

INDEX.

	Page
Notice of Appeal	1
Amended Notice of Appeal	3
Petition of Appeal	5
Answer to Petition of Appeal.....	7
Bill of Complaint	9
Schedule 1—Annexed to Bill of Complaint	16
Schedule 2—Annexed to Bill of Complaint	34
Schedule 3—Annexed to Bill of Complaint	37
Schedule 4—Annexed to Bill of Complaint	38
Schedule 5—Annexed to Bill of Complaint	40
Schedule 6—Annexed to Bill of Complaint	41
Schedule 7—Annexed to Bill of Complaint	43
Schedule 8—Annexed to Bill of Complaint	45
Statement of Claim of Defendant Fidelity Union Trust Company, as Executor, etc.	46
Statement of Claim of Defendant Armena B. Gemmell	49
Interlocutory Decree	53
Order of Reference	55
Order of Designation	57
Testimony	59
Opinion of Vice-Chancellor	109
Final Decree	117

WITNESSES FOR DEFENDANT FIDELITY UNION TRUST
COMPANY.

William A. Dennis:	
Direct	68
Cross	73
Redirect	82, 88
Recross	85

WITNESSES FOR COMPLAINANT, PRUDENTIAL
INSURANCE COMPANY.

Armena Gemmell:	
Direct	89

EXHIBITS.

	Adm'd	Ptd
	Page	Page
Exhibit D-1	69	92
Exhibit D-2	70	93
Exhibit D-3	71	95
Exhibit D-4	71	96
Exhibit D-5	73	98
Exhibit A-1	76	99
Exhibit A-2	89	106

Notice of Appeal.

Filed February 20, 1928.

In Chancery of New Jersey.

Between	10
PRUDENTIAL INSURANCE COMPANY OF AMERICA, Complainant,	
and	On Bill, Etc.
FIDELITY UNION TRUST COM- PANY, as Executor of the Last Will and Testament of Robert Gemmell, deceased, and AR- MENA B. GEMMELL, Defendants,	Notice of Appeal. 20

The Fidelity Union Trust Company, as Execu-
tor of the Last Will and Testament of Robert Gem-
mell, deceased, one of the defendants in the above
cause, appeals from the final decree made in the
above cause on the 16th day of February, 1928, in
favor of the defendant Armena B. Gemmell and
from the whole and every part thereof, to the 30
Court of Errors and Appeals in the Last Resort in
all Causes.

Dated February 17th, 1928.

HOOD, LAFFERTY & CAMPBELL,
Solicitors and Of Counsel with the de-
fendant Fidelity Union Trust Com-
pany, as Executor of the Last Will and
Testament of Robert Gemmell, deceas- 40
ed.

Amended Notice of Appeal.

I conceive that there is good cause for appeal in the above entitled cause.

FRANCIS LAFFERTY,
Of Counsel with the defendant Fidelity Union Trust Company, as Executor of the Last Will and Testament of Robert Gemmell, deceased.

10

Service of a copy of the within Amended Notice of Appeal is hereby acknowledged this 24th day of February, 1928.

McCARTER & ENGLISH,
Solicitors of Defendant Armena B. Gemmell.

20

30

40

Petition of Appeal.

Filed March 8, 1928.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between	}	On Appeal from Court of Chancery. Petition of Appeal.
THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,		
Complainant,		
and		
FIDELITY UNION TRUST COMPANY, as Executor of the Last Will and Testament of Robert Gemmell, deceased,		
Defendant-Appellant,	20	
and		
ARMENA B. GEMMELL,		
Defendant-Appellee.		

10

20

To the Honorable the Court of Errors and Appeals in the Last Resort in all Causes:

The petition of the defendant, Fidelity Union Trust Company, as executor under the last will and testament of Robert Gemmell, deceased, the appellant in the above entitled cause, respectfully shows that:

30

1. Petitioner finds itself aggrieved by a final decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, on the advice of Vice-Chancellor Church, bearing date of February 16, 1928, in a certain cause in said Court of Chancery wherein The Prudential Insurance Company of America

40

Petition of Appeal.

was complainant, and the said Fidelity Union Trust Company, as executor of the last will and testament of Robert Gemmell, deceased, and Armena B. Gemmell, were interpleaded as defendants, in this respect, to wit:

10 (a) The Court of Chancery erred in finding and adjudging that the sum of \$10,074.80, the full disability benefits under two certificates of insurance issued by the complainant to Robert Gemmell, was not due and owing to said Robert Gemmell prior to his death.

20 (b) That the said decree was erroneous in adjudging and decreeing that the sum of \$10,074.80, the proceeds of two certificates of insurance issued by the complainant to Robert Gemmell and paid into court, belonged to and was the property of the defendant, Armena B. Gemmell.

(c) That the decree was erroneous in awarding to the defendant, Armena B. Gemmell, costs and a counsel fee of \$1,000.

30 (d) That the Court of Chancery erred in not finding and adjudging that the sum of \$10,074.80, the full disability benefits under two certificates of insurance issued by the complaint to Robert Gemmell, was due and owing from the complainant to said Robert Gemmell prior to his death.

40 (e) That the Court of Chancery erred in not adjudging and decreeing that such sum of \$10,074.80, the proceeds of two certificates of insurance issued to Robert Gemmell, now deceased, by the complainant, The Prudential Insurance Company of America, and paid into court, belongs to the defendant, Fidelity Union Trust Company, as execu-

Petition of Appeal.

tor under the last will and testament of Robert Gemmell, deceased.

Petitioner, therefore, prays that said decree of the said Chancellor may be wholly reversed, set aside and for nothing holden, and that petitioner may have such other relief in the premises as to this court shall seem proper. 10

HOOD, LAFFERTY & CAMPBELL,
Solicitors for and of counsel with
Defendant-Appellant.

Answer to Petition of Appeal.

Filed March 21, 1928.

NEW JERSEY COURT OF ERRORS AND APPEALS. 20

Between
THE PRUDENTIAL INSURANCE
COMPANY OF AMERICA,
Complainant,
and
FIDELITY UNION TRUST COM-
PANY, as Executor of the Last
Will and Testament of Robert
Gemmell, deceased,
Defendant-Appellant,
and
ARMENA B. GEMMELL,
Defendant-Appellee.

On Appeal
from Court
of Chancery. 30
Answer to
Petition of
Appeal.

The answer of Armena B. Gemmell, the above named Defendant-Appellee, to the petition of ap- 40

Answer to Petition of Appeal.

peal of the above named Defendant-Appellant.

10 This appellee not acknowledging all or any of the matters, which in the said petition of appeal are contained to be true, in answer thereto, nevertheless, says and admits that a decree was on the 16th day of February, 1927, made and entered in the Court of Chancery in the cause for that purpose mentioned in the said petition as is therein stated; but as to the substance and form thereof, this appellee prays to refer thereto when the same shall be produced. And this appellee is advised and believes that the said order is agreeable to equity, and she prays that the same may be affirmed with costs to be adjudged to this appellee.

20 McCARTER & ENGLISH,
Solicitors for and of counsel
with Defendant-Appellee.

30

40

Bill of Complaint.

Filed May 2, 1927.

IN CHANCERY OF NEW JERSEY

To his Honor, Edwin Robert Walker,
Chancellor of the State of New Jersey:

The Complainant, THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, a corporation organized and existing under and by virtue of the laws of the State of New Jersey, having its principal office at 763 Broad Street, Newark, New Jersey, respectfully shows: 10

1. That on the 1st day of October, 1924, it issued a certain contract or policy of life insurance of the kind ordinarily known as Group Insurance Policy covering the lives of a number of its employees who were to contribute toward the payment of the premiums, such policy being Group Policy No. 1690. A copy of said policy is hereto annexed and marked "Schedule 1". 20

2. That one Robert Gemmell, now deceased, who was then one of the Assistant Secretaries of the Complainant, was one of the employees whose life was insured by said policy and that on the 1st day of October, 1924, Certificate No. 15 under said policy, copy of which Certificate is hereto annexed and marked "Schedule 2", was executed and delivered to said Robert Gemmell. On the 16th day of June, 1926, Armena B. Gemmell, wife of said Robert Gemmell, was named as beneficiary in said Certificate by amendment thereof, copy of which Amendment is hereto annexed and marked "Schedule 3". In and by said Certificate as amended, the Complainant, subject to the terms and conditions of said policy, agreed to pay the sum of 30 40

Bill of Complaint.

\$5,000. to the Defendant, Armena B. Gemmell, wife of the said Robert Gemmell, therein named as beneficiary, upon receipt of due proof of the death of the said Robert Gemmell.

10 3. On the 10th day of December, 1925, Certificate No. 15-A under said policy was executed and delivered by the Complainant to the said Robert Gemmell. A copy of said Certificate is hereto annexed and marked "Schedule 4". On the 16th day of June, 1926, Armena B. Gemmell, wife of said Robert Gemmell, was named as beneficiary in said Certificate by amendment thereof, copy of which amendment is hereto annexed and marked "Schedule 5". In and by said Certificate as amended, the Complainant, subject to the terms and conditions
20 of said policy, agreed to pay the sum of \$5,000. to the said Defendant, Armena B. Gemmell, therein named as beneficiary, upon receipt of due proof of the death of the said Robert Gemmell.

30 4. That both of said Certificates No. 15 and 15-A contain the provision that if the said Robert Gemmell while less than sixty years of age and while the insurance on his life under said policy should still be in full force and effect, should become totally and permanently disabled or physically or mentally incapacitated to such an extent that he, by reason of such disability or incapacity, should be rendered wholly, continuously or permanently unable to perform any work for any kind of compensation of financial value during the remainder of his lifetime, the amount of insurance therein named would be paid to said Robert Gemmell either in one sum six months after the Complainant had received due proof of such disability
40

Bill of Complaint.

or incapacity or in monthly instalments as therein provided in accordance with the provisions of said policy.

5. Prior to the month of April, 1926, the said Robert Gemmell, being then under sixty years of age, became totally and permanently disabled and physically incapacitated to such an extent that he, by reason of such disability and incapacity, was rendered wholly, continuously and permanently unable to perform any work for any kind of compensation of financial value during the remainder of his lifetime, which fact was then known to the Complainant. On the 16th day of December, 1926, the said Robert Gemmell, being then under sixty years of age, executed and delivered to the Complainant an application in writing for the payment of the entire amount of said insurance evidenced by said Certificates No. 15 and 15-A to him in one sum. A copy of said application is hereto annexed and made a part hereof and marked "Schedule 6".
10
20

6. On said last mentioned date the said Robert Gemmell submitted to the Complainant due proof in writing of such disability and incapacity, copy of which is hereto annexed and marked "Schedule 7", and made a part hereof, and on the 17th day of December, 1926, Complainant accepted such proof and determined to forthwith make payment of the entire amount of said insurance evidenced by said Certificates 15 and 15-A, viz., the sum of \$10,074.80 to the said Robert Gemmell in accordance with the provisions of said policy and said Certificates. Accordingly on said day Complainant's check was duly drawn to the order of said
30
40

Bill of Complaint.

Robert Gemmell for the sum of \$10,074.80, being the amount then due on said Certificates, payable to the said Robert Gemmell under said application. Said check, although drawn on Friday, the 17th day of December, 1926, and duly signed on said day, was dated December 20, 1926, because of the practice in Complainant's office when issuing claim checks on a Friday to have them bear the date of the following Monday, and it was the intention of the Complainant to deliver said check to the said Robert Gemmell on said 20th day of December, 1926. A copy of said check is hereto annexed and marked "Schedule 8".

7. The said Robert Gemmell died on the said 20th day of December, 1926, while said check was still in the possession of the Complainant and because of this fact such check was not delivered. The said Armena B. Gemmell survived the said Robert Gemmell and is still living.

8. The said Robert Gemmell left a last will and testament which has been duly admitted to probate by the Surrogate of the County of Essex, in and by which he appointed the Defendant, Fidelity Union Trust Company, Executor thereof, and letters testamentary were duly issued to said last mentioned Defendant.

9. The said Defendant, Fidelity Union Trust Company, claims the amount due on said Certificates, viz., the sum of \$10,074.80, on the ground, as the Complainant is informed and believes, that the said Robert Gemmell, prior to his death, had perfected his right to receive the payment of said sum and Complainant had determined to make pay-

Bill of Complaint.

ment thereof to him and that said sum was, therefore, a part of his estate at his death. The said Fidelity Union Trust Company, as Executor of the said Robert Gemmell, has made demand upon Complainant for the payment of said sum.

10. The said Armena B. Gemmell, widow of the said Robert Gemmell and the beneficiary named in the said Certificates No. 15 and 15-A, as amended, claims to be entitled to the said sum of \$10,074.80, upon the ground, as the Complainant is informed and believes, that payment thereof had not actually been made to the said Robert Gemmell at the time of his death and that she, as the beneficiary named in said Certificates, is, therefore, entitled to said sum. The said Armena B. Gemmell has made demand upon the Complainant for the payment of said sum.

11. The Complainant has been and is unable to determine to whom of right the said sum belongs or ought to be paid.

12. Complainant further shows that it has always been willing to pay the said sum of \$10,074.80 to such person or persons as shall be lawfully entitled to receive the same and to whom it can pay it with safety and it hereby offers to pay the same with interest into this court.

13. Complainant further shows that it does not in any respect collude with either the said Fidelity Union Trust Company, as Executor of the said Robert Gemmell, or with the said Armena B. Gemmell, concerning any of the matters above mentioned or in any respect whatsoever and that it has not been indemnified by such Defendants, or any or

Bill of Complaint.

either of them, but brings this suit of its own free will and to avoid being molested or injured touching the matters contained in this Bill.

Complainant is without adequate remedy at law and therefore prays

10 (a) That the said Fidelity Union Trust Company as Executor of the last will and testament of Robert Gemmell, Deceased, and the said Armena B. Gemmell, who are the Defendants in this suit, and each of them, may answer this Bill and interplead and settle their rights to said sum of \$10,074.80, with interest as aforesaid.

20 (b) That Complainant be at liberty to pay the said sum of \$10,074.80, with interest as aforesaid, into this court.

(c) That the Fidelity Union Trust Company, as Executor of the said Robert Gemmell, and the said Armena B. Gemmell, may be enjoined and restrained from instituting or prosecuting any suit at law or in equity against Complainant for the recovery of said sum or any part thereof.

30 (d) That Complainant, upon payment into court of said sum of \$10,074.80, with interest thereon as aforesaid, and procuring said Defendants to interplead according to the practice of this court, may be decreed to be discharged from all liability to such Defendants in the premises, and may have all its costs therein.

40 (e) That a writ or writs of subpoena may issue out of and under the seal of this Honorable Court to be directed to the said Fidelity Union Trust Company, as Executor of Robert Gemmell, Deceased, and to the said Armena B. Gemmell, command-

Bill of Complaint.

ing them and each of them, to answer this Bill of Complaint and to abide by such decree as this court may make in the premises.

LINDABURY, DEPUE & FAULKS,
Solicitors for and of counsel
with Complainant.

JOSIAH STRYKER,
Of Counsel.

10

State of New Jersey }
County of Essex. } ss.:

ALFRED HURRELL, of full age, being duly sworn according to law on his oath says:

I am one of the Vice Presidents of THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, the Complainant in the foregoing Bill of Complaint, and am familiar with the matters therein set forth.

20

The Complainant has exhibited its Bill of Interpleader against the defendants in the foregoing cause without any fraud or collusion between it and the said defendants, or any of them, but merely of its own accord for relief in this court. The said Bill is not exhibited at the request of the said defendants or of any or of either of them and the Complainant is not indemnified by the said defendants or any or either of them.

30

The Complainant has exhibited said Bill with no other intent but to avoid being sued or molested by the defendants touching the matters contained in said Bill.

ALFRED HURRELL.
Subscribed and sworn to before me }
this 30th day of April, 1927. }
Ralph W. Hyatt,
Master in Chancery
of New Jersey.

40

Schedule 1.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA

In Consideration of the Application of the Employer for this Policy, which is hereby made part of this contract, a copy of which Application is attached hereto, and of the payment, in the manner specified, of the premium herein stated, hereby insures the life of each of the persons herein designated as the Insured, for the term of three-months from the date hereof, subject to readjustment and renewal as hereinafter set forth, for the amount specified herein, payable as provided, subject to the provisions on the second and third pages hereof, which are hereby made part of this contract.

The Insured hereunder are the several persons named in the

SCHEDULE OF EMPLOYEES

forming part of the Application above referred to, said persons being all the employees of

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA

herein designated as the Employer, that have agreed to be included in the group or class defined in the Application. The original of said Application with Schedule has been retained by The Prudential Insurance Company of America, herein designated as the Company.

The Amount of Insurance on the life of any person insured hereunder is the amount stated in the

Schedule 1.

plan of insurance set forth in the Application, and said amount shall be payable by the Company immediately upon receipt of due proof of the death of such person while the insurance on such life is in force in accordance with the terms hereof, at the Home Office of the Company, in Newark, New Jersey; said amount being

Payable to the Beneficiary designated by the Employee.

The Premium hereunder, payable by the Employer, shall be the sum of the several premiums for the individual amounts insured, computed upon the basis of the table of term premiums on the second page hereof for the respective ages, nearest birthday, of the Insured and in accordance with the terms of the Policy.

The first premium hereunder is payable on the delivery of this Policy, in exchange for the Company's receipt. Subsequent payments of premium shall be made on the first day of each and every month thereafter of every year while this Policy is continued in force, in exchange for the Company's receipt, beginning with the first day of November, 1924.

In Witness Whereof, the said The Prudential Insurance Company of America, at its office in the City of Newark, New Jersey, has caused this Policy to be signed by its President and its Secretary, and to be duly attested, this first

Schedule 1.

day of October, one thousand nine hundred and twenty-four.

(Seal) EDWARD D. DUFFIELD, President.
WILLARD I. HAMILTON, Secretary.

10 Attest,
JOHN H. BIRKETT

Group Insurance Policy No. 1690
Renewable Term. Annual Dividends.
Total and Permanent Disability Provision: Waiver
of Premiums, Payment of Insurance.
Founded by John F. Dryden
Pioneer of Industrial Insurance in America

20 (Page 2)

GENERAL PROVISIONS.

30 *Payment of Premiums.*—All premiums are payable at the Home Office of the Company, but may be paid to an agent of the Company on or before the dates when due, in exchange for official receipts signed by the President or the Secretary and countersigned by an authorized agent of the Company. If any premium be not paid when due, this Policy shall be void and all premiums forfeited to the Company except as herein provided.

40 It is understood that the Employer and the Employees shall contribute jointly toward the payment of the premiums, and that the contribution of the Employer shall not be less than one per cent. of the total premium and that the contribution of an individual Employee shall not be more than 60 cents per month for each \$1,000 of insurance.

Schedule 1.

Grace in Payment of Premiums.—In the payment of any premium under this Policy, except the first, a grace of thirty-one days without interest will be allowed, during which time the Policy will remain in force.

10 *Renewal of Policy.*—This Policy is issued upon the three-months Renewable Term plan and may be renewed from time to time for succeeding terms of three-months each, upon the payment on or before the date of each renewal of the premium for the amount of insurance to be renewed. During the first term from the date hereof the monthly premium shall be computed upon the basis of the following Table of monthly Term Premiums per \$1,000 of Insurance, at the respective ages, nearest birthday, of the Insured on the date hereof, but at the end of said first term and at the end of each succeeding term thereafter the Company will adjust the premium rates upon which renewals may be effected at the respective ages, nearest birthday, attained by the Insured at the time of renewal, in accordance with the mortality experience of the Insured under this Policy. If the number of the Insured hereunder at any time shall be less than seventy-five per cent. of the employees eligible for insurance hereunder or less than fifty of such employees the Company shall have the right to decline to renew the insurance under the Policy. The renewal premium, payable by the Employer, shall be the sum of the several premiums for the individual amounts to be insured.
20
30
40

Schedule 1.

TABLE OF MONTHLY TERM PREMIUMS
PER \$1000 OF INSURANCE.

	Age	Premium	Age	Premium	Age	Premium
	15	\$.49	37	\$.64	59	\$2.45
	16	.49	38	.66	60	2.66
	17	.50	39	.68	61	2.88
10	18	.51	40	.71	62	3.11
	19	.52	41	.74	63	3.37
	20	.53	42	.78	64	3.65
	21	.54	43	.81	65	3.96
	22	.55	44	.86	66	4.29
	23	.56	45	.91	67	4.65
	24	.56	46	.96	68	5.03
	25	.57	47	1.02	69	5.45
	26	.57	48	1.09	70	5.90
	27	.57	49	1.16	71	6.39
	28	.58	50	1.25	72	6.92
20	29	.58	51	1.34	73	7.48
	30	.58	52	1.44	74	8.09
	31	.58	53	1.54	75	8.75
	32	.59	54	1.67	76	—
	33	.59	55	1.80	77	—
	34	.60	56	1.94	78	—
	35	.61	57	2.10	79	—
	36	.63	58	2.27	80	—

30 *Additions to the Number of Insured.*—New employees of the Employer eligible for insurance in the group or class insured under this Policy may from time to time, subject to evidence of insurability satisfactory to the Company, be added to the group or class originally insured hereunder, and, subject to the provisions of the Policy, insured in accordance with the plan of insurance set forth in the application for this Policy, provided that no evidence of insurability will be required of employees added within sixty days from the date of eligibility according to the Plan of Insurance. The

40

Schedule 1.

