

TYGERT Co. v. THE CHARLES P. SINNICKSON.

(District Court, E. D. Pennsylvania. May 29, 1885.)

CARRIER OF GOODS BY WATER—DAMAGE TO CARGO OF KAINIT—DELIVERY OF PART ONLY.

In this case the vessel was held liable for the damage to the cargo and the failure to deliver the whole of the kainit taken on board.

In Admiralty.

Theodore M. Etting, for libellant.

Henry R. Edmunds, for respondent.

BUTLER, J. The cargo, kainit, was taken on board in good order, and put off damaged, by water. For this damage the respondent must pay. It is not shown to have occurred from "peril of the sea." I am convinced, also, that the quantity delivered was not the whole quantity taken on board. The weighing on delivery was not so careful as on loading, and the precise extent of shortage may be difficult, if not impossible, of ascertainment. The disadvantage of this must fall on the libellant, whose agents are responsible for want of care. But that some allowance should be made on this account seems clear. How the shortage occurred, whether in pumping out the water, with which the kainit became mixed, or otherwise, need not be considered. The burden of accounting for it is on the respondent, and he has failed to give us any information. The commissioner appointed to assess damages may hear further testimony respecting the amount lost; and will be careful to avoid charging the respondents excessively, confining his allowance to the loss clearly shown.

HAMLET and others v. FLETCHER and others.¹

(Circuit Court, E. D. Louisiana. June 4, 1885.)

REMOVAL OF CAUSES—SEPARATE CONTROVERSY—SERVICE OF PROCESS.

In a suit in a state court against a commercial firm, which is brought into court by service of process upon one of its members, who appears and defends for it and himself to a point beyond the time allowed for the legal removal of the cause to the federal court, service at that late day of process upon another member of the firm would not affect the removability of the cause, and make it a removable one, unless there is in the suit a controversy which is wholly between citizens of different states, which can be fully determined as between them, and which could not have been tried before the term at which the removal was applied for.

On Motion for Rehearing on order to remand to the state court.

B. R. Forman, for plaintiffs.

E. H. Farrar and *E. B. Kruttschnitt*, for defendants.

PARDEE, J. The petition of Hamlet, Bliss, and Elliott, citizens of Alabama, against Fletcher, Weissenberg & Co., alleged to be a commercial firm, residing and doing business in New Orleans, and composed of John F. Fletcher, Thomas O'Connor, William Weissenberg, and George M. Fletcher, was filed in the civil district court of the parish of Orleans, March 17, 1883. Service of citation was made, as appears by the sheriff's return, on the same day on the firm, and on William Weissenberg through William Weissenberg in person. April 6, 1883, William Weissenberg individually, and on behalf of the firm, appeared and filed exceptions on his own behalf, and on behalf of the firm, which exceptions went to the merits of the whole case. The exceptions were tried on April 13, 1883, and sustained on the seventeenth of the same month. An appeal was taken to the supreme court of the state, and at the November term of that court the judgment below was reversed, and the case was remanded for further proceedings.

In the lower court, May 22, 1884, the said William Weissenberg answered for himself and the firm. June 4, 1884, citation and the original petition were served on John F. Fletcher individually, and as a member of the firm of Fletcher, Weissenberg & Co. June 17th of the same year Fletcher filed exceptions individually and on behalf of the firm. These exceptions, it appears, were cumulated with the merits, and on November 28, 1884, Fletcher filed his answer. The case was set down for trial on December 4, 1884, but not being reached was ordered to be continued to the next jury term. February 5, 1885, William Weissenberg and John F. Fletcher joined in a petition for the removal of the case to this court, on the ground that they were citizens of Tennessee, and the plaintiffs were citizens of Alabama, and that the suit involves a controversy wholly between citizens of

¹ Reported by Joseph P. Hornor, Esq., of the New Orleans bar.