instrument was filed for record in the proper office of Jefferson county, Ark., on the 29th of March, 1890. On the 25th of December, 1890, Ferdinand Gates brought an action at law in the circuit court of Jefferson county, Ark., against Victor Meyer and Adolph Meyer, partners under the firm name of V. & A. Meyer & Co., to recover the sum of \$10,000, and caused a writ of attachment to be