uphold contracts of hazard similar in many respects to the one in this case.*

DECREE REVERSED, and the cause REMANDED to that court, with instructions to enter a decree for the complainant,

IN CONFORMITY TO THIS OPINION.

RAILWAY COMPANY *v.* RAMSEY.

Although consent of the parties to a suit cannot give jurisdiction to the courts of the United States, the parties may admit the existence of facts which show jurisdiction, and the courts may act judicially upon such an admission.

Where the statutes of the United States authorizing a removal into the Circuit Court of the United States, of a cause brought originally in the courts of a State, require that the parties to the suit shall be citizens of different States, and where a cause has been removed from a State court to a Circuit Court, and all the papers in it have been afterwards destroyed by fire, and the parties then, by writing filed in the Circuit Court, admit that the cause was brought to the Circuit Court by transfer from the State court, *in accordance with the statutes in such case provided*, and—being now anxious apparently only to get to trial—simply ask and get leave to file a declaration and plea as substitutes for the ones originally filed and now destroyed,—in such case this court will, in the absence of all proof to the contrary, presume that the citizenship requisite to give the Circuit Court jurisdiction was shown in some proper manner; though it be not apparent on the mere pleadings.

ERROR to the Circuit Court for the Northern District of Illinois; the case being thus:

Several statutes authorize, as is known, the transfer or removal of causes, commenced in the State courts, to those of the United States.

First. Where the amount in dispute, exclusive of costs, exceeds $500, and when the suit is *against an alien*, or is *by a citizen of the State where it is brought, and against a citizen of*

* Boulware *v.* Newton, 18 Grattan, p. 708; Taylor *v.* Turley, 33 Maryland, p. 500.

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another State, it may be removed on the petition of the defendant filed in the case, in the State court, at the time of entering his appearance in said court.*

Second. When the suit is *against an alien, and a citizen of the State wherein it is brought*, or is *by a citizen of such State* against a citizen of the same, *and a citizen of another State*, upon petition of the defendant, filed at any time before trial or final hearing, if (so far as relates to him) it is brought for the purpose of restraining or enjoining him, or is a suit in which there can be a final termination of the controversy, so far as concerns him, without the presence of the other defendants, as parties in said cause.

Third. When a suit is between *a citizen of the State in which it is brought and a citizen of another State*, it may be so removed on the petition of the latter, whether he be plaintiff or defendant, filed at any time before the trial or final hearing of the suit, if before or at the time of filing said petition he makes and files in said State court an affidavit, stating that he has reason to and does believe that, from prejudice or local influence, he will not be able to obtain justice in such State court.

To effect a removal in any of the cases the petitioner must, at the time of filing his petition in the State court, offer to the State court "good and sufficient security for his entering in said Circuit Court on the first day of its session copies of said process against him, and of all pleadings, *depositions, and testimony, and other proceedings in the case*, or in said cases, where a citizen of the State where the suit is brought is a defendant, copies of all process, pleadings, *depositions, testimony, and other proceedings* in the cause *concerning or affecting the petitioner*," &c.

These different statutes being in force, and the only ones on the subject, the record in the present case came here.

It showed that Ramsey originally commenced an action against the Pittsburg, Cincinnati, and St. Louis Railway

* See the statutes embodied in section 630 of the Revised Statutes of the United States, 873, 874, title 13, chapter 7.

Company in the Superior Court of the City of Chicago; that the suit was afterwards transferred, *according to the statutes in such case provided*, to the Circuit Court of the United States for the Northern District of Illinois; that while it was pending in that court undetermined the files and pleadings were all destroyed by fire; that after the fire the plaintiff asked leave to file a declaration as a substitute for the one destroyed; that the defendant assented to this request, and on the same day the court made an order, as follows:

"By agreement of the parties, by their attorneys, as per stipulation filed, leave is given them to file a copy of the declaration and plea heretofore filed herein and destroyed by fire on the 9th of October last, and it is ordered that they be substituted for and stand in the place of the original declaration and plea so destroyed."

That thereupon copies of such pleadings were filed, but that *there was nothing in the declaration or plea to show the jurisdiction of the Circuit Court;* that on the 11th June, 1872, the parties went to trial upon the issues joined, and that a verdict was rendered for the plaintiff on the 14th of the same month; that on the same day the defendant filed a motion for a new trial, and on the 29th a further motion in arrest of judgment, for the reason that there was nothing upon the record to show that the court had jurisdiction, and that on the 29th of December following the court overruled both motions and gave judgment upon the verdict.

