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Notice of Appeal.

(Filed August 25, 1931.)

In Chancery of New Jersey

Between

THE PRUDENTIAL INSURANCE
COMPANY OF AMERICA,
Complainant,

and

THOMAS NILAN, Administrator of
the Estate of Thomas Niland,
Deceased,
Defendant.

10

82-380.

On Bill, &c.

Notice of Appeal.

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The complainant, The Prudential Insurance Company of America, a corporation, hereby appeals from the Final Decree made by the Chancellor, on the advice of Honorable John J. Fallon, Vice Chancellor, in the above-entitled cause on the tenth day of July, 1931, and from the whole and every part thereof, to the Court of Errors and Appeals in the Last Resort in All Causes.

Dated, August 24th, 1931.

30

PERKINS & DREWEN,
Solicitors for and of Counsel
of Complainant.

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

JOHN DREWEN,
Of Counsel with Complainant.

40

Petition of Appeal.

(Filed September 11, 1931.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

10 Between

THE PRUDENTIAL INSURANCE
COMPANY OF AMERICA,
Complainant-Appellant,

and

THOMAS NILAN, Administrator of
the Estate of Thomas Niland,
Deceased,
Defendant-Appellee.

On Appeal from
the Court of
Chancery.

Petition of
Appeal.

20

*To the Honorable The Court of Errors and Ap-
peals in the Last Resort in All Causes:*

The petition of The Prudential Insurance Com-
pany of America, 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 Chan-
cellor John J. Fallon, bearing date the 10th day
of July, 1931, in a certain cause in said Court of
Chancery, wherein the said The Prudential In-
surance Company of America was complainant,
and the said Thomas Nilan, administrator of the
estate of Thomas Niland, deceased, was defend-
ant, in this respect, to wit: That the said decree
40 adjudges and decrees that the Bill of Complaint

Petition of Appeal.

of your petitioner as complainant in the said cause be dismissed; and in the further respect that the said decree adjudges and decrees that the sum of \$500 with interest thereon from October 29, 1929, amounting to \$49.58 be paid by the complainant to the defendant; and in the further respect that the said decree adjudges and decrees that the defendant be allowed his costs to be taxed in the said cause, including a counsel fee of \$150 allowed to the solicitor of the said defendant.

10

2. And your petitioner appeals from the decree of the Chancellor, which decrees as aforesaid, upon the ground that the same is erroneous in that it should have decreed that the relief prayed for in complainant's bill of complaint as filed in the said cause, be in all things granted and allowed; and that the policy of insurance issued by your petitioner upon the life of Thomas Niland, as set forth in said bill of complaint, be rescinded and surrendered for cancellation; and that the said policy did not take effect on its said date or at any other time; that the same is void and of no effect; and that injunction issue against the said defendant, Thomas Nilan, restraining and enjoining him from assigning, transferring, or parting with any right, title or interest he may claim in said policy of insurance, and from instituting any proceedings against your petitioner therein.

20

30

3. And as further grounds of appeal from the decree of the Chancellor, which decrees as aforesaid, petitioner states that it was erroneous to limit complainant's proofs of the allegations in the bill to the date of the issuance of the policy; and that it was erroneous to exclude complainant's offer into evidence of the application upon

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Petition of Appeal.

which the policy in suit was issued; and that it was erroneous to exclude evidence tending to show fraud or misrepresentation of material facts contained in the application.

- 10 4. And your petitioner further prays that the said decree of the Chancellor may be wholly reversed, set aside, and for nothing holden; and that the petitioner may have such other relief in the premises as this Court shall deem proper.

PERKINS & DREWEN,
Solicitors for and of Counsel with the
Prudential Insurance Co. of America,
a Corporation, Appellant's Attorneys for Appellant.

20

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Amended Petition of Appeal.

(Filed September 24, 1931.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between:

THE PRUDENTIAL INSURANCE
COMPANY OF AMERICA,
Complainant-Appellant,

and

THOMAS NILAN, administrator of
the Estate of Thomas Niland,
Deceased,
Defendant-Appellee.

On Appeal from
the Court of
Chancery.
Amended Petition
of Appeal.

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20

*To the Honorable The Court of Errors and
Appeals in the Last Resort in All Causes:*

The petition of The Prudential Insurance Company of America, appellant in the above-entitled cause, is amended by leaving out of paragraph one, that part which states as follows:

“with interest thereon from October 29, 1929, amounting to \$49.58 be paid by the complainant to the defendant.”

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PERKINS & DREWEN,
Solicitors for and Counsel with the
Prudential Insurance Co. of America, a corporation, appellant's
attorneys.

40

Bill of Complaint.

IN CHANCERY OF NEW JERSEY.

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

10 Complainant, The Prudential Insurance Company of America, a corporation of the State of New Jersey, having its principal office in the City of Newark, County of Essex, and State of New Jersey, respectfully shows:

1. Complainant is a corporation engaged in the business of life insurance and authorized to conduct such business under and by virtue of the laws of this State.

20 2. That on November 30th, 1928, one Thomas Niland, then residing in the City of Bayonne, Hudson County, New Jersey, made written application for insurance on his life with the complainant company; and said application was signed by said Thomas Niland; and in said application said Thomas Niland made certain answers and statements to questions propounded to him by complainant.

30 3. That annexed hereto and forming a part hereof, and marked Schedule "A", is a true copy of said application.

40 4. That in and by, and at the time of making said application so signed by Thomas Niland, he, the said Thomas Niland, declared to complainant, and it was understood and agreed by and between the complainant and defendant, Thomas Niland, that all of the answers and statements made by said Thomas Niland in his said application were

Bill of Complaint.

correct and wholly true; and that they should form the basis of the contract of life insurance made or to be made in pursuance of said application.

5. That in said application for insurance made and signed by the said Thomas Niland, he stated as follows: 10

I HEREBY APPLY for insurance of the amount named herein and I agree that any policy which may be granted by The Prudential Insurance Company of America in pursuance thereof shall be accepted by me, subject to the conditions and agreements contained in said policy. I further agree that there shall be no liability on the part of the Company on account of this application unless and until it shall issue a policy, except that if a premium be paid when this application is made as shown by the receipt detached therefrom and a policy is issued subsequent thereto, payment of the amount of such policy shall be made in accordance with and subject to the conditions and agreements therein contained, if death occur after the signing of this application and before the issue of said policy, PROVIDED THE INSURED WAS IN SOUND HEALTH ON THE DATE OF THE APPLICATION. Unless the answer to question number 5 above shows that the person to be insured is over the age of fifteen years, I further state that I am liable for such person's support. 20 30

(Signed) THOMAS NILAND.

6. That in and by the said application said Thomas Niland represented and stated to complainant that on the date of said application, to wit, the 30th day of November, 1928, he was in good condition and health; and that he had never been seriously sick; and that he was not suffer- 40

Bill of Complaint.

ing from any physical or mental defect or infirmity; and that he had never suffered from Consumption, Asthma, Spitting of Blood, Habitual Cough, Apoplexy, Paralysis, Heart Disease, Insanity, Fits or Convulsions, Rheumatism, Disease of the Liver or Kidneys, Cancer, Ulcers or Accident of any kind.

10

7. That the said application for insurance was for a policy in the sum of \$500.

8. Complainant further shows that all the answers and statements therein made by said Thomas Niland, were offered to the complainant by the said Thomas Niland as consideration for, and as a basis for, said contract of life insurance under any policy or policies that might be issued by complainant under said policy.

20

9. Complainant, relying upon the truthfulness of the answers and statements made in said application by said Thomas Niland, and relying upon the truthfulness of all of said answers and statements, and believing them to be true, did, on the 3rd day of December, 1928, issue and deliver to said Thomas Niland a policy of insurance number 76479408, in the sum of \$500.

30

10. A true copy of said policy of insurance is annexed hereto and made a part of this bill of complaint.

11. Said policy of insurance was made payable, upon due proof of death of the insured during the continuance of the policy, to the executor or administrator of the insured, unless payment were made under the provisions of the Facility-of-Payment Clause in said policy.

40

12. Complainant is informed and verily believes, and charges the fact to be, that Thomas

Bill of Complaint.

Niland was duly appointed administrator of the estate of Thomas Niland, deceased, by the Surrogate of Hudson County.

13. That in and by the said policy of insurance, it was provided that the said policy should not take effect if on the date of said policy the insured were not in sound health, but that in such event the premiums paid thereon, if any, should be returned. That in and by said policy of insurance it was provided that the said policy contained the entire contract between the parties; and that if the said policy should be in force during the life of the insured for one full year after its date, said policy should be incontestable except for non-payment of premiums.

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14. Complainant further shows that in and by said application the said Thomas Niland made certain untrue and fraudulent representations which, to his knowledge, were untrue and false, as follows:

20

- (a) Said Thomas Niland stated and represented to complainant that his present condition of health was good;
- (b) That he had never been seriously sick;
- (c) That he had no physical or mental defects or infirmities;
- (d) And that he had never suffered from any one of the diseases mentioned in question 18 of the application.

30

15. Complainant further shows that each and every of the answers made in said application and set forth in the foregoing paragraph, was false and fraudulent, to the knowledge of the said Thomas Niland; and that it was not true that his

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Bill of Complaint.

condition of health on the 30th day of November, 1928, was good; and that it was not true that he had never been seriously sick; and that it was not true that he had no physical defects or infirmities; that it was not true that he had not ever suffered from Consumption, Asthma, Spitting of Blood, Habitual Cough, Apoplexy, Paralysis, Heart Disease, Insanity, Fits or Convulsions, Rheumatism, Disease of the Liver or Kidneys, Cancer, Ulcers or Accident of any kind.

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16. Complainant further shows that all of said statements and representations, so made by said Thomas Niland, were made by him to induce complainant company to enter into said contract of insurance with him, and to issue said policy of insurance on his life; and that all of said statements and representations were untrue and were false and fraudulent, to the knowledge of said Thomas Niland; and that the complainant company, at the time of the making of said application, and at the time of the issuance of said policy, and at the time of the receipt by it of premiums on said policy, had no knowledge whatever of the falsity or untruthfulness of the said statements so made by Thomas Niland, and issued its said policy of insurance relying upon the truth of said statements; and that the complainant did not discover the falsity of said statements, nor the fraud practiced upon it by the said defendant, until some time after the death of said Thomas Niland, which occurred on October 29th, 1929, after the making and signing of said application for insurance by said Thomas Niland, and within one year from the date of said policy.