Employer shall notify the Company whenever such new employees are to be added. The Employer's pay-rolls and other similar records shall be open for inspection by the Company for the purpose of determining the amounts of insurance under this Policy and the premiums therefor.

10 *Termination of Individual Insurance.*—Irrespective of any other mode of termination the insurance upon the life of any person insured hereunder shall cease and determine upon termination of the employment of such person with the Employer, upon receipt by the Company of written notification to that effect from the Employer, except that at the option of the Employer employees temporarily laid-off, on leave of absence or temporarily disabled shall during such periods be considered as being in the employ of the Employer. Such written notification by the Employer of any termination of insurance shall be satisfactory evidence that such insurance has terminated and shall release the Company from all claims on account of the insurance so terminated, except as to the right of conversion as herein provided.

20

30 *Change of Beneficiary.*—Any person insured hereunder may at any time, while insured hereunder, change his (or her) Beneficiary of Beneficiaries under this Policy by written notice through the Employer to the Company at its Home Office, on a form furnished by it. Such change shall take effect when due acknowledgment thereof is furnished by the Company to such person insured and all rights of his (or her) former Beneficiary or Beneficiaries shall thereupon cease.

40

Schedule 1.

Incontestability.—This Policy, except for non-payment of premiums, shall be incontestable one year from its date of issue, but if the age of any person insured hereunder shall have been misstated the amount of the premium actually paid for the insurance on his (or her) life shall be adjusted accordingly. 10

Modification, etc.—No condition, provision or privilege of this Policy can be waived or modified in any case except by an endorsement hereon signed by the President, one of the Vice Presidents, the Secretary, one of the Assistant Secretaries, the Actuary, the Associate Actuary, or one of the Assistant Actuaries. No modification or change shall be made in this Policy except such as is in accordance with the laws of the State in which the same is issued. No Agent has power in behalf of the Company to make or modify this or any other contract of insurance, to extend the time for paying a premium, to waive any forfeitures, or to bind the Company by making any promise, or by making or receiving any representation or information. 20

Basis of Reserve and Computations.—The reserve upon this Policy for which funds are to be held, exclusive of any reserve on account of disability insurance, shall be computed upon the American Experience Table of Mortality with three and one-half per cent. interest per annum. 30

Entire Contract Contained in This Policy.—This Policy together with the Application of the Employer, copy of which is attached hereto, and the individual applications, if any, of the employees insured, contains and constitutes the entire con- 40

Schedule 1.

tract between the parties hereto, and all statements made by the Employer, or by the individual employees, shall in the absence of fraud be deemed representations and not warranties, and no statement shall avoid the Policy or be used as a defence to a claim thereunder unless it be contained in the Application and unless a copy of such Application be attached to or endorsed on the Policy. 10

DIVIDEND PROVISIONS.

Annually, during its continuance in force, the proportion of the divisible surplus accruing upon this Policy shall be ascertained and apportioned by the Board of Directors and credited to this Policy at the end of the policy year as a dividend. Such dividend shall be paid to the Employer in cash or at the option of the Employer applied to the reduction of the premium then due, if any. 20

PROVISIONS AS TO EMPLOYEE'S CERTIFICATE AND CONVERSION OF INDIVIDUAL INSURANCE.

The Company will issue to the Employer for delivery to each person insured under this Policy an individual certificate setting forth the insurance protection to which such person is entitled hereunder and to whom such insurance is payable, together with a provision that when the insurance on the life of any person insured hereunder shall terminate by reason of termination of employment, as herein provided, the Company will upon application by such person within thirty-one days after the date of such termination, without evidence of insurability, issue a policy upon the life of such 40

Schedule 1.

person on any of the forms customarily issued by the Company, except a policy of Term insurance, for the same amount as such person was insured for under this Policy at the time of said termination of employment, subject to the payment of the premium for such policy at the then current rates of the Company according to the occupation of and at the age attained by such person at that time.

(Page 3)

A copy of the Application upon which this Policy is issued is attached hereto.

PROVISIONS AS TO TOTAL AND PERMANENT DISABILITY:

Waiver of Premiums, Payment of Insurance.

Disability Before Age 60: Waiver of Premiums—Payment of Insurance.—If any person insured under this Policy shall become totally and permanently disabled, either physically or mentally, from any cause whatsoever, to such an extent that he (or she) is rendered wholly, continuously and permanently unable to engage in any occupation or perform any work for any kind of compensation of financial value during the remainder of his (or her) lifetime, and if such disability shall occur at any time after the payment of the first premium on account of such insurance, while this Policy is in full force and effect and the said person is less than sixty years of age, the Company, upon receipt of due proof of such disability, will grant the following benefits:

(1) *Waiver of Premiums.*—The Company will, during successive renewal periods, waive the pay-

Schedule 1.

ment of that portion of each premium under this Policy applicable to the insurance on the life of said disabled person the due date of which, as specified on the first page hereof, shall occur after receipt by the Company of said proof of such disability.

(2) *Payment of Insurance.*—The Company will, in addition to waiving the premiums, pay to said person at its Home Office the amount insured on his (or her) life, as the Employer may request, either in one sum six months after the Company shall have received such proof, or in sixty monthly instalments during five years, each instalment to be of the amount of \$17.95 per \$1,000 of insurance payable. The first of such monthly instalments shall be paid immediately upon receipt by the Company of due proof of such disability and subsequent monthly instalments shall be paid on the first day of each month thereafter.

The total amount of insurance under this Policy on the life of the said person at any time after one or more of such instalments have been paid shall not exceed the commuted value of such of said instalments as are not then due computed at the rate of three and one-half per cent. per annum compound interest.

Any insurance remaining at the death of the said person shall be paid to the Beneficiary or Beneficiaries of said person.

Recognized Disabilities.—Without prejudice to any other cause of disability, the Company will recognize the entire and irrecoverable loss of the sight of both eyes, or of the use of both hands, or of both feet, or of one hand and one foot, as total

Schedule 1.

and permanent disability under this Policy.

Proof of Continuance of Disability.—Notwithstanding the acceptance by the Company of proof of total and permanent disability, the said person, upon demand by the Company from time to time, but not oftener than once a year after the disability of said person has continued for two full years, for the purpose of verifying that such disability is actually permanent and not temporary, shall furnish due proof that he (or she) actually continues in the state of disability defined above. In case of failure to furnish such proof, no further proportional parts of the premium on account of said person's insurance shall be waived and no further monthly instalments shall be paid on account of such disability, and any insurance on the life of said person then remaining under this Policy may continued to be renewed subject to the terms of the Policy, but if the said person be no longer in the employ of the Employer or if this Policy be no longer in force the said person may, in respect of such reduced amount, make use of the privilege set forth under the heading "Provisions as to Employee's Certificate and Conversion of Individual Insurance."

These provisions are granted without additional cost to the Employer.

Schedule 1.

PROVISIONS AS TO MODES OF SETTLEMENT.

Whenever an amount of insurance shall become payable on account of the death of any person insured hereunder one of the following options may be designated by the Employer as the manner in which such amount of insurance shall be payable provided that in no event shall Option 4 be available if the amount of each instalment payable thereunder would be less than \$10.

Option 1. Payment in One Sum.

Option 2. Payment Partly in One Sum and the Balance in Instalments in Accordance with either Option 3 or Option 4.

Option 3. Weekly Instalments for One Year.—Payment during one year in fifty-two equal weekly instalments of \$19.36 per \$1,000 of amount so payable, together with dividends, if any.

Option 4. Payment in Monthly Instalments for a number of months as selected from the following table, each instalment of the amount specified in the table for the number of months selected, together with dividends, if any:

Schedule 1.

	Number of Months During which Monthly Instalments Would be Paid	Amount of Each Monthly Instal- ment per \$1000 of Amount so Payable	Number of Months During which Monthly Instalments Would be Paid	Amount of Each Monthly Instal- ment per \$1000 of Amount so Payable
	6	\$167 03	34	\$30 49
	7	143 31	35	29 67
	8	125 52	36	28 90
10	9	111 67	37	28 17
	10	100 60	38	27 47
	11	91 53	39	26 81
	12	83 99	40	26 18
	13	77 60	41	25 58
	14	72 12	42	25 00
	15	67 38	43	24 45
	16	63 23	44	23 92
	17	59 59	45	23 42
	18	56 36	46	22 94
	19	53 47	47	22 47
20	20	50 87	48	22 03
	21	48 52	49	21 65
	22	46 38	50	21 23
	23	44 43	51	20 83
	24	42 55	52	20 49
	25	40 98	53	20 12
	26	39 37	54	19 76
	27	38 02	55	19 46
	28	36 76	56	19 12
	29	35 46	57	18 80
	30	34 36	58	18 48
30	31	33 33	59	18 21
	32	32 36	60	17 95
	33	31 45		

Unpaid Instalments at Death of Beneficiary.—

If one or more instalments shall actually be paid in accordance with the provisions above and if the Beneficiary shall die before all instalments shall have been paid, and if there be no contingent beneficiary designated, the unpaid instalments will be commuted at the rate of three and one-half per cent. per annum compound interest and paid in one

Schedule 1.

sum to the executors or administrators of the Beneficiary.

Dividends with Instalments.—If an amount of insurance be payable in instalments, monthly or weekly, any dividend from the surplus earnings as ascertained and apportioned by the Board of Directors on account of amounts so payable will be paid in addition to the instalments.

(Sheet 4)

AMENDMENT OF PLAN OF INSURANCE.

At the request of the Employer, as per Amendment Form, dated December 1, 1925, the Plan of Insurance set forth in the Application for this Policy is amended from the date hereof by the addition of the following provision:

Employees, representing not less than seventy-five per cent. of the members of each of the respective classifications of Employees below, to be named in Schedules of Employees furnished by the Employer, such Schedules to be attached hereto and made a part hereof, may be insured for the amounts stated below opposite the respective Classifications of Employees, in addition to the insurance provided by this Policy as originally issued, subject to the provisions of the Policy.

Schedule 1.

CLASSIFICATIONS OF EMPLOYEES.

Field Force.

	Superintendents	\$5,000
	Ordinary Managers	\$5,000
	Assistant Superintendents	\$3,000
10	Full-time Special Agents not heretofore insured shall be insured for.....	\$4,000
	Industrial Agency Force	\$2,000
	District Cashiers	\$1,000
	Field Clerical Force (exclusive of District Cashiers)	none
	Home Office Staff	
	Officers	\$5,000
	Department Heads	\$5,000
	Professional Staff	\$5,000
20	Assistant Department Heads	\$3,000
	Chief Clerks	\$3,000
	Supervising Clerks	\$3,000
	Special Clerks	\$3,000
	Inspectors	\$3,000
	Examiners of Accounts	\$3,000
	Clerical Force:	
	Male, 21 and over	\$2,000
	Female, 21 and over	none
30	Male and Female, under 21 ...	none
	Mechanical Department:	
	Male (including elevator operators)	\$2,000
	Female, 21 and over	none
	Female, under 21	none

40

Schedule 1.

Commissary Department:

Male employees	\$1,000
Female employees	none
Porters	none

The Prudential Insurance Company of America.

By 10

Assistant Actuary.

Newark, N. J., December 1, 1925.

rl
HF

The Prudential Insurance Company of America

Group Insurance Policy No. 1690	
Renewable Term. Annual Dividends.	
Total and Permanent Disability Provision:	20
Waiver of Premiums, Payment of Insurance.	

(Sheet 5)

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA

Incorporated under the laws of the State of New Jersey.

Edward Duffield, *President* 30

Home Office, Newark, N. J.

APPLICATION FOR GROUP INSURANCE

In the Prudential Insurance Company of America Application is hereby made to The Prudential Insurance Company of America for a Group Policy on the One-Year Renewable Term plan, with premiums payable monthly, to insure the lives of the employees of the undersigned, The Prudential In- 40

Schedule 1.

this application has been approved by the Company.

The Prudential Insurance Company of America,

(Signature of Applicant)

10 By Edward D. Duffield, President, (Signed)

Witness Fred W. Tasney (Signed)

Dated at Newark, N. J. October 1, 1924

fk—MD

Schedule 2.

20 Claim Dept. Duplicate
Certificate Number 15

Incorporated Under the Laws of the State of New Jersey.

THE PRUDENTIAL INSURANCE COMPANY
OF AMERICA

30 in accordance with and subject to the terms and conditions of its Group Policy No. 1690, insuring the lives of a group of the employees of

THE PRUDENTIAL INSURANCE COMPANY
OF AMERICA

has insured the life of Robert Gemmell, an employee included in the said group of employees, for the amount of

Five Thousand Dollars,

40 payable to the Beneficiary designated by said em-

Schedule 2.

ployee upon receipt of due proof of the death of said employee while the insurance on the life of said employee under said Policy is in force.

BENEFICIARY:—

10 *If there be no Beneficiary living at the death of said employee the amount of insurance shall be paid to the executors, administrators or assigns of said employee.*

(The Beneficiary may be changed in accordance with the terms of the Policy by said employee at any time while the insurance on his or her life is in force by notifying the Company through the Employer. Such change shall take effect when due acknowledgment thereof is furnished by the Company to such person insured and all rights of his or her former Beneficiary or Beneficiaries shall thereupon cease.) 20

Total and Permanent Disability.—If the said employee, while less than sixty years of age, and while the insurance on the life of said employee under said Policy is in full force and effect, shall become totally and permanently disabled or physically or mentally incapacitated to such an extent that he or she by reason of such disability or incapacity is rendered wholly, continuously and permanently unable to perform any work for any kind of compensation of financial value during the remainder of his or her lifetime, said amount of insurance will be paid to said employee either in one sum six months after the Company has received due proof of such disability or incapacity, or in monthly instalments during five years, the first instalment to be payable immediately upon receipt by the Company of due proof of such disability or incapacity; 30 40

Schedule 2.

in accordance with the provisions of said Policy. The disability benefits will be granted subject to cessation, in accordance with the provisions of the Policy, should such disability or incapacity prove to be temporary and not permanent. The entire and irrecoverable loss of the sight of both eyes, or of the use of both hands, or of both feet, or of one hand and one foot, will be considered total and permanent disability or incapacity within the meaning of the provisions of said Policy.

Conversion of Insurance.—When the insurance on the life of said employee shall terminate by reason of termination of employment for any reason whatsoever, the Company will issue, upon application by said employee within thirty-one days after the date of such termination, without evidence of insurability, a policy on his or her life on any of the forms customarily issued by the Company, except a policy of Term Insurance, for the same amount for which said employee was insured under said group insurance policy at the time of the termination of employment, subject to the payment of premium for such policy at the then current rates of the Company according to the occupation of and at the age attained by said employee at that time.

EDWARD D. DUFFIELD,
President.
Newark, N. J., October 1, 1924.

Schedule 3.

Claim Duplicate

THE PRUDENTIAL INSURANCE COMPANY
OF AMERICA

Incorporated under the laws of the State of
New Jersey

Edward D. Duffield, *President*

Home Office, Newark, N. J.

This is to Certify that, in accordance with a request dated June 16, 1926 of the holder of the Certificate No. 15, the following change has been recorded in connection with the insurance of said holder under Group policy No. 1690.

The Beneficiary has been changed to
Armena B. Gemmell, Wife of the Insured.
(Name) (Relationship)

The Prudential Insurance Company of America
By Willard I. Hamilton
Vice President and Secretary.

Attest, C. Einhorn
Newark, N. J., June 16, 1926.

On side of Form—This Form must be securely attached to the Group Insurance Certificate referred to hereon.

10

20

30

40

Schedule 4.

Claim Dept. Duplicate
 Certificate Number 15
 Incorporated Under the Laws of the State of New
 Jersey.

10 THE PRUDENTIAL INSURANCE COMPANY
 OF AMERICA

in accordance with and subject to the terms and
 conditions of its Group Policy No. 1690, insuring
 the lives of a group of the employees of

THE PRUDENTIAL INSURANCE COMPANY
 OF AMERICA

Newark, New Jersey

20 has insured the life of ROBERT GEMMELL, an em-
 ployee included in the said group of employees, for
 the amount of

Five Thousand Dollars,

payable to the Beneficiary designated by said em-
 ployee upon receipt of due proof of the death of
 said employee while the insurance on the life of
 said employee under said Policy is in force.

30 BENEFICIARY:—

*If there be no Beneficiary living at the death of
 said employee the amount of insurance shall be
 paid to the executors, administrators or assigns of
 said employee.*

40 *(The Beneficiary may be changed in accordance
 with the terms of the Policy by said employee at
 any time while the insurance on his or her life is
 in force by notifying the Company through the
 Employer. Such change shall take effect when due*

Schedule 4.

*acknowledgment thereof is furnished by the Com-
 pany to such person insured and all rights of his
 or her former Beneficiary or Beneficiaries shall
 thereupon cease.)*

Total and Permanent Disability.—If the said
 employee, while less than sixty years of age, and
 while the insurance on the life of said employee un- 10
 der said Policy is in full force and effect, shall be-
 come totally and permanently disabled or physi-
 cally or mentally incapacitated to such an extent
 that he or she by reason of such disability or inca-
 pacity is rendered wholly, continuously and perma-
 nently unable to perform any work for any kind of
 compensation of financial value during the remain-
 der of his or her lifetime, said amount of insurance
 will be paid to said employee either in one sum six 20
 months after the Company has received due proof
 of such disability or incapacity, or in monthly in-
 stalments during five years, the first instalment to
 be payable immediately upon receipt by the Com-
 pany of due proof of such disability or incapacity;
 in accordance with the provisions of said Policy.
 The disability benefits will be granted subject to
 cessation, in accordance with the provisions of the
 Policy, should such disability or incapacity prove 30
 to be temporary and not permanent. The entire
 and irrecoverable loss of the sight of both eyes, or
 of the use of both hands, or of both feet, or of one
 hand and one foot, will be considered total and
 permanent disability or incapacity within the
 meaning of the provisions of said Policy.

Conversion of Insurance.—When the insurance
 on the life of said employee shall terminate by rea-
 son of termination of employment for any reason
 whatsoever, the Company will issue, upon applica- 40
 tion by said employee within thirty-one days after

Schedule 4.

the date of such termination, without evidence of insurability, a policy on his or her life on any of the forms customarily issued by the Company, except a policy of Term Insurance, for the same amount for which said employee was insured under said group insurance policy at the time of the termination of employment, subject to the payment of premium for such policy at the then current rates of the Company according to the occupation of and at the age attained by said employee at that time.

EDWARD D. DUFFIELD,
President.

Newark, N. J., December 10, 1925.

20

Schedule 5.

Claim Duplicate

THE PRUDENTIAL INSURANCE COMPANY
OF AMERICA

Incorporated under the laws of the State of
New Jersey

30 Edward D. Duffield, *President*

Home Office, Newark, N. J.

This is to Certify that, in accordance with a request dated June 16, 1926 of the holder of the Certificate No. 15-A the following change has been recorded in connection with the insurance of said holder under Group policy No. 1690.

40

Schedule 5.

The Beneficiary has been changed to
Armena B. Gemmell, Wife of the Insured.
(Name) (Relationship)

The Prudential Insurance Company of America
By Willard I. Hamilton
Vice President and Secretary.

Attest, Einhorn

Newark, N. J., June 16, 1926.

10

On side of Form—This Form must be securely attached to the Group Insurance Certificate referred to hereon.

Schedule 6.

Ordinary Claim Department.

20

THE PRUDENTIAL INSURANCE CO. OF
AMERICA

Home Office, Newark, N. J.

APPLICATION FOR DISABILITY BENEFITS

Ordinary, Intermediate, Group and Wholesale
Policies

An insured to be entitled to Disability Benefits must be physically or mentally incapacitated to such an extent that he is rendered permanently unable to engage in any gainful occupation.

30

Number of policy (or policies) 1717818

Certificates 15 15-A

Insured's full name Robert Gemmell

Date of insured's birth 6/15/1869

Insured's home address 311 Mt. Prospect Ave.

Newark, N. J. 40

Schedule 6.

- Where will insured be located during next thirty days? Same address
- Name and address of last employer Prudential Ins. Co.
- In what capacity employed? Assistant Secretary
- Last day of employment? April 1926 O.K.
- 10 On what date did insured first consult a physician during present illness? Approximately 4/1/26
- What was the insured's condition at that time?
Hospital Case
- When was insured first considered to be totally and permanently disabled? April 1926
- What was the insured's condition at that time?
Considered fatal N 41 69-6-15
- Names and addresses of all other physicians who together with period of treatment by each
- 20 Dr. Teeter, Dr. Hawkes, Dr. J. Gray. Refer to Dr. Patten, Medical Director Prudential Home Office
- What hospital or dispensary treatment has been received during present illness? (give name and location)
Presbyterian Hospital, Newark, N. J.
St. Barnabas Hospital, "
- 30 What other insurance has the insured (accident, health and life)? None
- Signature Robert Gemmell
Address 311

Schedule 7.

Ordinary Claim Department.

THE PRUDENTIAL INSURANCE COMPANY
OF AMERICA

Edward D. Duffield, *President*

Home Office, Newark, New Jersey 10

Proof of Total and Permanent Disability—Ordinary, Intermediate, Group and Wholesale Policies

PHYSICIAN'S STATEMENT

Please use the reverse side of this sheet for amplifying the answers to questions below, or for any comments which you consider will be helpful to us in reaching a decision in this case.

Name of patient Robert Gemmell 20

Present location Newark

How long have you been attending patient? Not his attending physician but have seen him from time to time

State diagnosis and describe fully the illness or injury causing disability Pernicious Anaemia

When were symptoms first noted? Probably two years ago or in Fall of 1924

If disability is caused by Pulmonary T. B. when was it so diagnosed? 30

What test confirmed the diagnosis? ✓

Date of confirmation ✓

Has the patient's condition shown any recent improvement? (Give particulars) No.