It nowhere appeared that either of the parties attempted to supply any of the lost files except the pleadings, or that any objection was made to the jurisdiction until after the trial was had and a verdict rendered.

The action of the court in overruling the motion in arrest of judgment was the only matter now assigned for error.

Messrs. E. Walker and R. B. Roberts, for the plaintiff in error:

There nowhere appears on this record any averment of the citizenship of the plaintiff, nor is any allusion made even to his residence.

Argument in support of the jurisdiction.

As early as *Bingham* v. *Cabot*,* and the short cases of *Abercrombie* v. *Dupuis*,† and *Wood* v. *Wagnon*,‡ the necessity of averment of citizenship, as an indispensable prerequisite to the maintenance of jurisdiction, was announced, and Marshall, C. J., in *Brown* v. *Keene*,§ said:

"The decisions of this court require that the averment of jurisdiction shall be positive; *that the declaration shall state expressly* the fact on which jurisdiction depends. It is not sufficient that the jurisdiction may be *inferred* argumentatively from the averments."

In *Jackson* v. *Ashton*,‖ and in *Piquignot* v. *The Pennsylvania Railroad Company*,¶ the court declined to examine any questions till the jurisdiction was shown in the pleadings.

In the later case of *The Lucy*,** the court uses this language:

"No consent of counsel can give jurisdiction. Appellate jurisdiction depends on the Constitution and the acts of Congress. When these do not confer it courts of the United States cannot exercise it."

In the case now before the court, the consent to file a declaration could not, under the authorities which we have cited, either confer citizenship on the plaintiff or jurisdiction on the court.

Messrs. Ross and Phillips (*a brief of Mr. John Van Arman being filed*) *contra:*

No doubt when a suit is brought originally in the Circuit Court, the *declaration* should state, and state positively, just as Marshall, C. J., in the case cited, says, the fact of different citizenships between the parties, upon which difference of citizenship the jurisdiction of the Circuit Court, as all know, depends. But the same thing is not true in a case removed from a State court. The declaration there never, or at least

* 3 Dallas, 382. † 1 Cranch, 343. ‡ 2 Id. 9.
§ 8 Peters, 112. ‖ Id. 148. ¶ 16 Howard, 105.
** 8 Wallace, 307; and see The Nonesuch, 9 Id. 504; and Pennsylvania *v.* Quicksilver Co., 10 Id. 553.

very rarely, states the citizenship of either party. Any statement of it would, in most cases, be surplusage, and irrelative to both the jurisdiction and the controversy. Citizenship, therefore, in a case originally brought in a State court can be shown, on a removal, by affidavit. Indeed if it could not be thus shown, the statutes, so far as they authorize removal on the application of a defendant would be a dead letter. *He* has nothing to do with the declaration in the case, and can put no averments of any sort into it.

The only question, therefore, now before the court is whether, when the case shows that the statutes authorizing removal require a difference of citizenship, and when it further shows that the case was removed according to the statutes in cases of removal provided, and when it further appears that all the original papers in the case have been burned,—the question, we say, is whether the court will, in such a case, presume that there was proper evidence before the court to justify a removal. That it will we can hardly doubt.

The CHIEF JUSTICE delivered the opinion of the court.

In cases where the jurisdiction of the courts of the United States depends upon the character of the parties, as it no doubt does in this, the facts upon which it rests must, of course, somewhere appear in the record. They need not necessarily, however, be averred in the pleadings. It is sufficient if they are in some form affirmatively shown by the record.

Here the parties have, by stipulation and agreement placed on file and made part of the record, admitted that the cause was brought to the Circuit Court by transfer from a State court in accordance with the statutes in such case provided. By the same stipulation it is made to appear that all the original files in the cause had been destroyed by fire. True the stipulation refers specially to pleadings alone, but in this court, after what has occurred below, it may with great propriety be assumed that it was intended to include all papers and entries in the cause.

The parties, after this destruction, asked to supply the pleadings. Neither party seems to have considered that anything else was necessary. Each, apparently admitting jurisdiction, seemed anxious to get ready for trial. They were permitted to file copies of the lost declaration and plea and thus make up their issues. The record now before us contains none of the lost files, but is made up of the stipulation above stated, the substituted pleadings, and the proceedings thereafter.

