ing functions described, which are not found in the regulators made by the appellee. The thermostat of the appellant is one thing; that of the appellee is another. The differences are so clearly developed in the opinion delivered below that a further discussion is deemed unnecessary. The decree below is affirmed.

BALLOU SHOE-MACH. CO. v. DIZER et al.[1]

(Circuit Court, D. Massachusetts. July, 1880.)

PATENTS—PRELIMINARY INJUNCTION.

A preliminary injunction will not issue against a mere user of a machine when plaintiffs have known for several years that the makers thereof were manufacturing such machines, and did not warn or proceed against them or any one else.

This was a suit in equity by the Ballou Shoe-Machine Company against C. M. Dizer and others for alleged infringement of a patent. The cause was heard on a motion for preliminary injunction.

T. W. Clarke, for complainant.
E. P. Howe, for defendants.

LOWELL, Circuit Judge. This is one of those cases in which the complainants should be required to take the testimony in the regular way before an injunction. The machine which they proceed against was made by the Goodyear & McKay Sewing-Machine Company, and is by them leased to the defendants. The complainants have known for several years that the above-named company were making these machines, and have not warned them, nor proceeded against them, nor against any one. The only reason given for the delay is that it would be more convenient to proceed in Massachusetts, where the plaintiff company have their usual place of business, but this does not appear to be a sufficient excuse. Add to this that there is a fair doubt in my mind whether the defendants' machine is an infringement of the twice reissued patent of the plaintiffs, and I find that the motion for a preliminary injunction should be denied. Motion denied.

[1] This case has been heretofore reported in 5 Ban. & A. 540, and is now published in this series, so as to include therein all circuit and district court cases elsewhere reported which have been inadvertently omitted from the Federal Reporter or the Federal Cases.

HOLLAND TRUST CO. v. INTERNATIONAL BRIDGE & TRAMWAY CO.

McLANE et al. v. HOLLAND TRUST CO.

(Circuit Court of Appeals, Fifth Circuit. March 1, 1898.)

No. 657.

JURISDICTION—FORECLOSURE OF MORTGAGE—RECEIVER.

Under a decree of foreclosure of a mortgage, where an order of sale has been made and the sale advertised, the court acquires jurisdiction and possession, to the exclusion of any other court; and the appointment of a receiver for said property by another court does not divest jurisdiction and stop the sale.

Appeal from the Circuit Court of the United States for the Western District of Texas.

Oscar Bergstrom and S. C. Newton, for appellants.

Geo. M. Van Hoesen, for appellees.

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

PARDEE, Circuit Judge. The Holland Trust Company, as trustee under a mortgage deed of trust, brought suit on the 16th day of September, 1895, in the United States circuit court for the Western district of Texas, for the foreclosure of the mortgage which was made to it by the International Bridge & Tramway Company. The defendant bridge company appeared and filed its answer, and then filed an amended answer on February 3, 1896. The bill of foreclosure prayed for the appointment of a receiver and for an injunction, but no motion for either an injunction or a receiver was made. On November 10, 1896, the court entered a final decree, adjudging a foreclosure of the mortgaged property, and the sale of the same by a special master, therein appointed. From this decree the International Bridge & Tramway Company prosecuted an appeal to this court, where, on May 17, 1897, the decree of the lower court was affirmed; the mandate issuing August 2, 1897. 81 Fed. 422.