Is patient still under treatment by you? No

Date you last saw the patient About two months ago

Do you think patient will ever be able to work in any gainful occupation? No 40

Schedule 7.

If so, to what extent? ✓
 Approximately, when do you think the patient will
 be able to perform work of some kind? ✓
 Do you consider the patient totally and perma-
 nently disabled so that he (or she) will, for
 all time, be prevented from engaging in any
 kind of work? Yes
 10
 If so, on what date did you first conclude that pa-
 tient would never again be able to work?
 About nine months ago
 Describe condition of patient at the time you made
 this unfavorable prognosis
 Very anaemic & weak; markedly disturbed
 and weak heart action; has had a blood trans-
 fusion
 20
 Date Dec. 16th, 1926
 Signed J. ALLEN PATTON, M. D.
 Address Med. Dpt., Prudential Ins. Co.
 Newark, N. J.

30

40

Schedule 8.

THE PRUDENTIAL INSURANCE COMPANY
OF AMERICA

Ordinary Department

No. 193926

Newark, N. J. Dec. 20, 1926

PAY Ten Thousand Seventy- Four and 80/100
 Dollars to Order of Robert Gemmell \$10074.80 10
 In full for all claims under Policy No. G. 1690
 C. 15A-G. 1690 C. 15

To

Fidelity Union Trust Company

Newark, N. J.

55-9

Ernest A. Burkhardt

Asst Cashier

Countersigned

T. J. Natley

Assistant Auditor

20

Endorsements

This check is in full payment of all claims under
 the policy or policies mentioned thereon, and the
 payee accepts it as such by endorsement below.

No other receipt required.

Sign here 30

40

Statement of Claim of Defendant Fidelity Union Trust Company, as Executor, etc.

Filed June 4, 1927.

IN CHANCERY OF NEW JERSEY.

	Between	
10	THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,	} On Bill of Interpleader.
	Complainant,	
	and	
	FIDELITY UNION TRUST COMPANY, a corporation of New Jersey, as Executor of the Last Will and Testament of Robert Gemmell, deceased, and ARMENA B. GEMMELL,	} Statement of Claim of Defendant, Fidelity Trust Company, as Executor, etc.
20	Defendants.	

Statement of claim of defendant, Fidelity Union Trust Company, a corporation of the State of New Jersey, as Executor of the last will and testament of Robert Gemmell, deceased:

1. On October 1, 1924 said Robert Gemmell was an officer or employee of the complainant, The Prudential Insurance Company of America, and continued as such officer or employee until his death, which occurred on December 20, 1926.

2. On October 1, 1924, the complainant, The Prudential Insurance Company of America, issued what is known as a group insurance policy, a copy of which is attached to the bill of complaint, and to which for greater certainty this defendant begs leave to refer.

3. Under said group insurance policy two certi-

Statement of Claim of Defendant Fidelity Union Trust Company, as Executor, etc.

ificates #15 and #15A for \$5,000. each, one dated October 1, 1924 and the other December 10, 1925, were issued to said Robert Gemmell, no beneficiary being named in said certificates.

4. On June 16, 1926 said Robert Gemmell caused said certificates to be made payable, upon his death, to his wife, the defendant, Armena B. Gemmell; the payment of which being subject to the terms of said group insurance policy and said certificates issued thereunder.

5. By the terms of said group insurance policy, it was, among other things, provided: that if any insured thereunder became totally and permanently disabled before attaining the age of sixty years and while such policy upon the life of the insured remained in full force, upon receiving due proof of such disability the company would pay to such person the amount insured upon his life, either in one sum six months after the company received proof, or in sixty monthly instalments during five years, each instalment to be of the amount of \$17.95 per \$1,000. of insurance claimable.

6. Each certificate issued to said Robert Gemmell under said policy contained the provisions set forth in paragraph 5 hereof.

7. On December 16, 1926 said Robert Gemmell, having prior thereto become totally and permanently disabled, and being under the age of sixty years, and said policy of insurance upon his life being then in full force and effect, executed and delivered to the complainant an application in writing for the payment to him, in one sum, of the

Statement of Claim of Defendant Fidelity Union Trust Company, as Executor, etc.

10 entire amount of insurance evidenced by certificates #15 and #15A; and having made due proof to the satisfaction of the complainant, The Prudential Insurance Company, of such total and permanent disability, his application was approved by his employer, The Prudential Insurance Company, and a check drawn by said company to his order for the sum of \$10,074.80.

8. Said check was dated December 20, 1926, though actually drawn and signed by the proper officers of the complainant, The Prudential Insurance Company, on December 17, 1926.

20 9. By reason of the application of said Robert Gemmell for the payment to him in one sum of the full amount due to him under said group policy of insurance as evidenced by his certificates, and the acceptance thereof by The Prudential Insurance Company, his employer, of the proof of such total and permanent disability, and of his application for such payment, the amount payable under said policy became due and payable, and his claim under such policy enured to the benefit of his estate, and said Armena B. Gemmell ceased to have any interest in or under said policy of insurance and the certificates issued thereunder.

HOOD, LAFFERTY & CAMPBELL,
Solicitors of Deft., Fidelity Union Trust Company, as Executor of the last will and testament of Robert Gemmell, deceased.

Statement of Claim of Defendant Armena B. Gemmell.

Filed June 22, 1927.

IN CHANCERY OF NEW JERSEY.

Between	}	On Bill of Interpleader.	10
THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, Complainant,			
and	}	Statement of Claim of Defendant, Armena B. Gemmell.	20
FIDELITY UNION TRUST COMPANY, a corporation of New Jersey, as Executor of the Last Will and Testament of Robert Gemmell, deceased, and ARMENA B. GEMMELL, Defendants.			

Statement of claim of defendant, Armena B. Gemmell, to the fund in dispute in the above entitled cause.

1. On October 1, 1924, said Robert Gemmell was an officer or employee of the complainant, The Prudential Insurance Company of America, and continued as such officer or employee until his death, which occurred on December 20, 1926. 30

2. On October 1, 1924, the complainant, The Prudential Insurance Company of America, issued what is known as a group insurance policy, a copy of which is attached to the bill of complaint, and to which for greater certainty this defendant begs leave to refer.

3. Under said group insurance policy two cer- 40

*Statement of Claim of Defendant Armena B.
Gemmell.*

tificates #15 and #15A for \$5,000. each, one dated October 1, 1924 and the other December 10, 1925, were issued to said Robert Gemmell, no beneficiary being named in said certificates.

10 4. On June 16, 1926, said Robert Gemmell caused said certificates to be made payable, upon his death, to his wife, the defendant, Armena B. Gemmell; the payment of which being subject to the terms of said group insurance policy and said certificates issued thereunder.

By the terms of said group insurance policy, it was, among other things, provided:

20 "Disability Before Age 60: Waiver of Premiums - Payment of Insurance.

20 If any person insured under this Policy shall become totally and permanently disabled, either physically or mentally, from any cause whatsoever, to such an extent that he (or she) is rendered wholly, continuously and permanently unable to engage in any occupation or perform any work for any kind of compensation of financial value during the remainder of his (or her) lifetime, and if such disability shall occur at any time after the payment of the first premium on account of such insurance, while this Policy is in full force and effect and the said person is less than sixty years of age, the Company, upon receipt of due proof of such disability, will grant the following benefits:

30

40 (1) Waiver of Premiums. - The Company will, during successive renewal periods, waive the payment of that portion of each premium under this Policy applicable to the insurance on the life of said disabled person the due date of which, as specified on the first page hereof, shall occur after receipt by the company of said proof of such disability.

*Statement of Claim of Defendant Armena B.
Gemmell.*

(2) Payment of Insurance. - The Company will, in addition to waiving the premiums, pay to said person at its Home Office the amount insured on his (or her) life, as the Employer may request, either in one sum six months after the Company shall have received such proof, or in sixty monthly instalments during five years, each instalment to be of the amount of \$17.95 per \$1,000 of insurance payable. The first of such monthly instalments shall be paid immediately upon receipt by the Company of due proof of such disability and subsequent monthly instalments shall be paid on the first day of each month thereafter. 10

The total amount of insurance under this Policy on the life of the said person at any time after one or more of such instalments have been paid shall not exceed the commuted value of such of said instalments as are not then due computed at the rate of three and one-half per cent. per annum compound interest. 20

Any insurance remaining at the death of the said person shall be paid to the Beneficiary or Beneficiaries of said person."

6. Each certificate issued to the said Robert Gemmell under said policy contained substantially the provisions set forth in paragraph 5 hereof, but the said provisions in said certificates are not complete, and this defendant relies on the provisions and terms of the policy above quoted. 30

7. On December 16, 1926, said Robert Gemmell, being very ill, and under the age of sixty years, while said policy of insurance was then in full force and effect, executed an application for disability benefits, a true copy whereof it is believed is attached to the bill of complaint and marked Schedule C, but for greater certainty this defend- 40

Statement of Claim of Defendant Armena B. Gemmell.

ant begs leave to refer to the original thereof. She denies that said paper was, or amounted to an application in writing for the payment to the said Robert Gemmell in one sum, of the entire amount of insurance evidenced by certificates #15 and #15A. She also denies that due proof to the satisfaction of the complainant, The Prudential Insurance Company of America, was made to such company of such total and permanent disability of the said Robert Gemmell, and that his application was approved by the Prudential Insurance Company in the form and manner required by said company, or in any other form, and she says that if a check was drawn by said company to the order of the said Robert Gemmell for the sum of \$10,074.80, the said check was never paid to him; no authority existed for the drawing thereof, and no rights had been acquired as against the rights of the said Armena B. Gemmell as beneficiary under said certificates by any action or steps taken as claimed by the said Executor of the last will and testament of Robert Gemmell.

8. This defendant is ignorant as to when said check was drawn, but she says that it was, for reasons aforesaid, totally ineffective.

9. By reason of the premises, the rights of the said Armena B. Gemmell to said sum of \$10,074.80, by reason of her being named as beneficiary, remain valid and subsisting and the Fidelity Union Trust Company, as Executor under the last will and testament of Robert Gemmell, has no right whatever to said sum or any part thereof.

MCCARTER & ENGLISH,
Solicitors of Defendant,
Armena B. Gemmell.

40

Interlocutory Decree.

Filed June 29, 1927.

IN CHANCERY OF NEW JERSEY.

Between

THE PRUDENTIAL INSURANCE
COMPANY OF AMERICA, a corporation,

10

Complainant,

and

On Bill, Etc.

FIDELITY UNION TRUST COMPANY, a corporation of New Jersey, as Executor of the Last Will and Testament of Robert Gemmell, deceased, and ARMENA B. GEMMELL,

Interlocutory Decree.

20

Defendants.

This cause coming on to be heard in the presence of Messrs. Lindabury, Depue and Faulks, of counsel with the Complainant, and

AND IT APPEARING that process of subpoena was duly issued out of this Court returnable on the 16th day of May, 1927, and was duly served on both of the defendants, and that both of said defendants have failed to plead to the said Bill of Complaint but have filed statements of their respective claims pursuant to Rule 69 of this Court,

30

AND IT APPEARING that the Complainant held the funds in its bill mentioned for the true owner without having or claiming any right or interest therein and that the said funds have been deposited in this Court to be delivered over to whomsoever may be entitled thereto, and that the said Bill of Inter-

40

Interlocutory Decree.

pleader is properly brought by said Complainant and that said Complainant is entitled to the relief prayed for by it,

IT IS, THEREUPON, on this 27th day of June, 1927, ORDERED, ADJUDGED and DECREED that the said Bill of Interpleader is properly brought by the
10 Complainant in this cause and that said Complainant is entitled to the relief prayed for by it,

AND IT IS FURTHER ORDERED, ADJUDGED and DECREED that said Complainant be and it is hereby dismissed from the further prosecution of this suit with its costs to be taxed, to be paid out of said fund so deposited in this Court as aforesaid, and that said Complainant be and it is hereby released, acquitted and discharged from all claims by, or
20 liability to the defendants in this suit, or either of them, for, upon or by reason of said fund,

AND IT IS FURTHER ORDERED, ADJUDGED and DECREED that the said defendants, Fidelity Union Trust Company, Executor of the last will and testament of Robert Gemmell, Deceased, and Armena B. Gemmell interplead, settle and adjust their several claims, demands and matters in controversy in this suit as between themselves.

30 E. R. WALKER,
C.

Respectfully advised
BAYARD STOCKTON, A. M.

Order of Reference.

Filed September 26, 1927.

IN CHANCERY OF NEW JERSEY.

Between THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, a corporation, <p style="text-align: right;">Complainant,</p> <p style="text-align: center;">and</p> FIDELITY UNION TRUST COMPANY, a corporation of New Jersey, as Executor of the Last Will and Testament of Robert Gemmell, deceased, and ARMENA B. GEMMELL, <p style="text-align: right;">Defendants.</p>	{ 	On Bill of Interpleader. Order of Reference.	10 20
---	---	---	--

An interlocutory decree having been entered in this suit on the 27th day of June, 1927, in which it was ordered that the defendants Fidelity Union Trust Company and Armena B. Gemmell interplead, settle and adjust their several claims, demands and matters in controversy in this suit as between themselves, and application being made to the Court, and solicitors for both the defendants consenting,

It is, on this 26th day of September, 1927, on motion of McCarter & English, Solicitors for and of counsel with the Defendant, Armena B. Gemmell, ORDERED that the above cause be and it hereby is referred to the Honorable Alonzo Church one of the Vice Chancellors of this Court, to hear the

Order of Reference.

same for the Chancellor, and to report to him what order or decree should be made therein.

E. R. WALKER,
C.

10 We consent to the making and entry of the foregoing Order.

MCCARTER & ENGLISH,
Solicitors for Defendant,
Armena B. Gemmell.

HOOD, LAFFERTY & CAMPBELL,
Solicitors for Defendant,
Fidelity Union Trust Company.

20

30

40

Order of Designation.

Filed October 7, 1927.

IN CHANCERY OF NEW JERSEY.

Between

THE PRUDENTIAL INSURANCE
COMPANY OF AMERICA, a corporation,

Complainant,

and

FIDELITY UNION TRUST COMPANY, a corporation of New Jersey, as Executor of the Last Will and Testament of Robert Gemmell, deceased, and ARMENA B. GEMMELL,

Defendants.

10

On Bill of Interpleader.

Designation.

20

This matter having been opened to the court by Messrs. McCarter & English, solicitors of the defendant Armena B. Gemmell, and it appearing that an interlocutory decree has been entered in this suit on the 27th day of June, 1927, in which it was ordered that the defendants Fidelity Union Trust Company and Armena B. Gemmell interplead, settle and adjust their several claims, demands and matters in controversy in this suit as between themselves, and it appearing that Hood, Lafferty & Campbell, solicitors for the defendant Fidelity Union Trust Company have consented hereto.

30

It is on this 7 day of September, 1927, ORDERED that the 17th day of November, 1927, at 10 o'clock in the forenoon at Chancery Chambers, Industrial

40

Order of Designation.

Office Building in the City of Newark, be designated as the time and place for the hearing of the above entitled cause.

ALONZO CHURCH,
V. C.

We consent to the foregoing designation.

10

MCCARTER & ENGLISH,
Solicitors for Defendant,
Armena B. Gemmell.

HOOD, LAFFERTY & CAMPBELL,
Solicitors for Defendant,
Fidelity Union Trust Co.

20

30

40

Testimony.

IN CHANCERY OF NEW JERSEY.

November 17, 1927.

Between

THE PRUDENTIAL INSURANCE
COMPANY OF AMERICA, a corporation,

10

Complainant,

and

FIDELITY UNION TRUST COMPANY, a corporation of New Jersey, as Executor of the Last Will and Testament of Robert Gemmell, deceased, and ARMENA B. GEMMELL,

20

Defendants.

TRANSCRIPT of shorthand notes of testimony taken in the above entitled cause before his Honor, ALONZO CHURCH, in the Chancery Chambers, Newark, New Jersey, in the presence of MCCARTER & ENGLISH (by ROBERT MCCARTER), for the Prudential Insurance Company; HOOD, LAFFERTY & CAMPBELL (by MR. LAFFERTY) for the Fidelity Union Trust Company.

30

Mr. Lafferty: If the Court please, do you want me to make an outline of the case?

The Court: Yes, please.

Mr. Lafferty: I suppose I have the laboring oar, like enough, because the policies were made pay-

40

Testimony.

able to Mr. Gemmell. Mr. Robert Gemmell was assistant secretary of the Prudential Insurance Company. The Prudential Insurance Company issued what is known as a group insurance policy, insuring the lives of their officers and employees up to a certain amount. There was only the one policy and certificates were issued to the various persons insured. Two certificates were issued to Mr. Gemmell for five thousand dollars each.

The policy provided that in the event of the total disability of an assured, before he came to the age of sixty years, that the company on presentation of proof, to the satisfaction of that fact, would either pay the face value—

(Mr. McCarter hands papers to Court.)

Mr. Lafferty: Yes; I will read it. It is on the third page: "If any person insured under this policy shall become totally and permanently disabled, either physically or mentally or any cause whatsoever, to such an extent that he (or she) is rendered wholly, continuously and permanently unable to engage in any occupation or perform any work for any kind of compensation of financial value during the remainder of his (or her) lifetime and if such disability shall occur at any time after the payment of the first premium on account of such insurance, while this policy is in full force and effect and the said person is less than sixty years of age, the company, upon receipt of due proof of such disability, will grant the following benefits—"

Then, one provision was the waiver of premiums.

"Two. The company will in addition to waiving the premiums, pay to the said person at its home office the amount insured on his (or her) life, as the employer may request, either in one sum six months after the company shall have received such

Testimony.

proof, or in sixty monthly installments during five years, each installment to be of the amount of \$17.95 per one thousand dollars of insurance payable. The first of such monthly installments shall be paid immediately upon receipt by the company of due proof of such disability and subsequent monthly installments will be paid on the first day of each month thereafter."

What happened was that Mr. Gemmell became totally disabled about April 1, 1926, and he made application to the insurance company for their benefit under this policy. His application was made—not dated—but was made on or about December 16, 1926. The doctor's certificate is dated December 16, 1926. The company approved his application on the 17th of December. The check was drawn to his order for \$10,074.80, the value of his certificates under this policy.

The checks, while issued on December 17th, are actually dated December 20. That was some internal arrangement they had in the company. And Mr. Gemmell died between the dates—Mr. Gemmell died, I think, on the 20th. Anyhow, it was before the checks were due.

The Fidelity Union Trust Company is executor under his will. These policies were made payable to Mrs. Gemmell, but in the policy there was the right to change the beneficiary.

Those are the facts.

Mr. McCarter: Perhaps I had better state it from our standpoint.

I represent Mrs. Gemmell. The suit is an interpleader by the Prudential, the maker of the two policies, or, rather, the two certificates under an omnibus policy of group insurance.

Testimony.

The two certificates aggregating, as Mr. Lafferty has said, \$10,000.

Mr. Gemmell was an officer, assistant secretary of the Prudential and was insured under this group plan. Among the provisions in the policy was that the insured could change the beneficiary.

10 The two certificates were issued without any name of the beneficiary, but later, pursuant to the terms of the policy, Mrs. Gemmell was made the beneficiary, so that she became by that act entitled to the proceeds of those two policies.

Her husband was ill and there was a provision, that is before your Honor in the policy, for a person who is totally disabled getting a disability payment and, I think, the terms of that document are rather important. That is the reason I handed it
20 up to your Honor. I have another one—and I will therefore venture to read it: "Provisions as to total and permanent disability. Disability before age sixty: waiver of premiums—payment of insurance. If any person insured under this policy shall become totally and permanently disabled, either physically or mentally or any cause whatsoever, to such an extent that he (or she) is rendered wholly, continuously and permanently unable
30 to engage in any occupation or perform any work for any kind of compensation of financial value during the remainder of his (or her) lifetime, and if such disability shall occur at any time after the payment of the first premium on account of such insurance, while its policy is in full force and effect and the said person is less than sixty years of age, the company, upon receipt of due proof of such disability, will grant the following: 1. Remit the premium and make a payment in two
40 forms—alternative of two forms, either of monthly

Testimony.

payments whose aggregate will equal the amount of the policy, or a lump sum payable six months after the receipt of proof of disability."

That, in the rough, is the provisions that appear germane.

Now, as counsel has stated, on a day that is not noted on the proof of disability or claim of disability, but which, I think, we all can agree was the
10 16th of December, Mr. Gemmell was home ill, and an officer of the company went down to his house in Newark and a document purporting to be his claim for disability was then and there signed by him and taken back to the office. I think he was in bed at the time. On that day the doctor's certificate of disability was filled, Dr. Patton, the medical director of the institution, and in the
20 course of his statement as to this man's total disability, he made the remark—although he had not been the attending physician of Mr. Gemmell—he made the remark "Do you consider the patient totally and permanently disabled so that he or she will be for all time prevented from engaging in any kind of work? Answer: Yes. If so, on what date did you first conclude that the patient would never again be able to work? About nine months ago."
30 But, mind you, this paper, as well as the claim for disability, were neither of them made out and neither of them presented to the company until the 16th of December. No return of the policy or shall I say certificates? It would be an omnibus policy. The certificates which Mrs. Gemmell had in her possession are still in her possession and they were not returned. I think the requirement is—in other words, you cannot be insured and have a disability benefit at the same time. They are in-
40 consistent.