We have then a case before us upon error in which the record presented shows upon its face that part of the files in the cause were destroyed before the record was made, and that neither one of the parties has considered it necessary to have them supplied. The question arises, therefore, whether under such circumstances we are confined to what is in terms expressed upon the record sent to us, or whether we may resort to presumptions to give effect to what is expressed.

We are reviewing the action of another court and are to determine whether or not there is error in what it has done. The restoration of the lost files was not absolutely necessary to support the jurisdiction of that court. Having been once there the court is presumed to know their contents and is permitted to act upon that knowledge. Parol proof, too, is admissible to aid the memory of the court.

Consent of parties cannot give the courts of the United States jurisdiction, but the parties may admit the existence of facts which show jurisdiction, and the courts may act judicially upon such an admission.

Here the parties have put into the record their joint admission that the cause was transferred to the Circuit Court from a State court, and that the evidence of the transfer which was once among the files has been destroyed. They have asked the court to act upon this admission and proceed with the cause. The court did proceed. The fair presumption from all this is that it was then within the knowledge of the parties and the court that there had been on the files in the cause everything which the statute required to be

there to complete the transfer, and that the appearance and admission of the parties was expected and intended to have all the force and effect which a restoration of the papers could have. If, therefore, with these papers in the record the jurisdiction would appear, the judgment ought not to have been arrested, and there is, consequently, no error.

We are then permitted to inquire what the lost papers would have shown if they had been incorporated into the record, and for that purpose may presume they contained all that the law required they should.

To obtain the transfer of a suit, the party desiring it must file in the State court a petition therefor and tender the required security. Such a petition must state facts sufficient to entitle him to have the transfer made. This cannot be done without showing that the Circuit Court would have jurisdiction of the suit when transferred. The one necessarily includes the other. If upon the hearing of the petition it is sustained by the proof the State court can proceed no further. It has no discretion and is compelled to permit the transfer to be made. The petitioning party is then required to file in the Circuit Court copies of the process, and of all pleadings, depositions, testimony, and other proceedings in the State court. This includes the proceedings by which the transfer was effected, and these, as has been seen, must show the facts necessary to give the Circuit Court jurisdiction.

Such are the papers which we are to presume were filed in this cause, and from what has occurred the conclusion is irresistible that they must have contained all that was necessary to justify the court in accepting the transfer. This it need not have done unless the jurisdiction was apparent. Either party upon the filing of the papers could have moved to remand, or the court itself, without a motion, could have sent the case back if the jurisdiction did not appear. As both the court and the parties accepted the transfer, it cannot for a moment be doubted that the files did then contain conclusive evidence of the existence of the jurisdictional facts.

This ends the case. With the lost files in the record, we should see that the court had the right to permit the parties to litigate before it as they did.

There is here no question of a restoration of lost records. This record has never been lost. It was not made until after the fire. The litigation was pending when that calamity occurred. What has been lost is part of the files which, when the time arrived to make up a record, would have been incorporated into it. What we have to consider is whether in the record as made their loss has been supplied. We think it has by the recorded acts of the parties and their stipulation.

JUDGMENT AFFIRMED.

STEPHEN *v.* BEALL ET UX.

1. Where one of four joint tenants makes a deed of trust (a mortgage) of land conveyed to the four—the deed of trust purporting to convey the *whole* estate—it is not necessary, on a bill filed to have the land sold under the deed of trust (in other words, to foreclose the mortgage), to make the three who do not convey parties defendant to the bill.
2. It is settled doctrine that a married woman may charge her separate property for the payment of her husband's debt, by any instrument in writing in which she in terms plainly shows her purpose so to charge it; she describing the property specifically and executing the instrument of charge in the manner required by law.
3. Though equity will enforce in the most rigid manner good faith on the part of a trustee, and vigilantly watch any acquisition by him in his individual character, of property which has ever been the subject of his trust, yet where he has sold the trust property to another, that sale having been judicially confirmed after opposition by the *cestui que trust*, the fact that thirteen years afterwards he bought the property from the person to whom he once sold it does not, of necessity, vitiate his purchase. The question in such a case becomes one of actual fraud. And where on a bill charging fraud, the answer denies it in the fullest manner, alleging a purchase *bonâ fide* and for full value paid, and that when he, the trustee, made the sale to the person from whom he has since bought it, the purchase by himself, now called in question, was not thought of either by himself or his vendee—the court will not decree the purchase fraudulent, the case being heard on the pleadings, and without any proofs taken.