

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.

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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.

This was an action at law by Roswell C. Nichols against the Fitchburg Railroad Company to recover damages for personal injuries received by him while in charge of cattle on a train. In the circuit court the verdict and judgment were given for the plaintiff, and the defendant sued out this writ of error. The case has been heard on a motion by plaintiff in error to amend the original writ in respect to the allegation of plaintiff's citizenship.

George A. Torrey, for plaintiff in error.

George A. Blaney and William S. B. Hopkins, for defendant in error.

Before COLT and PUTNAM, Circuit Judges, and WEBB, District Judge.

PUTNAM, Circuit Judge. The record in this case contains the suitable allegations to show the citizenship of the corporation defendant in the court below, but it fails in this respect as to the plaintiff below. There are only two courses open. If the plaintiff below is an alien, or a citizen of some state other than Massachusetts, the record may be amended in this court according to the truth by the consent of both parties. *Fletcher v. Peck*, 6 Cranch, 87, 127; *Kennedy v. Bank*, 8 How. 586, 611; *U. S. v. Hopewell*, 51 Fed. 798, 800, 2 C. C. A. 510; *Nashua & L. R. Corp. v. Boston & L. R. Corp.*, 9 C. C. A. 468, 61 Fed. 237, 245. If this is not done, the judgment of the court below must be reversed. It is not necessary to set aside the verdict, as the court below may allow an amendment, in accordance with the facts, to supply the defect, as well after verdict as before, provided it gives the adverse party an opportunity to meet the new issue thus raised, if that party is advised to do so. All this is not only in accordance with the general principles of law, but is emphasized by section 954 of the Revised Statutes, and paragraphs 1 and 3 of rule 11 of the circuit court. Of course, if an amendment is not made, or the issue made by it is not sustained, it will be the duty of the court below to dismiss the suit. It is ordered that the judgment of the circuit court be reversed, without costs for either party in this court, and that the case be remanded to the circuit court for further proceedings according to law, unless an amendment is made in this court on or before February 1, 1898, as provided in this opinion.

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STATE OF INDIANA, to Use of DELAWARE COUNTY, v. ALLEGHANY OIL CO. et al.

(Circuit Court, D. Indiana. March 24, 1898.)

No. 9,371.

**1. REMOVAL OF CAUSES—STATE A PARTY.**

When a state brings a suit in a court of its own creation against a citizen of another state, no removal can be had into a circuit court of the United States on the ground of the diverse citizenship of the parties.

**2. JURISDICTION—FEDERAL QUESTION—HOW MUST APPEAR.**

Where the jurisdiction of courts of the United States depends on the existence of a federal question, it must affirmatively appear from the allegations