Testimony.

10 On the 17th, which was Friday, a check was drawn by the Prudential, which will be shown you, or a copy—we don't care for the originals—for \$10,000 with some increase to the order of Robert Gemmell, that check, however, being actually physically drawn on the 17th, Friday, was dated the 20th, a matter of convenience. I don't know why, but it was dated the 20th and was retained by the insurance company, nothing more done, it being, I imagine, the expectation that on Monday, which was the 20th, to deliver the check to Mr. Gemmell, and whatever else was to be done would then be completed and the whole thing would be as the French say *un fait accompli*, but on the morning of the 20th, Mr. Gemmell died.

The Court: The early morning of the 20th?

20 Mr. McCarter: The early morning of the 20th. The check is still in the office of the Prudential the day the check is dated. I think he died about eight o'clock, before business hours. Of course, he never had the check; the check had not left—it was in the custody of the Prudential.

30 Well, a will was found and proved, by which the Fidelity is made executor, and Mrs. Gemmell simply given a small sum of money, \$20,000, as the residue of this estate is left to two Scotch sisters living in Scotland—Bonny Scotland—and the Prudential Company, under these circumstances, being in doubt as to their rights and liabilities, filed this bill of interpleader, in which they set out these following facts, upon which there is no dispute at all. It is stated that the Fidelity Company considered that that was an accomplished fact and it was money belonging to his executors and should go to Scotland. Mrs. Gemmell, on the
40 other hand, said, "Nay, Nay," said that that was

Testimony.

not an accomplished fact; the check was never delivered; it was not drawn until the day he died.

The Court: Well, it probably was not drawn until after he died.

Mr. McCarter: It probably was not—physically drawn? It was physically drawn, I believe they say, on the 17th. 10

The Court: Oh, I see.

Mr. McCarter: It was postdated, postdated and therefore she says it was not an accomplished fact. But, in addition to that, she also says that part of the things that had to be, under the rules and regulations of the company, accomplished, had been not accomplished, namely, the return of the policy, certificates. They are in her possession.

Moreover, if your Honor will again recur to that provision about total disability— 20

The Court: Upon receipt of due proof of such disability.

Mr. McCarter: Yes; upon receipt of due proof of such disability.

Now, we will assume momentarily for the purpose of argument that the due proof was sent in when this claim of his, plus the doctor's certificate on the 16th, were presented. You observe, upon the receipt of due proof they will grant the following benefits, first, remit the premium. That we are not concerned with. Then, one of two things, "The company will in addition to waiving the premiums, pay to said person at its home office the amount insured on his (or her) life, as the employer may request." Of course, this is a curious situation in that the employer and the insurance people are the same people, but I take it for the purpose of just having that in our mind and then waiving it, for it has nothing to do with it because, 40

Testimony.

apparently, we will assume that instead of Mr. Gemmell working for the Prudential he worked for the Public Service, and the group insurance, then, apparently the scheme is that the Public Service, the employer, shall designate which one of the two methods of commutation shall be adopted. Now, 10
 “the company will in addition to waiving the premiums, pay to said person at its home office the amount insured on his (or her) life, as the employer may request, either in one sum six months after the company shall have received such proof.” Not six months, your Honor, after total disability is ex post facto believed to have occurred, but the commuted payment of one sum instead of the monthly payment of installments for a sufficiently long period to exhaust the amount of the insurance, is only payable six months after the receipt of such proof.” Any insurance remaining at the death of the said person shall be paid to the beneficiary or beneficiaries of such person. That is also the provision. So that, in brief, to sum up, the claim of Mrs. Gemmell is she is the beneficiary in this policy, she is the person entitled to it unless her right has legally been taken away. 20

There was undoubtedly an expectation of changing the situation and adopting the terms that policies provide could be adopted of a payment of a disability certificate. The possession had started on its way. There had, if you will, been an act on the part of the company of acceptance of the proof of claim, which was only presented on the 16th, and the doctor's disability certificate was received the same day, so that the company never had any proof before, nor any claim for disability until the 16th of December, and whatever formalities transpired after those two documents had been 30
 40

Testimony.

received will be told you by the gentleman who is here from the company, on the 17th we will assume that they concluded to accept this proof and, as I understand what runs through their mind—although I think this better be proven—they issued a check immediately—but, as I read the policy, it could not be issued until six months after receipt of proof, because the doctor, medical doctor of the company, friendly to Mr. Gemmell antedated this disability way back last April and the company rather, perhaps, insuring the strict phraseology of the policy, undertook to say that therefore they had a right to pay six months from April, see? Instead of six months from December. 10

The Court: Yes.

Mr. McCarter: So they concluded to draw a check, and they did draw a check, owing to their business methods, this formality occurring on Friday, they dated that check Monday the 20th and held it and nothing more was done by anybody, as I understand it, and on Monday morning Mr. Gemmell died. 20

Now, we say that it is not an accomplished fact; the check was never delivered or anything else—if everything else was right; the policies were never surrendered as they ought to have been; and an undelivered check is nothing but that, under the negotiable instruments act, and under the law. I draw a check to the order of your Honor and keep it in my pocketbook or leave it with my secretary, it has no effect. It has to be handed to you before it has any vitality whatever, and, therefore, the estate has no right to this money whatever and your Honor, on this interpleader should adjudge that the money belongs to Mrs. Gemmell. Now, that is our situation. Fortunately, there is no 30
 40

William A. Dennis—Direct.

room for much dispute and each is trying to treat the interesting and novel question, perhaps, in a remarkable way, and we won't stand on any technicalities, as I told Mr. Lafferty.

Mr. Lafferty: I understand from Mr. McCarter it is admitted without formal proof—(interrupted)

10 The Court: Don't you think you better put your appearances on record?

Mr. Lafferty: He has it.

The Court: Oh.

Mr. Lafferty: He has it. It is admitted without formal proof that the Fidelity is the executor of the will of Mr. Gemmell?

(Mr. McCarter nods assent.)

Mr. Lafferty: Now, I will call Mr. Dennis.

20

WILLIAM A. DENNIS, sworn for the defendant Fidelity Trust Company.

Direct-examination by Mr. Lafferty:

Q. Where do you reside, Mr. Dennis? A. I reside in Maplewood, 13 Oakland Road.

Q. What is your business? A. I am supervisor of claims for the Prudential.

30 Q. Insurance Company? A. Insurance Company.

Q. Were you acquainted with Robert Gemmel? A. I was.

Q. Did you see him at any time shortly before his death? A. Yes; I did.

Q. Where? A. At his home.

Q. Did you have any particular reason for seeing him at that time? A. Yes. He telephoned

40

William A. Dennis—Direct.

me on the 15th of December saying that he had decided to take his disability insurance and asked me if I would come up and fix the papers for him, or assist him in completing the papers.

Q. And, pursuant to that telephone call you called at his home? A. Yes.

Q. Did Mr. Gemmell, at that time, sign any paper? A. Yes. 10

Q. Have you that paper? A. Yes. Mr. Hyatt, I think.

(Paper produced.)

Q. I show you a paper headed, "Ordinary Claim Department, the Prudential Insurance Company of America, Home office in Newark, New Jersey, application for disability benefit" and ask you if that is the paper signed by Mr. Gemmell? A. Yes; it is. 20

Q. I notice the paper is not dated. Do you know when it was signed? A. It was signed on the 16th of December.

Mr. McCarter: What year?

Witness: 1926.

Mr. Lafferty: I offer the paper in evidence.

(Paper marked Exhibit D-1.)

30

Q. Let me have the next paper, the doctor's certificate.

(Paper produced.)

Q. I show you a paper dated December 16, 1926, and signed by J. Allen Patton, M. D. and ask you if you have ever seen that paper before? A. Yes, sir.

Q. When did you first see it? A. I saw it on December 16, '26. 40

William A. Dennis—Direct.

Mr. Lafferty: I offer this in evidence, Mr. McCarter.

(Paper marked Exhibit D-2.)

Q. I show you a paper dated December 17, 1926, and, I think, signed by you and it mentions policy 1690, certificate 15. Is that your signature, Mr. Dennis? A. Yes, sir.

Q. And what is that, Mr. Dennis? A. That is a home office form—an office form which is used to complete—

Mr. McCarter: I beg pardon. A little louder.

Witness: Oh. This is a home office form used for record purposes and on which is written the particulars of the policy and claim and from which the approval is made.

Q. Then you approved the payment in one sum of certificate 15-A under policy 1690 to Mr. Gemmell? A. Yes.

The Court: When is it dated?

Mr. Lafferty: December 17, 1926.

The Court: This one?

Mr. Lafferty: Yes. They are both the same date.

The Court: All right.

Witness: Yes; I approved it.

Q. You approved it? A. (No answer.)

Mr. Lafferty: I offer it.

Mr. McCarter: May I see them?

Mr. Lafferty: Yes. They are both alike.

Mr. McCarter: Is the other exactly like this?

Mr. Lafferty: I suppose so.

William A. Dennis—Direct.

Mr. McCarter: Well, I won't detain you. I would like to look at them, after you have them marked.

The Court: No objection?

Mr. McCarter: No.

The Court: They will be admitted.

(The paper is marked Exhibit D-3.) 10

Q. I also show you another paper dated December 17 and signed by you and it refers to policy, general policy 1690, certificate 15-A, issued to Robert Gemmell. Was that approved by you, Mr. Dennis? A. It was.

Q. And that is part of the company record? A. It is.

The Court: Well, what is that about?

Mr. Lafferty: That is the second policy. There are two certificates. 20

The Court: Oh, there are two policies. I thought there was one policy of \$10,000.

Mr. Lafferty: There is a master policy covering all insurance issued, and the certificates.

Witness: It is for \$5000 each.

The Court: Let that be marked, if Mr. McCarter has no objection. 30

Mr. McCarter: No objection.

(Paper marked Exhibit D-4.)

Q. I show you a check cancelled—the signatures cancelled, drawn by the Prudential Insurance Company to the order of Robert Gemmell, and dated December 20, 1926, and is said to be in full of claims under policy number D-1690, C-15-A, G-1690, C-15, and ask you if you have ever seen that check before. A. I have. 40

William A. Dennis—Direct.

Q. I call your attention to the fact that the check is dated December 20. Do you know anything about that? Was that the date on which the check was actually issued by the company? A. No. It was drawn on the 17th of December.

10 The Court: How do you know that?

Witness: Sir?

The Court: How do you know that?

Witness: Why, because the claim was approved on that day and the check is drawn the same day it is approved.

The Court: Did you see it drawn on the 17th?

Witness: I saw the check on the 17th, yes.

20 The Court: You saw the check already made out and drawn on the 17th?

Witness: Yes, sir.

Mr. McCarter: The check was delivered to you to be taken to Mr. Gemmell?

Witness: No, no.

Mr. McCarter: Oh, I thought it was.

30 Witness: These checks—the check is drawn in my department and then it has to go to the auditors, cashier to be signed and be audited. Then it comes back.

Q. I see.

The Court: What I want to know is, did you see the check all signed up, according to your rules, so that it could be delivered and cashed on the 17th, or did you merely see it signed by—

40 Witness: No; I didn't see it after it was signed, because it takes some time for the

William A. Dennis—Cross.

check to go through the various departments, and it didn't get back to my department until the next morning, Saturday.

Q. That would be the 18th, then? A. The 18th, yes.

The Court: When did you see it signed and ready for delivery and cashing? 10

Witness: I saw it on the 18th.

Mr. Lafferty: I will offer that check in evidence.

(Check marked Exhibit D-5.)

Mr. Lafferty: I think that is all.

Cross-examination by Mr. McCarter:

Q. Mr. Dennis, the disability claim that was signed, as you say, by Mr. Gemmell, in your presence and which is marked Exhibit D-1, was that filled in before you got there? A. No, sir. 20

Q. In whose handwriting is the manuscript of the body of that instrument? A. It is in the handwriting of Mr. Gemmell.

Q. And was that all filled in that day? A. Yes, sir.

Q. In your presence? A. Yes, sir.

Q. After you came there? A. Yes, sir. 30

Q. Did you have a conversation with him? A. Yes, sir.

Q. He told you, did he not, that, in the event of this all going through, he expected to give the check to his wife? A. He did.

Mr. Lafferty: If the Court please, it doesn't make any difference, but I suppose there is no jury here so,—(interrupted) 40

William A. Dennis—Cross.

Q. Well, did you take the blank, Exhibit D-1, namely the claim for disability, with you or had he one in his possession? A. I took it with me.

Q. You took it with you, and he was able then, in your presence that day to fill it out completely? A. Yes, with difficulty. He had—he was very weak.

10 Q. Yes. Was Dr. Patton with you? A. No.

Q. Now, I observe that Exhibit D-1 is undated and that the bottom of it in the left hand lower corner is a blank for certain signatures, manager or superintendant, is there not? A. Yes. That is in use when the form comes from one of our agents, but, inasmuch as I took care of it myself, why, it was not filled out.

20 The Court: Do the rules require that it be filled out in all cases?

Witness: No; not if a home office man completes the transaction.

Q. Well, what record did the company have prior to the document, Exhibit D-3, which is the paper they kept in the office, that the disability claim Exhibit D-1 was in due form and correct? Anything beyond your say so? A. Well, the certificate of Dr. Patton and—

30 Q. Oh, please, answer my question. The certificate of Dr. Patton has nothing to do, as I understand it, with the claim of Mr. Gemmell. Now, I am asking you, previous to the signing of this ordinary disability claim paper, which has been marked Exhibit D-3, what evidence did the company have that the disability claim as such was in proper form and correct. A. We had none.

40 Q. I suppose with a company of your size you

William A. Dennis—Cross.

have numbers of these things, don't you? A. Yes, sir.

Q. A great many? A. Yes.

Q. Yes. Now, a man cannot be insured and be entitled to a disability certificate at the same time, can he? A. I think he can.

The Court: What Mr. McCarter means, under the same policy. 10

Q. Under the same policy. A. What is your question, again, please?

Q. If I have a policy of \$5000, or two policies such as these gentlemen have—scratch that all out, please. As I understand the mechanism of this kind of insurance, there is a master policy? A. Yes.

Q. Covering the entire group? A. Yes. 20

Q. And each one of these insured is given what is known as a certificate? A. Yes, sir.

Q. Yes. Now, I show you two documents. Are these the certificates, 15 and 15-A, that were issued to Mr. Gemmell— A. They are.

Q. —under this master policy? A. They are, yes.

Q. And are the two small papers that are attached to the designation by Mr. Gemmell of his wife as beneficiary? A. They are. 30

Q. Yes. So that she was, under those policies, or those certificates, the beneficiary entitled to the money? A. Yes, sir.

Q. Now, before the disability certificate becomes effective and complete, do you not require the return of the certificates? A. Yes; we require them if they are in existence.

Mr. Lafferty: If the Court please, I think that this is a matter of law, whether they do 40

William A. Dennis—Cross.

or whether they don't. If they pay them, it doesn't make any difference whether they are outstanding.

The Court: Well, I am not so sure about that. I think, in the first place, it is a question of fact.

10 Mr. McCarter: Yes.

The Court: Do they require it or don't they?

Witness: We do require it.

The Court: Now, he says they do require it.

Mr. McCarter: Yes.

The Court: Now, it comes to the question of law whether it makes any difference.

20 Mr. McCarter: Yes. That is exactly it. I offer it.

(Paper marked Exhibit A-1.)

Q. Now, in fact, they were not returned, were they? A. No.

Q. And are still in the possession of Mrs. Gemmell or her counsel?

The Court: Well, he doesn't know that.

Witness: I don't know.

30 Q. Well, you recognize them as—(interrupted)
A. I do. And they were not returned.

Q. No. They were not returned. If an employee is totally disabled and in receipt of a disability benefit, does he not, *ipso facto* cease to be an employee and cease to receive a salary? A. No. He is still an employee.

Q. Does he receive a salary? A. He—yes; he receives a salary.

40 The Court: Plus this disability?

William A. Dennis—Cross.

Witness: Yes, sir.

Q. After the disability. A. For a certain length of time, under what we call disability, he goes on disability; the salary is continued, depending on his length of service, for a period of time.

Q. Is that provided in the policy? A. It has nothing to do with the policy. 10

Q. It has nothing to do with the policy at all? A. No, sir.

Mr. Lafferty: The assured pays for the policy. That is his right under it, the same as would be my right if I took the policy.

Mr. McCarter: Yes.

Q. But you say—on what rule or regulation is it that after an employee of the Prudential has received a disability pension—(interrupted) A. You mean, from his policy—from his certificate? 20

Q. What on earth would I be talking about if I were not talking about that? What is the use of raising all these questions? On what principle is it that he still receives a salary? A. Well, that is a concession, or a gift of the company. He—depending on the length of service an employee still gets his salary for a certain period of time, depending on how long he has been with the company. 30

Q. Yes. So that the fact—it is a fact, isn't it, that Mr. Gemmell received a salary for some time after the 17th of December, 1926?

The Court: He couldn't have received it—

Witness: He had—

The Court: Except for three days because he died on the 20th. 40

William A. Dennis—Cross.

Witness: He received his salary during the time he was ill.

Q. Down to when? A. Well, it would be paid up to the date of his death; and I understand it was paid for three months after he died.

10 Q. Yes. All right. At any rate, it was paid up to the date of his death. A. Yes, sir.

Q. Yes. All right. Now, on the 17th of December, 1926, what official position did you hold in the company? A. Supervisor of claims.

Q. And as such were you the person who could and did approve or disapprove of claims of this character? A. Yes.

Q. And you did approve of each of the two claims on the 17th? A. I did.

20 Q. And this Exhibit D-3 is the evidence thereof. Is that right? A. Yes, sir.

Q. In whose handwriting on this Exhibit D-3 are the words at the bottom, "Wishes full amount of group insurance in cash." A. My handwriting.

Q. Now, you say that you saw that check—(have you got the check, Mr. Lafferty?)—number 193,926 on Saturday morning—

30 The Court: No, on the 18th—that would be Saturday.

Witness: That would be Saturday morning.

Q. That was the 18th, Saturday morning the 18th? A. Yes.

40 Q. Who handed it to you? A. I don't remember—nobody handed it to me—I don't remember who handed it to me. It came back in the usual way to the department, after it had been through—

William A. Dennis—Cross.

Q. Yes. A. —through the office routine.

Q. Was the check, at that time, except for the—well, yes, I guess the whole thing—was the check, at that time, in the condition that it is now, on the 18th? A. No; because it has a stamp on here, check returned to the company and voided.

The Court: Well, aside from that. 10

Witness: Aside from that, yes, it was all—

Q. Signed up. Where was the physical custody of the check between Saturday morning, when you saw it, and Monday morning? A. It was in my department.

Q. In the safe? A. No. We have no safe. It was kept with the papers, with the thought of delivering it. 20

Q. On Monday? A. On Monday, yes.

Q. Under your system of bookkeeping or accountancy when would the creditor's charge, or whatever you call it, of that check be made, on the 20th? A. We have a system of dating our checks one day ahead.

Q. Please answer my question. As of what date on your records? Leave out everything else now.

A. On the 20th. 30

Q. On the 20th? A. Yes.

Q. It would be entered up as paid on the 20th? A. Yes, sir.

Q. Yes. Now, you called my attention, Mr. Dennis, to some red ink typewriting on this document, on this check, the following, "Check returned to company and voided," check two hundred and four thousand—no. Check for twenty thousand," what is that, check for— A. "Check 204,861. issued in lieu." 40

William A. Dennis—Cross.

Q. Yes, "issued in lieu to the order of the clerk in chancery for the same amount as authorized by Mr. Hyatt, associate solicitor general, June 16, 1927." The check had, in fact, never left the custody of the company, had it? A. No, sir.

10 Q. No. So that insofar as that language there occurs, "Check returned to the company," that is rather a misstatement of the situation. A. Well, that is a stamp—

Q. It never left your department at all. A. It is a stamp we use.

Q. And it remained, this check remained just as it is without that typewritten red statement on it until June 16? A. Yes, sir.

20 Q. When it was cancelled, as you say there, and a new check to the Court of Chancery—to the clerk in the Court of Chancery issued? A. Yes, sir.

Q. In furtherance of this suit? A. Yes, sir.

Q. I think you said that it was your intention to deliver that check to Mr. Gemmell on the 20th? A. Yes, sir.

Q. Did you expect to take it yourself? A. I did.

Q. You have been very friendly to him? A. Yes, sir.

30 Q. Yes. Now, you supposed, did you not, Mr. Dennis, that the certificates with the beneficiary designation, A-1, had been returned to the company? A. Yes. He told me they had.

Q. He told you they had? A. Yes. He said he had mailed them.

Q. I beg your pardon? Yes. A. He said he had mailed them.

Q. Yes. That turned out to have been an error? A. Yes.

40 Mr. McCarter: I think that is all.

William A. Dennis—Cross.

The Court: Now, Mr. Dennis, whose duty is it to deliver checks in matters of this kind? Is there any one specific person whose duty it is to go and take these checks?

Witness: No.

The Court: Well, is there anybody whose 10 duty it is to mail these checks?

Witness: Yes, sir.

The Court: Well, who is the person that is supposed to mail these checks?

Witness: Well, they are mailed in our mailing department.

The Court: Is the mailing department a separate department from your department?

Witness: Yes, sir. 20

The Court: Now, in whose hand was this check when you last saw it signed and ready, in whose hand was it?

Witness: Well, I am not sure. It was—

The Court: You said, a moment ago, it was in the papers.

