

had a right to bring an action upon this policy, until the mortgage was satisfied, was Berrick, the mortgagee, who did, as shown by the agreed statement of facts, bring his action within the six months limited by the contract of insurance for bringing suits upon the policy. *Insurance Co. v. Coverdale*, 48 Kan. 446, 29 Pac. Rep. 682.

My own view is that a decree should be entered declaring the \$4,000 received by Berrick on the policy of insurance to be a payment, as of April 6, 1889, of that amount on the note and mortgage given by the Spragues to Berrick, and that the cross complainant's (the insurance company's) mortgage, received by it from Berrick, be foreclosed for any balance of interest due thereon on the 6th day of April, A. D. 1889, and paid by it to Berrick, if said balance is not paid to it by the defendants the Spragues, or the complainant herein, within 60 days from the date of the decree; and that the complainant's mortgage be foreclosed (subject to the claim of the insurance company for any balance due it for interest paid as above stated) if the amount due the bank, for which the complainant is trustee, be not paid within 60 days from the date of the decree; and, in case of default in either or both cases, then the property covered by the mortgage shall be sold to satisfy these liens in the order stated; and it is so ordered.

LONERGAN v. ILLINOIS CENT. R. CO.

(Circuit Court, N. D. Iowa, E. D. April 24, 1893.)

CIRCUIT COURTS—JURISDICTION—DIVERSE CITIZENSHIP—CORPORATIONS.

In showing diverse citizenship for the purpose of sustaining federal jurisdiction, it is not sufficient to merely allege that a corporation is a citizen of a given state, for corporations are not strictly citizens. The averment must be to the effect that the corporation was created under the laws of the state named. *Insurance Co. v. French*, 18 How. 404, and *Muller v. Dows*, 94 U. S. 444, followed.

At Law. Suit brought by Sarah Lonergan, as administratrix, etc., against the Illinois Central Railroad Company in the district court of Floyd county, Iowa, and removed on application of the defendant to the United States circuit court for the northern district of Iowa, eastern division. Plaintiff moves to remand. Motion granted.

J. S. Root, for plaintiff.

Ellis & Ellis and W. J. Knight, for defendant.

SHIRAS, District Judge. This cause was originally brought in the district court of Floyd county, Iowa, whence it was removed to this court upon the application of the defendant. The motion to remand filed on behalf of the plaintiff presents the question whether the removal was applied for in time, and also whether a proper record had been filed in this court. These questions will not be considered, because upon the face of the record there appears another

objection to entertaining jurisdiction, which, in the judgment of the court, is fatal thereto. The rule is well settled that, as the courts of the United States are of limited jurisdiction, the presumption is against the jurisdiction, unless upon the face of the record the contrary affirmatively appears. *Robertson v. Cease*, 97 U. S. 646. It is furthermore required that the fact or facts upon which jurisdiction is sought to be founded shall be clearly and positively stated. In *Brown v. Keene*, 8 Pet. 115, it was said by Mr. Chief Justice Marshall, speaking for the court, that "the decisions of this court require that the averments of jurisdiction shall be positive; the declaration shall state expressly the fact on which jurisdiction depends. It is not sufficient that jurisdiction may be inferred, argumentatively, from its averments." And in *Robertson v. Cease*, supra, it is ruled that, "in cases where jurisdiction depends upon the citizenship of the parties, such citizenship, or the facts which in legal intendment constitute it, should be distinctly and positively averred in the pleadings, or they should appear affirmatively, and with equal distinctness, in other parts of the record."

This action being brought to recover damages for personal injuries caused to plaintiff's intestate, the only ground upon which jurisdiction in the federal court could be based is that of the diverse citizenship of the parties litigant. In the original and substituted petition filed in the case it is averred that the defendant, the Illinois Central Railroad Company, is an incorporated company, organized and operating a railway in the state of Iowa. In the petition for removal it is averred that at the commencement of the suit, and ever since, the plaintiff was and is a citizen of the state of Iowa, and that the defendant "was at the time of the commencement of this suit, and still is, a citizen of the state of Illinois." In no part of the record nor in the petition for removal is there an averment to the effect that the defendant company is a corporation created under the laws of the state of Illinois. By the decisions of the supreme court in the cases of *Bank v. Deveaux*, 5 Cranch, 61; *Bank v. Earle*, 13 Pet. 521; *Railroad Co. v. Letson*, 2 How. 497; *Marshall v. Railroad Co.*, 16 How. 314; *Drawbridge Co. v. Shepherd*, 20 How. 232; *Railroad Co. v. Wheeler*, 1 Black, 286; *Muller v. Dows*, 94 U. S. 444; and *Chapman v. Barney*, 129 U. S. 677, 9 Sup. Ct. Rep. 426,—it is settled that a corporation is not, strictly speaking, a citizen; and therefore, to sustain a suit by or against a corporation in the federal courts, it is regarded as a suit by or against the stockholders of the corporation, and for jurisdictional purposes it is conclusively presumed that the stockholders are citizens of the state under whose laws the corporation is created. In other words, if it is averred in a given case that a corporation is created under the laws of a named state, the court will indulge in the legal presumption that all the stockholders are citizens of the named state, and that as citizens of such state they may sue or be sued in the corporate name. The jurisdiction is based upon the assumed citizenship of the stockholders; and to give rise to this legal assumption it must be averred, and in case of contest it must be proved, of what state the corporation is a creation. As already stated, it is not averred

in any part of the record in this cause that the defendant railway company is a corporation created under laws of the state of Illinois, or of any state other than Iowa, and therefore no facts are averred from which the court can draw the legal conclusion that the stockholders are citizens of Illinois, or of any state other than Iowa. The averment found in the petition for removal, that the defendant is a citizen of the state of Illinois, is not sufficient to justify the court in assuming that the company is an Illinois corporation.