40
17. Complainant further shows that said policy of insurance was not in force for one full year from its date during the life of the insured.

Bill of Complaint.

18. Complainant further shows that the said Thomas Niland obtained said policy of insurance by and through false and fraudulent statements and representations made to complainant in his applications for insurance; which statements and representations were relied upon by complainant in issuing its policy on the life of said Thomas Niland. 10

19. Complainant further shows that in and by the terms of the said policy of insurance it was provided that the policy should be void unless, on the day of its date, to wit, December 3rd, 1928, the insured be not in sound health.

20. Complainant further shows that on December 3rd, 1928, the insured, Thomas Niland, was not in sound health; and that he was not free from any physical defects or infirmity; and that he had been seriously sick; and that he was, on the said date, suffering with one or more of the diseases set forth in question 18 of the application. 20

21. Complainant further shows that the defendant, Thomas Niland, has heretofore caused himself to be appointed administrator of the estate of Thomas Niland, deceased, and as such administrator has instituted against complainant a suit in the Bayonne District Court on the said policy of insurance; and that the said suit is pending and undetermined in said Bayonne District Court. 30

22. Complainant has heretofore, and does hereby tender repayment of the premiums paid on said policy of insurance by the said Thomas Niland.

Complainant is without adequate remedy in the Courts of Law, and therefore prays: 40

Bill of Complaint.

1. That the said Thomas Niland, the defendant in this suit, may answer this bill of complaint, without oath, and each statement therein made.

2. That the said Thomas Niland may set forth and discover—

10 (a) When, where, and by what authority he was appointed administrator of the estate of Thomas Niland, deceased;

 (b) The name and address of the last physician that treated said Thomas Niland previous to October 29th, 1929;

 (c) The disease or illness for which said physician treated said Thomas Niland;

 (d) The duration of the illness of which the insured, Thomas Niland, died; and

20 (e) The last sickness of said Thomas Niland previous to October 29th, 1929, and the nature thereof.

3. That a decree may be made that said policy of insurance issued by the complainant as aforesaid on the 3rd day of December, 1928, was fraudulently obtained by the said insured, Thomas Niland; and that said contract of insurance be rescinded and surrendered by defendant to complainant for cancellation.

30 4. That an injunction may issue against said defendant, restraining and enjoining him, his servants, agents or employees, from further proceeding with his said suit in the Bayonne District Court, or from proceeding against complainant on said policy in any other court or jurisdiction, or from in any way assigning, transferring or disposing of the possession of said policy until further order of this court.

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Bill of Complaint.

5. That a writ of subpoena may issue commanding the defendant to answer this bill of complaint, and to abide by such decree as the court may make in the premises.

6. And that complainant may have such other and further relief as may be equitable and just.

10

PERKINS & DREWEN,
Solicitors for and of Counsel
with Complainant.

Affidavit of James M. Joyce.

STATE OF NEW JERSEY, }
COUNTY OF HUDSON, } ss.:

20

JAMES M. JOYCE, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am now, and I have for some time past been, employed by The Prudential Insurance Company of America, complainant in the foregoing bill of complaint, in the capacity of an inspector attached to the Claim Inspection Department of the complainant company. As such inspector, it was my duty, among other things, to investigate claims made upon the company growing out of policies of insurance issued by it.

30

2. The complainant is a corporation organized under the laws of the State of New Jersey and authorized to do a general life insurance business.

3. On the 30th day of November, 1928, an application was made for insurance in The Prudential Insurance Company of America, and this application is signed by Thomas Niland. Annexed to

40

Affidavit of James M. Joyce.

this bill of complaint is a true copy of this application.

10 4. In this application Thomas Niland represented that on the 30th day of November, 1928, his condition of health was good; that he had never been seriously sick prior to that date; and that on said date there existed in him no physical or mental defect or infirmity; and that he had never suffered from Consumption, Asthma, Spitting of Blood, Habitual Cough, Apoplexy, Paralysis, Heart Disease, Insanity, Fits or Convulsions, Rheumatism, Disease of the Liver or Kidneys, Cancer, Ulcers or Accident of any kind.

20 5. On said date, or shortly thereafter, the said application was filed with The Prudential Insurance Company of America, and the statements and representations therein made by Thomas Niland were offered by him as consideration for, and to induce, the complainant to issue a policy of insurance to him.

6. On the 3rd day of December, 1928, there was issued to the said Thomas Niland a policy of insurance, a copy of which is annexed to the bill of complaint. Said policy is numbered 76479408 and is in the sum of \$500.

30 7. The policy of insurance was issued by The Prudential Insurance Company upon said application, relying upon the statements and answers made therein by the said Thomas Niland, and in issuing said policy said The Prudential Insurance Company of America believed said statements and said answers made by Thomas Niland to be true, and had no knowledge or information to the contrary.

40 8. In the said application on Thomas Niland said that the condition of his health on the 30th

Affidavit of James M. Joyce.

day of November, 1928, was good; that he had never been seriously sick; that he did not have any physical or mental defect or infirmity; that he had never suffered from Consumption, Asthma, Spitting of Blood, Habitual Cough, Apoplexy, Paralysis, Heart Disease, Insanity, Fits or Convulsions, Rheumatism, Disease of the Liver or Kidneys, Cancer, Ulcers or Accident of any kind. 10

9. Said answers and statements so made by said Thomas Niland were false to his knowledge, and by means of said false and fraudulent statement he procured the said policy of insurance from the complainant company.

10. The policy of insurance contains a provision that it will not take effect if, on its date, said Thomas Niland be not in sound health; that the policy contains the entire contract; and that if said policy should be in force during the lifetime of the insured for one full year from its date, said policy would become incontestable except for non-payment of premium. 20

11. Deponent is informed, and believes it to be true, that Thomas Niland died on October 29th, 1929, at Bayonne, Hudson County, New Jersey, and within one year of the date of the issuance of the policy of insurance. 30

12. Deponent is further informed, and believes, that on the date of said application for said policy, he was suffering from a disease which later contributed to his death; that he was not in sound health; and that he had received divers treatments at hospitals and dispensaries for many months prior to the date of his application for ulcers; and that he did have a physical defect on said date; and if the said Thomas Niland had dis- 40

Affidavit of James M. Joyce.

closed either or any of these facts, The Prudential Insurance Company of America would not have issued its policy. The said policy was procured by the said Thomas Niland by means of false and fraudulent statements made by him to said company in his said application.

10

13. Deponent further says that on December 3rd, 1928, the date on which the policy of insurance was issued by the company to Thomas Niland, he was not in sound health; that he was suffering from a disease which later contributed to his death, and which he had been suffering with for some time previous to the date of the issuance of the policy; and if The Prudential Insurance Company of America had known the true condition of the health of said Thomas Niland at the time of the making of the application or the issuance of its policy, it would not have issued a policy of insurance on his life. These facts did not come to the attention of the company until some time after his decease and when a claim was made to it under this policy.

20

14. Deponent is informed, and believes it to be true, that at the time of the making of said application, and at the time of the issuance of the policy of insurance, said Thomas Niland was not in sound health and was not an insurable risk.

30

15. Deponent further says that the false statements and answers made by the said Thomas Niland induced the Prudential Insurance Company of America to issue its policy of insurance, and affected the hazard and risk of said policy.

40

16. Deponent is informed, and verily believes, that the insured, Thomas Nilan, was admitted to the Bayonne Hospital and Dispensary at Bayonne, New Jersey, on the 26th day of January, 1928,

Affidavit of James M. Joyce.

and discharged therefrom February 1st, 1928, and the illness for which he was treated at that time was diagnosed as varicose ulcers of the left leg. He was again admitted to the institution on June 8th, 1928, and discharged June 25th, 1928, and the illness for which he was treated was diagnosed as acute lobar pneumonia. He was again admitted on March 26th, 1929, and discharged April 21st, 1929; and the illness for which he was then treated was diagnosed as ulcers of the legs.

10

17. Deponent is further informed, and verily believes, that Thomas Nilan was admitted to the County Hospital of Hudson County at Laurel Hill, New Jersey, and thereat treated for an illness from which he suffered. Deponent is informed and verily believes that for some two years prior to his death, which occurred on October 29th, 1929, Thomas Nilan was suffering with chronic myocarditis. Deponent is further informed, and verily believes, that this disease of myocarditis was a contributing cause of said Thomas Nilan's death.

20

(Signed) JAMES M. JOYCE.

Subscribed and sworn to before
me this 8th day of January, }
1931, at Jersey City, N. J. }

30

CECIL F. WOOLSEY,
Atty. at Law of New Jersey.

40

**Schedule A, Application for Insurance,
Annexed to Bill of Complaint.**

(Opposite) 

THE UNIVERSITY OF CHICAGO
DEPARTMENT OF CHEMISTRY
RECEIVED
JAN 10 1964
FROM THE
LIBRARY OF THE
UNIVERSITY OF CHICAGO

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UNIVERSITY OF CHICAGO

AGENT (PLEASE PRINT)

ALFRED MARCH 76 479 408

DEC. 3

Asst. Supt.

F. A. MEYERS

District BAYONNE

APPLICATION FOR INDUSTRIAL INSURANCE

The Prudential Insurance Co. of America

FOR H. O.