August 16, 1897, the court entered an order of sale, which directed the special master "to seize and sell the above-described property in accordance with the terms of the decree of this court." On August 19, 1897, the special master proceeded to execute the order of sale by advertising the time, place, and terms of sale. The time of sale fixed was November 2, 1897. On October 30, 1897, Hiram H. McLane filed a petition in the Forty-Fifth district court of Texas, praying for the appointment of a receiver of the International Bridge & Tramway Company as an insolvent corporation, and on November 1, 1897, the day before the sale, George W. Russ was appointed such receiver, and on the same day telegraphed to the agent of the bridge company that he had been appointed receiver, and the agent recognized such appointment, and has since paid over to Russ the income and tolls. On November 2, 1897, the special master sold the mortgaged property under the decree and order of sale, and reported the same to the court. On November 10, 1897, Hiram H. McLane and George W. Russ filed an

alleged intervention, in which the aforesaid proceedings in the Forty-Fifth district court of Texas, and the acts of Russ as receiver, were set forth, and therein claimed that because of such proceedings the sale made by the special master was absolutely null and void, and of no force and effect. On the same day the intervention and the report of the sale came on to be heard, and the court, after considering the facts in the case, being of opinion that the circuit court had acquired such jurisdiction over the property of the defendant, the International Bridge & Tramway Company, fully described in the original bill, as well as in the final decree and order of sale, as to entitle the court to hold the exclusive jurisdiction and possession thereof, to the exclusion of any other court, ordered that the intervention of McLane and Russ should be dismissed, and the sale made by the special master confirmed. From that decree McLane and Russ appealed to this court, assigning as error:

"That the court erred in its finding, and in holding a suit to foreclose a mortgage on realty, and the final decree of such foreclosure, and order appointing a special master to make sale thereof to satisfy the judgment rendered, gave the court such possessory jurisdiction of the property described in the bill of foreclosure as to deprive any other court of concurrent jurisdiction from appointing a receiver and directing such receiver to take possession of said property, and in its holding that, notwithstanding the appointment of such receiver by a court of concurrent jurisdiction, and such receiver, under the direction of the court, taking actual possession thereof, that the master in the foreclosure proceedings could make a valid sale of such realty, and that, upon a confirmation of such report, the court in the foreclosure proceeding could direct the marshal to put the purchaser in possession as against such receiver and the defendant."

On full consideration of the authorities cited on both sides in this court, we agree with the learned judge of the circuit court that the circuit court had acquired such jurisdiction over the specific property of the defendant the International Bridge & Tramway Company, as fully described in the original bill, and in the final decree and order of sale, as to entitle the court to hold the exclusive jurisdiction and possession thereof, to the exclusion of any other court. The following cases are in point: Adams v. Trust Co., 15 C. C. A. 1, 66 Fed. 617, decided by this court, and Riesner v. Railway Co., 36 S. W. 53, decided by the supreme court of Texas. And on these authorities, and many others which might be cited, and on the general rule, well recognized in the supreme court of the United States, that as a matter of necessity, and therefore of comity, when the object of the action requires the control and dominion of property involved in litigation, that court which first acquires possession, or that dominion which is equivalent, draws to itself the exclusive right to dispose of it for the purposes of its jurisdiction (Heidritter v. Oil-Cloth Co., 112 U. S. 294, 305, 5 Sup. Ct. 135), the decree of the circuit court should be affirmed.

It would be an anomaly in judicial proceedings if, after a court with full jurisdiction over the parties, and over specific property which is the object of the litigation, has finally determined all rights to that property, subsequent proceedings, prima facie collusive, as in the present case, in a court of another jurisdiction, could annul the decree and disturb the rights thus definitely determined. No such anomaly exists in the jurisdiction of the state and federal courts. The latter,

having once acquired full jurisdiction, and proceeded to a final determination, may rightfully proceed still further to an execution of that decree, irrespective of any subsequent proceedings in the courts of the state. See Coal Co. v. McCreery, 141 U. S. 475, 477, 12 Sup. Ct. 28.

The authorities cited by the learned counsel for the appellants, so far as they are contrary to the views herein expressed, do not apply to the case in hand. Affirmed.

MONTANA ORE-PURCHASING CO. et al. v. BOSTON & M. C. C. & S. MIN. CO.

(Circuit Court of Appeals, Ninth Circuit. February 28, 1898.)

No. 374.

JURISDICTION OF FEDERAL COURT—FEDERAL QUESTION—MINING CLAIMS.