Witness: Well, the papers would be retained by one of the clerks or the manager of the department— 30

The Court: That is, the last time you saw it, it was in your department?

Witness: In the department, yes.

The Court: And it had not gone to the mailing department?

Witness: It had not gone to the mailing department.

The Court: That is all. 40

William A. Dennis—Redirect.

Redirect-examination by Mr. Lafferty:

Q. Now, Mr. Dennis, did you see the check on December 20? A. No. We got word—

Q. Didn't you—oh, go ahead. A. We got word early that Mr. Gemmell had died, and I didn't see the check after that.

10 Q. Oh, I see. The reason I asked, I thought that you had taken the check up there and found that he was dead. A. No.

Q. Now, Mr. McCarter asked you whether it was not necessary, before a claim is paid on an insurance policy that the policy, or the certificate in this case, be returned, and you said yes. I will ask you to look at the certificate, the photostatic copy of it, and show me where you find anything 20 in there requiring the return of those policies. It says it will pay five thousand dollars upon proof of the death. A. Well—

The Court: It doesn't say so.

Mr. McCarter: There is nothing in there about the disability at all.

Mr. Lafferty: Nothing on there?

The Court: That is, in the policy—

30 Mr. Lafferty: Oh, yes there is.

Mr. McCarter: In the certificate?

Mr. Lafferty: Oh, yes.

Witness: Oh, yes, yes; that is the certificate.

Mr. McCarter: Oh, yes, I am mistaken.

The Court: In the certificate, then, it does not say that these things have to be returned.

Mr. Lafferty: Not at all.

40 The Court: All right.

William A. Dennis—Redirect.

Q. Now, if I understand, Mr. Dennis, you are the superintendent of the claim department; is that right—supervisor? A. Supervisor of claims.

Q. Supervisor of the claim department? A. Yes, sir.

Q. And does that mean that all claims made against the company come to your department? A. 10 Yes.

Q. Claims under policies— A. —come to our department—

Q. Come to your department, and you are the head of that department? A. Well, Mr. Guest, the assistant secretary, is my superior.

Q. I see. A. And my position is next, supervisor.

Q. You are supervisor. Then, when you made out—or, when Mr. Gemmell made out his applica- 20 tion in your presence, there was nothing for you to do in studying the situation. You knew whether it was to be approved or not, if the medical department—

Mr. McCarter: Well—

The Court: What does it say; who is to approve it?

Mr. Lafferty: It doesn't say. It says— 30 there is a bracket or block down in the corner "approved by" I think. "The papers examined by" papers examined by, that is the block and, if the papers had come through from an outside source, they would have been examined by someone.

Witness: One of the clerks first, yes, sir, an examiner, we call them.

Q. And then what? A. Then they are checked 40 by another examiner and then they are approved

William A. Dennis—Redirect.

by the manager or assistant manager, usually. If it is a questionable case, I act on it.

Q. And they are under you, those people? A. Yes, sir.

Q. So that, when this application was made by Mr. Gemmell, and you, in fact, supervised it, it required no further approval? A. No further approval.

Q. Now, Mr. McCarter called your attention to the exhibit—(you have it there, I think, Mr. McCarter)—where something was written on the bottom of it?

Mr. McCarter: Oh, yes. (Producing paper.)

Q. That is D-3 in which there is written in your hand, "wishes full amount of group insurance in cash," and initialed W.H.D., is it? A. W. A. D.

Q. And you said that that was written by you? A. Yes, sir.

Q. Now, will you tell the court why you wrote that?

Mr. McCarter: Is that material why he wrote it?

Mr. Lafferty: Yes, I think so.

A. Why, I wrote that so it would be—

Q. Were you requested that this money be paid in one—(interrupted) A. Yes. He requested it, and that showed how the claim was to go through, that he did not want it in installments, he wanted it in cash—in one lump sum.

Q. Then you wrote that? A. I wrote it after he expressed the wish for it in the lump sum.

Q. And that was the authorization to pay it in a lump sum? A. Yes.

William A. Dennis—Recross.

Q. And that authorization was made on December 17?

Mr. Lafferty: 1926. That is all.

The Court: Mr. McCarter, you asked the witness whether or not, under this policy, he could have the cash and also have disability. Do you want to press that? You did not finish, whether under one policy he could have those two things.

Mr. McCarter: Yes, I will conclude that, your Honor. I think I got diverted and forgot it. Your Honor is quite right.

Recross-examination by Mr. McCarter:

Q. The enjoyment of a disability payment, either by installments—or else in a commuted sum, is inconsistent with the existence and outstanding insurance policy, is it not, and that is the reason why you require the return of the policy? A. Well, we only require the return of the policy when the full amount is paid. That terminates the contract. If it is paid in installments, it comes in and we place an endorsement on it, and it goes back to the insured to keep as long as he lives, or until the amount is all used up.

Q. Yes, because, if he should happen to die before the expiration of the five years during which the installments are running, he will be entitled to collect the balance of the insurance, wouldn't he? A. Yes, sir.

Q. Yes. But, if the sum is not paid in full, the commuted—(interrupted) A. We require the surrender of the policy.

Q. Because it no longer has any occasion for existence. A. No.

William A. Dennis—Recross.

The Court: In other words, it is a fact that the payment of the entire corpus, we will call it, of the insurance is inconsistent

Mr. McCarter: That is it.

The Court: With the continuation of the policy?

10

Witness: Yes, sir.

Q. Yes. Now, Mr. Dennis, let me ask you another question. When was this document, Exhibit D-3 prepared? I don't mean approved by you, but prepared.

A. Well, it was prepared, I would say, the 16th, the day I brought the certificate back we prepared that immediately.

20 Q. Yes. You have no recollection except that would be your practice? A. Yes, sir.

Q. Well, now, I don't understand one thing, and I am only asking for information. A. Yes.

Q. "Examined W. Belford, 12/11/26." What does that mean? A. That is "12/17/26."

Q. Oh, I thought that was eleven. A. Is this where you mean?

(Counsel indicates on paper.)

30 A. Oh, yes, that is—that does say "December 11, 1926."

Q. That is an error, you think? A. Well, no, I may explain it this way, if you will allow me. We anticipated Mr. Gemmell's claim and, as we sometimes—we get notice of a disability claim before the papers come in, we get all prepared to write on it, and I think that preparation was made ahead of the papers coming in.

40

William A. Dennis—Recross.

The Court: Then, this paper was made out before the man said what he wanted to do?

Witness: Yes. I mean the policy numbers and records were all filled out on that form, not the final—(interrupted)

Q. Your abbreviation of your signature is W. A.D., I take it? A. Yes, sir.

Q. Who is "H"? A. Why, that is a man named Mr. Heller, who is assistant manager.

Q. Yes. A. He checked it, after some other clerk had—(interrupted)

Q. Yes. I notice this document has on it written the words "Certs." I suppose that means certificates—"to be obtained later. H 12/17/26." Do you know anything about that? A. "Certificate to be obtained later. H. 12/17/26." That is the day it was approved.

Q. I understand that, but do you know anything about that at all? A. Yes. When Mr. Heller checked this, of course, he noticed the certificates were not in.

Q. So he put that down there? A. He put that in; yes.

Mr. McCarter: Is that on the other one?

Mr. Lafferty: Not on the other one.

Mr. McCarter: I think that is all, Mr. Dennis.

The Court: That is all, sir.

(Short discussion.)

Mr. McCarter: Mr. Dennis, won't you take the stand?

Examination by Mr. McCarter:

Q. You have stated to me on cross-examination,

10

20

30

40

William A. Dennis—Redirect.

as I understood you, that the body of the proof of disability was written by Mr. Gemmell the day that you were there and in your presence. Now, aren't you mistaken about that? I want to show you memorandums that you made about the time, to refresh your recollection, which were sent to me by Mr. Hurrell, and see if your recollection is not refreshed by that memorandum, that the blanks had been filled in when you got there. A. Well, I was under the impression that he—he at least signed it in my presence.

Q. Undoubtedly, there is no doubt about that. I don't know that it makes the slightest difference, but I refer you to a memo that you made a day or two after the occurrence, when your memory was more fresh. A. December '26, is quite a long while ago.

Q. Naturally, I am not criticizing you.

The Court: It is the day after Christmas also.

Mr. McCarter: Yes.

Q. I now ask you whether, upon reflection, you do not rather conclude that you are mistaken in this statement that the paper was filled out by Gemmell in your presence and that it had been prepared. A. Well, it may have been. I know I took some forms up with me.

Mr. McCarter: Oh, all right. That is all.

Further redirect-examination by Mr. Lafferty:

Q. Just a minute. The application is in Mr. Gemmell's handwriting all the way through, isn't it? A. Yes, absolutely; I am familiar with it.

Armena Gemmell—Direct.

Mr. Lafferty: And it is very fine handwriting. I wish I could do it myself.

The Court: Well, now, is that all of this witness.

Mr. Lafferty: Yes.

Mr. McCarter: Yes.

Mr. Lafferty: If the Court please, that is our case. 10

Mr. McCarter: I will call Mrs. Gemmell. Will you take the stand, please?

ARMENA GEMMELL, sworn for the complainant, Prudential Insurance Company.

Direct-examination by Mr. McCarter: 20

Q. You are the widow, Mrs. Gemmell, of the late Robert Gemmell? A. Yes.

Q. When were you married? A. The 16th of June, '22.

Q. The 16th of June, 1922. And (To counsel.) Mr. Lafferty, you have not offered the will. I have a copy of it here, but not a certified copy. Is there any objection?

Mr. Lafferty: I thought you didn't want it. I have a certified copy. 30

Mr. McCarter: I would like to offer a certified copy of the will.

(Certified copy of will marked Exhibit A-2.)

The Court: What is the date of the will?

Mr. McCarter: The date of the will, your Honor, is the 18th of December, 1926.

Q. You have no children? A. No. 40

Armena Gemmell—Direct.

Q. No. And Mr. Gemmell had more than one sister in Scotland? A. Three sisters.

Q. Three sisters. When did you first learn of the contents of your husband's will? A. About two weeks after his death.

10 Q. After his death. Now, do you recall the visit that Mr. Dennis made at your residence in Newark on the occasion when your husband signed the claim for disability? A. Yes.

Q. Were you there in your husband's presence? A. I was right—

Q. During the visit of Mr. Dennis? A. Yes.

Q. Do you remember a remark that your husband made to Mr. Dennis with reference to what he intended to do with the proceeds of his disability claim? A. Yes.

20 Mr. Lafferty: If the Court please, I object to—the next question.

Mr. McCarter: I am through with the question.

Mr. Lafferty: Oh, I thought you were—

The Court: She says she does not remember the remark.

Q. What was the remark?

30 Mr. Lafferty: If your Honor please, I object to that.

The Court: Why?

Mr. Lafferty: Because it would make no difference in a case of this kind what he was going to do. It is not a present, a gift; it is not claimed to be a gift. She is not suing or putting in a claim because it was given to her. She is claiming under the policies.

40

Armena Gemmell—Direct.

The Court: I think that is right, Mr. McCarter. I will sustain the objection.

Mr. McCarter: All right. That is all.

The Court: Do you want to cross-examine?

Mr. Lafferty: No, sir.

Mr. McCarter: We are through. 10

The Court: I think that, under the circumstances, I better ask counsel to furnish me with memorandums. It seems to be a little bit technical, this question.

Mr. Lafferty: I think you are entitled to it.

20

30

40

Exhibit D-1.

Ordinary Claim Department.

**THE PRUDENTIAL INSURANCE CO. OF
AMERICA**

Home Office, Newark, N. J.

APPLICATION FOR DISABILITY BENEFITS

10

Ordinary, Intermediate, Group and Wholesale
Policies

An insured to be entitled to Disability Benefits
must be physically or mentally incapacitated to
such an extent that he is rendered permanently
unable to engage in any gainful occupation.

Number of policy (or policies) 1717818
Certificates 15 15-A

20

Insured's full name Robert Gemmell
Date of insured's birth 6/15/1869
Insured's home address 311 Mt. Prospect Ave.
Newark, N. J.

Where will insured be located during next thirty
days? Same address

Name and address of last employer Prudential
Ins. Co.

In what capacity employed? Assistant Secretary

30

Last day of employment? April 1926 O.K.

On what date did insured first consult a physician
during present illness? Approximately 4/1/26

What was the insured's condition at that time?

Hospital Case

When was insured first considered to be totally
and permanently disabled? April 1926

What was the insured's condition at that time?

Considered fatal N 41 69-6-15

40

Names and addresses of all other physicians who
have been consulted during present illness, to-

Exhibit D-1

gether with period of treatment by each
Dr. Teeter, Dr. Hawkes, Dr. J. Gray. Refer
to Dr. Patten, Medical Director Prudential
Home Office

What hospital or dispensary treatment has been
received during present illness? (give name and
location) 10

Presbyterian Hospital, Newark, N. J.

St. Barnabas Hospital, "

What other insurance has the insured (accident,
health and life)? None

Signature Robert Gemmell

Address 311

Exhibit D-2.

20

Ordinary Claim Department.

**THE PRUDENTIAL INSURANCE COMPANY
OF AMERICA**

Edward D. Duffield, *President*

Home Office, Newark, New Jersey

Proof of Total and Permanent Disability—Ordin- 30
ary, Intermediate, Group and Wholesale Policies

PHYSICIAN'S STATEMENT

Please use the reverse side of this sheet for am-
plifying the answers to questions below, or for any
comments which you consider will be helpful to us
in reaching a decision in this case.

Name of patient Robert Gemmell

Present location Newark 40

Exhibit D-2.

- How long have you been attending patient? Not his attending physician but have seen him from time to time
- State diagnosis and describe fully the illness or injury causing disability Pernicious Anaemia
- When were symptoms first noted? Probably two years ago or in Fall of 1924
- 10 If disability is caused by Pulmonary T. B. when was it so diagnosed?
- What test confirmed the diagnosis?
- Date of confirmation
- Has the patient's condition shown any recent improvement? (Give particulars) No.
- Is patient still under treatment by you? No
- Date you last saw the patient About two months ago
- 20 Do you think patient will ever be able to work in any gainful occupation? No
- If so, to what extent?
- Approximately, when do you think the patient will be able to perform work of some kind?
- Do you consider the patient totally and permanently disabled so that he (or she) will, for all time, be prevented from engaging in any kind of work? Yes
- 30 If so, on what date did you first conclude that patient would never again be able to work? About nine months ago
- Describe condition of patient at the time you made this unfavorable prognosis
- Very anaemic & weak; markedly disturbed and weak heart action; has had a blood transfusion
- Date Dec. 16th, 1926
- 40 Signed J. ALLEN PATTON, M. D.
Address Med. Dpt., Prudential Ins. Co.
Newark, N. J.

Exhibit D-3.

Pol Form used 2911 16328

THE PRUDENTIAL GROUP

(3) Ordinary Disability Claim

Policy No. G1690 Cert. 15 Insured Robert Gemmell 10

Beneficiary Armena B. Wife

Assigned No

Kind of Policy Group Cont. Disability clause? Yes. Amount, \$5000.

Date of issue Pol. date 10/1-24 Rating or lien

Age at issue 55

Certificate cancelled Full amount + interest paid to insured

G C C

District H. O. Ord. State N. J. Entered E 20

Checked Fc/W

Amount of Prem., \$ G Payable M. Premium paid to 1/1-27

Entered E Checked Fc/W

Cause of dis. Pernicious Anemia

(A) { Premiums waived
Insurance payable

B { Premiums waived
only

Right of revocation C { Premiums waived
Ins. reduced 30

D { Premiums waived
Disability Income

E { Premiums waived
Monthly Income (Int.)

Cause of dis. Pernicious Anemia

Date of T. & P. dis. 4/1/26 Age attained 56

First premium waived

First instalment due 4-1-26

Adjust Direct 40

Exhibit D-3.

Examined W. Baeliert 12/11/26 Checked R H
 12/15 Approved W. A. Dennis 12/17/26
 Acturial Department Mesu 12/17/26
 Policy canceled 12-17-26 Dividend Department
 CW EJB 12/17/26

Rec'd 12-16-26

10

Wishes full amount of Group Ins. in cash

W.A.D.

Certs to be obtained later

H 12/17/26

Exhibit D-4.

20 Pol Form used 2911 16329

THE PRUDENTIAL GROUP

(3) Ordinary Disability Claim
 Policy No. G1690 Cert. 15 Insured Robert
 Gemmell

Beneficiary Armena B. Wife

Assigned No

Kind of Policy Group Cont. Disability clause?

30

Yes. Amount, \$5000.

Date of issue 12/1/25 Rating or lien ✓

Age at issue 56 ✓

Certificate cancelled Full amount +
 interest paid to insured

G C C

District H. O. Ord. State N. J. Entered E
 Checked Fc/W

Amount of Prem., \$ G Payable M. Premium
 40 paid to 1/1-27

Exhibit D-4.

Entered E Checked Fc/W
 Cause of dis. Pernicious Anemia
 Clause

(A) { Premiums waived
 Insurance payable

B { Premiums waived
 only

Right of
 revocation

C { Premiums waived
 Ins. reduced

D { Premiums waived
 Disability Income

E { Premiums waived
 Monthly Income (Int.)

10

Cause of dis. Pernicious Anemia

Date of T. & P. dis. 4/1/26 Age attained 56

First premium waived ✓

First instalment due 4-1-26

Adjust Direct

20

Examined W. Baeliert 12/11/26 Checked R H
 12/15 Approved W A Dennis 12/17/26
 Acturial Department Mesu 12/17/26

Policy canceled 12-17-26 Dividend Department
 CW EJB 12/17/26

Rec'd 12-16-26

Wishes full amount of Group Ins. in cash

W.A.D.

Certs to be obtained later

30

H 12/17/26

40

Exhibit D-5.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA

Ordinary Department

No. 193926

Newark, N. J. Dec. 20, 1926

PAY Ten Thousand Seventy-Four and 80/100 Dollars to Order of Robert Gemmell \$10074.80 In full for all claims under Policy No. G. 1690 C. 15A-G. 1690 C. 15

To Fidelity Union Trust Company Newark, N. J.

55-9

Ernest A. Burkhardt Asst Cashier

20 Countersigned T. J. Natley Assistant Auditor

Endorsements

This check is in full payment of all claims under the policy or policies mentioned thereon, and the payee accepts it as such by endorsement below.

No other receipt required.

30 Sign here

Exhibit A-1.

Claim Dept. Duplicate Certificate Number 15

Incorporated Under the Laws of the State of New Jersey.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA 10

in accordance with and subject to the terms and conditions of its Group Policy No. 1690, insuring the lives of a group of the employees of

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA

has insured the life of Robert Gemmell, an employee included in the said group of employees, for the amount of 20

Five Thousand Dollars,

payable to the Beneficiary designated by said employee upon receipt of due proof of the death of said employee while the insurance on the life of said employee under said Policy is in force.

BENEFICIARY:— 30

If there be no Beneficiary living at the death of said employee the amount of insurance shall be paid to the executors, administrators or assigns of said employee.

(The Beneficiary may be changed in accordance with the terms of the Policy by said employee at any time while the insurance on his or her life is in force by notifying the Company through the Employer. Such change shall take effect when due 40

Exhibit A-1.

acknowledgment thereof is furnished by the Company to such person insured and all rights of his or her former Beneficiary or Beneficiaries shall thereupon cease.)

10 *Total and Permanent Disability.*—If the said employee, while less than sixty years of age, and while the insurance on the life of said employee under said Policy is in full force and effect, shall become totally and permanently disabled or physically or mentally incapacitated to such an extent that he or she by reason of such disability or incapacity is rendered wholly, continuously and permanently unable to perform any work for any kind of compensation of financial value during the remainder of his or her lifetime, said amount of insurance will be paid to said employee either in one sum six
20 months after the Company has received due proof of such disability or incapacity, or in monthly instalments during five years, the first instalment to be payable immediately upon receipt by the Company of due proof of such disability or incapacity; in accordance with the provisions of said Policy. The disability benefits will be granted subject to cessation, in accordance with the provisions of the Policy, should such disability or incapacity prove
30 to be temporary and not permanent. The entire and irrecoverable loss of the sight of both eyes, or of the use of both hands, or of both feet, or of one hand and one foot, will be considered total and permanent disability or incapacity within the meaning of the provisions of said Policy.

40 *Conversion of Insurance.*—When the insurance on the life of said employee shall terminate by reason of termination of employment for any reason whatsoever, the Company will issue, upon application by said employee within thirty-one days after

Exhibit A-1.

the date of such termination, without evidence of insurability, a policy on his or her life on any of the forms customarily issued by the Company, except a policy of Term Insurance, for the same amount for which said employee was insured under said group insurance policy at the time of the termination of employment, subject to the payment of premium for such policy at the then current rates of the Company according to the occupation of and at the age attained by said employee at that time. 10

EDWARD D. DUFFIELD,
President.

Newark, N. J., October 1, 1924.

Claim Duplicate 20

THE PRUDENTIAL INSURANCE COMPANY
OF AMERICA

Incorporated under the laws of the State of
New Jersey

Edward D. Duffield, *President*

Home Office, Newark, N. J. 30

This is to Certify that, in accordance with a request dated June 16, 1926 of the holder of the Certificate No. 15, the following change has been recorded in connection with the insurance of said holder under Group policy No. 1690.

40

Exhibit A-1.

in accordance with the provisions of said Policy. The disability benefits will be granted subject to cessation, in accordance with the provisions of the Policy, should such disability or incapacity prove to be temporary and not permanent. The entire and irrecoverable loss of the sight of both eyes, or of the use of both hands, or of both feet, or of one hand and one foot, will be considered total and permanent disability or incapacity within the meaning of the provisions of said Policy.

