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SUMMONS.

The State of New Jersey to Prudential Insurance Company of America:

You are summoned to answer the annexed complaint of Archibald F. Slingerland, executor under the Last Will and Testament of Jonathan Sloan, deceased, in an action at law in the Essex County Circuit Court.

(L. S.) And take notice that unless you file your answer to said complaint with the Clerk of the said Essex County Circuit Court, at Newark, within twenty days after the service upon you of this writ, and the annexed complaint, the plaintiff may proceed in the suit, and judgment may be entered against you.

Witness, Nelson Y. Dungan, Judge of the said Circuit Court at Newark, this 17th day of July, nineteen hundred and nineteen.

JOHN H. SCOTT,
Clerk.

Smith & Slingerland,
Attorneys.

See notice endorsed on complaint.

COMPLAINT.

Filed July 17, 1919.

ESSEX COUNTY CIRCUIT COURT.

ARCHIBALD F. SLINGERLAND, Executor under the Last Will and Testament of JONATHAN SLOAN, deceased, *Plaintiff*, *vs.* PRUDENTIAL INSURANCE COMPANY OF AMERICA, *Defendant*.	*Action at Law. Upon Contract. Complaint.*

Plaintiff,

Residing at 659 Stuyvesant avenue, in the Town of Irvington, in the County of Essex and State of New Jersey, says that:

1. On January 17, 1887, defendant was and still is, a corporation duly incorporated, with power to insure the lives of persons.

2. On that date, in consideration of the payment to defendant by one Jonathan Sloan, deceased, late of the City of Newark, of a weekly premium of 39 cents on or before every Monday during the continuance of the contract, defendant made its policy of insurance in writing (which policy is now in the possession of the defendant) and thereby insuring the life of said Sloan in the sum of $500.

3. On February 7, 1919, said Sloan died leaving a will by which plaintiff was appointed executor, and on February 20, 1919, said will was admitted to probate by the Surrogate of Essex County and letters testamentary thereon were issued to plaintiff.

4. Said Sloan duly performed all the conditions of said contract of insurance on his part, and, till his death, said weekly premiums were duly paid.

5. On February 8, 1919, plaintiff notified defendant in writing of the death of said Sloan, and of plaintiff's appointment as

executor of the said will, and demanded that the moneys due under said contract of insurance should not be paid by defendant to anyone else without first notifying plaintiff.

6. Plaintiff made due proof of the death of said Sloan to the defendant, in accordance with the requirements of said policy, on March 28th, 1919, and otherwise performed all conditions of said policy on his part.

7. Notwithstanding the notice of the plaintiff to the defendant, mentioned in paragraph 5 hereof, and in disregard thereof and of plaintiff's claim to said insurance, defendant made payment of the amount of said insurance to one Martha W. Murphy on February 13, 1919.

8. Plaintiff has demanded of defendant the amount of said insurance, but defendant has refused and still refuses to pay the same to the plaintiff.

Plaintiff, as executor, demands as damages $1,000.00, with interest and costs of suit.

SMITH & SLINGERLAND,
Attorneys of Plaintiff.

Dated July 17, 1919.

29379 ESSEX COUNTY CIRCUIT COURT.

ARCHIBALD F. SLINGERLAND, executor, etc.,
Plaintiff,

vs.

PRUDENTIAL INSURANCE COMPANY OF AMERICA,
Defendant.

Action at Law.
Upon Contract.

SUMMONS AND COMPLAINT.

SMITH & SLINGERLAND,
Plaintiff's Attorneys.

P. O. address, 765 Broad St., Newark, N. J.

Notice to the Within-Named Defendant:

In case the within writ or summons and complaint are served upon you personally, then take notice that if you intend to make a defense to this action you must file an affidavit of merits within ten days from the date of service thereof upon you, and must file your answer within twenty days from the date of such service, and in default, judgment will be entered against you: Lawful service upon a corporation is deemed personal service for the purpose of this notice.

SMITH & SLINGERLAND,
Plaintiff's Attorneys.

I hereby appoint and depute John L. Kane to serve the within writ.

Witness my hand and seal this 18th day of July, 1919.

JOHN R. FLAVELL,
Sheriff.

By GEO. F. BRANDENBURGH,
Under-Sheriff.

Sheriff fees $2.80. (SEAL)

Summons and Complaint.

Served the within summons and complaint with a ten days' notice endorsed thereon July 18, 1919, personally upon Lester E. Wurfel, agent in charge of the Prudential Insurance Company of America, the within-named defendant, at their office, Prudential Building, Newark.

JOHN R. FLAVELL,
Sheriff.

By John L. Kane,
Special Deputy.

State of New Jersey, }
Essex County, } *ss.*

John L. Kane, Special Deputy Sheriff of the County aforesaid, being duly sworn, on his oath deposes and says that on the 18th day of July, A. D. 1919, he delivered personally to the said defendant Lester E. Wurfel, agent in charge, Prudential Insurance Company of America, a true copy of the within summons and complaint, with a ten days' notice endorsed thereon.

JOHN L. KANE.

Subscribed and sworn to this 19th
day of July, A. D. 1919.

Milton E. Crawley,
Notary Public of New Jersey.

ANSWER.

Filed August 1, 1919.

Defendant, a corporation of New Jersey, with an office at 763 Broad street, Newark, New Jersey, says that:

1. Defendant admits paragraphs 1 to 6, inclusive, of the complaint.

2. Defendant admits paragraph 7 of the complaint and alleges said payment was made to the said Martha W. Murphy, a daughter of said Jonathan Sloan, upon submission by her of proofs of his death, dated February 8, 1919, and delivery by her to defendant of the policy on or about February 13, 1919. Payment was made under the second condition of said policy, copy of which policy is attached hereto and made a part of this answer.

3. Defendant admits paragraph 8 of the complaint.

4. Defendant denies plaintiff as executor is damaged in any sum.

5. Defendant will object that the complaint discloses no cause of action, as the second condition of the policy provides that payment made in accordance therewith shall be conclusive evidence that all claims thereunder have been paid.