Where a controversy between owners of adjoining mining claims as to the right of one to follow the vein outside of the vertical line of his claim clearly depends upon a question of fact under the statutes as finally construed by the supreme court, such controversy no longer presents a federal question.

Appeal from the Circuit Court of the United States for the Southern District of Montana.

John J. McHatton and Joel F. Vaile, for appellants.

John F. Forbis, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. This is an appeal from an interlocutory decree entered in the circuit court of the United States for the district of Montana on the 22d day of April, 1897, granting a preliminary injunction restraining the Montana Ore-Purchasing Company, a corporation organized under the laws of the state of Montana, and F. Augustus Heinze and Arthur P. Heinze, from mining or extracting any ores within the limits of that portion of the Pennsylvania lode claim lot No. 172, situated in Silver Bow county, in the state of Montana, described in the decree. The appellee is also a corporation organized under the laws of Montana. It is the owner of the Pennsylvania lode claim, and was the complainant in the court below. The jurisdiction of the circuit court is invoked upon the ground that the dispute is one arising under the laws of the United States. The allegations of the complaint upon which this jurisdiction is claimed are as follows:

"That as plaintiff is informed and believes, and therefore alleges, the said defendants claimed the right to enter upon the premises of this complainant, to wit, that portion of the Pennsylvania lode claim above described, by reason of the fact that certain veins owned or claimed by the defendants, or in their possession, have their tops or apexes within the ground owned or claimed as a portion of the Rarus lode claim, a portion of the Johnstown lode claim, or a portion of the Little Ida lode claim; and defendants assert the right to follow such veins on their downward courses or dips, although the same so far depart from a perpendicular as to depart from the ground owned or claimed by the defendants, and enter the premises owned and claimed by this complainant, to wit, that

portion of the Pennsylvania lode claim hereinbefore described. But complainant denies and disputes the fact that the said veins upon which the said defendants have mined within the lines of the Pennsylvania lode claim are such veins as can be followed on their dip beyond the lines of the defendants' possessions, and into the ground or premises of this plaintiff, but alleges the facts to be that the said veins are broken and intersected by faults in such a manner that the same cannot be traced or followed from the ground of the defendants into the said Pennsylvania lode claim, and that, therefore, the said defendants have no right to enter upon the ground of this plaintiff, to wit, the said Pennsylvania lode claim, for the purpose of extracting ores therefrom, by reason of their ownership of the apexes of any veins within their ground. And this complainant further shows unto the court that the veins upon which the defendants have been extracting ores within the premises of this complainant do not, in their course or strike, depart from the end lines of the defendants' claims or possessions, but that the same depart from the side lines of such claims in such a manner as to prohibit the said defendants from following the same beyond the side lines of their own possessions or claims into plaintiff's portion of said Pennsylvania lode claim. That there are several veins which the defendants claim the right to follow on their dips beyond the side lines, and into the ground of this complainant, the said Pennsylvania lode claim, but that neither of the said veins, in their courses or strikes, depart from the end lines of the said claims or possessions of the defendants, but complainant alleges that the ground claimed by the defendants was not so located or situated as to have any end lines whatever, as provided by the statutes of the United States in such cases, and that in consequence of such failure upon the part of the locator or locators of the ground or claims owned or claimed by the defendants to mark the same with end lines parallel, or to locate the same along the defendants' veins, but on the contrary having located the same across the said veins, the said defendants have no extralateral rights in or to any of the veins in their said ground, and are not entitled to follow the same into or upon the ground of this plaintiff, the said portion of the Pennsylvania lode claim. That, in consequence of the facts hereinbefore alleged, this complainant alleges and asserts that there are questions involving the construction of the statutes of the United States relative to the rights of the said defendants to follow their veins into the ground of this complainant, the said portion of the Pennsylvania lode claim, and that such questions are necessary to be determined in this action, as between this complainant and the said defendants, in determining the right of this plaintiff to recover in the said action."