USE ONLY Examined by

Incorporated under the laws of the State of New Jersey

HOME OFFICE, NEWARK, NEW JERSEY

MARK KIND OF POLICY WANTED WITH X	☒ WHOLE LIFE	Questions to be answered by the person proposed for insurance if age is 18 years NEXT birthday or over; if younger, by parent or guardian. If application was written in a new home, check here
	☐ 20-YR. PAYT LIFE	1. Full name of person to be insured (Please Print)
	☐ 20-YEAR END'T	THOMAS NILAND
	☐ CHILDREN'S END'T 25c. ONLY	No. Street Address Town or City Floor Front Right Rear Left (Cross out one)
	☐ CONVERTIBLE END'T 25c. ONLY	2. Age NEXT Birthday 3. Amount of Insurance 4. Weekly Premium 5. Weekly Income Payable for
	☐ END'T AT AGE 60 25c. ONLY	5. DATE OF BIRTH Month Day Year 6. PLACE OF BIRTH, State, province or country 7. RACE WHITE COLORED (Cross out to leave correct answer) 8. SEX MALE FEMALE 9. MARRIED UNMARRIED 10. OCCUPATION (Omit if under age 18)

11. Is life proposed now insured in this Company? If so, state numbers, kinds and amounts of policies.

If infantile, state kind and premium.

Numbers

Kind

Amounts

No

12. Is life proposed now insured in this Company under Paid-up or Extended Insurance? If so, give policy numbers and amounts.

13. Has life proposed ever been rejected or postponed by this or any other company? If so, by what company?

14. Is life proposed now insured in any other company? If so, for what amount? If infantile, state kind and premium.

15. Height and Weight

5 ft. 9 in. 175 lbs.

16. a. What is the present condition of health?

good

b. When last sick?

Month. never Year. seriously

17. Does any physical or mental defect or infirmity exist?

None

18. Has life proposed ever suffered from Consumption, Asthma, Spitting of Blood, Habitual Cough, Apoplexy, Paralysis, Heart Disease, Insanity, Fits or Convulsions, Rheumatism, Disease of the Liver or Kidneys, Cancer, Ulcers or Accident of any kind?

State what disease.

None

19. THIS LINE FOR WEEKLY INCOME INSURANCE ONLY. Full name of Beneficiary (subject to change)

(PLEASE PRINT)

20. Relationship to Insured.

21. Age of Beneficiary.

22. Is life proposed now insured in this Company under Intermediate or Ordinary issued within 52 weeks? If so, state policy number.

No

Is application now pending for Int. or Ord.?

No

I HEREBY APPLY for insurance of the amount named herein and I agree that any policy which may be granted by The Prudential Insurance Company of America in pursuance thereof shall be accepted by me, subject to the conditions and agreements contained in said policy. I further agree that there shall be no liability on the part of the Company on account of this application unless and until it shall issue a policy, except that if a premium be paid when this application is made as shown by the receipt detached therefrom and a policy is issued subsequent thereto, payment of the amount of such policy shall be made in accordance with and subject to the conditions and agreements therein contained, if death occur after the signing of this application and before the issue of said policy, PROVIDED THE INSURED WAS IN SOUND HEALTH ON THE DATE OF THE APPLICATION. Unless the answer to question number 5 above shows that the person to be insured is over the age of fifteen years, I further state that I am liable for such person's support.

Signature of Applicant.

To be made by the person whose life is to be insured if 16 years old NEXT birthday, or over, but if younger, by the parent or guardian.

Thomas Niland

APPLICANT'S MARK NOT ACCEPTED IF ABLE TO WRITE

State relationship of person who signs, if life proposed is less than 16 years old NEXT birthday.

AGENT'S CERTIFICATE

This certificate must be signed by the Agent or Assistant Superintendent after the above questions are all answered and he has seen the person whose life is proposed for insurance, and is satisfied that the person is a first-class risk. If parent's signature is secured by one representative and child is seen by another, the former will write the word "witness" and the date, above his signature.

I CERTIFY that I have this 30th day of Nov. 1924, personally seen and

questioned the Applicant herein named, have collected 1.00 cents in advance, and I recommend the Company to accept the risk. The signature above was made by the applicant in my presence.

Assistant Superintendent

A. Marchi

Agent

* If application is for increased or decreased insurance, and the existing policy is to be lapsed, a lapse schedule containing particulars of the policy, as well as the policy itself, must be attached to the application.

IND 1-REV 4-27 2500-9-27

PRINTED IN U. S. A. by Prudential Press

INSTRUCTIONS FOR THE MEDICAL EXAMINER.—Applications upon which the signature of the applicant has been previously attached to the Medical Examiner's report, in space marked "Signature of party examined," or on which the signature is omitted under the declaration on the other side, in space marked "Signature of Applicant," should be sent to the Home Office without examination.

NOTICE.—A Medical Examination is to be made by a regularly appointed Medical Examiner of the Company, when the amount of insurance applied for, or such amount added to any insurance now in force on the same life in this Company issued within 52 weeks without medical examination, exceeds the following:

Attained age, 45 years next birthday, or younger...\$1000 (combined amount)
Attained age, 46 to 49 years next birthday...\$750 (combined amount)
Attained age, 50 years next birthday, or older...\$500 (combined amount)

SPECIAL STATE LAWS.—The following limits in certain States must be strictly observed. Medical examination will be required when the amount of new insurance applied for, or when such amount added to any Industrial insurance now in force on the same life issued by this Company without medical examination, exceeds the following amount:

Iowa, \$500. Mass., \$500 (Except as noted below):

NOTE.—In Massachusetts, if a medical report was obtained in connection with a previous policy issued by this Company, further insurance up to the limits at the ages stated above may be written within ninety days thereafter without securing additional medical report.

MEDICAL EXAMINER'S REPORT

1. Is Question 18, on the other side, answered correctly?	2. Has applicant consulted a doctor in last three years? If yes, when and for what?	3. What do you believe to be the age next birthday?	4. Race (White or Colored?)
5. Height and Weight? (If over 15 years of age.)	6. Does the applicant appear to be in good health?	7. Is there any physical defect or infirmity?	8. Has the applicant ever been rejected by this or any other Company?
9. Has either parent or any brother or sister died of consumption?	10. Have you reason to suspect intemperate habits, or, if female, immoral life?	11. Has applicant within the past five years had any serious illness or injury: Spitting Blood, Habitual Cough, etc.? If yes, give date and particulars below.	
12. Pulse rate and character?	13. Is the heart diseased?	14. Are the lungs diseased?	15. Do you detect disease of any kind?
16. Where did you personally examine the applicant?	17. Day. Month. Year. When?	18. Is the life, in your opinion, a first-class, average, or poor risk?	

REMARKS: (Use this space for full particulars if required.)

Signature of party examined, or, if too young to write, of the person who is applying for Child's Insurance.

Signature of Medical Examiner.

I CERTIFY that my answers to the above questions are true and that the applicant signed in my presence.

M. D.

INSPECTION REPORT

To be made by an Assistant Superintendent only for Agents not granted the AX concession, at ages 10 or over next birthday, when the amount of insurance applied for and in force in this Company is less than the amount at which Medical Examination is required (see above). Agents must not, under any circumstances, secure the applicant's signature to this portion of the application. This report may also be completed by an Assistant Superintendent, if he deems it advisable, even though the application is written by an Agent who has been authorized to certify to the condition of health.

A. What do you believe to be the age next birthday?	B. Is there reason to suspect intemperate habits, or, if female, immoral life?	C. Are the home surroundings sanitary?	D. Race (White or Colored?)	E. Has applicant ever been rejected?
F. Did applicant sign this application on other side?	G. Where did you personally see applicant?	H. Day. Month. Year. When?	I. Does applicant appear to be in good health?	

REMARKS:

Signature of party inspected, or, if too young to write, of person applying for Child's Insurance.

I CERTIFY that my answers to the above questions are true and that applicant signed in my presence.

Asst. Supt.

IND 1-REV 4-27

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Supl.

**Insurance Policy, Annexed to Bill
of Complaint.**

(Opposite) 

Answer to Bill.

IN CHANCERY OF NEW JERSEY.

10	THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, Complainant, <i>vs.</i> THOMAS NILAND, Administrator of the Estate of Thomas Ni- land, Deceased, Defendant.	} On Bill, &c. Answer.
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The answer of Thomas Nilan.

20 This defendant, Thomas Nilan, answering the Bill of Complaint says that:

1. He admits paragraph 1.

2. He knows nothing about the alleged application for insurance, never saw it, and is sure that it was never attached to the policy.

30 3. He has not enough information to form a belief as to paragraph 3, and asserts that all references to the application marked Schedule "A" are irrelevant, immaterial, and inadmissible.

4. He has not enough information to form a belief as to paragraphs 4, 5, and 6 all of which refer to the application above mentioned.

5. He has not enough information to form a belief as to paragraph 7 but admits that a policy in the sum of Five Hundred Dollars (\$500.00) was issued.

40 6. He denies the allegations of paragraph 8 as there is no reference to them in the contract of insurance—the policy.

Date

DEC. 3
1928

76 479 408

The Prudential

Insurance Company of America

THE
PRUDENTIAL
HAS THE
STRENGTH OF
GIBRALTAR

In Consideration of the payment of the weekly premium herein specified, on or before each and every Monday during the continuance of this Policy or until the anniversary date of the Policy immediately preceding the seventieth anniversary of the birth of the Insured, will pay at its Home Office, Newark, New Jersey, immediately upon receipt of due proof of the death of the Insured during the continuance of this Policy, the amount of insurance herein specified, to the executors or administrators of the Insured, unless payment be made under the provisions of the next succeeding paragraph; subject to the "General Provisions" on the second page hereof, which are hereby made part of this contract.

FACILITY OF PAYMENT.—It is understood and agreed that the said Company may make any payment or grant any non-forfeiture provision provided for in this Policy to any relative by blood or connection by marriage of the Insured, or to any person appearing to said Company to be equitably entitled to the same by reason of having incurred expense 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 or grant of such provision to any or either of them shall be conclusive evidence that such payment or provision has been made or granted to the person or persons entitled thereto, and that all claims under this Policy have been fully satisfied.

PRELIMINARY PROVISION.—This Policy shall not take effect if the Insured die before the date hereof, or if on such date the Insured be not in sound health, but in either event the premiums paid hereon, if any, shall be returned.

SCHEDULE.