ALFRED HURRELL,
Attorney of Defendant.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA

Home Office: Newark, N. J. Number 1576737

(Copy)

Special Industrial Policy. Age, 41

In consideration of the Application for this Policy, and of the payment of the weekly premium of thirty-nine Cents, on or before every Monday during the continuance of this contract, promises to pay at its Home Office, in the city of Newark, New Jersey, unto the executors, administrators, or assigns of Jonathan Sloan, the person herein designated as the insured, unless payment shall be made under the provisions of article second hereinafter contained, the sum of Five hundred Dollars, within

Answer.

twenty-four hours after acceptance at its said office of satisfactory proof of the death of the insured, such promise however, being made, and

This Policy issued and accepted subject to the following Conditions and Agreements:

First. The Application for this Policy is hereby made a part of this contract, and if the representations in said Application are not true, or if the premiums shall not be paid to the Company or its authorized agent according to the terms hereof, this Policy shall be void, and all premiums paid hereon shall be forfeited to the Company, except as hereinafter provided.

Second. The Company may pay the sum of money insured hereby, to any relative by blood, or connection by marriage of the insured, or to any other person appearing to the Company to be equitably entitled to the same by reason of having incurred expense in any way on behalf of the insured for his or her burial, or for any other purpose, and the production by the Company of a Receipt signed by any or either of said persons, or of other sufficient proof of such payment to any or either of them shall be conclusive evidence that such sum has been paid to the person or persons entitled thereto, and that all claims under this Policy have been fully satisfied.

Third. The insured may engage in any occupation, but if he shall be in military or naval service in time of actual war or other hostilities, he shall so notify the Company, and pay the extra premium charged therefor.

Fourth. If within three years from the date hereof, the insured shall die by suicide, whether sane or insane, or in consequence of his or her own criminal action, the liability of the Company shall not exceed the amount of the premiums paid on this Policy.

Fifth. If the insured shall die within three months from the date hereof, no amount will be payable under this Policy. If the insured shall die after three months and within six months from the date hereof, the Company shall be liable for only one-fourth of the amount of this Policy. If the insured shall die after six months and within one year from the date hereof, the Company shall be liable for only one-half of the amount of this Policy. But if the insured shall die after one year from the date hereof, the whole amount shall be payable. In case the age of

Answer.

the insured shall have been understated by mistake, the sum insured will be reduced to the amount the premiums would pay for at the true age.

Sixth. No suit or action at law or in equity shall be maintainable to enforce the performance of this contract until after the filing of the above mentioned proof of death, including the surrender of this Policy and the Premium Receipt Book belonging therewith at the Home Office of the Company, nor unless such suit or action shall be commenced within one year next after the death of the insured and should any such suit or action be commenced after the expiration of said period of one year, the lapse of time shall be deemed conclusive evidence against the validity of such claim, any statute of limitations to the contrary notwithstanding.

Seventh. If this policy shall be assigned, the assignment must be in writing, and the Company shall not be required to notice such assignment until the original or a duplicate thereof is filed in the said Home Office.

Eighth. If after the payment of the weekly premium hereon for three or more years this Policy shall become void by reason of default in payment of premiums, the Company agrees to issue a paid-up policy for the sum hereby insured, for a term of as many weeks as the number of times the full legal reserve upon this Policy at the time of forfeiture, contains the premium for said sum insured, at the age of the insured at the time of lapse, according to the then published rates of the Company for Special Industrial whole life policies; provided that this Policy shall be surrendered to the Company and application made in writing for such paid-up policy within sixty days after default in the payment of premiums hereon.

Ninth. If for any reason, the premium shall not be called for by an authorized agent on or before the day when due, it shall be the duty of the policy-holder to bring or send the same to the Home Office of the Company within four weeks thereafter.

Tenth.—No payment of premium will be recognized by the Company as binding unless made to a duly authorized agent, and by such agent entered at the time of payment in the Premium Receipt Book belonging with this Policy.

Eleventh. Agents are not authorized to make, alter or discharge contracts, waive forfeitures or receive premiums on Policies in arrears beyond the time allowed by the regulations of the Company, which in no case shall exceed four weeks.

Twelfth. After three years from the date hereof, if all due premiums shall have been paid and full proof of death given to the Company within three months next after the death of the insured, and if the foregoing condition as to occupation shall have been complied with, and in case of understatement of age, the amount reduced as above provided, this Policy shall be incontestable.

(SEAL) IN WITNESS WHEREOF, the President and Vice President of said Company have signed these presents and affixed the seal of the Company at the City of Newark, New Jersey, this Seventeenth day of January, 1887.

JOHN F. DRYDEN,
President.

LESLIE D. WARD,
Vice President.

AGREED STATE OF FACTS.

Filed December 4, 1919.

It is hereby stipulated and agreed by and between the respective attorneys for the above parties that the following are the facts upon which this case is to be submitted to the Court for decision:

1. On January 17, 1887, defendant, in consideration of the payment by one Jonathan Sloan, plaintiff's decedent, of a weekly premium of 39 cents on or before every Monday during the continuance of the contract, issued a policy upon the life of plaintiff's decedent in the sum of $500.

2. Said Jonathan Sloan died on February 7, 1919, leaving a will appointing plaintiff executor thereof and on February 20, 1919, said will was admitted to probate by the Surrogate of the County of Essex and letters testamentary thereon were issued to plaintiff, who duly qualified and is now acting as such.

3. All of the conditions of said contract of insurance required by the said Sloan to be performed were performed.

4. On February 8, 1919, plaintiff wrote a letter to the defendant, of which the following is a true copy:

"February 8, 1919.

Prudential Insurance Co.,
Newark, N. J.

Dear Sirs:

I write to advise you that I represent the Estate of Jonathan Sloan, upon whose life your company issued a policy numbered 1576737 for $500. Mr. Sloan died yesterday leaving a Will in which I am named as Executor. It appears that one of his daughters, a Mrs. Martha Murphy, of Elmira, N. Y., while on a visit at her father's home several years ago, obtained possession of the policy and although Mr. Sloan made several demands upon her for it she refused to surrender it.

