meaning in respect of permanency of abode." Century Dict. To be an inhabitant does not imply the relation of the inhabitant to the commonwealth. It refers primarily to one's abode or residence for the time being. If one is not an inhabitant, it is understood that he has no abode in the place spoken of. To be "out of this commonwealth" implies, as we think, one permanently out, as a nonresident or noninhabitant, and that the act, by authorizing constructive service of notice upon one "out of this commonwealth," meant one who had neither domicile nor habitation within it. The other clause of the act, authorizing publication for one who could not be found at his "usual place of abode," was intended to cover all cases of absence of an inhabitant from his abode. The order in this case seems to have followed the usual wording of such orders, and to have been heretofore treated as a compliance with the statute. The order of publication sustained in Applegate v. Mining Co., cited heretofore, was in the very terms now criticised. For the error in excluding the record offered, the judgment must be reversed, and a new trial awarded.

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## NEW YORK LIFE INS. CO. v. SMITH.

(Circuit Court of Appeals, Ninth Circuit. January 21, 1895.)

No. 169.

1. PARTIES—ACTION ON LIFE INSURANCE POLICY.
   In an action at law on a life insurance policy, by the administratrix of the insured, who has possession of the policy, a person who claims the policy under an alleged assignment by the insured, in his lifetime, is not an indispensable party.
2. EXECUTORS AND ADMINISTRATORS—RIGHTS OF REPRESENTATIVES APPOINTED IN DIFFERENT STATES.
   An administrator of the deceased holder of a life insurance policy, appointed in the state where the policy is, and having possession of the policy, is entitled to recover the amount due thereon, as against an administrator appointed in any other state, including that in which the decedent resided at the time of his death.

In Error to the Circuit Court of the United States for the Northern District of California.

This was an action by Eudora V. Smith, administratrix with the will annexed of William F. Smith, deceased, against the New York Life Insurance Company, on a policy of insurance. The circuit court gave judgment for the plaintiff. 57 Fed. 133. Defendant brings error.

This is an action at law brought by Mrs. Eudora V. Smith, as administratrix with the will annexed of the estate of Dr. William F. Smith, deceased, to recover of and from the New York Life Insurance Company the sum of $5,800, alleged to be due and payable on a life insurance policy which was issued and delivered to Dr. Smith on the 18th day of July, 1887. The record shows: That Dr. Smith died on April 7, 1891, at Chicago, Ill. That at the time of the issuance of the policy, and at the time of his death, he was a resident of the state of Illinois. That he left, surviving him, a widow, the defendant in error, a resident of San Francisco, Cal., and two sons,

Larz Anderson Smith, a minor, residing in San Francisco, and Paul Smith, of age, residing at Springfield, Ohio. That he had formerly resided in California. That, before leaving said state, financial and domestic difficulties had arisen between himself and wife. That, under the laws of California (section 137 of the Civil Code), she had brought an action and obtained a judgment against him in the superior court of the city and county of San Francisco for maintenance and support, upon which judgment there was due at the time of his death the sum of $10,000. That prior to his death the policy of insurance, together with the sum of $5,000, had been sent by him to San Francisco, in order to enable him to comply with the terms of a certain agreement which had been entered into by himself and wife, to the effect that the policy in question should be delivered to her in trust for their son Larz, and that the $5,000 should be paid to her upon her obtaining a divorce from him. That the policy was sent to his counsel, E. L. Campbell, and the money to his agent, Jeremiah Lynch. That no action for a divorce had ever been commenced. That, after his death, Mr. Campbell delivered the policy to Mr. Lynch, and it was thereafter, by an order of the superior court of the city and county of San Francisco, delivered to Mrs. Smith, as the special administratrix of her husband's estate. That on April 4, 1891, three days prior to his death, Dr. Smith, being then indebted to one Dr. J. B. Murphy in the sum of $3,400, made, executed, and delivered to said Murphy the following instrument, in writing:

"Chicago, April 4, 1891.

"For value received, I hereby sell, assign, and transfer to John B. Murphy all of the property, effects, choses in action, and things of value hereinafter mentioned, and all my right, title, and interest therein: A judgment note made by Morris J. Allberger for $8,700.00 or thereabouts; a policy in the N. Y. Mutual Life Insurance Company for $5,000.00 or thereabouts; accounts due me as shown by my books, and said books; my horse and buggy; all my stock bonds in all corporations and associations; all my library, books, instruments, office furniture, household furniture, and effects of every kind soever. And I hereby authorize said Murphy to take immediate possession thereof, or possession thereof at any time thereafter.

"Wm. F. Smith. [Seal.]"

—That this document was executed and delivered to, and was accepted by, J. B. Murphy, in payment of the indebtedness of Smith to him. That Murphy thereafter took possession of all the property therein described that was in the city of Chicago. That, after this instrument was executed, Dr. Smith made his will, wherein he bequeathed to John B. Murphy, to be first paid out of his estate, the sum of $3,400, to his son Larz Anderson Smith the sum of $50, to Eudora Bascom (the defendant in error), designated "as formerly my wife," $50; and, subject to these bequests, he devised and bequeathed all of his estate to Elizabeth C. Merrill. That the party named as executor of the will declined to act, and thereafter, upon proceedings regularly had in the proper court in Cook county, Ill., letters of administration upon said estate were issued to the Jennings Trust Company, a corporation duly organized and existing under and by virtue of the laws of the state of Illinois; and that said company, under its letters of administration, made a demand upon the insurance company for payment of the amount due on the policy, which was refused; and the trust company thereupon commenced an action to recover the said amount, which action is still pending and undetermined in the circuit court of Cook county, Ill. It is claimed that said action was brought and is being prosecuted for, on behalf of, and at the request of, J. B. Murphy. The policy in question has never been paid. Judgment was rendered in favor of Mrs. Smith.

Edward J. McCutcheon and Charles A. Shurtleff, for plaintiff in error.

Henry N. Clement, for defendant in error.

Before GILBERT, Circuit Judge, and HAWLEY and MORROW, District Judges.