Thus, in *Insurance Co. v. French*, 18 How. 404, the averment was that the plaintiffs, citizens of Ohio, complained "of the Lafayette Insurance Company, a citizen of the state of Indiana;" and it was held by the supreme court that "this averment is not sufficient to show jurisdiction. It does not appear from it that the Lafayette Insurance Company is a corporation, or, if it be such, by the law of what state it was created. The averment that the company is a citizen of the state of Indiana can have no sensible meaning attached to it. This court does not hold that either a voluntary association of persons, or an association into a body politic, created by law, is a citizen of a state, within the meaning of the constitution." The ruling thus made was cited and approved in the subsequent case of *Muller v. Dows*, 94 U. S. 444, in which case it was averred in the bill that the defendants, the Chicago & Southwestern Railway Company and the Chicago, Rock Island & Pacific Railroad Company, were citizens of the state of Iowa. The supreme court, speaking through Mr. Justice Strong, held that, "were this all that the pleadings exhibit of the citizenship of the parties, it would not be enough to give the circuit court jurisdiction of the case. In *Insurance Co. v. French*, 18 How. 404, a similar averment was held to be insufficient because it did not appear from it that the Lafayette Insurance Company was a corporation, or, if it was, that it did not appear by the law of what state it was made a corporation. * * * It is therefore necessary that it be made to appear that the artificial being was brought into existence by the law of some state other than that of which the adversary party is a citizen." These decisions settle the proposition that the averment in the petition for removal, to the effect that the defendant railway company was when the suit was brought, and continued to be, a citizen of the state of Illinois, cannot be construed to be an averment that the company is a corporation, or that it was created such under the laws of the state of Illinois; and, unless these facts are made clearly to appear upon the record, the court cannot draw the legal conclusion that the stockholders are citizens of the state of Illinois. The other parts of the record do not supply this defect, but on the contrary it is averred in the original and substituted petitions that the Illinois Central Railroad Company is an incorporated company, organized and operating a railway in the state of Iowa, which averment certainly does not show that it is a corporation created under the laws of the state of Illinois. The record, therefore, fails to show that the controversy involved in the suit is one in which the adversary parties were when the suit was brought, and when the removal was

sought, citizens of different states, and of necessity it must be held that this court cannot take jurisdiction thereof. The case is therefore remanded to the state court, at cost of the defendant.

SINGLE v. SCOTT PAPER MANUF'G CO. et al.

(Circuit Court, N. D. Ohio, W. D. May 11, 1893.)

No. 1,136.

1. FEDERAL COURTS—JURISDICTION—NONRESIDENT PARTIES—SERVICE BY PUBLICATION.

Under Rev. St. § 738, which provides for serving nonresident defendants by publication "in a suit in equity to enforce any legal or equitable lien or claim against real or personal property within the district where the suit is brought," such a suit is maintainable in a circuit court when the parties are citizens of different states, although neither of them resides in the district where suit is brought.

2. SAME—SUITS FOR SPECIFIC PERFORMANCE OF CONTRACT TO CONVEY LAND—STATE STATUTES.

In determining whether a suit to enforce specific performance of a contract to convey lands is a suit to enforce an "equitable claim" to real estate, within the meaning of Rev. St. § 738, the court may take into consideration the relief prescribed by the state statutes in favor of parties having the right to enforce such contracts; and in Ohio, where the statutes provide for constructive service on nonresidents, and also declare that if a judgment ordering a conveyance is not complied with the judgment itself shall operate as a conveyance, such a suit is an "equitable claim," and falls within the section.

3. SAME.

In such a case a federal circuit court, in Ohio, may acquire jurisdiction by constructive service, under section 738, and has authority to enter a judgment providing that, if the conveyance thereby ordered is not complied with within a time named, the judgment itself shall operate as a conveyance.

In Equity. Suit by John Single, a nonresident, against the Scott Paper Manufacturing Company and others, also nonresidents, to enforce specific performance of a contract to convey real estate. Heard on motion to dismiss the bill for want of jurisdiction. Denied.

Rev. St. § 738, provides as follows:

"When any defendant in a suit in equity to enforce any legal or equitable lien or claim against real or personal property within the district where the suit is brought is not an inhabitant of, nor found within, the said district, and does not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant to appear, plead, answer, or demur to the complainant's bill at a certain day therein to be designated; and the said order shall be served on such absent defendant, if practicable, wherever found, or, where such personal service is not practicable, shall be published in such manner as the court shall direct."

King & Tracey, for complainant.

Brown & Tyler and Reeve & Roby, for defendants.

RICKS, District Judge. On the 17th of February, 1893, the complainant filed his bill in equity in this court, alleging that the defendant, by Clarence W. Scott, its president, director, and duly-