Conversion of Insurance.—When the insurance on the life of said employee shall terminate by reason of termination of employment for any reason whatsoever, the Company will issue, upon application by said employee within thirty-one days after the date of such termination, without evidence of insurability, a policy on his or her life on any of the forms customarily issued by the Company, except a policy of Term Insurance, for the same amount for which said employee was insured under said group insurance policy at the time of the termination of employment, subject to the payment of premium for such policy at the then current rates of the Company according to the occupation of and at the age attained by said employee at that time.

EDWARD D. DUFFIELD,
President.
Newark, N. J., December 10, 1925.

Exhibit A-1.

Claim Duplicate

THE PRUDENTIAL INSURANCE COMPANY
OF AMERICA

Incorporated under the laws of the State of
New Jersey

Edward D. Duffield, *President*

Home Office, Newark, N. J.

This is to Certify that, in accordance with a request dated June 16, 1926 of the holder of the Certificate No. 15-A the following change has been recorded in connection with the insurance of said holder under Group policy No. 1690.

The Beneficiary has been changed to
Armena B. Gemmell, Wife of the Insured.
(Name) (Relationship)

The Prudential Insurance Company of America
By Willard I. Hamilton
Vice President and Secretary.

Attest, Einhorn
Newark, N. J., June 16, 1926.

On side of Form—This Form must be securely attached to the Group Insurance Certificate referred to hereon.

Exhibit A-2.

IN THE NAME OF GOD, AMEN.

10 I, Robert Gemmell, of the City of Newark, County of Essex and State of New Jersey, being of sound mind, memory and understanding, do hereby make, publish and declare this my Last Will and Testament, in manner following, that is to say:

First: I direct my Executor hereinafter named to pay my just debts and funeral expenses as soon as may be convenient after my decease.

Second: I give and bequeath all my household furniture to my wife, Armena B. Gemmell.

20 Third: I give and bequeath to my said wife the sum of Twenty Thousand Dollars (\$20,000.00), the said bequest being hereby made and to be by her received in lieu of dower in my estate.

Fourth: I give and bequeath to my sister, Agnes Gemmell of Paisley, Scotland, certain Dominion of Canada Five Per-cent. Bonds due in 1937, in the amount of Ten Thousand Dollars (\$10,000.00) now owned by me.

30 If before my decease I shall sell or otherwise dispose of the said Bonds, I give and bequeath to my said sister in lieu thereof the sum of Ten Thousand Dollars (\$10,000.00) in cash.

Fifth: I give and bequeath to my cousin, Albert T. McGown, of Newark, New Jersey, the sum of Two Thousand Dollars (\$2,000.00)

Sixth: I give and bequeath to Kathleen McGown, wife of Albert T. McGown, the sum of Two Thousand Dollars (\$2,000.00).

40 Seventh: I give and bequeath to George H. Hoff-

Exhibit A-2.

man of Allerton, New Jersey, the sum of One Thousand Dollars (\$1,000.00).

Eighth: I give devise and bequeath all the rest, residue and remainder of my estate to my sisters, Agnes Gemmell and Janet Gemmell of Paisley, Scotland, share and share alike.

10 Ninth: This will shall remain in full force and effect notwithstanding that a child or children may hereafter be born to me.

Tenth: I hereby direct that if any one of the above named devisees or legatees shall institute a contest of this Will, then the said devisee or legatee so instituting a contest shall forfeit any bequest or devise provided for in this Will and any and all rights to share in my estate.

20 Eleventh: I hereby nominate and appoint the Fidelity-Union Trust Company of Newark, New Jersey, to be Executor of this Will and Testament, to serve without bond. I hereby give my said Executor full power to sell and convey any real estate which I may own at the time of my death.

30 IN WITNESS WHEREOF, I have hereunto set my hand and seal this eighteenth day of December, Nineteen Hundred and Twenty-six.

ROBERT GEMMELL. (L.S.)

Signed, sealed, published and declared by Robert Gemmell, the above named Testator, as and for his Last Will and Testament, in the presence of us, who were both present at the same time, and who at his request, in his presence, and in the presence

10

20

30

40

Exhibit A-2.

of each other, have hereunto subscribed our names as witnesses.

JAMES H. GUEST, 24 North 21st St., East Orange, N. J.
JOHN A. AMERMAN 201 Essex Ave., Bloomfield, N. J.

10

STATE OF NEW JERSEY

ESSEX COUNTY SURROGATE'S COURT

I, E. Garfield Gifford, Surrogate of the County of Essex, and Clerk of the Surrogate's Court of said County, do hereby certify the foregoing to be a true copy of the record of the last will and testament of Robert Gemmell, deceased, as the same appears of record in this office.

20

Witness my hand and seal of office, this Fourth day of January, in the year of our Lord, one thousand nine hundred and twenty-seven.

(Seal) E. GARFIELD GIFFORD,
Surrogate and Clerk.

30

40

Opinion of Vice Chancellor.

Filed February 6, 1928.

IN CHANCERY OF NEW JERSEY.

Between
PRUDENTIAL INSURANCE COMPANY
OF AMERICA,
Complainant,
and
FIDELITY UNION TRUST COMPANY, as Executor of the Last Will and Testament of Robert Gemmell, deceased, and ARMENA B. GEMMELL,
Defendants.

10

Opinion.

20

McCARTER & ENGLISH for complainant.
HOOD, LAFFERTY & CAMPBELL for defendants.

CHURCH, V. C.

This is an interpleader suit and the following facts are agreed upon as correct by counsel:

1. On October 1, 1924, Robert Gemmell was a junior officer of the Prudential Insurance Company and continued as such until his death, which occurred on December 20, 1926. 30

2. On October 1, 1924, the Prudential Insurance Company of America issued its group insurance policy No. 1690 under which a number of officers and employees of said company were insured; there being but one policy issued and certificates issued to the several persons insured thereunder. Two certificates were issued to Robert Gemmell. 40

Opinion of Vice-Chancellor.

Originally, neither certificate named a beneficiary.

3. Said insurance policy, in addition to insuring the lives of the certificate holders, contained the provisions and privileges following:

10 "The Prudential Insurance Company of America in consideration of the application of the employer for this policy, which is made part of this contract, a copy of which application is attached hereto, and of the payment, in the manner specified, of the premium herein stated, hereby insures the life of each of the persons herein designated as the insured, for the term of three months from the date hereof, subject to readjustment and renewal as hereinafter set forth, for the amount specified herein, payable as provided, subject to the provisions on the second and third pages hereof, which are hereby made part of this contract."

On the second page of said policy it is provided:

30 "Change of beneficiary. - Any person insured hereunder may at any time, while insured hereunder, change his (or her) beneficiary or beneficiaries under this policy by written notice through the employer to the company at its home office, on a form furnished by it. Such change shall take effect when due acknowledgment thereof is furnished by the company to such person insured and all rights of his (or her) former beneficiary or beneficiaries shall thereupon cease."

On the third page of said policy it is provided:

40 "Disability before age 60: Waiver of premiums payment of insurance. - If any person insured under this policy shall become totally and permanently disabled, either physically or mentally, from any cause whatsoever, to such an extent that he

Opinion of Vice-Chancellor.

(or she) is rendered wholly, continuously and permanently unable to engage in any occupation or perform any work for any kind of compensation of financial value during the remainder of his (or her) lifetime, and if such disability shall occur at any time after the payment of the first premium on account of such insurance, while this policy is in full force and effect and the said person is less than sixty years of age, the company, upon receipt of due proof of such disability, will grant the following benefits: 10

"(1) Waiver of Premiums. - The company will, during successive renewal periods, waive the payment of that portion of each premium under this policy applicable to the insurance on the life of said disabled person the due date of which, as specified on the first page hereof, shall occur after receipt by the company of such proof of such disability. 20

"(2) Payment of Insurance. - The company will, in addition to waiving the premiums, pay to the said person at its home office the amount insured on his (or her) life, as the employer may request, either in one sum six months after the company shall have received such proof, or in sixty monthly instalments during five years, each instalment to be of the amount of \$17.95 per \$1,000. of insurance payable. The first of such monthly instalments shall be paid immediately upon receipt by the company of due proof of such disability and subsequent monthly instalments shall be paid on the first day of each month thereafter. 30

"The total amount of insurance under this policy on the life of the said person at any time after one or more of such instalments have been paid 40

Opinion of Vice-Chancellor.

shall not exceed the commuted value of such of said instalments as are not then due computed at the rate of three and one-half per cent. per annum compound interest.

10 "Any insurance remaining at the death of the said person shall be paid to the beneficiary or beneficiaries of said person."

4. Two certificates for \$5,000. each were issued to Robert Gemmell, which certificates were afterward, by proper endorsement, made payable to the defendant, Armena B. Gemmell.

5. Robert Gemmell, on December 16, 1926, made application to the insurance company for his disability benefits under said policy.

20 6. The report of the medical examiner showing the permanent disability of Gemmell was dated December 16, 1926, and his application for disability benefits was approved by the company on December 17, 1926.

30 7. On December 18, 1926, a check was drawn and fully signed by the company to the order of Robert Gemmell for \$10,074.80, which on the face thereof stated to be "In full for claim under Policy G. 1690 C. 15A-G 1690 C. 15". The master policy was No. 1690 and "G" preceding it has reference to the general policy. "C.15A" and "C.15" refer to the certificates issued under the general or master policy. Though the check was fully executed on December 18th, it bears date of December 20, 1926.

40 8. Robert Gemmell died on December 20, 1926, prior to the delivery of such check. The Fidelity Union Trust Company is the executor under the will of said Gemmell. Both the executor and the

Opinion of Vice-Chancellor.

widow, Armena B. Gemmell, claim the proceeds of said certificates; the executor on the theory that the amount thereof was due Gemmell before his death; and the widow claims as beneficiary under the policies.

9. Mr. Dennis, the person authorized to approve the claim of Gemmell, said that upon the payment of a policy the company requires the surrender thereof. 10

It further appears that two days before his death Mr. Gemmell executed a will by which he left a legacy of \$20,000. to his wife, and the balance of the estate to others.

Under the policy the company can pay the insured "As the employer may request, either in one sum six months *after the company shall have received* such proof, or in sixty monthly instalments during five years." 20

On December 16, 1926, the insured signed an application for payment of the claim alleging total disability. The paper does not specify whether the payment is to be made in a lump sum or in instalments. Mr. Gemmell signed it in his home in the presence of William A. Dennis, the company's supervisor of claims, and it was taken by him to the home office. On the same day the medical director of the company, Dr. Patton, signed a certificate certifying to Mr. Gemmell's total disability, and also certifying that some months before he had decided the man was totally disabled. The exhibit was filled in on December 17. It names the insured, the beneficiary and the character of the policy. It bears Mr. Dennis' approval who says he as supervisor of claims is the proper person to approve. The document bears these words 30 40

Opinion of Vice-Chancellor.

"Certificate cancelled. Full amount plus interest paid to insured." Who decided to pay the lump sum instead of instalments does not appear, nor does it appear what officer or committee or board in the company has such authority.

10 The date of total disability is fixed as April 1st, 1926, nine months before the application was signed. Mr. Dennis says the words "Certificate cancelled, etc." quoted above, were placed on the paper because he supposed the certificates had been returned to the company, because the company requires their return before the disability certificate becomes effective.

20 The certificates were never returned and are still in the possession of the beneficiary. The application bears a further endorsement "Certificate to be obtained later. H." "H" is Mr. Heller an assistant manager. These words indicate that something remained to be done before the transaction was considered complete by the company. After these documents had been approved, a check was drawn on December 18th and dated December 20th. Mr. Dennis says he intended to deliver the check on the 20th and to enter the matter on the company's books on that day. Mr. Gemmell died at eight o'clock in the morning of December 20th. 30 The check was never delivered. Neither can it be said that the check was constructively delivered by putting it in the way of mailing. First, because Mr. Dennis says there was no intention of mailing it. He intended to deliver it in person. Second, because as a matter of fact, it never was put in the way of mailing.

40 In response to my questions, Mr. Dennis said it is the duty of the mailing department to mail checks. They are sent from the managing depart-

Opinion of Vice-Chancellor.

ment—a distinct department—to the mailing department. The check never left the managing department. It was last seen there. So it was not only not mailed, but was not even placed in a place from which, if the intention had been to mail, it would have been mailed. The check therefore had no effect.

10

Section 16, New Jersey Uniform Instruments Law, 3 Compiled Statutes, 3334-3337, says: "Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto."

See also *Polhemus v. Prudential Realty Company*, 74 New Jersey Law, 570.

The company bound itself to *pay*, not to agree to pay. It never did pay, and the transaction was not completed. Again, Mrs. Gemmell could only be divested of her right under the policy by the manner required by the policy.

20

In the case of *Sullivan v. Marony*, 77 Equity, 565, the Court of Errors and Appeals, through Mr. Justice Parker, said:

"Where a contract of insurance is made payable to designated beneficiaries, and prescribes a procedure for divesting their interest, in favor of another beneficiary, such interest can be divested, in the absence of an assignment by the beneficiaries themselves, only by following the procedure so prescribed."

30

In *Anderson v. Broad Street National Bank*, 90 New Jersey Equity, 78, Vice Chancellor Backes said:

"Whether the interest (of the beneficiary) be re-

40

Opinion of Vice-Chancellor.

garded as vested or defeasible, contingent, a mere expectancy, or whatever the characterization may be, if the policy stipulates the course by which the beneficiary's interest is to be nullified, he cannot be deprived of his right, unless the prescribed mode for its destruction is followed."

10 See also *Farmer Coal & Supply Co. v. Albright*, 90 New Jersey Equity, 132 (Foster, V. C.); *Metropolitan Life Ins. Co. v. Zgliczenski*, 94 New Jersey Equity, 300, (Lewis, V. C.); *Metropolitan Life Ins. Co. v. Clanton*, 76 New Jersey Equity, 4, (Emery, V. C.).

The policy says a lump sum shall be paid six months after the company *shall have received* proof of the disability, not six months after the existence of the disability. In this case the proof
20 was furnished only four days before payment was sought to be made, although the doctor announced that the disability had existed for nine months before that time.

This is not according to the terms of the policy and Mrs. Gemmell's interest could not be wiped out in such a manner. It is not shown that anyone in authority determined which of the two methods set out in the policy should be used and
30 the certificates which should have been returned before the transaction was completed were not returned.

40

Final Decree.

I believe Mrs. Gemmell is entitled to the money under this policy and will advise a decree accordingly.

Final Decree.

Filed February 17, 1928.

10

IN CHANCERY OF NEW JERSEY.

Between
PRUDENTIAL INSURANCE COMPANY
OF AMERICA,
Complainant,
and
FIDELITY UNION TRUST COMPANY, as Executor of the Last
Will and Testament of Robert
Gemmell, deceased, and AR-
MENA B. GEMMELL,
Defendants.

On Bill, Etc.

Final Decree.

20

This cause coming on to be heard before the Court in the presence of Hood, Lafferty & Campbell, Solicitors for and of Counsel with the defendant, Fidelity Union Trust Company, as Executor of Robert Gemmell, deceased, and of McCarter & English, Solicitors for and of Counsel with the defendant, Armena B. Gemmell, and the several answers and statements of claim of the said defendants having been read and the testimony of witnesses taken, and the arguments of the respective counsel heard and considered, and it appearing that the said Armena B. Gemmell was the
30 beneficiary named in two certain certificates issued by the complainant under a so-called policy of
40

Final Decree.

group insurance, upon the life of her husband Robert Gemmell, amounting to the sum of \$10,000., one of which was dated October 1, 1924, and the other December 10, 1925, which certificates were issued under said policy of so-called group insurance, by the terms of which it was, among other things, provided that if any insured thereunder became totally and permanently disabled before attaining the age of sixty years, and while such policy upon the life of the insured remained in full force, upon receiving due proof of such disability the Company would pay to such person, the amount insured upon his life, either in one sum, six months after the Company received proof, or in sixty monthly installments during five years, according as should be determined by the employer of said Robert Gemmell, and that on December 16, 1926, said Robert Gemmell, being at that time totally and permanently disabled and under the age of sixty years, executed and delivered to the Prudential Insurance Company of America, an application, in writing, for the payment to him, in one sum of the entire amount of insurance, evidenced by the two said certificates, and that certain proceedings had been taken upon such application resulting in the drawing of a check on the 17th day of December, 1926, to the order of the said Robert Gemmell, dated the 20th day of December, 1926, but which said check had never been delivered to the said Robert Gemmell, who departed this life early in the day of the 20th of December 1926; and it further appearing to the Court that the said Prudential Insurance Company of America, being in doubt as to whether the said sum of \$10,074.80 belonged to the said Armena B. Gemmell, the beneficiary thereof appointed by the

Final Decree.

said insured, or whether the proceedings looking to the procurement of said sum by the said Robert Gemmell, upon the ground of his total disability, under the terms of the said policy and certificates had been legally and completely executed, and that the said sum of money was claimed both by the said Executor and by the said Armena B. Gemmell, and that the said Insurance Company had therefore filed in this Court its bill of interpleader, praying that the two said claimants to said fund should interplead, and upon the payment by said Insurance Company of said sum of \$10,074.80 into Court, it should be relieved from responsibility therewith; and it further appearing that the said sum of \$10,074.80, being the balance due, together with interest, was at the time of filing the bill of complaint in this cause, paid by the complainant into this Court, and that the same, less the costs of said complainant still remains deposited in this Court, and is subject to the order and direction hereof,

It is thereupon, on this 16th day of February, 1928, by the Chancellor of the State of New Jersey, ORDERED, ADJUDGED and DECREED, and the said Chancellor, by virtue of the power and authority of this Court, does hereby ORDER, ADJUDGE and DECREE that the said sum of \$10,074.80, remaining in the hands of the complainant at the time of the death of the said Robert Gemmell, was the property of the said Armena B. Gemmell, and that the balance thereof, after deducting the costs heretofore directed to be paid to the said complainant out of said sum paid into this Court as aforesaid, and now remaining deposited therein, together with all interest accumulated thereon, be paid to the said Armena B. Gemmell, or her Solicitors,

Final Decree.

AND IT IS FURTHER ORDERED, ADJUDGED, and DECREED that the said defendant, Fidelity Union Trust Company, as Executor of Robert Gemmell, deceased, do pay to the said Armena B. Gemmell, her costs in this cause to be taxed, and also the taxed costs of the said complainant heretofore paid the said complainant out of the said fund deposited in this Court, together with a counsel fee of One Thousand Dollars.

Respectfully advised

ALONZO CHURCH,
V. C.

ER. WALKER

New Jersey Court of Errors and Appeals

Between

THE PRUDENTIAL INSURANCE
COMPANY OF AMERICA,
Complainant,

and

FIDELITY UNION TRUST COMPANY, as Executor of the last Will and Testament of Robert Gemmell, deceased,
Defendant-Appellant,

and

ARMENA B. GEMMELL,
Defendant-Appellee.

BRIEF FOR DEFENDANT-APPELLEE.

This is an interpleader suit filed by the Prudential Insurance Company, setting up certain facts which are correctly epitomized in the brief of Mr. Lafferty, and showing that by reason of those facts the sum of \$10,074.80, the amount admitted to be due on two certificates of insurance in the group class that had, previous to the death of Robert Gemmell, been taken out without naming any beneficiary, but as to which subsequently Mrs. Gemmell was duly named as beneficiary, was claimed both by Mrs. Gemmell, and by the Executor of her husband's estate, and that as the Insurance Company was in doubt as to who was entitled thereto, it prayed leave to the Court to pay it into court and relieve itself from responsibility therefor by the entry of a decree of interpleader between the two parties contend-

ing. Such a decree was entered, and each of the parties, pursuant to the rules, have filed their statements of claim.

The policy of group insurance is briefly as follows: A so-called omnibus policy issues insuring the lives of a group of employees of a given employer, and a certificate, or certificates subsidiary to the mother policy issues to each insured. In this case, Mr. Gemmell, a junior officer of the Prudential Insurance Company, had procured two such certificates, aggregating \$10,000 on his own life, and it is admitted had, agreeably to the rules of the company, later designated Mrs. Gemmell as the beneficiary thereunder. The original mother policy and the certificates contained, among other things, a clause which is of importance, providing that under certain circumstances, the insured can substitute, in the event that he is totally disabled, a payment of cash to himself in lieu of the provision for insurance. This clause is as follows:

“DISABILITY BEFORE AGE 60: WAIVER OF PREMIUMS—PAYMENT OF INSURANCE—If any person insured under this Policy shall become totally and permanently disabled, either physically or mentally, from any cause whatsoever, to such an extent that he (or she) is rendered wholly, continuously and permanently unable to engage in any occupation or perform any kind of compensation of financial value during the remainder of his (or her) lifetime, and if such disability shall occur at any time after the payment of the first premium on account of such insurance, while this Policy is in full force and effect and the said person is less than sixty years of age, the Company, upon receipt of due proof of such disability, will grant the following benefits:

(1) WAIVER OF PREMIUMS—The Company will, during successive renewal periods,

waive the payment of that portion of each premium under this Policy applicable to the insurance on the life of said disabled person the due date of which, as specified on the first page hereof, shall occur after receipt by the Company of said proof of such disability.