As I understand it there is no named beneficiary in the policy, but as an extra precaution I am writing you the facts so that you will have notice of the situation and will not make any payments under the policy to Mrs. Murphy or to anyone without first notifying me.

Yours very truly,

ARCHIBALD F. SLINGERLAND."

Which letter was received by the defendant on February 10, 1919.

3. The following are true copies of letters passing between plaintiff and defendant with reference to claim under said policy:

"March 8, 1919.

Day, Day, Smith & Slingerland,
Prudential Bldg., 765 Broad St.,
Newark, N. J.

Gentlemen:—

In *re* Jonathan Sloan.

We have before us your letter of recent date in connection with claim under policy #1576737 on the life of the above named.

In reply, would state, we have no record of the claim papers in connection with this policy having been received at this office but we are holding your letter on file and will give the matter our attention when the proofs of death have been received.

I remain,

Very truly yours,

J. H. GLOVER,
Asst. Manager,
A. W."

"March 10, 1919.

Prudential Ins. Co.,
Newark, N. J.

Dear Sirs:—

Attention of Mr. J. H. Glover, Asst. Mgr. *re* Est. Jonathan Sloan.

We have your favor of the 8th inst. in above. We will be obliged if you will send us proper form of proof of death and of claim under the policy in question.

Yours very truly,

DAY, DAY, SMITH & SLINGERLAND."

"March 18, 1919.

Day, Day, Smith & Slingerland,
Counsellors-at-law, Prudential Bldg.,
765 Broad St., Newark, N. J.

Gentlemen:—In *re* Jonathan Sloan.

We acknowledge receipt of your communication of March 10th in connection with a claim on the life of the above named, and in reply would state, we have referred the matter to our Superintendent J. R. Burt, Rooms 916-921 Prudential Building requesting that he give the matter his immediate attention. No doubt, you will hear from him within a few days.

Very truly yours,

J. H. GLOVER,
Asst. Manager.
A. W."

"March 18, 1919.

Prudential Insurance Company,
Broad Street, City.

Dear Sirs:—

Attention of Mr. J. H. Glover, Assistant Manager.
re Estate Jonathan Sloan.

On the 10th inst. we wrote you asking for proper forms for proof of death and of claim in above, which will you be good enough to forward to us promptly so that we may get the settlement of the estate under way.

Yours very truly,

DAY, DAY, SMITH & SLINGERLAND."

"March 22, 1919.

Messrs. Day, Day, Smith & Slingerland,
Counsellors-at-Law, Prudential Bldg.,
765 Broad St., Newark, N. J.

Dear Sirs:—In *re* Jonathan Sloan.

With further reference to our letter of March 18th regarding claim on the life of the above named, we are attaching blank proofs of death which we would like you to have completed in accordance with a letter of instruction and returned to this office.

We would prefer to have the policy in this case and if you will furnish us with the address of Mrs. Martha Murphy of Elmira, N. Y., we will write to her and endeavor to secure it and the premium receipt book. We will also thank you to furnish us with a copy of the will and a transcript given from the Surrogate court showing the appointment of the administrator.

Very truly yours,

J. H. GLOVER,
Asst. Manager.
A. W."

"March 24, 1919.

Prudential Insurance Company,
Attention of Mr. J. H. Glover,
Newark, N. J.

Dead Sir:—

re Estate of Jonathan Sloan.

We have your favor of the 22nd inst. in above. In reply we have to say that the address of Mrs. Martha Murphy is 209 Madison Avenue, Elmira, New York.

Yours very truly,

DAY, DAY, SMITH & SLINGERLAND."

"March 28, 1919.

Prudential Insurance Company,
Attention Mr. Glover,
Newark, N. J.

Dear Sir:—

re Estate of Jonathan Sloan.

As requested by you I have had the claim papers in above filled out and executed, including the Doctor's and Undertaker's certificates, which I trust you will find in due form. I also have in our possession a certified copy of the record of death from the City Clerk's office, and if you will require this I will be glad to forward it to you.

The policy in question, as you are aware, was taken by one of the daughters of the decedent, Mrs. Martha Murphy, who lives in Elmira and she has refused to turn the same over to me. My understanding is that the policy is payable to the Estate and therefore as executor I should not think it would be necessary for me to actually produce the policy and that you would be justified in paying me upon being satisfied as to my appointment and qualification as executor.

I enclose herewith a certified copy of the Will, together with a Certificate from the Surrogate showing my qualification.

Yours very truly,

ARCHIBALD F. SLINGERLAND."

Agreed State of Facts.

"April 4, 1919.

Messrs. Day, Day, Smith & Slingerland,
Counsellors at Law, Prudential Building,
Newark, N. J.

Dear Sirs:—In *re* Jonathan Sloan. Claim 2580357.

Supplementing our letter of March 22nd, we find upon further investigation that policy #1576737 on the life of the above named was presented at this office by Martha M. Murphy on Feb. 13, 1919 and payment was made to her on that day in the sum of $513.19.

The claimant, in submitting the policy and premium receipt book, stated that all premiums had been paid by her for four and one-half years and that the funeral expenses were to be paid by her, in view of which statement we felt justified in making payment to her under the Facility of Payment clause of the contract.

Unfortunately, your letter of Feb. 8th had not reached the undersigned at the time the claim was presented, and our subsequent letters on the subject were written without knowledge of the payment of the policy.

We greatly regret the circumstances and the fact that you were put to the trouble of furnishing the enclosed papers, which we enclose herewith for your files.

Very truly yours,

J. H. GLOVER,
Asst. Manager."

"April 8, 1919.

Prudential Insurance Co.,
Broad Street, City.

Dear Sirs:—

Attention Mr. J. H. Glover.
re Estate of Jonathan Sloan.

We have your favor of the 4th inst. in above and are greatly surprised at its contents. In the face of the notice contained in our letter to you of February 8th last and which was received at your office on February 10th, there was no justification for your making payment on February 13th to Mrs. Murphy. It is the duty of the executor, whom we represent, to collect in the amount due on this policy as part of the assets of the estate, and we hereby on his behalf make demand upon you for the amount due thereunder. We are ready at any time to re-deliver to you the claim papers which you returned to us in your letter.