Name of Insured	AGE NEXT BIRTHDAY	Amount of Insurance	Weekly Premium
THOMAS NILAND	56 If incorrect, notify Company	\$500-	\$1.00

Loss of Eyesight or Limbs.—If the Insured while this Policy is in full force and effect and while there is no default in the payment of premium shall sustain a physical impairment such as specified below, total and permanent disability shall be deemed to exist and the disability benefit hereinafter provided shall be granted immediately upon receipt of due proof of such impairment: in event of the loss by severance of one hand or one foot, an amount equal to one-half of the amount of insurance shall be paid in cash; or in event of the loss by severance of two hands or two feet, or one hand and one foot, or the permanent loss of the sight of both eyes, an amount equal to the full amount of insurance shall be paid in cash; and in either event no further premiums shall be required thereafter and the Policy shall be endorsed as fully paid-up for the amount of insurance as specified in the Schedule above. The amount payable in cash under this provision on account of disability as herein defined shall in no event exceed an amount equal to the full amount of insurance under this Policy.

DIVIDEND PROVISION.

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 in the form of a paid-up addition to the amount of insurance.

(Notice to Policyholder.—Owing to the low rate of premium at which policies of this nature are issued, the surplus accruing thereon will probably not be sufficient to enable the Company to credit any dividend to this Policy before the fifth year.)

NON-FORFEITURE PROVISIONS.

If this Policy lapse for non-payment of premium after premiums have been duly paid for three full years or more, the Insured, without any action upon his or her part, will become entitled to non-participating Extended Insurance for the respective term specified in the following table. The amount of insurance payable if death occur within said term shall be the same amount as that which would have been payable if this Policy had been continued in force, except as to dividend additions subsequent to the date of lapse.

Or, in lieu thereof, the Insured may surrender the Policy within three months after such lapse and will then be entitled at his or her option to receive either a non-participating Paid-up Life Policy or payment in cash as specified in the following table.

If there be any indebtedness under this Policy, such indebtedness will be deducted from the Cash Surrender Value, or the term of the Extended Insurance or the amount of the Paid-up Life Policy will be reduced to such term or amount as the net single premium value of the respective provision reduced by such indebtedness shall provide according to the mortality table hereinafter specified.

50	3 Yrs.	4 Yrs.	5 Yrs.	6 Yrs.	7 Yrs.	8 Yrs.	9 Yrs.	10 Yrs.	11 Yrs.	12 Yrs.	13 Yrs.	14 Yrs.	15 Yrs.	16 Yrs.	17 Yrs.	18 Yrs.	19 Yrs.	20 Yrs.
Extended Insurance	3 3	4 6	5 4	5 50	6 41	7 30	8 19	9 10	10 7	11 15	12 48	POLICY PAID-UP						
Paid-up Life Policy	\$4.10	\$5.70	\$7.40	\$9.10	\$10.70	\$12.40	\$14.20	\$16.00	\$17.90	\$19.80	\$21.90	POLICY PAID-UP						
Cash Surrender Value	None	None	None	None	None	None	None	\$11.80	\$13.37	\$15.05	\$16.87	\$19.48	\$19.73	\$19.97	\$20.21	\$20.44	\$20.66	\$20.88

NOTE.—Tables of Automatic Extended Insurance, Paid-up Life Policies and Cash Surrender Values after twenty years will be furnished on request.

The basis of the non-forfeiture values is the net reserve according to the Standard Industrial Mortality Table with three and one-half per cent. interest per annum. The figures in the above tables up to the end of the twentieth year include a surrender charge of not more than two and one-half per cent. of the amount of insurance. Should the amount of insurance be increased by dividend additions the reserve thereon shall be included with the net reserve on which the non-forfeiture values are based and the total surrender charge shall not be more than two and one-half per cent. of the total amount insured. At the end of twenty years and thereafter no surrender charge is made.

In computing values from the foregoing tables, due allowance will be made for each completed quarter of a year's premiums paid over and above the full number of years there indicated.

This Policy contains the entire contract between the parties hereto.

In Witness Whereof, the President and the Secretary of said Company have signed this Policy at its Home Office in the City of Newark, N. J., on the above date.

William J. Hamilton
Secretary.

Edward W. Buffum
President.

WHOLE LIFE POLICY. PREMIUMS TERMINATING AT AGE 70. ANNUAL DIVIDENDS. DISABILITY BENEFITS.

IND 15000
11-24

(OVER)

This Policy, if not satisfactory to the Insured, may be surrendered within two weeks after its date at the Branch Office of the Company, the address of which appears on the premium receipt book accompanying this Policy, and the premiums paid hereon will be returned.

GENERAL PROVISIONS

Payment of Premiums.—All premiums are payable at the Home Office of the Company, but may be paid to an authorized representative of the Company; such payments to be recognized by the Company must be entered at the time of payment in the premium receipt book belonging with this Policy. If for any reason the premium be not called for when due it shall be the duty of the policyholder, before said premium shall be in arrears four weeks, to bring or send said premium to the Home Office of the Company or to one of its district offices.

Period of Grace.—Should the Insured die while the premium on this Policy is in arrears for a period not exceeding four weeks, the Company will pay the amount of insurance provided herein, subject to the conditions of the Policy, but after the expiration of the said period of grace the Company's liability under this Policy shall cease, except as herein provided.

Incontestability.—After this Policy shall have been in force, during the lifetime of the Insured, for one full year from its date, it shall be incontestable, except for non-payment of premium, but if the age of the Insured be misstated, the amount payable under this Policy shall be such as the premium would have purchased at the correct age.

Policy When Void.—If at the time of the issuance of this Policy there be in force upon the life of the Insured hereunder an Industrial policy or policies issued by this Company, this Policy shall be void unless it contains an endorsement, signed by the President or Secretary, permitting this Policy to be in force concurrently with such other policy or policies previously issued; but it is expressly stipulated that the issuance of this Policy without such endorsement shall not be considered a waiver of this provision should there be then in force any Industrial insurance policy or policies previously issued by this Company upon the life of the Insured hereunder.

If for any cause this Policy be or become void, all premiums paid hereon shall be forfeited to the Company except as provided herein.

Reinstatement.—If this Policy lapse for non-payment of premium, it will be reinstated within one year from the date to which premiums have been duly paid upon payment of all arrears, provided evidence of the insurability of the Insured satisfactory to the Company be furnished, but such reinstatement shall not take effect unless at the date thereof the Insured is living and in sound health.

Modifications, 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 or Province 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 forfeiture, or to bind the Company by making any promise, or by making or receiving any representation or information.

**IMPORTANT
NOTICE TO
POLICYHOLDER**

If it becomes impossi-
ble to continue the
payment of premiums,

**PRESERVE THIS
POLICY**

because of the pro-
tection which may be
afforded under its pro-
visions.

**READ THE
NON-FORFEITURE
PROVISIONS IN
YOUR POLICY**

Fidelity and Prudential Insurance Company of America

INSURANCE COMPANY OF AMERICA

FOUNDED BY JOHN F. DRYDEN PIONEER OF INDUSTRIAL INSURANCE IN AMERICA INCORPORATED UNDER THE LAWS OF THE STATE OF NEW JERSEY

THE PRUDENTIAL HAS THE STRENGTH OF GIBRALTAR

Answer to Bill.

7. He has not enough information to form a belief as to paragraph 9 but admits that policy No. 76479408 in the sum of Five Hundred Dollars (\$500.00) was issued, dated December 3rd, 1928.

8. He admits paragraphs 10, 11, 12, and 13.

9. He has not enough information to form a belief as to paragraphs 14 and 15, the allegations of which are immaterial. 10

10. He has not enough information to form a belief as to paragraph 16, which is immaterial so far as it refers to the application above referred to. As to failure to ascertain the truth, complainant is to blame.

11. He admits paragraph 17.

12. He denies the allegations of paragraph 18, as there is no reference to them anywhere in the policy. 20

13. He admits paragraph 19 if its intention is to refer to the paragraph of the policy called "Preliminary Provision".

14. He denies paragraph 20 and states that Thomas Niland was in sound health on December 3rd, 1928.

15. He admits being appointed administrator of the Estate of Thomas Niland and that there is pending a suit, in the Bayonne District Court, on the said policy of insurance. 30

16. He refuses to accept the tender of repayment of premiums paid by him on said policy until it is decreed by the Court that he is entitled to no more.

*Answer to Bill.**First Separate Defense.*

10 By means of this action, the complainant is
doing nothing more than trying to avoid the pay-
ment of the insurance money due on the policy
in question. Complainant is guilty of laches or
lack of diligence in bringing this suit because it
elected to contest the suit brought by the defend-
ant in the Bayonne District Court for the recov-
ery of the amount due under the policy, and
permitted the said suit to continue in the Bayonne
District Court for a period of seven months before
bringing this action. During that period of seven
months, it requested a number of adjournments
of the trial in the District Court and also applied
20 for a motion to non-suit the action.

Second Separate Defense.

The policy of insurance provides that:

“This policy contains the entire contract be-
tween the parties hereto”.

30 The application referred to in the Bill of Com-
plaint was not attached to the policy when it was
delivered and, therefore, was not a part of the
policy of insurance so that all references to the
application in the Bill of Complaint should be
disregarded.

Third Separate Defense.

40 If there was a misstatement in the application,
it was due to the fault of the complainant's agent
and not to any fraudulent intent on the part of
the applicant for insurance.

Answer to Bill.

It was incumbent upon the complainant to satisfy itself as to the condition of the health of the assured especially in view of the fact that he called to the attention of the complainant's agent the only questionable fact as to his sound health, namely, a sore that he had had on his leg.

10

Fourth Separate Defense.

1. Thomas Niland was in sound health and good physical condition at the time he applied for insurance and on the date of the policy, December 3rd, 1928.

2. Thomas Niland was innocent of any fraud in obtaining the said policy of insurance.

3. The complainant has raised as an issue in this matter the condition of the health of the assured at the time of the issuance of the policy. Whether a person is in sound health or not is purely a question of fact which should be decided by a jury after hearing the testimony presented pro and con. Defendant hereby demands that this question be submitted to the jury for decision.

20

By way of cross relief, defendant seeks dismissal of the suit of the complainant and the granting of a decree that the complainant be restrained and enjoined from setting up any defense to any action which the defendant or his legal representative may institute for the recovery of the amount due on the policy here in question, and/or the granting of a decree that the complainant pay to the defendant the amount due under the policy and lawful interest.

30

NATHAN SUSSKIND,
Solicitor for and of Counsel
with Defendant.

