

its bill of interpleader in the California state court, tendering and offering to pay the proceeds thereof into court; that the proceeds of both policies are virtually in the hands of and under the control of Hubbard, and that the only question to be litigated and settled is as to whom he shall pay them out to and how. We contend that under the contracts set out in and exhibited with the bill that he should first pay himself such sums as he has advanced to the Meades out of the primary fund that he holds as security, to wit, the proceeds of the \$20,000 policy; that the balance he should pay to Mrs. Meade or her successor in interest, Mrs. Cross, and that he should pay over the whole of the proceeds of the \$15,000 policy to plaintiff as the legal representative of Meade, and the equitable owner thereof."

Now, if it be conceded—which, however, I do not decide—that the proceeds of the \$20,000 policy were contemplated by the parties to the contracts hereinbefore mentioned as the primary fund out of which Hubbard should be paid, still complainant's argument is unsound, for the reason that Hubbard has not yet realized on that policy. Its payment is suspended, at the instance of the insurance company, by a bill of interpleader pending in the state court. If Hubbard should fail, without fault on his part, to realize on said policy, he could unquestionably, and according to complainant's own theory, resort to the \$15,000 policy, since he holds both policies as collaterals. How is it possible to make a decree in the present suit fully covering these equities, when this court has no control whatever over the \$20,000 policy or its proceeds? Taking the most favorable view of the case for complainant which the allegations of his bill will allow, Hubbard holds the policy sued on in the common-law action as collateral security for lawful advances made by him to the Meades, and it is his right and duty to forthwith collect the amount due on said policy, applying a sufficiency of the proceeds to the payment of his own debt, and holding the balance for the parties equitably entitled thereto. Should he fail to pay over such balance, said parties will then have adequate remedies against him. The demurrer will be sustained.

PREFERRED ACC. INS. CO., OF NEW YORK, v. BARKER.

(Circuit Court of Appeals, Fifth Circuit. April 12, 1898.)

No. 686.

JURISDICTION OF FEDERAL COURTS—AVERMENTS OF CITIZENSHIP—AMENDMENT ON APPEAL.

A petition which avers the residence of the parties only cannot be amended on appeal so as to show citizenship; but the judgment may be reversed, and the cause remanded, with instructions to dismiss the suit, unless, by proper amendment below, diverse citizenship is made to appear.¹

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

This was an action at law brought by Harriet Barker against the Preferred Accident Insurance Company, of New York, to recover on a policy of accident insurance. In the circuit court, verdict and judgment were given for plaintiff, and the defendant sued out this writ of error. The case is heard here on mo-

¹ As to "Necessity for Averment of Citizenship," see note to *Shipp v. Williams*, 10 C. C. A. 261, and supplementary note to *Mason v. Dullaghan*, 27 C. C. A. 303.

tion of counsel for the plaintiff for leave to amend the petition by inserting certain allegations in respect to the citizenship of the parties. The averments of the petition in this regard were as follows: "The petition of Harriet Barker, widow of J. W. Barker, who resides in the city of New Orleans, respectfully represents: That the Preferred Accident Insurance Company, of New York, a corporation organized under the laws of the state of New York, and domiciled in the city of New York, but here present in this district by an agent,—Franke Watson,—who is authorized to accept service of legal process, and to stand in judgment for said corporation, as required by the constitution and laws of the state of Louisiana, is legally and justly indebted," etc.

Hewes T. Gurley, for plaintiff in error.

S. Wolff, for defendant in error.

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

PER CURIAM. The motion of counsel for defendant in error for leave to amend the petition filed in the court below by inserting that the plaintiff below was at the time that this suit was instituted, and is now, a citizen of the state of Louisiana, and the defendant was at that time, and is now, a citizen of the state of New York, is denied. The amendment proposed is one of substance, and presents an issuable fact, which cannot be traversed in this court. The motion presented is a confession of error; and as, upon an inspection of the record, the jurisdiction of the circuit court does not appear, it is ordered and adjudged that the judgment of the circuit court be, and the same is, reversed, and the cause is remanded, with instructions to dismiss the suit, unless, by a proper amendment, the jurisdiction of the circuit court shall be made to appear.

FIDELITY INSURANCE. TRUST & SAFE-DEPOSIT CO. v. NORFOLK & W. R. CO.

(Circuit Court, W. D. Virginia. July 2, 1898.)

1. RAILROAD RECEIVERS—FORECLOSURE—TRANSFER TO PURCHASER—LIABILITY FOR NEGLIGENCE.

A foreclosure decree provided that the purchasers should be let into possession on the execution and delivery of deeds by the special masters making the sale, and that they should take the property subject to all liabilities incurred by the receivers, which liabilities should be determined and enforced by the court ordering the sale. The receivers in fact remained in possession for six days after delivery of the deeds, during which period a liability arose for negligent operation of the road. *Held*, that the delivery of the deeds did not, in law, effect an immediate transfer of possession, so as to make the purchasers directly responsible for such negligence, nor could the receivers be considered as operating the road as their agents, but that such liability was one arising during the receivership, which could only be enforced by the federal court under the terms of the decree.

2. JURISDICTION OF FEDERAL COURT—ENJOINING PROCEEDINGS IN STATE COURT.

Where a federal court by its decree of sale retains jurisdiction of a foreclosure proceeding so far as to determine and enforce, against the property sold, claims for liability incurred by the receivers, it may enjoin the prosecution of an action on such a claim in a state court without violating Rev. St. § 720, which inhibits granting an injunction to stay proceedings in a state court.