Please let us hear from you promptly upon receipt.

Yours very truly,

DAY, DAY, SMITH & SLINGERLAND."

"April 19, 1919.

Day, Day, Smith & Slingerland,
Attorneys at Law,
765 Broad Street, Newark, N. J.

Gentlemen:—In *re* Jonathan Sloan. Claim #2580367.

We wish to acknowledge receipt of your favor of the 8th inst. with reference to claim under policy 1576737 on the life of Jonathan Sloan. As Mr. Slingerland called on me some days ago regarding the matter and as the situation was fully explained to him, I do not know whether any further explanation is expected. However, our position is as follows:—

The contract provides that "The Company may pay the sum of money insured hereby, to any relative by blood, or connection by marriage of the insured, or to any other person appearing to the Company to be equitably entitled to the same by reason of having incurred expense in any way on behalf of the insured for his or her burial, or for any other purpose."

The claim was made by Martha W. Murphy, daughter. Her adddress is 209 Madison Avenue, Elmira, N. Y. She had possession of the policy and had been paying premiums from between four and five years. She also stated she was responsible for the funeral expenses. She called here with the papers, waited for the check which was delivered to her personally. Under the contract, we had a legal right to pay the claim to her. Of course, we do not presume to say whether the amount of insurance belongs to her personally or whether she should turn it over to the estate, but this is a matter for the estate to determine.

There is no further liability on our part, however, after having paid the amount due under the policy to her, she being a daughter and therefore a blood relative.

Very truly yours,

WM. H. DENNIS,
Manager."

6. Plaintiff filed properly verified proof with defendant on March 28, 1919, in accordance with the requirements of said policy; and otherwise performed all of the conditions of said policy on his part.

7. On February 13, 1919, defendant paid the amount due under said policy to one Martha W. Murphy, a daughter of the decedent, upon submission by her of duly verified proofs and upon delivery by her to the defendant of the said policy, which was in her possession. This payment was made under the second condition of said policy reading as follows:

> "The Company may pay the sum of money insured hereby, to any relative by blood, or connection by marriage of the insured, or to any other person appearing to the Company to be equitably entitled to the same by reason of having incurred expense in any way on behalf of the insured for his or her burial, or for any other purpose, and the production by the Company of a receipt signed by any or either of said persons, or of other sufficient proof of such payment to any or either of them shall be conclusive evidence that such sum has been paid to the person or persons entitled thereto, and that all claims under this policy have been fully satisfied."

It is admitted that the defendant has produced such a receipt from the said Martha W. Murphy for the proceeds of the policy as provided in said condition.

8. Attached hereto is a photographic copy of the original policy received by defendant from the said Martha W. Murphy, a full copy thereof having been attached to and made a part of defendant's answer.

Decision.

9. Defendant has refused to pay plaintiff's claim, although payment thereof has been demanded by the plaintiff in proper form.

Dated November 18, 1919.

SMITH & SLINGERLAND,
Attorneys of Plaintiff.

ALFRED HURRELL,
Attorney of Defendant.

The photographic copy of the original policy referred to in paragraph 8 of the agreed state of facts is identical with the copy annexed to the answer.

DECISION.

MOUNTAIN, *J.*

This memorandum is attached to the agreed state of facts and is to be filed with it.

It was competent for the parties to the contract of insurance to stipulate that such primary obligation to pay to the executors, administrators or assigns of the deceased should be conditional or defeasible and that payment of the amount indicated in the policy to any of the class or classes of persons designated in the second provision of the policy should operate as a discharge of the insurance company from the obligation of the policy. The company has the power to exercise the discretion conferred upon it by the contract, and when it has done so in accordance therewith it is protected by the terms of the policy pertinent thereto. The beneficent purpose of the second provision of this policy would be of little value if anyone competent to be selected could legally and successfully protest against the discretion exercised by the company under the terms of the contract.

On the pleadings and agreed state of facts filed herein, I find as a matter of law that the payment made by the defendant to Martha W. Murphy, daughter of the insured, is a complete discharge of the defendant's liability under the policy in suit and a bar to the present action.

Order for Judgment.

Judgment will be entered for the defendant and plaintiff may have exception.

WORRALL F. MOUNTAIN,
Circuit Court Judge.

ORDER FOR JUDGMENT.

Filed December 4, 1919.

This action was tried upon an agreed state of facts submitted to Judge Worrall F. Mountain at the Essex Circuit Court on December 2, 1919.

Whereupon, it is ordered that judgment be entered for defendant on this 4th day of December, 1919, and plaintiff's objections for the purpose of appeal are noted.

WORRALL F. MOUNTAIN,
Circuit Court Judge.

On motion of

ALFRED HURRELL
and
JAMES GUEST,
Attorneys of Defendant.

Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

ARCHIBALD F. SLINGERLAND, executor of Jonathan Sloan, deceased, *Plaintiff-Appellant,* *vs.* PRUDENTIAL INSURANCE COMPANY OF AMERICA, *Defendant-Respondent.*	*Action at Law.* *On Appeal from Essex Circuit Court.*

BRIEF OF PLAINTIFF-APPELLANT.

I.

Statement of Facts.

This is a suit brought upon a policy of life insurance issued on January 17, 1887, by the defendant to Jonathan Sloan, plaintiff's decedent, insuring the life of said Jonathan Sloan in the sum of $500.

The policy was what was known as an Industrial Policy and contained a provision for payment

> "unto the executors, administrators or assigns of Jonathan Sloan, the person herein designated as the insured, unless payment shall be made under the provisions of article second hereinafter contained, the sum of five hundred dollars, within twenty-four hours after acceptance at its said office of satisfactory proof of death of the insured, such promise, however, being made, and THIS POLICY ISSUED AND ACCEPTED SUBJECT TO THE FOLLOWING CONDITIONS AND AGREEMENTS:" * * * "Second. The Company may pay the sum of money insured hereby, to any relative by blood, or connection by marriage of the insured, or to any other person appearing to the Company to be equitably entitled to the same by reason of having incurred expense in any way on behalf of the insured for his or her burial, or for any other purpose, and the production by the Company of a receipt signed by any or either of said persons, or of other sufficient proof of such payment to any or either of them shall be conclusive evidence that such sum has been paid to the person or persons entitled thereto, and that all claims under this policy have been fully satisfied."