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Discovery to Bill.

IN CHANCERY OF NEW JERSEY.

10	THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, Complainant,	<i>vs.</i>	On Bill, &c. Discovery.
	THOMAS NILAND, Administrator of the Estate of THOMAS NILAND, deceased,		
	Defendant.		

20 Thomas Nilan, by way of discovery, sets forth
as follows:

1. On November 12th, 1930, he was appointed administrator of the Estate of Thomas Niland at the Court House, Hudson County, New Jersey, by Surrogate Christian H. Ritter and received his letters of administration.
2. Thomas Niland never had a physician except when he entered the Bayonne Hospital.
- 30 3. He does not know what illness Thomas Niland was treated for at the time previous to October 9th, 1929.
4. At the time of his final illness, Thomas Niland, was admitted to the Hospital about the middle of September, 1929, and remained until he died on October 29th, 1929.
5. He does not know what the nature of the illness previous to his last sickness was.

Final Decree.

(Filed July 10, 1931.)

IN CHANCERY OF NEW JERSEY.

82/380.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, Complainant, <i>vs.</i> THOMAS NILAN, Administrator of the Estate of THOMAS NILAND, deceased, Defendant.	}	On Bill, &c. Final Decree.
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This cause coming on to be heard in the presence of Perkins and Drewen, by John Nugent, solicitors of the complainant, and Nathan Susskind, solicitor of the defendant, and the court having examined the pleadings and having taken proofs orally, in open court, and having heard and considered the arguments of counsel thereon, and it appearing to the satisfaction of the court that the complainant has failed to sustain the allegations set forth in the bill of complaint, and that it has failed to prove the cause of action therein alleged,

30

It is on this tenth day of July, 1931, ORDERED, ADJUDGED and DECREED that the said bill of complaint be dismissed and that the complainant be denied the relief sought thereby by it, and that all the restraints against the defendant now pending in this matter be hereby dismissed;

And it appearing that the defendant, by way of cross-relief, requested that the complainant be

40

Final Decree.

restrained and enjoined from setting up any defense to any action which the defendant or his legal representative may institute for the recovery of the amount due on the policy here in question, and that the complainant be ordered to pay to the defendant the amount due under the policy and lawful interest;

10 It is, therefore, further ORDERED, ADJUDGED and DECREED that the complainant be restrained and enjoined from setting up any defense to any action at law which the defendant or his legal representative may institute for the recovery of the amount due on the policy here in question;

20 And further ORDERED that the complainant pay to the defendant the amount due under the policy, viz., the sum of Five Hundred Dollars (\$500); and that the defendant, at the same time, surrender to the complainant the policy set forth in the bill of complaint.

And further ORDERED that the complainant pay to the defendant the amount of the taxed costs of this suit together with a counsel fee in the sum of One Hundred Fifty Dollars (\$150.00) to be included therein.

E. R. WALKER,
C.

30

Respectfully advised,

JOHN J. FALLON,
V. C.

40

Testimony.

IN CHANCERY OF NEW JERSEY.

Between

THE PRUDENTIAL INSURANCE
COMPANY OF AMERICA,
Complainant,

and

THOMAS NILAND, Administrator
of the Estate of Thomas
Niland, Deceased,
Defendant.

82-380.

On Bill, etc.
Testimony.

10

Final Hearing before Hon. JOHN J. FALLON,
Vice Chancellor.

20

Chancery Chambers, Jersey City, June 24,
1931.

Appearances:

MESSRS. PERKINS & DREWEN for Complain-
ant (appearing by Mr. RANDOLPH PER-
KINS and Mr. JOHN P. NUGENT, Jr.)

Mr. NATHAN SUSKIND for Defendant.

30

Mr. Nugent: There seems to be a little con-
fusion in the case. I would like to ask your
Honor to have leave, and I think I have consent
to it, to amend the bill of complaint to read
Thomas Nilan, Administrator of the Estate of
Thomas Niland, deceased.

The Court: You mean there is no "d" in the
first name?

40

William A. Pinkerton, for Complainant—Direct.

Mr. Nugent: No "d" in the first and there is a "d" in the second. I believe the original bill in the prayer merely prays that process issue against Thomas Nilan and says nothing about him being the administrator of Thomas Niland.

10 The Court: All right, that amendment may be made.

Mr. Nugent: With your Honor's permission I would like to interrupt the usual course and get rid of the doctors.

The Court: All right. Will you state in the record what amendment you wish to make?

20 Mr. Nugent: The amendment will read "That the said Thomas Nilan, Administrator of the estate of Thomas Niland, deceased, defendant in this suit, answer the bill of complaint, without oath, and each statement therein made."

Mr. Susskind: If the Court please I have a doctor who has not arrived but will be here before the end of the case. Will your Honor consent to hear him a little later?

The Court: I will hear him today, yes.

30 WILLIAM A. PINKERTON, a witness being sworn in behalf of Complainant.

Direct examination by Mr. Nugent:

Q. Doctor Pinkerton, are you a regularly licensed physician of the State of New Jersey?

A. Yes.

Q. Where do you practice doctor? A. Bayonne.

40 Q. Are you connected in any way with the Bayonne Hospital? A. Visiting surgeon of the Bayonne Hospital.

William A. Pinkerton, for Complainant—Direct.

Q. And as visiting surgeon of the Bayonne Hospital have you any particular ward assigned to you? A. I have supervision of the surgical ward from time to time.

Q. In the years 1927 and 1928 and 1929 were you connected in the same capacity with the Bayonne Hospital? A. Yes, I believe I am on duty three months a year during the year. It averages that. 10

Q. During the year 1928 did you have in the hospital under your care one Thomas Niland? A. Personally I do not remember, but looking over the records I see he was under my supervision. I have no personal recollection of it at all.

By the Court: 20

Q. Well, does looking over the records warrant you fully in testifying? A. I could from the records because the records are made——

Q. Not by you? A. Under my direction.

Q. Who makes them under your direction? A.

By the internes.

Q. You mean they are made by them and you take a squint at them? A. Yes, under my direction. 30

By Mr. Nugent:

Q. Doctor, do I understand it is you or is it the internes who diagnosed the particular ailment of Thomas Niland? A. As I see this now undoubtedly from the records——

The Court: I will strike out what he said about seeing it now undoubtedly from the records. 40

William A. Pinkerton, for Complainant—Direct.

By Mr. Nugent:

Q. Did you diagnose the ailment from which Thomas Niland was suffering?

10 The Court: He doesn't seem to remember it now. He has no knowledge of the matter except by referring to the records. How can he say he diagnosed the case?

Mr. Nugent: I am asking him.

A. I really have as I told you no personal recollection of the case. I can't recall it.

Q. The records, doctor, of the hospital, were they made under your supervision? A. Yes.

By the Court:

20 Q. You don't mean all the records of the hospital? A. No, not all of them. The operating records are signed by us. When we make an operation we sign the records. The progress records are looked over by us each day and all the records of the hospital. They are not signed by us but the operation sheets are.

By Mr. Nugent:

30 Q. Doctor, do you know whether the records of treatment—the records of the hospital setting forth the treatment of Thomas Niland were signed by you? A. No, I do not.

Q. Will you look at the alleged record of the hospital and tell us whether or not the record of the treatments were signed by you?

Mr. Susskind: I object, your Honor. He has no recollection of it. He has testified to that.

William A. Pinkerton, for Complainant—Direct.

The Court: I will sustain the objection unless it is shown he made the record or he has sufficient knowledge of it.

Mr. Nugent: I am merely asking the doctor to look at the record to determine whether or not the record of treatment was signed by him.

10

Mr. Susskind: I object to that on the ground he should not use the records to refresh his recollection.

The Court: He is merely asked to look at the record and see if it is signed by him.

A. I don't find any signature of mine on these records.

By the Court:

20

Q. On the papers that are presented to you?

A. Yes.

By Mr. Nugent:

Q. Who was the doctor if you know who treated under your supervision Thomas Niland while he was confined in the Bayonne Hospital? A. I can only testify from the records who did it. It is two years ago. I really don't recall it.

30

Mr. Nugent: If your Honor please, I would like to withdraw the doctor for a moment to have the records clerk of the Bayonne Hospital take the witness stand.

The Court: How will that help, because the witness said that the papers do not contain his signature. I will permit the witness to step aside but I will limit the examination of the other witness so it won't conflict with what is going on now.

40

Grace Kennedy, for Complainant—Direct.

GRACE KENNEDY, a witness being sworn on behalf of complainant.

Direct examination by Mr. Nugent:

10 Q. Miss Kennedy, are you employed at the Bayonne Hospital and Dispensary? A. Yes.

Q. In what capacity? A. Record clerk.

Q. How long have you been record clerk? A. Four years.

Q. In response to a subpoena served upon you did you bring with you this morning the records of the Bayonne Hospital & Dispensary pertaining to the treatment of Thomas Niland? A. Yes.

20 Q. Are these all the records of the hospital pertaining to this treatment? A. I have other records. This part is in my writing because I admitted the patient.

The Court: What is she referring to?

Mr. Nugent: The witness refers to a paper known as a summary card.

The Court: Let it be marked for identification.

Mr. Nugent: At this time I ask that the summary card referred to by the witness be marked for identification.

30

(Marked Nugent 1 for identification.)

Q. You say that this summary card marked for identification was made by you and is in your handwriting? A. Yes, this top line here—the admission entry.

By the Court:

Q. The top line? A. Yes, sir.

40

Grace Kennedy, for Complainant—Direct.

By Mr. Nugent:

Q. The admission entry? A. Yes.

Q. Are there any other of these records in your handwriting or made by you? A. No.

Q. Now then referring to a further record of the Bayonne Hospital is there any part of that record made by you? A. The top line of the summary card. 10

Mr. Nugent: The witness identifies the summary card on the first page. At this time I ask it be marked for identification.

(Marked Nugent 2 for identification.)

Q. Is there any other part of this record which you just referred to made by you? A. No. 20

Q. Referring to a third record, a part of the records of the Bayonne Hospital & Dispensary, and particularly referring to the summary card on page 1, was that made by you? A. The top line.

