

the rope was worn out, and would break, and asked for another; but I am satisfied, from the other evidence in the case, that, if this statement is true at all, it was after libellant's injury, and before the second parting of the rope, that the complaint was made. Besides, the second mate was charged with no duty in respect of the loading of the ship. The fact that the second mate, although examined as a witness, was not asked as to any such communication, is very significant, and corroborates the view that Burns was mistaken as to the time, if not as to the conversation.

The libel in this case will be dismissed, with costs.

THE ETHEL.¹

KIMBALL v. THE ETHEL.

(Circuit Court, W. D. Texas. January, 1887.)

1. ADMIRALTY—PRACTICE—APPEAL—MOTION TO DISMISS.

It is no ground to dismiss an admiralty appeal because the record shows that there was no evidence, nor agreed statement of facts, nor assignment of errors. Admiralty cases on appeal to the circuit court are tried *de novo*, on the original or amended pleadings, and on such evidence as may be properly offered, whether the same was offered in the district court or not.

2. SAME—TRANSCRIPT.

An appeal will not be dismissed on account of the transcript not having been properly made up or certified, when the fault thereof is not attributable solely to the appellant.

Admiralty Appeal. On motion to dismiss.

PARDEE, J. This case has been submitted to me by the proctors for the libellant and appellee on a motion to dismiss the appeal and affirm the judgment of the district court, on the grounds that the transcript shows no evidence nor agreed statement of facts nor assignment of errors. That there was no evidence to warrant the judgment of the district court may be the reason underlying the appeal. Admiralty cases, on appeal to the circuit court, are tried *de novo*, on the original or amended pleadings, and on such evidence as may be properly offered, whether the same was offered in the district court or not. The causes assigned are good, but the transcript is not properly made up and certified, and the appeal might be dismissed for that reason; but as the record of the case shows a general confusion in the minds of all parties, and as I cannot say the defective transcript is imputable solely to the appellant, I think it will accord more with justice if an order is entered denying the motion to dismiss the appeal, and to direct the appellant to procure and file in the circuit court by the first day of the next term a proper transcript, duly made up and certified according to the fifty-second admiralty rule, as adopted by the supreme court of the United States; otherwise his appeal to stand dismissed.

The clerk will enter such order, and notify proctors.

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

McDONALD and another v. SALEM CAPITAL FLOUR-MILLS Co. and others.

(Circuit Court, D. Oregon. August 1, 1887.)

1. REMOVAL OF CAUSES—PLEA TO THE JURISDICTION.

A party against whom a case has been removed from a state to a national court may contest any allegation of fact on which such removal was had, by a plea in the nature of a plea to the jurisdiction of the latter court; and this, whether such allegation is contained in the pleadings proper or the petition for removal.

2. SAME—RESIDENCE AND CITIZENSHIP.

An averment in a plea that a party is a citizen of Oregon is not neutralized by an admission therein that such party is residing abroad. Residence is *prima facie* evidence of citizenship, but not conclusive; and a person may be a citizen of one state or country, and reside for the time being in another.

3. SAME—DOMICILE.

Primarily, a person's domicile is his legal home; but domicile implies more than mere residence in a country.

4. EQUITY PLEADING—ARGUMENTATIVE PLEA.

A plea must be positive and direct, and not merely argumentative; and when a fact is controverted simply by alleging one contradictory thereof, the plea must go further, and directly negative or traverse the facts inconsistent with the fact alleged.

5. SAME—ANSWER IN SUPPORT OF PLEA.

A plea to the jurisdiction that one of the parties to the case is a citizen of a state other than that alleged in the petition for removal, need not be supported by an answer.

(Syllabus by the Court.)

John M. Bower, for Kelly and McDonald.

William B. Gilbert, for the bank and for Stuart.

DEADY, J. This suit was brought by the plaintiff, R. McDonald, in the state circuit court for the county of Marion, against the Salem Capital Flour-Mills Company, the First National Bank of Salem, the City of Salem Company, William Stuart, and James McDonald, trustee. On February 19, 1887, an amended complaint was filed, making Joseph F. Kelly a party plaintiff.

The object of the suit is to establish and enforce the alleged lien of two certain judgments in favor of the plaintiffs, respectively, as the assignees of the Oregon & Washington Mortgage Savings Bank, against the defendant, the City of Salem Company, namely: A judgment obtained by McDonald in the state circuit court for the county of Multnomah, on December 6, 1886, for \$14,368.22, and one obtained by Kelly in the same court on April 3, 1886, for \$12,771.50,—and to that end to set aside, as so far null and void, certain mortgages and conveyances of the property of said City of Salem Company, executed to certain of the defendants after the existence of the indebtedness on which said judgments were given, namely: A mortgage to William Stuart of August 2, 1883, to secure the sum of \$71,940; a conveyance on June 10, 1884, of all the property of said company to James McDonald, in trust for the Salem Capital Flour-Mills Company, and a conveyance of the same by the for-