(2) PAYMENT OF INSURANCE—The Company will, in addition to waiving the premiums, pay to said person at its Home Office the amount insured on his (or her) life, as the Employer may request, either in one sum six months after the Company shall have received such proof, or in sixty monthly instalments during five years, each instalment to be of the amount of \$17.95 per \$1,000 of insurance payable. The first of such monthly instalments shall be paid immediately upon receipt by the Company of due proof of such disability and subsequent monthly instalments shall be paid on the first day of each month thereafter.

The total amount of insurance under this Policy on the life of the said person at any time after one or more of such instalments have been paid shall not exceed the commuted value of such of said instalments as are not then due computed at the rate of three and one-half per cent. per annum compound interest.

Any insurance remaining at the death of the said person shall be paid to the Beneficiary or Beneficiaries of said person.”

There is no doubt the policy was in full force and effect, and that Mr. Gemmell was less than sixty years of age. An examination of the clause shows that under such circumstances, the Company, upon receipt of due proof of such disability, was granted two rights.

(1) To waive the payment of that portion of each premium as specified in the policy shall occur after the receipt by the Company of the proof of disability, and

(2) To pay to the insured the amount insured on his life

“as the Employer may request, either in one sum six months after the Company shall have received such proof, or in sixty monthly instalments during five years. The first of such monthly instalments shall be paid immediately upon receipt by the Company of due proof of such disability and subsequent monthly instalments shall be paid on the first day of each month thereafter.”

In a word, the insured has the right by the policy, in the event of making due proof to the insurance company of his total disability, to require the insurance company to grant one of two alternative benefits as the insured employer may request, namely, either the payment in a lump sum of the full amount of the policy six months after the company shall have received proof of disability, or the payment of a given sum in monthly instalments, the first of which is payable immediately after the receipt of due proof of the disability, and the subsequent instalments on the first day of each month thereafter.

The evidence and exhibits show that on the 16th of December, 1926, the insured signed an application for the payment of a claim based upon his total permanent disability (Exhibit D. 1). Naturally this document is silent as to the question whether the payment is to be in a lump sum or in instalments, for the reason that by the terms of the policy the employer, which in this case happens to be the Prudential Insurance Company, determines that question. This document was signed by Mr. Gemmell at his home, in the presence of Mr. Dennis, Supervisor of Claims of the Company, and taken on that day by him to the Company's home office in Newark. On the same

day, the medical director of the Company, Dr. Patton, signed Exhibit D. 2, certifying to the fact of Mr. Gemmell's total disability, and also certifying among other things, that about nine months previous he had concluded the patient would never be able to work again.

On December 17, 1926, Exhibit D. 3 (the approval of the claim for disability) was filled in, which among other things names the insured Robert Gemmell, the beneficiary his wife, the character of the policy, and bears the approval of Mr. Dennis on the 17th, who, as he swears, is the Supervisor of Claims, and the person competent to approve. Endorsed on this document are the words

“Certificate cancelled. Full amount plus interest paid to insured.”

An exact duplicate thereof (Exhibit D. 4) issued as to the other certificate. Who, on behalf of the employer (the Prudential Insurance Company) requested the payment of the full amount rather than instalments, does not appear. Mr. Dennis, by his evidence, assumes responsibility for both of these documents. He does not pretend to have had authority as Supervisor of Claims, to speak for the employer upon the question whether the payments should be in a lump sum or in instalments. The case is left without any proof whatever upon that subject. These documents named the date of total and permanent disability as “4/1/26”—the first of April, 1926, and fixed the first instalment as due the same date. The statement with reference to the cancellation of the certificates was doubtless placed there because of the company's rule that the certificate must be returned before any disability payment is made. (Evidence of Dennis p. 80.) Indeed, on page 80, Mr. Dennis says that he supposed that

the certificates had been returned to the company, because Gemmell told him on the 16th that he had mailed them. As a matter of fact, the certificates were never returned or cancelled, and are still in the possession of Mrs. Gemmell. This fact seems to have at some time been disclosed, because upon Exhibits D. 3 and D. 4 appear the words

“Certs to be obtained later. H. 12/17/26.”
 “H” is Mr. Heller, an Assistant Manager (Evidence p. 87), but it is not pretended that Heller had any authority to waive the production and cancellation of the certificates.

It appears, that after these documents had been approved on the 17th, a check to the order of Mr. Gemmell was directed to be prepared, but that check was not in fact actually completed until Saturday the 18th, and was dated the 20th—the following Monday. Mr. Dennis swears (pp. 79-80), that he had expected to deliver the check to Gemmell on Monday the 20th, but did not do so, because he learned that Gemmell had died at eight o'clock on that morning (p. 82). It further appears from Dennis' evidence (p. 79) that the transaction would have been entered up on the company's books as complete on the 20th.

Now Mrs. Gemmell's claim to this money is based on the fact that as the undoubted beneficiary named in both certificates, and recognized as such by the company, she was, upon her husband's death entitled to the insurance provided to be paid by the certificates, unless her husband and the insurance company had, in the manner specified in the certificates and the mother policy, completely deprived her thereof. As the beneficiary, she does not deny the right of the insured and the company to have substituted and paid to

Mr. Gemmell a disability claim in lieu of the insurance she would be entitled to receive upon his death, but she insists that the transaction or substitution must have been complete and must have been effected in the manner provided by the policy and the certificates, and because, as she claims, neither of these facts are shown to have existed, she claims that the decree adjudging that she is entitled to the money is correct.

As the authorities to be hereafter cited demonstrate, a beneficiary named in a policy of insurance in New Jersey, has a vested right therein, subject, however, to be divested in the manner, and only in the manner provided by the policy; and if for any reason the effort to divest that interest failed of completion, or was attempted to be accomplished in a manner otherwise than as required by the policy, then there has been no divesting of the beneficiary's interest, and her rights under the policy remain unimpaired.

I.

The transaction was not complete.

The language with reference to the proposed substituted total disability claim, is that the company, in addition to waiving the premiums, would *pay* to the person the amount of the disability claim. This payment is an essential ingredient of the transaction. The whole point of the substitution of the liquidated sum in the event of disability is that the disabled person will have enjoyed the money. Whether it be in a lump sum or an instalment, the money is to be “*paid to the insured*” so that he will have enjoyed the benefit thereof, being disabled; and if the instalment plan be chosen by the employer and

the insured died before the expiration of the instalment period, then, in the language of the policy

“any insurance remaining at the death of the said person shall be paid to the beneficiary.”

The company does not obligate itself *to agree to pay* the disability benefits, but to waive the further payment of premiums, and *pay* to the person the amount fixed. Now in this case, as we have seen, the check was dated December 20th. It would have been charged up on the company's books as of that date, and Mr. Dennis intended to hand it to Gemmell on that date, but before any of these things had occurred, and at eight o'clock in the morning, before business hours, Mr. Gemmell died, so that it was impossible to complete the transaction. The check was never delivered. Under well-settled principles, it had, therefore, no vitality. *Cowing v. Altman*, 71 N. Y. 435; *Polhemus v. Prudential Realty Corporation*, (N. J. Court of Errors & Appeals) 74 N. J. Law 570.

A check, of course, is a negotiable instrument, and by Section 16 of New Jersey's Uniform Instruments Law, 3 Compiled Statutes 334, 3737, it is specifically provided that

“Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto.”

See Vol. 5, Uniform Laws Annotated, page 74, where we find:

“A bill made in the form of a check, even if valid is incomplete and not commercial paper at all, until it has been endorsed and delivered to some person other than the drawer. Until then it is in form only an order to pay to the maker, and no obligation can arise.”

U. S. v. Chase National Bank, 241 Federal Reporter 535.

In the instant case those authorities, which are numerous, and some of which are quoted in Mr. Lafferty's brief, to the effect that placing a check, or other negotiable instrument in due course, in the mail is tantamount to a delivery thereof, have no application, because, as we have seen, it was not intended to mail the check, but Mr. Dennis intended to deliver it in person on Monday. The cases holding that the placing of a check, or other negotiable instrument in the mail, addressed to the payee, constitutes delivery, within the rule requiring delivery, is based upon the theory that the parties are at a distance from each other, and expected the well recognized system of intercommunication, namely the mail, to be availed of. *Trego v. Cunningham*, 267 Ill. 367, 108 N. E. Reporter 350; *Manbridge v. Hoes*, 149 N. Y. Supplement 20.

I contend, therefore, that the cases cited by counsel in his brief, have no application. Each case necessarily depends upon the terms of the contract, and here, as we have seen, an essential step is the delivery to the insured, who is disabled, of the substituted funds, so that he may have the benefit thereof.

II.

Even if the transaction had been complete it was not carried out in the manner required by the policy and therefore for this reason too, is of no avail against the beneficiary.

This rule is too well settled in New Jersey to admit of any doubt. In *Sullivan v. Maroney*, 76 N. J. Equity 104, the whole subject was con-

sidered by VICE-CHANCELLOR GARRISON, and the principle adopted that in order to divest a beneficiary named in a policy, either at the time it is taken out or subsequently thereto, of her interest therein, the method provided by the policy must be strictly pursued. This case was unanimously affirmed in 77 N. J. Equity 565, in an elaborate opinion by Mr. Justice Parker, the first syllabus of which reads:

“Where a contract of insurance is made payable to designated beneficiaries, and prescribes a procedure for divesting their interest, in favor of another beneficiary, such interest can be divested, in the absence of an assignment by the beneficiaries themselves, only by following the procedure so prescribed.”

In *Anderson v. Broad Street National Bank*, 90 N. J. Equity 78, VICE-CHANCELLOR BACKES said:

“Whether the interest (of the beneficiary) be regarded as vested or defeasible, contingent, a mere expectancy, or whatever the characterization may be, if the policy stipulates the course by which the beneficiary's interest is to be nullified, he cannot be deprived of his right, unless the prescribed mode for its destruction is followed.”

See also *Farmer Coal & Supply Co. v. Albright*, 90 N. J. Equity 132 (Foster, V.-C.); *Metropolitan Life Ins. Co. v. Zgliczenski*, 94 N. J. Eq. 300 (Lewis, V.-C.); *Metropolitan Life Ins. Co. v. Clanton*, 76 N. J. Eq. 4 (Emery, (V.-C.)).

Of course, in reality, the substitution of a disability benefit to the insured in lieu of the payment otherwise required to be made to the beneficiary, is tantamount to the naming of another beneficiary. Perhaps it is more analogous to the case of a surrender of a policy by the insured, at the expense of the beneficiary named in the policy.

In 25 Cyc., page 785, we find:

“As the beneficiary has a vested interest in the contract, the insured cannot by surrendering the policy cut off the rights of the beneficiary without his, or her consent, unless permitted to do so by the terms of the contract.”

The surrender or cancellation of a policy by an insured, must be made in accordance with any requirements imposed by the policy. To effect a cancellation, the insured must follow these requirements. *Home Ins. Co. v. Hamilton*, 128 S. W. 273; *Northern Pine Co. v. Liverpool*, 128 N. W. 70; *Burmood v. Farmers Union Ins. Co.*, 60 N. W. 905; *Roberta v. Royal*, 76 S. E. Reporter 865.

Now, at the time that Mrs. Gemmell's rights as beneficiary became fixed, she, of course, knew that those rights were subject to be divested, by an arrangement between the company and the insured, of a fixed and definite character, according to which the insurance company, at the option of the employer, might pay the insured a certain number of instalments, or else a lump sum six months after the company shall have received proof of the disability. The provision is not that the payment shall be made six months after the existence of the disability, but six months after the company shall have received such proof, and it is conceded that the only proof the company, in this case, received was that furnished by Dr. Patton on December 16, 1926, or four days before the death of Mr. Gemmell, and the same day the latter made his application for a disability benefit. The company sought to get around this situation by designating the date of his disability as having occurred (Exhibit D. 4) on the first of April, 1926, and hence allowing six months from that date to elapse, it included in

its check, interest from October 1st—six months thereafter—to December 18th. No warrant whatever existed for any such disposition of the matter. Mrs. Gemmel knew nothing of it. All that she knows is that her husband died on the 20th, and by the terms of her husband's will (Exhibit A. 2), which is dated the 18th of December she is cut off with a miserly specific payment, and the residue of Mr. Gemmell's estate is bequeathed to his sisters living in Scotland. When Mrs. Gemmell became a beneficiary under these certificates, she took her rights subject to having them divested, only in the manner set out in the policy. Her husband and the company, without her consent, could not modify or change the situation, and her rights under the authorities above cited were such as that they could be taken away only in the manner specified in the policy and certificates. To say that her husband and the company could change the whole contract, and turn the phrase authorizing the payment of a lump sum

“six months after the Company shall have received proof of the disability”

into a payment immediately after an *ex post facto* determination of previous disability six months in advance, is to write into the policy provisions that are not there found. Nor can it be said that the company and the insured, or either of them, could waive this provision. As was said in the case of *Reid v. Field*, Va. Court of Appeals, 1 S. E. Reporter 395, 400:

“Waiver is a renunciation of some rule which invalidates the contract, and which having been introduced for the benefit of the contracting party, may be dispensed with at his pleasure. Hare Cont. 2. Hence where a party has stipulated for a benefit, the enforcement or relinquishment of which can effect him only, and is in no way prejudicial

to the community at large, he may, if the other party is not in default, by a subsequent promise waive a defense which would otherwise be valid.”

As has already been shown, there is no proof whatever that anyone authorized to speak on behalf of the employer determined whether the payment should be in a gross sum or by instalments. Under the system adopted by the company in the event of a gross sum being requested by the employer, before it can be paid, the insurance certificates must be returned (p. 75), and not only were the certificates not returned, but as we have seen, Mr. Dennis, supposed they had been (p. 80). The beneficiary had a right to rely on the fact, as the authorities cited have time and again held, that she could not be deprived of her rights, except in the way and under the circumstances provided by the terms of the policy.

III.

The allowance of the counsel fee to the respondent as the prevailing party, was within the discretion of the Court.

Section 91 of the Chancery Act, 1 Compiled Statutes page 445, of course, allows the Court of Chancery to award a counsel fee to the prevailing party, and the fact that in this case the contest was between the widow and her husband's executor, makes no difference. *Walton v. Taylor*, 78 N. J. Equity 266. The decree below was in all respects correct, and should be affirmed.

Respectfully submitted,

ROBERT H. McCARTER,
Counsel for Respondent.

May Term, 1928.

73

New Jersey Court of Errors and Appeals

Between

THE PRUDENTIAL INSURANCE
COMPANY OF AMERICA,
Complainant,
and

FIDELITY UNION TRUST COM-
PANY, as Executor of the Last
Will and Testament of Robert
Gemmell, dec'd.,
Defendant-Appellant.

and

ARMENA B. GEMMELL,
Defendant-Appellee.

On Appeal
from Final
Decree of
Court of
Chancery.

BRIEF OF DEFENDANT, FIDELITY UNION TRUST COMPANY, as Executor, etc.

Facts.

1. On October 1, 1924 Robert Gemmell was a Junior Officer of the Prudential Insurance Company and continued as such until his death, which occurred on December 20, 1926.

2. On October 1, 1924, The Prudential Insurance Company of America (hereinafter called the "Insurance Company") issued its group insurance policy #1690 (Case p. 16, Schedule 1) under which policy certificates were issued insuring a number of its officers and employees. Two certificates of \$5,000. each were issued by the Insur-

ance Company to Robert Gemmell (Case, pp. 33 & 34, Schedules 2 and 4, Exhibit A-1 pp. 99 & 102).

3. Said insurance policy, in addition to insuring the lives of the certificate holders, contained the provisions and privileges following (Case pp. 24 & 25, Schedule 1):

"The Prudential Insurance Company of America, in consideration of the Application of the Employer for this Policy, which is made part of this contract, a copy of which Application is attached hereto, and of the payment, in the manner specified, of the premium herein stated, hereby insures the life of each of the persons herein designated as the Insured, for the term of Three months from the date hereof, subject to readjustment and renewal as hereinafter set forth, for the amount specified herein, payable as provided, subject to the provisions on the second and third pages hereof, which are hereby made part of this contract."

On the second page of said Policy it is provided:

"Change of Beneficiary.—Any person insured hereunder may at any time, while insured hereunder, change his (or her) Beneficiary or Beneficiaries under this Policy by written notice through the Employer to the Company at its Home Office, on a form furnished by it. Such change shall take effect when due acknowledgment thereof is furnished by the Company to such person insured and all rights of his (or her) former Beneficiary or Beneficiaries shall thereupon cease."

On the third page of said Policy it is provided:

"Disability Before Age 60: Waiver of Premiums-Payment of Insurance.—If any per-

son insured under this Policy shall become totally and permanently disabled, either physically or mentally, from any cause whatsoever, to such an extent that he (or she) is rendered wholly, continuously and permanently unable to engage in any occupation or perform any work for any kind of compensation of financial value during the remainder of his (or her) lifetime, and if such disability shall occur at any time after the payment of the first premium on account of such insurance, while this Policy is in full force and effect and the said person is less than sixty years of age, the Company, upon receipt of due proof of such disability, will grant the following benefits:

"(1) Waiver of Premiums.—The Company will, during successive renewal periods, waive the payment of that portion of each premium under this Policy applicable to the insurance on the life of said disabled person the due date of which, as specified on the first page hereof, shall occur after receipt by the Company of such proof of such disability.

"(2) Payment of Insurance.—The Company will, in addition to waiving the premiums, pay to the said person at its Home Office the amount insured on his (or her) life, as the Employer may request, either in one sum six months after the Company shall have received such proof, or in sixty monthly instalments during five years, each instalment to be of the amount of \$17.95 per \$1,000. of insurance payable. The first of such monthly instalments shall be paid immediately upon receipt by the Company of due proof of such disability and subsequent monthly instalments shall be paid on the first day of each month thereafter.

"The total amount of insurance under this Policy on the life of the said person at any time after one or more of such instalments

have been paid shall not exceed the commuted value of such of said instalments as are not then due computed at the rate of three and one-half per cent. per annum compound interest.

"Any insurance remaining at the death of the said person shall be paid to the Beneficiary or Beneficiaries of said person."

4. The two certificates issued to Robert Gemmell were subsequently, by proper endorsements, made payable to the defendant, Armena B. Gemmell. (Case, Exhibit A-1, line 20, p. 101 & 105; Schedule 3 p. 37 and Schedule 5 p. 40)

5. Robert Gemmell, on December 16, 1926, made application to the Insurance Company for his disability benefits under said policy. (Case, Schedule 6 p. 41; Exhibit D-1 p. 92.)

6. The report of the medical examiner showing the permanent disability of Gemmell was dated December 16, 1926, (Case p. 43 Schedule 7; Exhibit D-2, p. 93), and his application for disability benefits was approved by the company on December 17, 1926. (Case, pp. 95, 96; Exhibits D-3 and D-4).

7. On December 18, 1926 a check was drawn and fully signed by the company to the order of Robert Gemmell for \$10,074.80, which on the face thereof stated to be "In full for claim under Policy G. 1690 C. 15A - G. 1690 C. 15". (Case p. 45 Schedule 8; Exhibit D-5 p. 98). The master policy was No. 1690 and "G" preceding it has reference to the general policy. "C.15A" and "C. 15" refer to the certificates issued under the general or master policy. Though the check was fully executed on December 18th, it bears date of December 20, 1926. (Case p. 71, line 34, p. 72, lines 1 to 4 & p. 73 lines 1 to 20).

8. Robert Gemmell died on December 20, 1926, prior to the delivery of such check.

9. The Fidelity Union Trust Company is the executor under the will of said Gemmell. Both the executor and the widow, Armena B. Gemmell, claimed the proceeds of said certificates; the executor on the theory that the amount thereof was due Gemmell before his death; and, the widow upon the theory that the money is due her as a death claim.

10. The Insurance Company filed its bill of interpleader, and paid the sum due on the certificates issued under the policy to the Clerk of the Court of Chancery.

11. The defendants, Fidelity Union Trust Company, as such executor, and Armena B. Gemmell, filed statements of their respective claims to said moneys.

12. A decree was entered in favor of the defendant, Armena B. Gemmell with costs and a counsel fee of \$1,000., and the defendant, Fidelity Union Trust Company, as such executor, appealed from the whole of the decree.

POINTS.

As we see it, the questions to be determined in this cause are:

First: What interest had Armena B. Gemmell under the policy of insurance?

Second: Was the interest of Robert Gemmell under said policy superior to the interest of Mrs. Gemmell?

Third: If said Robert Gemmell had the right under said policy, in case of total disability, to demand and receive the face amount of the certificates issued to him thereunder, and if such right were superior to any interest Mrs. Gemmell had therein, then had he and his employer—the Insurance Company—done all things necessary to entitle him to payment?

Fourth: Did the provision in the policy and in the certificates providing that disability benefits after proof thereof should be payable “either in one sum six months after the Company shall have received such proof, or, etc” preclude the company from making payment immediately upon receipt of such proof?

Fifth: If the court correctly awarded the proceeds of the certificates to Mrs. Gemmell, then did it err in allowing her a counsel fee of \$1,000. and costs to be paid by the executor under the will of Robert Gemmell, deceased?

POINT I.

What interest had Armena B. Gemmell under the policy of insurance?

Where, as in this case, the right to change the beneficiary of a life insurance policy is reserved to the insured, the beneficiary's interest therein, if vested, is subject to being divested,

Sullivan v. Maroney, 77 N. J. E. 565.

Anderson v. Broad Street Nat'l. Bank,
90 N. J. E. 78.

and in some jurisdictions it is held that where the right to change the beneficiary has been reserved to the insured, the beneficiary named in the policy has a mere expectancy and no vested right or interest during the lifetime of the insured.