Q Just the top line? A. This part here is the same where the doctor referred the patient to the hospital. That's also in my handwriting.

By the Court:

Q. Suppose you give us the line. The top line and what other? A. The eighth line. 30

Q. The first and eighth line? A. Yes.

Q. And the same as to the other papers referred to, the first and eighth lines on each paper? A. Yes.

Mr. Nugent: I ask that the third part of the record particularly the summary card referred to by the witness be marked for identification. 40

(Marked Nugent 3 for identification.)

Grace Kennedy, for Complainant—Direct.

By Mr. Nugent:

10 Q. Now, Miss Kennedy, particularly calling your attention to the first part of the record referred to and marked Nugent 1 for identification, is there any other part of that card except the first line that was made by you? A. That's my writing there—the tenth line.

Q. Calling your attention to part 2 of the record of the Bayonne Hospital, particularly summary card marked for identification Nugent 2, is there any part of that, identifying the line, other than the first line which was made by you? A. The eighth and tenth line.

20 Q. Referring now to part 3 of the record of the Bayonne Hospital & Dispensary, particularly directing your attention to summary card marked Nugent 3 for Identification, is there any part of that other than the first line that was made by you? A. The eighth, ninth, tenth and eleventh lines.

Q. You said you had further records of the hospital besides these cards? A. There are other records but not my writing.

30 The Court: I will strike that out about there being other records. That might be a conclusion. If there are they might be produced.

By Mr. Nugent:

Q. Do you know of your own knowledge Miss Kennedy what particular doctor or doctors, interne or internes of the Bayonne Hospital treated Thomas Niland while he was in the hospital? A. Yes, there were quite a few of them.

40 Q. What were the names of the doctors if you know? A. Doctor Rothberg, Doctor Kresch and Doctor Morganstein also.

Grace Kennedy, for Complainant—Direct.

Q. When, Miss Kennedy, was Thomas Niland treated at the Bayonne Hospital?

Mr. Susskind: I object to that your honor.

The Court: You will have to state the grounds of your objection. 10

Mr. Susskind: She is the record clerk. How would she have knowledge of that? I object on the ground she is not qualified to answer that. She is the record clerk.

The Court: You didn't object to the answer she gave, but the thought was in my mind what knowledge she would have of her own of the doctors who attended the man, because she is only the record clerk. Her station would be in a different part of the hospital where the records are kept. If she can answer of her own knowledge I will let her answer it. You can cross-examine her after as to whether it is her own knowledge or whether she is testifying from records. 20

A. Well, I remember him being there several times because I knew the man to see him, but so for the exact date I would have to refer to the records to give it. 30

By Mr. Nugent:

Q. Was he treated there during the year 1928?

A. Yes.

Q. When in 1928?

Mr. Susskind: I object to that your honor.

The Court: I will sustain the objection because I do not believe this witness from 40

Grace Kennedy, for Complainant—Direct.

the proofs thus far personally appreciates what she is saying. She says she knew the man came there and was treated. How does she know that? He might have gone there to visit somebody.

10 By Mr. Nugent:

Q. How do you know Miss Kennedy this man was treated at the hospital? A. Because I admitted him.

By the Court:

Q. You admitted him but do you know he was treated? A. I didn't see him treated.

20 By Mr. Nugent:

Q. Did you see Thomas Niland lying in a bed there? A. I don't remember that.

Q. Did you see him walking around the corridors and the grounds? A. Yes.

Q. Did you see any nurses caring for him? A. I don't remember seeing the nurses taking care of him particularly.

30 Q. What did you see Thomas Niland doing around the place? A. I admitted him to the ward and as I say I saw him walking around the corridors.

Q. From the summary cards that you have identified as being the first lines being in your handwriting, what were the addresses given by Thomas Niland at the time of the admission?

The Court: Why should I let her say that if the paper-writing is the best evidence?

40

Mr. Nugent: For the purpose of identification.

Grace Kennedy, for Complainant—Direct.

The Court: You are trying to get in evidence the contents of these paper-writings. If they are evidential offer them and see whether there is any objection to them. I might say to you apparently from your question she wrote it down on a piece of paper.

10

By Mr. Nugent:

Q. Do you know from whom you obtained the information, Miss Kennedy? A. From Thomas Niland.

Q. From Thomas Niland himself? Just as soon as he gave it to you did you put it down on the first line? A. Yes.

Mr. Nugent: I ask at this time that the summary cards marked Nugent 1, 2 and 3 for Identification be offered in evidence.

20

The Court: Any objection, and if so what?

Mr. Susskind: The objection is limited only to what is not in her handwriting.

The Court: That is only what he is offering them for.

Mr. Nugent: That's right.

The Court: Let them be marked in evidence.

30

(Nugent 1 for Identification marked Exhibit C-1 in evidence. Nugent 2 for Identification marked Exhibit C-2 in evidence. Nugent 3 for Identification marked Exhibit C-3 in evidence.)

By Mr. Nugent:

Q. When, Miss Kennedy, was Thomas Niland admitted to the Bayonne Hospital?

40

Grace Kennedy, for Complainant—Direct.

The Court: The paper shows that. Why not read into the record those few lines.

By Mr. Nugent:

10 Q. Exhibit C-1, will you read it into the record?
A. Thomas Niland, 86 West 12th Street, case No. 10414, Doctor Pinkerton.

By the Court:

Q. Is that all on the first line? A. Yes. Admitted January 7, 1927.

By Mr. Susskind:

Q. What line is that? A. On the second line.

20 By Mr. Nugent:

Q. Calling your attention to the second line, age, etc.—

By the Court:

Q. You didn't write that? A. I wrote the age and that date.

Q. What is that? A. The admission date 1/7/27, but I didn't write that (indicating).

30 Q. What is that? A. The discharge date.

By Mr. Nugent:

Q. What date was this man admitted to the hospital? A. January 7, 1927.

By Mr. Susskind:

Q. Is that your handwriting? A. Yes.

40 The Court: What is that you are referring to?

Mr. Susskind: Doctor Pinkerton.

Grace Kennedy, for Complainant—Direct.

By Mr. Nugent:

Q. Now, referring to Exhibit C-2——

Mr. Susskind: What did you get on C-1?

The Court: He has Thomas Niland, 86 West 12th Street, and what she read in the record.

10

Mr. Susskind: Just the first line was admitted on C-1.

The Court: There are other things on the second line.

Mr. Susskind: In her previous testimony she said she only wrote line 1.

The Court: She qualified that and said January 7, 1927, and the age.

By Mr. Nugent:

20

Q. Referring to Exhibit C-2, will you read into the record that part which is in your handwriting on line 1?

Mr. Susskind: Your Honor, I would like to object. She should not read anything.

The Court: Nothing except what is in her handwriting.

Mr. Nugent: All that she is testifying to is in her handwriting.

30

A. Thomas Niland, 86 West 12th Street, No. 12549, Doctor Pinkerton, age 50, is on the second line. Admission date, 9/17/27. This discharge date I don't think is in my handwriting.

Q. Calling your attention to Exhibit C-3— A. Thomas Niland, 86 West 12th Street, No. 13577, Doctor Pinkerton. On the second line age 50. Admission date, 1/26/28.

40

Grace Kennedy, for Complainant—Direct.

By the Court:

Q. Is that handwriting on the top a 2 and a 3 yours? A. Yes, Ward 3. Religion, Catholic, that means.

10 By Mr. Nugent:

Q. Miss Kennedy, did Thomas Niland die in the Bayonne Hospital? A. Yes.

The Court: Her testimony wouldn't be the best proof of that.

Mr. Nugent: No.

The Court: There was no objection to it.

By Mr. Nugent:

20 Q. Do you know Miss Kennedy how many times Thomas Niland was in the Bayonne Hospital?

Mr. Susskind: I object to that, your Honor. She has produced all the records she has.

The Court: She may know he was there without referring to the records. I will let her answer that question.

A. Eight times that I know of.

30

By Mr. Nugent:

Q. What did Thomas Niland say was the matter with him?

Mr. Susskind: I object to that. First of all it is a conversation with a dead man.

Mr. Nugent: If the court please, this is an admission made by the insured.

The Court: I will sustain the objection. It is incompetent.

40

Grace Kennedy, for Complainant—Direct.

Mr. Perkins: May I address your Honor on that?

The Court: There is no question now pending. If you wish you can put a new question.

By Mr. Nugent:

10

Q. What did Thomas Niland tell you he was suffering with?

Mr. Susskind: I object to that, your Honor. A conversation with a dead man is not permissible.

The Court: Is that your only objection?

Mr. Susskind: She should testify of her own knowledge. This is a suit against an administrator.

20

The Court: She is not a party to the suit.

Mr. Perkins: Why couldn't she make an admission?

The Court: Are you going to prove by this witness a conversation had with this man and herself?

Mr. Perkins: Yes.

The Court: What is the purpose?

Mr. Perkins: To show he knew he was suffering with an illness before and at the time he made the application for insurance.

30

The Court: How would that vitiate the policy?

Mr. Perkins: Because the policy says the policy will not take effect if the insured be before a year of unsound health.

The Court: There is a big difference between illness and unsound health.

Mr. Perkins: The question is what the man said to her. Suppose he said, "I have heart disease"?

40

Grace Kennedy, for Complainant—Direct.

The Court: I will sustain the objection. Even if that man said, "I have heart disease", it wouldn't make it so. How would he know what he had?

Mr. Perkins: If he said, "I have heart disease"?

10

The Court: That wouldn't be evidence that he had.

Mr. Perkins: It would be evidence of good faith because of his answer.

The Court: Suppose he said no in the application, and he told this witness he had heart disease?

Mr. Perkins: I think that's an admission he had heart disease.

20

The Court: I will sustain the objection.

By Mr. Nugent:

Q. Did you see Thomas Niland in bed in the hospital?

Mr. Susskind: I object to that.

The Court: She has already said no previously.

The Witness: I said I didn't remember.

30 By Mr. Nugent:

Q. Did you see him treated around the hospital by any physician? A. No.

Q. Did you see any bandages or other evidence of surgical treatment upon him? A. No.

The Court: Suppose she did. If he had a black eye that wouldn't make him of unsound health.

