

(except between ports on the Atlantic and ports on the Pacific coast) and vessels engaged in trade between ports of the United States and the dominion of Canada from the requirements of the act of 1872 as to keeping official log books. There is, therefore, no statute in force requiring the production of an official log book containing evidence of desertion of any of the crew from the steamship *Victorian* while on a voyage from Puget Sound to British Columbia or Alaska, and there is no rule applicable to this case contrary to the general admiralty law which deprives a deserter of all right to sue for and recover wages for his unperformed contract. *The Yosemite*, 18 Fed. 383. The evidence is clear and convincing that both of the libelants did willfully desert the vessel at Victoria. A decree of dismissal will be entered.

SCHMIDT et al. v. KEYSER et al.

KEYSER et al. v. SCHMIDT et al.

(Circuit Court of Appeals, Fifth Circuit. May 31, 1898.)

No. 655.

SHIPPING—DEMURRAGE CESSOR CLAUSE—CONSTRUCTION OF CHARTER PARTY.

A charter provided for demurrage, but a "cessor clause" therein provided that "the charterer's responsibility under this charter shall cease as soon as the cargo is shipped and bills of lading signed, provided all the conditions called for in this charter have been fulfilled or provided for in the bill of lading." The charter also provided that bills of lading should be signed as presented without prejudice to the charter party, but any difference of freight was to be settled on signing the bills of lading. *Held*, that the signing of bills of lading did not operate to release the charterers from liability for demurrage accruing prior to the signing of the bills, from their failure to fulfill the conditions of the charter.

Appeal from the District Court of the United States for the Northern District of Florida.

This was an appeal in a libel in admiralty to recover demurrage. A full statement of the facts in the case will be found in *Wood v. Keyser*, 84 Fed. 688, and *Steamship Co. v. Keyser*, *Id.* 693.

Ben. C. Tunison, for Schmidt & Hansen.

John C. Avery, for Keyser & Co.

Before PARDEE and McCORMICK, Circuit Judges, and PARLANGE, District Judge.

PARLANGE, District Judge, as the organ of the court, said:

The issues in this case are the same as those in *Wood v. Keyser* (No. 654) 84 Fed. 688, 87 Fed. 1007, and *Steamship Co. v. Keyser* (No. 653) 84 Fed. 693, 87 Fed. 1005, recently decided by this court, except that in this cause reliance is placed on the "cessor clause" to wholly relieve the charterers from liability. The provisions of the charter party must be construed together. By articles 8, 9, and 10 of the

charter party it is clear that provision was made for demurrage. Article 6 provided that bills of lading should be signed as presented without prejudice to the charter party; but any difference of freight was to be settled on signing the bills of lading. Article 10, the "cessor clause," reads as follows: "The charterer's responsibility under this charter shall cease as soon as the cargo is shipped and bills of lading signed, provided all the conditions called for in this charter have been fulfilled or provided for by bills of lading." The bills of lading stated that all the conditions of the charter had been complied with. It seems plain that, under such bills of lading, no demurrage could be claimed by the consignees or their transferees; and if it be true, as contended, that the signing of the bills of lading operated the release of the charterers from all prior liability, then the shipowners have no recourse. But it is clear that the signing of the bills of lading did not release the charterers. Under the plain terms of the clause relied on, they were to be released on one of two conditions, viz. a full compliance with all the conditions of the charter party, or by making provision in the bills of lading for the shipowners' security. The charterers complied with neither condition.

We notice that Lord Esher, M. R., in *Clink v. Radford* [1891] 1 Q. B. Div. 625, said that the main rule to be derived from the cases interpreting the "cessor clause" is that the court will construe it as inapplicable to the particular breach complained of if, by construing it otherwise, the shipowners would be left unprotected in respect to that particular breach, unless the clause is expressed in terms which prohibit such a conclusion. In *Christoffersen v. Hansen*, L. R. 7 Q. B. 509, where the charter party provided that all liability on the part of the charterer should "cease as soon as he shipped the cargo," it was held that the clause applied only to liability accruing after the loading, and did not release the charterer from liability accruing before the completion of the loading. The decree appealed from is affirmed.

TRACY et al. v. MOREL et al.

(Circuit Court, D. Nebraska. August 4, 1898.)

1. REMOVAL OF CAUSES—TIME OF APPLICATION.

When a party not served enters a voluntary appearance, with a stipulation that he shall have a certain time to plead, an application for removal made within that time is made in time, although not within the statutory time for answering.

2. SAME—DIVERSE CITIZENSHIP.

It must affirmatively appear that the citizenship of all the defendants is diverse from that of all the plaintiffs; and, in an action in Nebraska by a citizen of Nebraska and a citizen of Tennessee, an allegation that one of the defendants is not a citizen of Nebraska, "but that his residence and citizenship are unknown," is insufficient.

3. SAME.

A cause is not removable on the ground that it is a controversy between citizens of a state and foreign citizens, when one of the defendants is a citizen of a state, although of a different state from that of plaintiff.

4. SAME—SEPARABLE CONTROVERSY.

An alien has no right to the removal of a cause on the ground of a separable controversy.

Barnes & Tyler, for plaintiffs.

Lohr, Gardner & Lohr, for defendants.

MUNGER, District Judge. This action was commenced in the district court for Dakota county on the 8th day of September, 1896, against Leon Grezaud, Benoit Grezaud, Joseph Beauvernois, Francis Jeandet, M. P. Ohlman, John Kellner, and John M. Severson, to quiet the title of plaintiffs to certain real estate therein described. Plaintiffs, in their petition, allege title in themselves through several mesne conveyances from the United States; that said lands were by the county treasurer of Dakota county sold for taxes due thereon, and a tax deed issued therefor; that said tax title is void because of certain irregularities in the proceedings leading up to the sale; that defendants "claim to have some interest in and to the said premises, but whatever interest, if any, the said defendants have in and to the said lands, is derived through and by virtue of the void tax deed heretofore mentioned"; that said real estate is unoccupied. The prayer of plaintiffs' petition is that the title of plaintiffs in and to the lands mentioned be quieted, confirmed, and adjudged to be in plaintiffs, and that the tax deed be decreed void; that the pretended rights, title, claims, and interests of the said defendants, and each of them, in and to said premises, be cut off, annulled, and held for naught. On the 12th of October, 1896, the defendant John M. Severson filed a general demurrer to plaintiffs' petition. The usual affidavit required by the Nebraska Code for service by publication upon the other defendants was filed, and notice was published; the answer day therein being May 31, 1897. On May 31, 1897, there was a stipulation filed that the defendant Leon Grezaud has died, leaving surviving him Fannie Grezaud, his widow, and Mme. Charles Emil Luc, and Jeanne Grezaud, children. Said stipulation provided for the entering by said heirs of their voluntary appearance in said case, and that the time to plead should be extended 60 days. July 28, 1897, the defendants Fannie Grezaud,