Whether the appellants retained their right to the vein or lode in controversy after it entered the ground of the appellee is clearly a question of fact, to be determined by the strike or course of the vein. If the vein passed through the side lines of the Rarus or Johnstown lode claims, and into the ground of the appellee, on its course or strike, then the side lines of these claims, with respect to this particular vein, became end lines extending down vertically; and the vein, in its course under appellants' surface location, became the property of the latter. King v. Mining Co., 152 U. S. 222, 14 Sup. Ct. 510; Last Chance Min. Co. v. Tyler Min. Co., 157 U. S. 683, 15 Sup. Ct. 733. But if, on the other hand, the vein passed through these side lines on its downward course or dip, the appellee had the right to follow the vein, although it so far departed from a perpendicular in its course downward as to extend outside the vertical side lines of appellants' surface location, and enter that of the appellee. Rev. St. § 2322. The law upon this subject has been clearly established by the cases cited, and such a controversy no longer presents a federal question. Kansas v. Bradley, 26 Fed. 290; Fost. Fed. Prac. p. 35. At the oral argument, and in the briefs that have been filed, a federal question has been suggested as arising out of the dispute as to the rights of the parties under the

Rarus and Johnstown patents; but, as this controversy does not appear in the complaint, it cannot be considered. The jurisdiction of the circuit court of the United States is limited, in the sense that it has no other jurisdiction than that conferred by the constitution and laws of the United States. The presumption is that a case is without its jurisdiction, unless the contrary affirmatively appears; and it is not sufficient that jurisdiction may be inferred argumentatively from averments in the pleadings, but the averments should be positive. Hanford v. Davies, 163 U. S. 273, 279, 16 Sup. Ct. 1051. In Metcalf v. Watertown, 128 U. S. 586, 9 Sup. Ct. 173, Mr. Justice Harlan, speaking for the court, said:

"Where the original jurisdiction of a circuit court of the United States is invoked upon the sole ground that the determination of the suit depends upon some question of a federal nature, it must appear at the outset, from the declaration or bill of the party suing, that the suit is of that character; in other words, it must appear, in that class of cases, that the suit was one of which the circuit court, at the time its jurisdiction is invoked, could properly take cognizance. If it does not so appear, then the court, upon demurrer or motion, or upon its own inspection of the pleadings, must dismiss the suit, just as it would remand to the state court a suit which the record, at the time of removal, failed to show was within the jurisdiction of the circuit court. It cannot retain it in order to see whether the defendant may not raise some question of a federal nature, upon which the right of recovery will finally depend; and, if so retained, the want of jurisdiction at the commencement of the suit is not cured by an answer or plea which may suggest a question of that kind."

See, also, Mining Co. v. Turck, 150 U. S. 138, 14 Sup. Ct. 35; Hanford v. Davies, supra.

The decree, granting a temporary injunction, will therefore be reversed. It will be for the court below to determine whether the complaint can be so amended as to present a cause within its jurisdiction.

ROSS, Circuit Judge (concurring). To bring this suit within the jurisdiction of the court below, it was essential for the bill to show by clear and unambiguous allegations that the suit involves a controversy that can only be determined by reference to the federal statute, and its proper application to the facts of the case. The averments of the bill do not meet this requirement, and therefore I concur in the judgment of reversal.

FITCHBURG R. CO. v. NICHOLS.

(Circuit Court of Appeals, First Circuit. January 20, 1898.)

No. 228.

JURISDICTION OF FEDERAL COURTS—DIVERSE CITIZENSHIP — DEFECTIVE ALLEGATION—CORRECTION ON APPEAL.

A defective allegation of citizenship may be corrected on appeal, so as to sustain the jurisdiction, by the consent of both parties. In the absence of such consent the judgment must be reversed, but the verdict need not be set aside, as the court below may allow an amendment in accordance with the facts, giving the adverse party an opportunity to meet the issue raised if he be so advised.

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