On February 7, 1919, Jonathan Sloan died, leaving a will in and by which he did appoint plaintiff executor thereof.

On February 8, 1919, plaintiff notified defendant in writing of the death of the insured and of plaintiff's appointment as executor, and demanded payment of the amount due under the policy. This notice was received by the defendant at its home office on February 10, 1919 (Case, pp. 10 and 11).

On February 13, 1919, defendant, disregarding plaintiff's notice, paid at its home office the amount due under the policy to one Martha W. Murphy, a daughter of the decedent, and now relies upon the provision of the policy hereinabove set forth, commonly known as the "Facility of Payment" clause (Case, p. 17) to relieve it from liability to plaintiff.

On February 20, 1919, the will of Jonathan Sloan was admitted to probate and plaintiff duly qualified as executor.

This case was submitted to the court below upon an agreed state of facts (Case, p. 10, *et seq.*), and the court below found in favor of the defendant and judgment for the defendant was entered thereon, reserving, however, to the plaintiff an exception for the purpose of this appeal.

II.

Specification of Grounds of Appeal.

1. The judgment of the Trial Court was contrary to law.
2. Upon the pleadings and agreed state of facts the Trial Court should have found that the payment made by the defendant to Martha W. Murphy was not a complete discharge of the defendant's liability under the policy in suit and was not a bar to the present action.

III.

ARGUMENT.

(A)

The Executor or Administrator of the Insured only could maintain suit upon the policy in question.

The authorities are all in accord that the Facility of Payment Clause (Case, p. 8, l. 16, *et seq.*) gives no right of action to the persons named therein, but gives to the Insurance Company the right to select one of those persons and to make payment to him. A right of action upon the policy is vested only in the executor or administrator of the insured (Case, p. 7, l. 42).

> *L. R. A. 1916 F.*, p. 461, &c.; *Lewis* v. *Metropolitan Life Ins. Co.* (1901), 178 Mass. 52, 86 Am. St. Rep. 463; *Mazulli* v. *Metropolitan Ins. Co.* (1910), 79 N. J. L. 271; *Prudential Ins. Co.* v. *Young,* 14 Ind. App. 560, 56 Am. St. Rep. 319.

The difference in character between the rights of the plaintiff as executor of the insured and those of the persons named in the Facility of Payment Clause in the policy in suit is an important one.

The interest of the plaintiff as executor was a vested interest and he alone had the right to enforce it by suit; while the persons named in the Facility of Payment Clause had no vested rights and their interest was of no value unless the insurer properly exercised its right of selection and elected to make payment thereunder. This right of selection, if properly exercised, would have defeated the vested interest of the plaintiff. The question therefore arises, and this is the sole question to be determined, whether or not the insurer has properly exercised this right of selection. In other words, was the defendant justified in making payment under the Facility of Payment Clause to one of the class named therein after service upon it of a demand by the executor of the insured for payment?

(B)

The election by the Insurer must be exercised in good faith and prior to notice from the Executor or Administrator.

The contention of the defendant has been that it had the privilege of electing to whom to pay, notwithstanding the demand of the plaintiff as executor. The court below in its decision (Case, p. 18) did not pass upon this question (which was the only question at issue), but confined its decision to affirming the validity of the contract. It has never been and is not now the contention of the plaintiff that the contract of insurance in this case is illegal or void—on the contrary, its validity is admitted. But it is our contention that the discretion conferred upon the insurer under the Facility of Payment Clause in such a case must be exercised before payment is demanded by the representative of the insured's estate. This right to thus limit the power of selection of the insurer is one of the rights given under the contract.

In *Thompson* v. *Prudential Ins. Co.* (1907), 119 App. Div. 666, 104 N. Y. Sup. 253, the policy involved was similar to the one here in question, and the Court said:

> "At the time this payment was made, no administrator of the estate of deceased had been appointed and there is no evidence that plaintiff or any other member of his family then or at any time prior thereto had even a suspicion of the existence of this insurance; and there is no evidence that any information had come to defendant that deceased had relatives, who might, if opportunity served, claim an interest in the insurance moneys."
>
> "It seems to be and under the authorities must necessarily be conceded by plaintiff that if payment has been made by defendant *prior to notice of her claim as administratrix* to a person chosen from one of the classes designated in provision 2 above quoted in the due exercise of the discretionary power of selection reserved to it by that provision that fact would be a complete defense to this action."

In *Prudential Ins. Co.* v. *Godfrey* (1907), 75 N. J. E. 484, 72 Atl. 456 (Aff. in 77 N. J. E. 267, 76 Atl. 1067), the policy in suit contained a Facility of Payment Clause identical with the one in this case. Immediately after the death of the insured her half-sister furnished proofs of death and made claim for the same, the insured having paid the premiums on the policy, which she surrendered, together with the premium receipt book. Afterwards the decedent's husband was granted administration upon her estate and made claim for the insurance money under the policy and brought suit at law to enforce such claim. The company paid neither of the claims and filed its bill of interpleader in the cause. In his opinion, 75 N. J. E. at page 487, Vice-Chancellor Walker says:

> "My judgment is that the complainant had a right to pay any one of the persons named in the Facility of Payment Clause in the policy under consideration *up to the time that suit was brought by the person entitled to payment under the contract, namely, the administrator of the insured;* and that such payment would be a complete defense to the administrator's action, but not having made such payment, the right of the administrator under the contract, upon suit brought, was complete and a plea by the company of subsequent payment to one of the class mentioned would not operate to bar the administrator's suit."

The Court there expressly limited the privilege of the defendant of electing to whom to pay, up to the time that the administrator started suit, and held that the defendant would not be justified in making payment to one of the class named subsequent to that time, and that such payment would not be a bar to the suit of the administrator.