In *Slocum, Adm'r. v. Metropolitan Life Insurance Co.* (Mass) 139 N. E. 816, 27 A. L. R. 1517, the court says:

“In a policy which permits the insured to change the beneficiary, the latter has no vested interest in the money to be paid, but only an expectancy.”

In *re Whiting*, 3rd Fed. 2nd Series 440, it was held that where by the terms of a life insurance policy the beneficiary may be changed at the will of the insured, the beneficiary has no vested interest therein, which means a future interest not dependent on an uncertain period or event, or a fixed present right of future enjoyment.

The same was held in *Brown v. Home Life Ins. Co. of N. Y.*, 3rd Fed. Rep. 2nd Series, 661. The two last mentioned cases arose under the bankruptcy act, and were decided under authority of

Cohn v. Malone, Trustee, 245 U. S. 453, in which Mr. Justice McKenna says:

"The declaration of sub-division 3 (Bankruptcy Act) in that 'powers which he might have exercised for his own benefit' 'shall in turn be vested' in the trustee, and there is vested in him as well all property that the bankrupt could transfer or which by judicial process could be subjected to his debts and especially as to insurance policies which had a cash-surrender value payable to himself, his estate or personal representatives. It is true the policies in question here are not so payable, but they can be or could have been so payable at his own will and by simple declaration. Under such conditions to hold that there was nothing of property to vest in the trustee would be to make an insurance policy a shelter for valuable assets and it might be a refuge for fraud."

The learned Vice-Chancellor cites as authority for his opinion, the cases of

Sullivan v. Maroney, 77 N. J. E. 565,
Anderson v. Broad Street Nat'l. Bank,
 90 N. J. E. 78,
Farmers' Coal & Supply Co. v. Albright,
 90 N. J. E. 132,
Metropolitan Life Ins. Co. v. Zgliczenski,
 94 N. J. E. 300,
Metropolitan Life Ins. Co. v. Clinton, 76
 N. J. E. 4.

Those decisions do not appear to have any bearing upon the question involved in this case.

In *Anderson v. Broad Street National Bank*, the facts were that the insured had assigned the policy to the bank as collateral security for his indebtedness. The court held, following *Sullivan v.*

Maroney, that in a life insurance policy where a beneficiary is named, two have interests therein, namely, the insured and the beneficiary. If the beneficiary survive the insured, the policy is payable to him. If the insured is the survivor of them, the policy, upon his death, is payable to his estate. Therefore, an assignment by the insured of such policy without the consent of the beneficiary or without changing the beneficiary to "his estate", carries only the interest of the insured, which, of course, is divested by his death in the lifetime of the beneficiary.

The same was held in *Sullivan v. Maroney*.

The case of *Farmers' Coal & Supply Co. v. Albright*, 90 N. J. E. 132, has no application to the case at bar. This was a creditor's bill in which a creditor sought to effect a lien against the proceeds of life insurance policies under a writ of attachment issued during the life of the insured. The insured had the right to surrender the policies and to collect the cash value thereof. He died on August 8, 1917 while the policies were still in force. Foster, V. C. says:

"It is claimed that the present case by this reservation of control and dominion is easily distinguishable from *Sullivan v. Maroney*, 76 N. J. E. 104, affirmed in 77 N. J. E. 565, and *Lanning v. Parker*, 84 N. J. E. 429, 94 Atl. Rep. 64, in which the effect of such reservation was not considered or decided, but I do not find this distinction to be apparent as claimed. The control reserved to the insured by the terms of the policy was required by the policies to be exercised in a prescribed manner, and until it was so exercised the right of the insured and the beneficiary were not changed or altered in the slightest degree."

Metropolitan Life Ins. Co. v. Zgliczenski, 94 N. J. E. 300 has no application because it was an assignment of the policy without change of beneficiary.

Metropolitan Life Ins. Co. v. Clinton, 76 N. J. E. 4 has no application. This was an industrial policy, but Emery, V. C. says:

“In contracts of the kind now in question which are pure life insurance contracts, the interest of a person designated as the beneficiary is on the other hand a vested property right subject to the terms of the policy construed as applying to such vested right.”

POINT II.

Was the interest of Robert Gemmell under said policy superior to the interest of Mrs. Gemmell?

A policy of insurance is essentially a contract made between the insured and the insurance company for the benefit of a third party or for his own benefit, and all rights which a third party or the insured has under the contract of insurance are fixed and determined by the policy and must be controlled by its terms.

In *Eagle v. New York Life Ins. Co.* (Ind.) 91 N. E. 814, the facts were that the insured had obtained a loan from the insurance company upon his policy. The beneficiary claimed the full amount of the policy. The court says:

“Whatever may be considered the true consideration underlying the insurance, the wife cannot be said to possess a greater interest

in the policy than is given her by the terms thereof. When she acquires the title to the same upon execution and delivery, she takes such title burdened with all of its conditions and limitations.”

In re Waldsburger, 78 Colo. 516, 45 A. L. R. 718 the facts were that the insured had obtained a loan from the insurance company upon his policy. Upon the death of the insured the difference between the amount due the insurance company and the face of the policy was paid to the beneficiary. The beneficiary then made claim against the estate of the insured for the amount by which the policy had been reduced by said loan. The court says:

“The beneficiary’s claim against the estate of the deceased insured for \$1263.77 is based upon the contention that when claimant was named as beneficiary he had a vested interest in the policy to the extent of \$3,000., the principal sum, and that if the insured borrowed money from the insurer, it would not affect the beneficiary’s right to the principal sum.

“This contention is not sound in view of the loan provision contained in the policy. Whatever interest the beneficiary had was an interest in the amount payable under the policy under the conditions existing with reference to loans at the time of the death of the insured. In this case the amount payable was the sum actually paid to the beneficiary by the insurer.”

That the right of the beneficiary is controlled by the terms and provisions of the policy is effectually illustrated by the following cases in which the courts uniformly hold that the rights of the beneficiary are subject to the benefits conferred upon the insured by the policy:

- Travelers' Ins. Co. v. Healey*, 25 A. D. 53,
49 N. Y. S. 29, Aff'd. 164 N. Y. 607,
58 N. E. 1093 (memo);
Miller v. Campbell, 2 Misc. 518, 22 N. Y.
S. 388, Aff'd. 140 N. Y. 456, 35 N. E.
651;
*Tennes v. Northeastern Mutual Life Ins.
Co.*, 26 Minn. 271, 3 N. W. 346;
Cooper v. West, 173 Ky. 289, 190 S. W.
1085;
Robison v. Union Cent. Life Ins. Co., 96
Kans. 237, 150 P. 564;

In *Travelers' Insurance Co. v. Healey*, *supra*, Alonzo H. Doty took out a policy of insurance upon his life for \$2,000., payable to his wife if she survive him, if she did not survive him, then to his children who should survive him, and if neither wife nor child should survive him, then the policy was to be paid to his executors or administrators. The eighth clause of the policy provided "that this policy may be converted into cash at the option of the holder at any time after the expiration of fifteen years from the date hereof for the amount endorsed upon the back of the policy". Alonzo H. Doty, without the consent of the beneficiary, assigned the policy to the defendant, Healey. Alonzo H. Doty survived the fifteen year period, and during his lifetime the defendant, Healey, exercised this option. The court held that the person who takes out and pays for the policy, or his transferee, is the policy holder, and that the holder can assign this option without the consent of the beneficiaries and could exercise this option.

After referring to the provisions of the policy, the court said:

"Thus, if the holder should exercise the

option, he would become the beneficiary in the lifetime of Alonzo H. Doty, and the wife, Josephine, and the Doty children would cease to be beneficiaries, or rather, never would become beneficiaries at all. The plaintiff, by the terms of the policy, held out to Alonzo H. Doty two inducements—one, the provision for his wife or children if he could get along without himself resorting to the policy in his lifetime; the other, that if he could not get along, if poverty or misfortune constrained him, he could himself, after 15 years passed, realize its cash value.

"Alonzo H. Doty thus had the right to become sole beneficiary of the policy. It was a property right, and he could dispose of it without consulting either his wife or his children, since whatever interests they had were subject to the contingency that he, by exercising the option, could make his own right superior and absolute, and thereby cut off their contingent interests. Laws 1879, c. 248, as it seems to me, does not impair this right. It provides that 'all policies of insurance heretofore or hereafter issued within the State of New York upon the lives of husbands for the benefit and use of their wives, in pursuance of the laws of the state, shall be from and after the passage of this act assignable by said wife with the written consent of her husband'. To the extent that this policy was for the benefit and use of the wife, the written consent of the husband was necessary to her assignment of it; but, to the extent that it was for the benefit and use of the husband, it was not. Her written consent or assignment was not necessary * * *.

"Cases arising after the death of the husband upon policies insuring his life for the benefit of his wife or children, with no optional cash-converting provision in his favor in his lifetime, or if so, with the option unexercised are foreign to the case presented by this policy. Here the claim of Ann Heal-

ey does not rest upon the wife's assignment, but upon the husband's assignment to her of his endowment interest therein, which cuts off every other interest therein. The policy is either an endowment policy or a life policy, at the option of the holder. If the policy had said that, at the expiration of 15 years, \$740. should be paid to Alonzo H. Doty or to the holder in full for the insurance, the interest of the wife and children would then have ceased. *Miller v. Campbell*, 140 N. Y. 457, 35 N. E. 651. It can make no difference that, instead of fixing the exact period when the endowment shall mature, the policy gives the holder the option to fix it at any time after 15 years."

In *Miller v. Campbell, supra*, a life insurance policy provided that the insurance company should pay the insurance to the wife "for her sole use, if living * * * or if the person whose life is insured shall survive said term of 15 years * * * the sum above insured shall be paid to him". The husband and wife joined in an assignment of the policy to plaintiff. By statute the wife was unable to assign her policy. Yet, it was held that the plaintiff was entitled to the proceeds as against the wife since the husband had survived the fifteen year term. The court said:

"It was there held that her interest had ceased under the terms of the policy * * * While the 15 years of the policy were running, the policy was unassignable by Mrs. Brick * * * . Subsequently * * * an event had happened, by the expiration of the period of 15 years, which deprived Mrs. Brick of her interest in the policy, and vested every interest in her husband, Mr. Brick, to whom, by its express terms, the amount of the insurance had become due. The previous assignment to the defendant, however,

had operated to transfer whatever interest he had in the policy * * * . But differing from ordinary life insurance a certain period is fixed by the contract or policy, within which the obligation of the insurer runs to the wife, children or personal representatives, and they had no right to receive payment under it beyond that period."

And in *Tennes v. Northeastern Mutual Life Ins. Co., supra*, it was held that the proceeds of the endowment policy, where the insured survives the period, belong to the insured and not to the beneficiary because the terms of the policy so provide.

In *Robison v. Union Cent. Life Ins. Co., supra*, it was held that where a term policy has matured by the running of the allotted time, the insured can compel the insurer to pay him its proceeds without obtaining the consent of the beneficiary.

So, also, where the policy, by its express terms, provides that the insured may take the cash surrender value of the policy at any time, he may do so without the consent of the beneficiary.

Cooper v. West, supra.

Blinn v. Dame, 207 Mass. 159, 93, N. E. 601.

In *Blinn v. Dame, supra*, the policy provided that it undertook "to pay the sum of \$10,000. to him, 'the insured, his executors, administrators or assigns', on the 10th day of July, 1918, or if 'he should die before that time then to make such payment to Irving F. Dame and Mildred L. Dame,' his children, 'if they survive the insured (with power to the insured to surrender the policy to the said company at any time), otherwise to the insured's executors, administrators or assigns'". The policy was assignable by the insured. The in-

sured made an assignment for the benefit of his creditors, and the court held that the assignee could require the insured to execute any cash surrender that might be necessary to enable him to collect the surrender value of the policy in question without the consent of the beneficiary. The court said:

"The right of his children was to receive the amount of the policy if he did not live until the appointed time, and if they survived him and he had not in his lifetime surrendered the policy. If this right is regarded as contingent, it would not come into existence at all if the father should at any earlier time exercise his absolute right to surrender the policy; if their right was a vested one, it would be completely divested by their father's exercise of his right. Their right, in the opinion of the majority of the court, was strictly subordinate to the prior and superior right of their father. It was so made by the very language which created it. Either it was not to arise at all if the paramount right of their father should be exercised, or it would be completely divested by the exercise of his paramount right to surrender the policy. Whether their interest was vested or contingent, they could have no part of the proceeds of the policy if their father lived until its maturity, or if they did not survive him, or if he had at any earlier time surrendered the policy. Unless these three contingencies concurred in their favor, either their right never would vest, or it would be completely divested and cut off by the very terms of the conditional limitations in their favor. We do not deem it material to determine whether their right was vested or contingent; for, as we have seen, the result would be the same in either event. There is no question here of the attempted revocation of a trust. Such cases as *Stone v. Hackett*,

12 Gray, 227, and *Kelley v. Snow*, 185 Mass. 288, 70 N. E. 89, and those cases in which an absolute interest was given to the beneficiaries of life insurance policies, have no bearing. We are to construe the language of the policy and to determine what rights it gives to the children. The statute which has been referred to protects these rights when ascertained, but it has no operation to increase or extend them."

* * * * *

"What we have said is also, in our opinion, decisive upon the only remaining question in the case. His right of surrender was a valuable property right, vested in him by the language of the policy. It constituted an integral part of the value to him or his estate of the policy itself. The pecuniary value would be very much less either to himself or to anyone to whom he might transfer his property rights if this unqualified and paramount right of surrender were not secured to him. There was here an agreement on the part of the company to pay the surrender value to him upon his surrender; this was a contract right given to him by the policy, which materially increased its value to him. This was not merely a right to surrender under the third article or the third clause of the eighth article of the provisions attached to the policy. Under the parenthetical clause contained in the promise of the Company he had the right to surrender the policy at any time and to receive its surrender value. Moreover, this clause was made a part of the conditional limitation or appointment in favor of his children, apparently for the very purpose of saving to him the absolute ownership and control of the policy. The children's right was made subject to his unrestricted right of surrender. This was a valuable property right incident to his general right under the policy such as would

pass with an assignment of the latter. It now must be held, in the opinion of the majority of the court, that it did pass, with the policy itself, under the general language of the assignment."

POINT III.

If said Robert Gemmell had the right under said policy to demand and receive the face amount of the certificates issued to him thereunder, and if such right were superior to any interest Mrs. Gemmell had therein, then had he and his employer—the Insurance Company—done all things necessary to entitle him to payment?

When the contingency provided for in the policy happened and the insured exercised his right thereunder, he became immediately entitled to its benefit and the right of the beneficiary was completely destroyed.

Miller v. Grand Lodge, Brotherhood of Trainmen, 118 N. E. 713;

Thorensen v. Massachusetts Ben. Ass'n, 68 Minn. 477, 71 N. W. 668;

Wright v. Western States Life Ins. Co., 61 Calif. Appeals 488, 240 P. 990.

In *33 C. J. 75*, it is said:

"In the absence of a contractual or statutory provision to the contrary, an action upon a policy of insurance may be brought immediately upon the happening of the loss or other contingency fixing the liability, or at least upon furnishing all requisite proof of loss."

Bost v. Volunteer State Life Ins. Co., 103 S. E. 771 (S. C.)

Northwestern Mutual Life Ins. Co. v. Joseph, 31 Ky. 714, 103 S. W. 317, 12 L. R. A. N. S. 439.

In *Bost v. Volunteer State Life Insurance Co.*, *supra*, the insured exercised the privilege of surrendering his policy during his lifetime by executing the proper papers and mailing the policy to the company. He died before he received payment. The court said:

"The fact that he died before check was received and cashed does not make the company further liable. When the insured accepted the offer of the company and mailed the policies to the company and the company sent check for the agreed amount of the cash surrender value, that completed the payment and finished the transaction."

In the case of *Northwestern Mutual Life Ins. Co. v. Joseph*, *supra*, the facts were that Lafayette H. Joseph held a tontine policy in which the tontine featured matured on May 25, 1901. Under the policy he had several options, among others to surrender the policy and receive its cash value. He elected to accept the cash value of the policy, which then amounted to \$1124.52, and on that day signed a receipt for the amount of the cash payment and also an order directing the Company to pay one Beull the amount of the note due him which was secured by pledge of the policy. The papers, after being signed, were delivered on that day to the agent of the insurance company to be forwarded by him to the company, and on May 27, 1901, they were placed in the mail addressed to the company at its home office in Milwaukee, and were received

by the company on the afternoon of May 28th. On the morning of May 28th, and before the papers were received by the company, Mr. Joseph died, and on the same day the company was notified of his death. On June 4th the company paid to Beull \$1048.20, the amount of his debt, and forwarded check to the beneficiary for \$76.24, the balance of the cash value of the policy. The beneficiary, Mrs. Joseph, refused to accept the amount paid, and instituted action against the company to recover the sum of \$2,000., less the amount paid to Beull. The court said:

"It will thus be seen that the principal question to be determined is, Did the mailing of the letter inclosing in proper form his election complete the contract in this respect as between Joseph and the Company? and, If so, did his death before the letter was delivered to the company annul the election made by him,—it being conceded that the acceptance of the election by Joseph was made in proper form and was in terms in exact compliance with the option tendered? In Page on Contracts, Section 52, it is said: 'Where the mail or telegraph is a proper means of communication, the great weight of modern authority is that the acceptance is binding on both parties from the moment that it is transmitted, if such transmission is effected in the proper way. So an insurance policy which is not to be in effect until 'delivery' takes effect when it is mailed to the insured, properly addressed, postage prepaid.' The author also declared that the acceptance thus made or a contract thus completed cannot be revoked after the letter of acceptance is mailed, and says: 'If the party making the offer dies before the letter of acceptance is received, but after it is mailed, the offer does not lapse, since it has already been turned into

an agreement by acceptance. The rule is the same where the party accepting the offer dies after his letter of acceptance is mailed.'

* * * *

"Counsel for appellee concede the general rule announced in the authorities mentioned, that the unqualified acceptance of an offer by placing it in the mails completes the contract, but attempt to take the case at bar out of this general rule upon the ground that here it was required that the papers and policy must have been actually received by the company before the contract of election was completed; but we cannot find anything in the record that justifies this conclusion. The insured, under his contract, had the unqualified right, upon the maturity of the tontine period, to elect which one of the several options in his contract he would accept; and the company had no right or authority to modify or in any way interfere with or deny him the right to accept which one of them he pleased. His right to the election was optional with him, but absolutely binding upon the company, as in the contract it tendered to him unequivocally this right. Therefore, when the insured exercised his election in proper form and in the manner provided in the policy, it was as irrevocable a contract as could be made. It was a complete contract before Mr. Joseph died."

POINT IV.

Did the provision in the policy and in the certificates providing that disability benefits after proof thereof should be payable "either in one sum six months after the Company shall have received such proof, or, etc." preclude the Company from making payment immediately upon receipt of such proof?

It is quite apparent why the policy contained the provisions that "the Company will * * * pay to said person at its home office the amount insured on his (or her) life as the employer may request, *either in one sum six months after the Company shall have received such proof* or in sixty monthly instalments, etc." It was not on account of the possible shortage of funds with which to make the payment, but was to enable the Insurance Company, during the six months period, if it had any doubt about the matter, to determine whether the insured had become permanently disabled.

Such provision in the policy was for the sole benefit of the Insurance Company, and it could be, and was waived in this case, as evidenced by the drawing of the check for the full amount due the insured under his certificates.

POINT V.

If the court correctly awarded the proceeds of the certificates to Mrs. Gemmell, then did it err in allowing her a counsel fee of \$1,000. and costs to be paid by the executor under the will of Robert Gemmell, deceased?

We submit that it did.

The executor then and still believes that the transaction between the insured and the Insurance Company was consummated in the life of the insured, and the amount due on the certificates issued under the policy was payable to it as such executor. Furthermore, the executor was acting in a representative capacity.

Argument.

Therefore, we submit that under the law:

First: That the interest of Mrs. Gemmell in said policy of insurance was subject and subordinate to the right of Mr. Gemmell to claim and collect the disability benefits given him under such policy.

Second: That Mr. Gemmell was wholly incapacitated within the meaning of the policy of insurance.

Third: That the application of Mr. Gemmell for payment of his disability claim in one sum was approved by The Prudential Insurance Company, his employer, on December 16, 1926 (as evidenced by the drawing and executing of a check to his order for the full amount due him), at which time his right and the obligation of the Insurance Company to pay became and were fixed and settled, and his right passed to his executor.

Fourth: That there is nothing in the policy or the certificates issued thereunder requiring the surrender of the policy (which is held by the Company) or the certificates before he became entitled to payment thereof. The policy is a contract between the insurer and the insured, and no matter what an officer or employee may say in reference to the requirements of the Company, the contract governs.

Fifth: That the provision that payment would be made six months after the "Company has received due proof of such disability or incapacity" is a right reserved to the Insurance Company and could be and was waived. Furthermore, it has nothing to do with the fixing of the liability of the Company to pay and the right of Mr. Gemmell to payment.

Sixth: That the issuance of the check by the Company payable to Mr. Gemmell for the full amount due him under the policy, with the statement upon the face thereof that it was in full payment, is plenary evidence of his fixed right under said policy.

We submit that the decree entered by the Court of Chancery in the above cause should be reversed.

Respectfully submitted,

HOOD, LAFFERTY & CAMPBELL,
Solicitors of defendant-appellant, Fidelity Union Trust Company, as Executor of the last will and testament of Robert Gemmell, deceased.