Mr. Nugent: That's all.

40

Grace Kennedy, for Complainant—Cross.

Cross-examination by Mr. Susskind:

Q. You say Doctor Rothberg, Doctor Kresch and Doctor Morganstein treated Mr. Niland? A. Yes.

Q. How do you know that? A. They were internes in the hospital at that time. Of course, I didn't see them treating him. 10

The Court: You have sworn they treated him. I want you to be careful.

By Mr. Susskind:

Q. When you testified they treated him you were merely testifying from records?

The Court: She testified she wrote down on the card Doctor Pinkerton. 20

The Witness: He is asking me about internes.

Mr. Susskind: They are doctors now. They were internes then.

The Court: Put your question.

By Mr. Susskind:

Q. When you said Doctor Rothberg and Doctor Kresch and Doctor Morganstein treated him you are not saying that from your own knowledge? A. I didn't see them treat him. 30

Q. When you said he was in the hospital eight times you didn't say that from your own knowledge? A. I saw him a few times but I couldn't say eight times.

By the Court:

Q. But you did say eight times. A. I don't know how many times I saw him. 40

Grace Kennedy, for Complainant—Re-direct

Q. Why did you say eight times? You are sworn to tell the truth. You swore he was there eight times. A. No, because I have eight records with me. They include those three times.

By Mr. Susskind:

10 Q. But you don't know of your own knowledge he was there eight times? A. I couldn't say. I don't know how many times I saw him.

Q. You don't mean to say he was there eight times? A. I only remember he was there eight times.

By the Court:

20 Q. Why do you say that? You said before you didn't know how many times. You are now in a position you have to explain your answer. A. I don't remember how many times I saw him. It may have been eight times and more than that.

Q. You are guessing? A. I am guessing the number.

Mr. Susskind: That's all.

By the Court:

30 Q. You are sure you saw him but you don't remember how many times? A. No.

Re-direct examination by Mr. Nugent:

Q. Miss Kennedy, can you recall when you first saw him? A. I can't recall the date, no.

Q. From the records you say you have made in your handwriting, will that refresh your recollection as to when you first saw him? A. Those dates are all right in the record.

Grace Kennedy, for Complainant—Re-cross.

William A. Pinkerton, for Complainant—Direct.

Q. Now, besides those dates—those three occasions, how many times after that did you see on and off? A. I don't know how many times altogether.

Q. Would you say you saw him many times around there? A. Yes.

10

Mr. Nugent: That's all.

Re-cross examination by Mr. Susskind:

Q. Miss Kennedy, didn't Mr. Niland work in the hospital? A. I think he did at one time but I don't think he worked there since I worked there. I think it was before my time.

By the Court:

20

Q. Are you guessing at that? A. I heard that. I was told that.

The Court: I will strike out anything based on hearsay.

Mr. Susskind: That's all.

WILLIAM A. PINKERTON, recalled.

30

Direct examination by Mr. Nugent:

Q. Doctor, can you tell us about how many times you either treated or prescribed treatment for Thomas Niland?

Mr. Susskind: I am going to object to that because the doctor has said he had no recollection of it.

The Court: That is my recollection of it. He may change his mind now.

40

William A. Pinkerton, for Complainant—Direct.

A. I stated I could only testify from the hospital records. I have no personal recollection.

By the Court:

10 Q. You said the records did not refresh your recollection. A. Yes, they did, but I didn't sign them.

By Mr. Nugent:

Q. I will ask the doctor to look at these records and refresh his recollection about a treatment of Thomas Niland.

20 Mr. Susskind: I am going to object because he did look at them before and he said he was satisfied there was nothing in his signature.

The Court: I will overrule the objection just now and see what is coming. I heard what the doctor said. He used the word "direction".

A. According to the records. I already stated I had no personal recollection of this particular man but the hospital records I recall.

30 The Court: I will strike that last part out.

By Mr. Nugent:

Q. Doctor, do the hospital records refresh your recollection of having prescribed and diagnosed the treatment and ailment of this man?

Mr. Susskind: I think he has already answered it.

40 The Court: I will let him answer it now.

William A. Pinkerton, for Complainant—Direct.

A. I cannot formulate in my mind any recollection of Thomas Niland.

By Mr. Nugent:

Q. Do the records by reference and looking through these records refresh your recollection?

A. You mean recall the man to me?

10

Q. Not only the man but your diagnosis of his treatment and your treatment or direction of his treatment. A. The handwriting is familiar. I recall I treated him by the records but I don't recall him.

By the Court:

Q. How do you know you treated him? A. They are final records.

20

Q. You mean made by somebody else? A. Yes.

The Court: I will disregard the testimony.

Mr. Nugent: I am merely asking the doctor, if the Court please, whether he prescribed any treatment for him. I am asking him to use the records to refresh his recollection.

The Court: He said the records were not made by him and he said he could not tell whether he treated this man unless there was something in the records.

30

Mr. Nugent: It appears, if the Court please, that the internes, Doctor Rothberg, Doctor Kresch and Doctor Morganstein, under the direction of Doctor Pinkerton who was their superior carried out a certain line of treatment for this particular patient. If they did that and the doctor's recollection can be refreshed by that I think he has a perfect right to testify.

40

William A. Pinkerton, for Complainant—Direct.

The Court: That may be but you will have to lay a foundation for it first before I receive the doctor's testimony.

By Mr. Nugent:

10 Q. Doctor, was Doctor Kresch and Doctor Rothberg under your supervision in the hospital? A. Yes.

By the Court:

20 Q. Only your supervision or under the supervision of other doctors? A. They were under my direction when I was on service. They are regular doctors after having taken an examination in the hospital. The men in the service are under my direction.

Q. When you are not there they are under some other doctor who is then serving? A. Yes.

By Mr. Nugent:

Q. Do these records refresh your recollection of having prescribed any treatment for Thomas Niland?

30 The Court: I think I will have to overrule that question in view of the testimony adduced.

Mr. Nugent: I didn't know there was any objection made to it.

The Court: The witness has repeatedly indicated he does not know anything about Thomas Niland and he does not know of any treatment prescribed for Thomas Niland except from these records, which were not made by him.

40 Mr. Nugent: They are made by people who were under his supervision.

Robert Stewart, for Complainant—Direct.

The Court: You say so, but until those persons are produced and present some evidence to warrant the admission of the records I will not let you examine the doctor on them. The records have to be put in evidence and substantiated before I will permit the doctor to testify to them.

10

By Mr. Nugent:

Q. Doctor, do you know whether or not this man was admitted to the Bayonne Hospital in 1927? A. I have already testified I have no personal recollection of it. I am only testifying from records.

The Court: That is what he said several times, Mr. Nugent.

20

Mr. Nugent: That's all.

Mr. Susskind: That's all.

ROBERT STEWART, a witness being sworn in behalf of complainant.

Direct examination by Mr. Nugent:

Q. Doctor, you are a regularly licensed physician of the State of New Jersey? A. And New York.

30

Q. And are you connected with the Hudson County Hospital? A. I am.

Q. Were you connected with the hospital in 1927 and 1928? A. I was.

Q. 1929? A. I was.

Q. Where is the Hudson County General Hospital? A. Laurel Hill, Secaucus, Hudson County.

Q. Doctor, do you recall any time having diag-

40

Robert Stewart, for Complainant—Direct.

nosed the ailment of a Thomas Niland at the general hospital up there? A. I do.

Mr. Susskind: I object to it, your Honor.

10 The Court: Of course he will have to identify the Thomas Niland in the insurance policy with the Thomas Niland he diagnosed. There might be 4,000 Thomas Nilands.

By Mr. Nugent:

Q. Was there a record made of his treatment in the hospital? A. There was.

Q. Was it made by you? A. No, not by me.

Q. Was it made under your direction or under your supervision? A. No, the—

20

The Court: That answers it.

By Mr. Nugent:

Q. Do you recall what nationality Thomas Niland was? A. I do not.

Q. Do you know where he lived or where he came from? A. I believe he came from—

The Court: You are asked if you know.

30 (Witness continuing) He said he came from Bayonne.

By Mr. Nugent:

Q. Thomas Niland said he came from Bayonne? A. He did.

Q. Did he tell you where in Bayonne he lived? A. He did not.

Q. Did he tell you of what disease he was suffering?
40

Robert Stewart, for Complainant—Direct.

Mr. Susskind: I object to what a dead man told him. It is a conversation with a dead man.

The Court: That doesn't estop him from testifying.

Mr. Susskind: And also the suit is in a representative capacity.

10

The Court: That doesn't estop the witness from testifying. I cannot see the connection, Mr. Nugent, by which the Thomas Niland he is testifying about is the Thomas Niland here in question. One is spelled Nilan and one is Niland.

Mr. Perkins: I suppose that is evidence to be connected up.

The Court: I think it ought to be connected up. I think you ought to identify the Thomas Niland he had dealings with with the Thomas Niland which is the subject of this inquiry.

20

By Mr. Nugent:

Q. Doctor, I call your attention to the name Robert Stewart signed to the first page, and ask you whether or not that is your signature? A. It is.

Q. Was this statement made by you? A. The man told me the facts which I transcribed here.

30

Q. Without reference to this can you tell us where the Thomas Niland who was attended by you in the hospital lived in Bayonne? A. I could not.

Q. Now will you use this record which you have testified is in your handwriting and refresh your recollection and tell us where he lived?

Mr. Susskind: Is it all in his handwriting?

40

Robert Stewart, for Complainant—Direct.

The Witness: No, it is not.

Mr. Susskind: I object to it being used at this time.

The Court: I will have to sustain the objection just now.

10 By Mr. Nugent:

Q. This part of the chart referring to the name and address did you elicit that information from Thomas Niland? A. I did not.

By the Court:

Q. What lines are you referring to? The first, second, third and fourth lines? A. Yes.

Q. That you were no party to? A. No.

20 By Mr. Nugent:

Q. What part of this was made by you? A. The history of the case.

By the Court:

Q. You are referring to writing all below the printed matter? A. Yes.

By Mr. Nugent:

30 Q. Family history, previous history, and previous ailment? A. Yes.

Q. Was that information put in there under your supervision? A. No.

Q. Were you present when that information was elicited from Mr. Niland? A. I would like to qualify that statement.

The Court: You can say yes or no.