Under the facts in the Godfrey case it was, of course, unnecessary for the Court to go further than to make the time of the starting of the administrator's suit the point beyond which the insurer would not be justified in making payment under the Facility of Payment Clause. The reasoning in that case, however, is applicable to the present case. Can we say that there is any distinction between the bringing of a suit by the administrator and the service of a demand for payment by him upon the insurer? The bringing of a suit is nothing more nor less than the making of a demand for one's rights. Blackstone says: "Suits and actions are defined by the Mirror to be 'the lawful demand of one's right.'" 3 Bl. Com. 116. Coke defines an action as the form of a suit given by law for the recovery of that which is one's due; the lawful demand of one's right. Co. Litt. 285, 285a. An "action" is the legal and formal demand of one's right from another person or party, instituted in a court of jurisdiction. (*Black, Law Dict.*) An action or suit according to its legal definition is the lawful demand of one's right in a court of justice. *Words & Phrases "Action,"* citing *Appeal of McBride,* 72 Pa. (22 P. F. Smith) 480-483; *Hook* v.

McCune (Pa.), 39 Atl. 72, 73; *Hall* v. *Decker,* 48 Me. 255, 256; *Sanford* v. *Sanford,* 28 Conn. 6, 22. See also *1 C. J.* 924.

It is manifest that in the Godfrey case the Court could not have considered the starting of suit as anything more than a formal demand, and therefore the service of the demand by the plaintiff in this case ought, we contend, to be as efficacious as the starting of a suit was held to be in the Godfrey case.

Otherwise grave injustice might be done. For instance, as in the present case, if the starting of a suit be made the test as to whether the insurer may or may not make payment under the Facility of Payment Clause, then the hands of the executor named in the will of a decedent are tied until at least ten days after the death, when the will can be probated and the executor qualify and thus be entitled to institute the necessary suit. In a majority of such cases the damage has been done before the expiration of the ten days and payment has been made to the fortunate member of the class selected by the insurer. In other words, the representative of the estate having a vested right to the proceeds of the policy would be in a position where for at least ten days he would be unable to enforce that right. Further, would it not result in an absurd condition of affairs to hold that the administrator, in order to make certain of collecting the insurance money, must start suit against the insurer immediately upon the death of the insured, and even before he has given the insurer an opportunity to pay, for fear that the insurer might, in the interim between the receipt of the notice of claim of the administrator and the beginning of his suit, pay to one of the class mentioned, and thus bar the administrator's suit? And in the case of an executor, would it be anything less than asinine to say to him on the one hand, "If you start suit at once you will bar payment to anyone else and the insurer will have to pay you"; and on the other hand say "You are not allowed to start suit at once for you must wait until after the probate of the will which must be at least ten days after the death of the insured"?

We therefore earnestly contend that in all reason where an executor under circumstances such as in this case serves a formal demand for payment upon the insurer before the insurer's right of selection has been exercised, such demand should be as efficacious as the starting of a suit.

The Trial Court in its opinion intimates that the beneficent purpose of the Facility of Payment Clause would be of little value if anyone competent to be selected could legally and successfully protest against the discretion exercised by the company under the terms of the contract. The Court apparently had in mind the case of *Prudential Ins. Co.* v. *Brock,* 48 App. D. C. 4, L. R. A. 1918 E. 489, where the Court in a case similar to the present case said:

> "If a mere protest by one competent to be selected would operate to estop the company from exercising the discretion conferred by the contract there would be few cases where it could act with safety, and the beneficent purpose of the provision of the policy would be completely nullified."

The Court in that case, however, and the Trial Court in the present case, have overlooked the distinction between the rights of the representative of the insured's estate and rights of the persons named in the Facility of Payment Clause, to which we have referred in Point (A) of this brief. We are not attempting to argue that "anyone competent to be selected" should have the power to successfully protest against the discretion exercised by the company. The law is well established that the persons named in the Facility of Payment Clause have no right of action, and, of course, cannot legally protest. We do earnestly contend, however, that the representative of the insured, besides being one of those competent to be selected by the insurer and having a vested interest in the policy and a right of action thereon, has the power to estop the company from exercising such discretion. Such, in effect, is the decision in the Godfrey case. It seems clear that the party having a vested interest has the right to demand payment and bar the company from paying anyone else, while those having no vested interest would have no such right. To thus hold would not in any way qualify the beneficent purpose of the Facility of Payment Clause, and the fear that such purpose would be nullified is groundless, for the company is estopped only after notice from the representative of the insured, and the company would be safeguarded to the same extent as after the institution of a suit.

We respectfully submit that the Godfrey case, hereinabove referred to, which is controlling in this State, and not the Brock case, upon which the defendant relies, is correct in its reasoning, for otherwise no effect is given to the vested interest of the executor or administrator according to the provisions of the policy; and that the logical result of the decision in the Godfrey case is that the limitation upon the insurer's election to pay under the Facility of Payment Clause arises as soon as the representative of the insured's estate sets up his claim to the insurer for the benefit under the policy.

For these reasons we respectfully insist that the judgment of the Trial Court was erroneous and should be reversed.

SMITH & SLINGERLAND,
Attorneys of Plaintiff-Appellant.

New Jersey Court of Errors and Appeals

ARCHIBALD F. SLINGERLAND, *executor of Jonathan Sloan, deceased,* *Plaintiff-Appellant,* *vs.* THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, *Defendant-Respondent.*	*Action at Law.* *On Appeal from Essex Circuit Court.*

BRIEF OF DEFENDANT-RESPONDENT

I

Statement of Facts

This action was tried upon an agreed state of facts, and the submission of briefs, and decided in favor of defendant by Judge Mountain at the Essex Circuit Court on December 2, 1919 (opinion case p. 18).

The suit is based upon a policy of Industrial insurance for five hundred dollars ($500) issued January 17, 1887, by defendant on the life of Jonathan Sloan, who died February 7, 1919, leaving a will appointing the plaintiff executor, which will was probated February 20, 1919.

