much other of similar import, as appears by the record, it would have been gross error for the court to have refused to give this instruction.

The next and last error assigned, not abandoned, is the thirty-first, to wit:

"The court erred in giving to the jury defendant's instruction number eleven, to wit: 'The court instructs the jury that the length of time necessary to bar a right of entry on an action for land between the year 1834 and the year 1850 was twenty-five years; that from the year 1850 to the year 1861 the length of time necessary was fifteen years; and that since the year 1861 the length of time necessary has been ten years, from which last period, however, the time of any possession existing between the 17th day of April, 1861, and the 1st day of January, 1869, must be excluded.'"

We think this instruction in strict accordance with the statutes of Virginia relating to this question. There was no evidence before the jury rendering it inapplicable, as claimed by plaintiffs in error, and the court very properly gave it.

We have now considered and passed upon all the specifications of error not abandoned by the plaintiffs in error, and we find no error in the record; therefore the judgment is affirmed, with costs.

SHIRK *v.* CITY OF LA FAYETTE.

(*Circuit Court, D. Indiana.* October 24, 1892.)

No. 8,783.

1. CONSTITUTIONAL LAW—TRUSTEES.
   Rev. St. Ind. § 2983, which provides that it shall be unlawful for any person, association, or corporation to appoint a nonresident a "trustee in a deed, mortgage, or other instrument in writing, except wills, for any purpose whatever," is in conflict with Const. U. S. art. 4, § 2, which provides that "citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states."
2. FEDERAL COURTS—JURISDICTION—DIVERSE CITIZENSHIP.
   Where a citizen of Illinois is appointed trustee by an Indiana court of property situated in the latter state, the citizenship of such person for the purpose of jurisdiction is not affected by such appointment, and he may maintain an action in a federal court for Indiana in his trust capacity for damages to such property.

At Law. Action by Elbert W. Shirk, trustee, against the city of La Fayette. On motion to dismiss the complaint for want of jurisdiction. Overruled.

A. C. Harris, for plaintiff.

John F. McHugh, for defendant.

BAKER, District Judge. Action by the plaintiff, as trustee, against the defendant, to recover damages for the diversion and use of water. The complaint alleges that the plaintiff is a citizen of the state of Illinois, and that the defendant is a citizen of the state of Indiana. It further alleges that the plaintiff was duly appointed trustee of property situated

in this state by the circuit court of Miami county, Ind. The defendant moves to dismiss for want of jurisdiction on the ground that the plaintiff, though actually residing in Illinois, is to be deemed a citizen of this state, because he was appointed trustee by an Indiana court, and sues in his trust capacity for damage to trust property situated in this state. Assuming, without deciding, that the jurisdiction of the court may be challenged by motion, as well as by plea or answer, (but see *McDonald* v. *Flour-Mills Co.*, 31 Fed. Rep. 577; *Sharon* v. *Hill*, 23 Fed. Rep. 353,) I will proceed to dispose of the question of jurisdiction on its merits. Section 2988, Rev. St. Ind., which provides that "it shall be unlawful for any person, association, or corporation to nominate or appoint any person a trustee in any deed, mortgage, or other instrument in writing except wills, for any purpose whatever, who shall not be at the time a *bona fide* resident of the state, to act as such trustee," is in conflict with Const. U. S. art. 4, § 2, which declares that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." *Bryant* v. *Richardson*, 126 Ind. 145, 25 N. E. Rep. 807; *Robey* v. *Smith*, (Ind. Sup.) 30 N. E. Rep. 1093; *Farmers' Loan & Trust Co.* v. *Chicago & A. Ry. Co.*, 27 Fed. Rep. 146.

The statute of this state which sought to make it unlawful for a citizen of another state to act as trustee in this state being unconstitutional and void, the question of jurisdiction must be settled by determining whether the citizenship of the plaintiff for the purposes of jurisdiction is affected by the fact of his appointment as trustee by an Indiana court for property situated in this state. In *Rice* v. *Houston*, 13 Wall. 66, it is held that one appointed administrator may become a citizen of another state, and, after such change of citizenship, he may sue in the federal court. So, in *New Orleans* v. *Whitney*, 138 U. S. 595, on page 606, and 11 Sup. Ct. Rep. 428, on page 431, the court says: "We have repeatedly held that representatives may stand upon their own citizenship in the federal courts, irrespectively of the citizenship of the persons whom they represent,—such as executors, administrators, guardians, trustees, receivers," etc. To the same effect is the case of *Harper* v. *Railroad Co.*, 36 Fed. Rep. 102. Text writers on practice in the federal courts state the rule of law in the same way. Fost. Fed. Pr. § 19; Story, Fed. Pr. § 19. The motion is groundless, and must be overruled. It is so ordered.

BLACK v. ELKHORN MIN. CO., Limited.

(Circuit Court of Appeals, Ninth Circuit. October 6, 1892.)

No. 44.

DOWER IN MINING CLAIMS.

The mere possessory right given by Rev. St. § 2322, to the locator of a mining claim is not such an estate as that dower can be predicated thereon by state legislation as against the United States or its grantee. 49 Fed. Rep. 549, disapproved.

In Error to the Circuit Court of the United States for the District of Montana.

At Law. Action by Mary A. Black against the Elkhorn Mining Company, Limited, to recover dower in a mining lode. A demurrer to the complaint was overruled. 47 Fed. Rep. 600. So, also, was a demurrer to new matter in the answer. 49 Fed. Rep. 549. Judgment for defendant. Plaintiff brings error. Affirmed.

Word, Smith & Word, for plaintiff in error.

W. E. Cullen, (*Geo. F. Shelton*, on the brief,) for defendant in error.

Before McKENNA, Circuit Judge, and Ross and MORROW, District Judges.

Ross, District Judge. The plaintiff in error is the widow of L. M. Black, who, during his lifetime, and while plaintiff in error was his wife, owned an undivided two fifths of a certain mining claim, situate in the then territory of Montana, called the "A. M. Holter Quartz Lode." Black, on the 7th of March, 1879, sold and conveyed his interest in the claim to one Burton, his wife, the plaintiff in error, not joining in the conveyance. In July, 1881, Black died intestate. The interest so conveyed to Burton subsequently passed by various mesne conveyances to the defendant in error. On the 29th of October, 1883, an application was made to the proper United States land office by the immediate predecessor in interest of the defendant in error to enter the claim, and such proceedings were had in the matter of the application that on the 19th of November, 1889, a patent therefor was issued by the United States to the applicant. No protest, adverse claim, or objection of any character was made by the plaintiff in error at any stage of the proceedings in the land department. A statute of Montana, passed in 1876, provides as follows:

"A widow shall be endowed of the third part of all lands whereof her husband was seised of an estate of inheritance at any time during the marriage, unless the same shall have been relinquished in legal form. Equitable estates shall be subject to the widow's dower, and all real estate of every description contracted for by the husband during his lifetime, the title to which may be completed after his death." Section 1, Laws Mont. 1876, (9th Sess.) p. 63.

This statute the supreme court of Montana decided, in the case of *Chadwick* v. *Tatem*, 9 Mont. 354, 23 Pac. Rep. 729, continues in force. Under and by virtue of its provisions the plaintiff in error, on the 20th