

at public auction before the debt fell due, and apply the proceeds to the payment of its debt, to the exclusion of every other creditor of the mortgagor. This mortgage has the same practical operation and effect that an assignment to the bank giving it a preference for the \$4,251, and containing a provision that the assignor should act as the bank's clerk in making the sale of the goods without compensation until the bank discharged her, would have had. The defendant Mathews, under this instrument, is in effect the clerk of the bank, subject to discharge at any moment, under a contract to serve without compensation. That the form of the instrument is a chattel mortgage cannot take it from under the ban of the statute. The statute cannot be evaded by such a subterfuge. Its evident purpose was to prevent an insolvent debtor who had made up his mind that he could no longer proceed with his business, and that it was necessary for him to surrender the dominion of his property, from then preferring one or more of his creditors to others. It is a remedial statute, and must be liberally construed, so as to advance the remedy it provides, and prevent the preferences it prohibits.

Under the proofs, as they now stand, the execution of this chattel mortgage created a trust for the benefit of all the creditors of the defendant Mathews under the proviso of section 4660. If, at the final hearing, a state of facts different from that presented upon the pleadings and affidavits before me is developed, the proceeds of the property will be decreed to the parties entitled to them, but, as the case now stands, the application to set aside the order appointing the receiver, and to vacate the injunction, must be denied.

TINSLEY v. HOOT et al.

(Circuit Court of Appeals, Fifth Circuit. January 9, 1893.)

No. 80.

1. FEDERAL COURTS—JURISDICTION—DIVERSE CITIZENSHIP—RESIDENCE.

Averments showing diverse residence are not equivalent to averments of diverse citizenship, and are insufficient to sustain the jurisdiction of a federal court.

2. APPEAL—JURISDICTION—DEFECTS NOTICED BY COURT OF ITS OWN MOTION.

The jurisdiction of a federal circuit court must appear affirmatively on the record, and a default therein will be noticed by the appellate court of its own motion, and the case reversed and remanded, with directions to dismiss, unless proper amendments are made.

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

At Law. Action of trespass to try title, brought by Thomas Tinsley against A. B. Hoot and others. Verdict and judgment for defendants, and plaintiff brings error. Reversed.

S. W. Jones, (W. B. Denson, on the brief,) for plaintiff in error.

Percy Roberts, (F. Charles Hume, of counsel,) for defendants in error.

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

PARDEE, Circuit Judge. The record does not show the jurisdiction of the circuit court. The suit is one of trespass to try title to one third of a league of land in San Jacinto county, Tex., and within the eastern district of Texas. On the trial in the circuit court, plaintiff asserted title to the land through a deed from the sole surviving heir of the patentee. Defendants deraigned title through a judgment obtained in the district court of the state for Walker county, Tex., in a proceeding in personam, with citation by publication. The jurisdiction of the circuit court, if existing at all, therefore depended upon the opposite parties being aliens and citizens of the United States, or citizens of different states. The plaintiff's original petition makes no averment as to the citizenship of any of the parties, but in the description of parties alleges as follows:

"The petition of Thomas Tinsley, who resides in the state of New York, complaining of Joshua B. Hoot, A. B. Hoot, and J. M. Phillips, who reside in San Jacinto county; of Imogene Banton, who resides in McLennan county; of Juliet B. and her husband R. H. Bush, Cornelia Hamilton, Sallie E. Gibbs, W. S. Gibbs, and the minor children of Sanford Gibbs, deceased, to wit, M. A. Gibbs, Thomas C. Gibbs, Sallie S. Gibbs, J. P. Gibbs, and Luteola Gibbs, who reside in Walker county, and all in the state of Texas, whose given names, except those stated, are unknown to complainant, with respect represents," etc.

Nowhere in the record do we find any averment as to the citizenship of any of the parties, except in an amendment to the original petition, as follows:

"Now comes the plaintiff, and amends his original petition by leave, and says that Joshua M. Hoot, who is a citizen of the state of Texas, and resides in San Jacinto county, within the eastern district of Texas, is a proper party defendant in this cause, and is claiming," etc.

The jurisdiction of the circuit court must appear affirmatively in the record. Where the jurisdiction of the circuit court does not appear in the record, the appellate court will, on its own motion, notice the defect, and make disposition accordingly. It is well settled that an averment of residence is not the equivalent of an averment of citizenship in the courts of the United States. *Telephone Co. v. Robinson*, 2 U. S. App. 148, 1 C. C. A. 91, and 48 Fed. Rep. 769, and cases there cited. The judgment of the circuit court must be reversed, and the cause remanded, with instructions to dismiss plaintiff's petition for want of jurisdiction, unless, by proper amendment showing the citizenship of the parties the jurisdiction of the circuit court shall affirmatively appear, in which case the circuit court will thereafter proceed according to law; the plaintiff in error to pay all costs of this and the circuit court. And it is so ordered.

CLEVELAND ROLLING-MILL CO. v. JOLIET ENTERPRISE CO. et al.

(Circuit Court, N. D. Illinois. December 24, 1892.)

1. EQUITY JURISDICTION—CREDITOR'S SUIT—RETURN OF EXECUTION.

A court of equity will not take jurisdiction of a suit brought in aid of a judgment at law, where the bill avers that execution has been issued, and levied upon the judgment debtor's property, and does not allege that such execution has been returned.