The defendant paid the proceeds of the policy to Martha W. Murphy, the insured's daughter, by delivering to her on the day she presented the policy at the office of the defendant in Newark, i. e., February 13, 1919, a check for $513.19 in full payment of the claim (letter April 4, 1919, case p. 15). Prior to this payment the plaintiff had demanded payment (letter February 8, 1919, case p. 11). Although the letter was in the office of the Company, it was not known by the person authorizing payment (case pp. 15 and 16).

The policy (case p. 7) provides for payment

> unto the executors, administrators or assigns of Jonathan Sloan, the person herein designated as the insured, unless payment shall be made under the provisions of article second hereinafter contained, the sum of five hundred dollars, within twenty-four hours after acceptance at its said office of satisfactory proof of death of

> the insured, such promise, however, being made, and THIS POLICY ISSUED AND ACCEPTED SUBJECT TO THE FOLLOWING CONDITIONS AND AGREEMENTS:
>
> Second, the Company may pay the sum of money insured hereby to any relative by blood, or connection by marriage of the insured, or to any other person appearing to the Company to be equitably entitled to the same by reason of having incurred expense in any way on behalf of the insured for his or her burial, or for any other purpose, and the production by the Company of a receipt signed by any or either of said persons, or of other sufficient proof of such payment to any or either of them shall be conclusive evidence that such sum had been paid to the person or persons entitled thereto, and that all claims under this policy have been fully satisfied.

The defendant contends the payment of the proceeds to Martha W. Murphy, daughter of the insured, is a bar to the executor's suit, although such payment was made subsequent to notice by the plaintiff that he was named executor of the insured's will and a demand for the proceeds. This, it is submitted, is the sole question for decision on this appeal.

II

ARGUMENT

Company may elect to pay under second clause until suit is brought by executor or administrator.

The purpose of policies of this nature is mainly to provide quick payment for burial expenses without the expense of administration proceedings, the person claiming having no enforcible right in his or her individual capacity, but the Company having the option to pay to such person, which payment it can set up as against a claim by an executor or administrator. The cases on this subject including decisions of all the states wherein this question has been involved are set forth in elaborate notes to the case of *Metropolitan Life Ins. Co.* vs. *Nelson, Admx.*, L.R.A. 1916 F., pp 461-467.

The New Jersey cases on this subject are *Metropolitan Life Ins. Co.* vs. *Schaffer* 50 N. J. L 72; 11 Atl. 154.

Brooks, Executrix, vs. *Metropolitan Life Ins. Co.* 70 N. J. Law 37; 56 Atl. 168.

Prudential Ins. Co. vs. *Godfrey, Administrator,* 75 N. J. Eq. 484; 72 Atl. 456 (affirmed on other grounds by the Court of Appeals in 77 Eq. 267; 76 Atl. 1067).

In the SCHAFFER case the policy made the application a part of the contract and Frederick Schaffer, designated as the son of the insured, was the beneficiary in the application. The policy also contained a clause somewhat similar to the one in the present policy, including the beneficiary as one of the class who might receive the proceeds, but as against the beneficiary the court upheld payment to the insured's daughter, who produced the policy, as coming within the class mentioned. The Supreme Court said:

> Conceding that the beneficiary named in the application has a vested interest in the policy, he holds it in accordance with and subject to the conditions of the contract contained in the policy.
>
> The purpose and object of this kind of insurance seem to require the payment to be made in that way and it should, in good policy, be upheld.
>
> The terms and manner of the insurance contemplates speedy payment to the family of the insured, immediately after his death, to provide a burial fund, or to meet expenses, which, in such an emergency, must be incurred.

In the BROOKS case the policy provided for payment to an executor or administrator, husband or wife, or relative by blood, or lawful beneficiary of the insured. The beneficiary being a minor at the time of the insured's death, the Company made payment to the duly appointed guardian of the beneficiary, which payment was sustained as against the plaintiff who was executrix under insured's will. The facts show the insured died June 22, 1902, and letters testamentary were issued July 2, 1902. It is fair to assume the Company had knowledge of the appointment of the executrix as it did not pay the beneficiary's guardian until September 20, 1902, three months after the insured's death and two months after the issuance of letters testamentary.

In the GODFREY case the Company filed its bill of interpleader, inasmuch as the administrator of the insured's estate commenced an action at a time when the Company was about to pay the proceeds to a person under the second or Facility of Payment Clause, which clause was precisely the same as the one in the present suit. Vice Chancellor Walker, after a careful review of the New Jersey authorities and those of other states, laid down the law as follows:

> My judgment is that the complainant had a right to pay any one of the persons named in the Facility of Payment Clause in the policy under consideration up to the time that suit was brought by the person entitled to payment under the contract, namely, the administrator of the insured; and that such payment would be a complete defense to the administrator's action; but not having made such payment, the right of the administrator under the contract, upon suit brought, was complete, and that a plea by the Company of subsequent payment to one of the class mentioned would not operate to bar the administrator's suit.

There can be no question as to the meaning of the words "upon suit brought." They cannot be stretched to mean "upon demand made" or "notice given" by an executor or administrator. The Vice Chancellor was actually dealing with a case wherein formal demand had been made by the administrator and formal proofs of death had been submitted by him. In the middle of page 486 of 75 Eq., it is said:

> Two days after the death of the insured her husband was granted administration upon her estate by the Surrogate of Camden and on May 23, 1907, he furnished proofs of death to the complainant and made a claim for the insurance money under the policy.

And prior to that time the defendant had made claim upon the Company's Camden Superintendent (see top of page 487). Surely, if the time for establishing the administrator's rights, to the exclusion of the class of persons mentioned in the policy, was upon demand made by the administrator, the court would have said so, and in deciding that the complainant had the right to pay to an individual within the second or Facility of Payment Clause, it was giving the clause the liberal construction it had already received at the hands of the courts in this and other states, for the purpose of working out justice in the quick payment of claims on Industrial policies

Defendant justifies its payment by the discretion vested in it under the terms of the policy. Plaintiff contends substantially that inasmuch as he must wait at least ten days after the insured's death to probate the will and qualify as executor, defendant should pay him merely upon demand. It is conceivable that in some cases the executor might not qualify. He might be prevented from qualifying. Payment of the claim would then be delayed for a considerable time and the Company prevented from making a prompt payment which is of the essence of the contract. Defendant claims it is not necessary for the Company to await appointment or qualification of an executor in order to choose to whom it will pay. There is no provision in the contract placing a burden upon the Company to wait until a person qualifies as either executor or administrator before paying the claim. If this were so an avenue would be opened whereby the entire purpose of Industrial insurance could be defeated.

If A notifies the insurance company of his intention to administer upon the estate of an insured surely such notice, or demand, cannot bind the Company to pay A to the exclusion of a claimant under the second clause, and it is submitted the position of the plaintiff who had not qualified when making demand, is no stronger, so far as the exercise by the defendant of its contract right is concerned.

The insured died February 7, 1919; on February 8, plaintiff notified defendant of the death of Sloan; defendant paid Martha Murphy, the insured's daughter, on February 13, 1919, which was seven days prior to the issuance of letters testamentary to the plaintiff. And the policy provides for payment within twenty-four hours after acceptance of satisfactory proof of death.

Should there be any doubt in the mind of the court of defendant's right to pay the insured's daughter, the case of *Prudential Insurance Company, Appellant*, vs. *Mary E. Brock, Executrix*, 48 Appeals D. C.; L. R. A. 1918 E. 489, is earnestly called to its attention and it is submitted establishes this right conclusively. Defendant asserts also that this case is entirely in accord with the Godfrey case. The terms of the policy construed are on all fours with the policy in suit. We find the submission of formal proofs of death and demand for payment by the executrix, an aunt of the insured, prior to the payment to the husband individually, the latter having submitted the policies to the Company's office in Pittsburgh, and the executrix claiming the fund in Washington, D. C., under her appointment at that place, to which the deceased had moved from Pittsburgh. In justifying the Company's right to pay to the husband, the court said:

> Nor was the Company estopped from making distribution of the payment under the second article of the conditions of the policies by notice of the existence of a will and the designation of the plaintiff as executrix.

The court further said:

> If a mere protest by one competent to be selected would operate to estop the Company from exercising the discretion conferred by the contract, there would be few cases where it could act with safety, and the beneficent purpose of the provision of the policy would be completely nullified.

From these quotations it is quite evident that the court considered the case from the same viewpoint as the court in the Godfrey case. It realized that it was optional with the Company to make payment to either an individual or an executrix. And when its discretion was exercised by payment to the individual, it was a complete defense to the action of the executrix. It must pay somebody. The individual has no vested right, nor has the executor, as such before suit brought, a vested right to the proceeds, but in him alone is the right to sue. When that right has been so exercised the proceeds, as set forth in the Godfrey case, belong to him. The difficulty with the plaintiff's position is that it would narrow the defendant's rights under a form of contract, which, as we have said, has been liberally construed to favor immediate payment to one in an individual capacity, who, like the daughter in this case, paid premiums for some years and presented the policy for payment.

There is no difference in the construction of the contract between the Court of Appeals of the District of Columbia and the New Jersey courts. Vice Chancellor Walker in his opinion refers to the cases both in New Jersey and out of it, with a full realization that the person claiming in an individual capacity had no legal right of action, but indicated quite plainly that such person could be paid by the Company up to the time of the commencement of suit by the one entitled to sue, i. e., an executor or administrator.

The best answer to the plaintiff's contention that the Trial Judge in this case, and the Court in the Brock case, had overlooked the distinction between the rights of the representative of the insured's estate and rights of the persons named in the second or Facility of Payment clause, is the following excerpt from the opinion of the court in *American Security and Trust Company, Administrator,* vs. *Prudential Insurance Company,* 16 Appeals D. C., quoted in the Brock opinion:

> Doubtless the executor or administrator of the deceased would be primarily entitled to receive the fund as provided in the first article or clause of the policy, but it was competent by the parties to the contract of insurance to stipulate that such primary obligation to pay the executors or administrators should be conditional or defeasible, and that payment to any of the class or classes of persons designated in the second article of the policy showing themselves to be equitably entitled to receive the money should operate a discharge of the defendant from the obligation of the policy.

If the Company fails to elect to make payment to any of the classes mentioned in the Facility of Payment clause, the executor or administrator is entitled to bring suit on the policy. *Wokal* vs. *Belsky,* 53 App. Div. 167, 65 N. Y. Supp. 815.

In *Thompson* vs. *Prudential Insurance Company,* 119 Appellate Div. 666, 104 N. Y. Supp. 257, cited in plaintiff's brief, payment had been made to one who had incurred expense on the insured's behalf, in accordance with the Facility of Payment clause in the policy, prior to notice of any claim by an administrator, and the court was not called upon to decide the question as to what defendant's position would have been had a notice or demand been made by an administrator prior to payment.

Another case indicating that the Company may make payment under the Facility of Payment clause at any time before suit is brought by the executor or administrator is *Thomas* vs. *Prudential Insurance Company,* 158 Ind. 463; 63 N. E. 795, in which the Company paid the insurance to the mother of the insured, notwithstanding an assignment of the policy to the appellant, Thomas, and the court after citing the New Jersey case of *Metropolitan Life Insurance Company* vs. *Schaffer, supra,* said:

> Before actual payment by the Company to some of the persons named in article second, an action might perhaps be maintained by the executor, administrator or beneficiary for the amount named in the policy, but when such payment has actually been made, by the express terms of the policy, it operates as a complete discharge of the Company from further liability.

This case is cited also to illustrate the point that even where title passes during an insured's lifetime to an assignee as distinguished from the rights of an insured passing to one in a representative capacity after his death, the assignee's rights are subject to the Company's discretionary power under the policy to pay to an individual coming within the class provided for in the second or Facility of Payment clause.

There is no question of fraud on the part of the Company, or of waiver, and it is submitted that payment has been made in accordance with the contract and defendant should not be subjected to a double liability on the policy in suit.

For the reasons advanced herein defendant asks an affirmance of the judgment.

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