40 (Witness continuing) No.

Robert Stewart, for Complainant—Direct.

By Mr. Nugent:

Q. Now, then, doctor, will you read into the court that part of the page you referred to in your handwriting?

Mr. Susskind: I object to it. They haven't connected it up with the case at all.

10

The Court: If they don't connect it up it will not be evidential. I will permit them to connect it up.

By the Court:

Q. Will you read it into the record, doctor? A. Family History—father and mother dead. No brothers or sisters. Previous History—Drain laborer. He worked in the street department. Never sick in childhood. Always healthy. Denies venereal disease. Had operation on left leg (ulcers) eleven years ago. He told me this. Present illness ulcer of the left leg, inner side, middle third. Started four months ago. Leg became swollen and broke down into an open sore. Treated by physician at home, then sent to Bayonne Hospital seven days ago. Can walk. Leg does not heal. Signed Robert Stewart.

20

Q. What is the date of that record? A. This is February 1, 1928.

30

By Mr. Nugent:

Q. Doctor, is there any other part of that record that was made by you? A. Yes.

Q. What part is that? A. Physical examination.

The Court: Mr. Nugent, the only thing I am concerned with particularly is whether or not on the date of the policy this man was in sound health. He might have been

40

Robert Stewart, for Complainant—Direct.

ill years before, yet be in sound health on the date of the policy.

Mr. Nugent: Your Honor overlooks our contention that the application contains——

10 The Court: The application is no part of the policy.

Mr. Nugent: It is our contention it is part of the policy.

20 The Court: The policy says: "This policy contains the entire contract between the parties." This kind of a policy I am observing now is clearly distinguishable from policies which came to my attention heretofore which read that the application and the policy together should be taken as the contract. The policy here in question seems to me to be a peculiar sort of policy—distinguishable from ordinary policies.

Mr. Perkins: If the court please it would be quite proper to show the history of the man's disease, showing he was in the hospital in Bayonne and in Laurel Hill and that he died suffering from the same disease.

30 The Court: I will overrule all line of testimony except the condition of the man's health at the time of the issuance of the policy. I wouldn't care whether he was a cripple or sick before. The only question is whether the man at the time this policy took effect was alive and was in sound health. The policy says "This Policy shall not take effect if the Insured die before the date hereof, or if on such date the Insured be not in sound health." That's the gist of the action as I see it.

40

Robert Stewart, for Complainant—Direct.

Mr. Perkins: We offered the Bayonne Hospital records and contend he was suffering from the same illness at the time he died, and you cannot pick out one date and show what is the date.

The Court: If you will couple it up, all right.

10

Mr. Perkins: That's the purpose.

The Court: You are not going to argue by way of analogy because a man was once sick he continued sick?

Mr. Perkins: No, but we expect to show as a matter of fact the man continued sick and died of an illness he was suffering from at the time he took out the policy. Then in addition, if the court please, it is our contention that even though the whole policy is expressed in the writing which is offered in evidence it is proper for us to show fraud in the inception of the contract that the contract was induced by the false, fraudulent misrepresentations of the insured.

20

The Court: The only fraud you can show from the policy is that the man at the time of the issuance of the policy was not of sound health. If you can show that it would be a fraud.

30

Mr. Perkins: I think it is proper in this forum to show that a man made a false and fraudulent statement with reference to his condition of health and with reference to his being in a hospital.

The Court: You have a right to attempt to show it, but my impression is I will overrule it. I have had occasion to deal with insurance cases and insurance policies, and

40

Robert Stewart, for Complainant—Direct.

I am frank to say what you are suggesting in the way of proof might be admissible in other kinds of cases, but not in this case. However, we will get the record in and see what will develop.

By Mr. Nugent:

10

Q. Doctor, will you read into the record what the contents are of what you call the physical examination? A. Skin——

By the Court:

Q. That's the heading? A. Yes.

20

Q. Following that reads what? A. Clear and well washed. Caption Face—Pupils react. Mouth and Throat Caption—Tongue clear. Bad teeth. Caption Heart—Normal. Caption Lungs—Normal. Line and Spleen—Negative. Intestines—Negative. Stomach—Normal. Caption G. U. System—Negative. Patella Reflexes—Normal. Signed Robert Stewart.

By Mr. Nugent:

30

Q. Doctor, I show you the third page and ask you whether or not that was made either by you or under your supervision? It is signed by you, isn't it? A. I signed it, yes. I sign all the records in that ward.

By the Court:

Q. Have you personal knowledge of the subject matter that you signed? A. Well, some of it I did not write and some of it I did.

By Mr. Nugent:

40

Q. What part did you write? A. Well, on 2/11/28 I wrote "Improving".

Robert Stewart, for Complainant—Direct.

Q. What particular ailment was he suffering with from which his condition was improving?

Mr. Susskind: I object unless he knows of his own knowledge.

The Witness: I know of my own knowledge.

The Court: I think I will receive it and deal with it later because my impression is this case before me is as to whether or not the man was of sound health at the time the policy was issued. If I exclude it now counsel will not have the benefit of it, so I will receive it subject to your objection, Mr. Susskind, and deal with it later.

10

By Mr. Nugent:

Q. Will you answer that question? A. Varicose ulcer of the left leg anterior inner middle third.

20

By the Court:

Q. That wouldn't make a man unsound in health, would it? A. No.

By Mr. Nugent:

Q. When, doctor, if you know, was he discharged from the hospital? A. I will read from the record—"Discharged August 12, 1928, to his home."

30

Q. Was he entirely cured of varicose ulcer of the left leg at the time he was discharged from the hospital? A. I didn't say so.

Q. I am asking you was he? A. No.

Mr. Nugent: That's all.

40

Robert Stewart, for Complainant—Cross.

Cross-examination by Mr. Susskind:

Q. Doctor, have you come across many cases of varicose ulcers of the leg? A. Thousands of them.

10 Q. Would you say that a man suffering from varicose ulcers of the leg was not of sound health?

The Court: He said no.

By Mr. Susskind:

Q. Do you know of anybody dying of varicose ulcers of the left leg?

Mr. Nugent: I object to that.

The Court: I will sustain the objection.

20 By Mr. Susskind:

Q. Is it curable? A. In most cases it is curable.

By the Court:

Q. It is curable by an operation which you perform in the upper part of the thigh, isn't it? A. Yes.

Mr. Susskind: That's all.

30 Mr. Nugent: If your Honor please, I wish at this time to offer in evidence a certified copy of death certificate of the Board of Health & Vital Statistics of Hudson County.

The Court: How is that material as to the cause of death?

Mr. Nugent: It is material in this respect because it says under the heading Cause of death—Chronic Myocarditis.

Mr. Susskind: I have no objection.

40 The Court: All right, let it be marked in evidence.

Robert Stewart, for Complainant—Cross.

(Certificate marked Exhibit C-4 in evidence.)

The Court: Does that certificate indicate how long it had been chronic?

Mr. Nugent: Two years.

The Court: And he died when?

Mr. Nugent: October 28, 1929.

10

ROBERT STEWART, recalled.

By the Court:

Q. Doctor, in the report counsel interrogated you on, you said the man's heart was normal? A. I did.

20

Q. That was the early part of 1928? A. February.

Q. If this man was suffering from myocarditis at that time would you expect to have discovered it? A. I would.

Q. And did he at that time have myocarditis? A. He had no lesion of the heart that I could ascertain at that time.

Q. You have been a practicing physician for a great many years? A. Over twenty-five years.

30

Q. And you have been connected with that institution up there practically the same amount of time? A. Yes.

Mr. Perkins: I suppose the witness is called not in our behalf.

The Court: By the Court.

Mr. Perkins: May I examine him?

The Court: Yes, but he is your witness as to previous matters. This Court is seeking to do justice to the parties concerned

40

Robert Stewart, for Complainant—Cross.

10 and this witness was produced by you and his production indicates he is a credible witness, and the testimony he gave indicates clearly that at the time this doctor examined this man his heart was in a normal condition. That was the early part of 1928. Now you produce in evidence a death certificate of a man named Thomas Niland who is said to have died from chronic myocarditis.

Mr. Perkins: That is part of the proofs offered by the other side to us. There is no question about the identification of Thomas Niland.

20 The Court: You can go ahead and question him. The Court recalled him for the purpose of asking him whether the heart was normal and with a view of enabling the Court to determine whether the doctor who signed that certificate erred or the witness erred.

Cross-examination by Mr. Perkins:

30 Q. What examination if any did you make of his heart? A. A thorough physicial examination. I used a stethoscope. I examined the chest to see if the heart was hyperthrophy or enlarged. I listened to find out if the heart beat was normal and strong. I listened with a stethoscope to find out if the valvular action was smooth and clear. I found it so.

Q. Doctor, if Thomas Niland died October, 1929, having suffered from a chronic heart disease for two years would that exclude the man you have just spoken of? A. No.

40 Q. I don't know whether you understand it. If on the first of October, 1929, a man named Thomas

Robert Stewart, for Complainant—Cross.

Niland died of heart disease chronic for two years, could that dead man have been the same man?

The Court: I will overrule that question. That calls for a conclusion. In other words you are asking him whether he made a mistake. 10

Mr. Perkins: Your Honor is making a great point about the identification of Mr. Niland.

The Court: I will overrule the question. Mr. Perkins: That's all.

Cross-examination by Mr. Susskind:

Q. Doctor, did you examine Mr. Niland?

The Court: Do you want to call him as your own witness? 20

Mr. Susskind: I think it is relevant.

The Court: The Court called him for a specific purpose but if you examine him it will be as your own witness.

Mr. Susskind: I will make him my own witness.

Mr. Perkins: We object at this time.

The Court: You can use him when the time comes Mr. Susskind. That's all doctor. 30

Alfred Macchi, for Complainant—Direct.

ALFRED MACCHI, a witness being sworn on behalf of Complainant.

Direct examination by Mr. Nugent:

10 Q. Mr. Macchi, are you an agent of the Prudential Insurance Company? A. I am.

Q. Were you an agent of that company in 1928? A. June 18th I started in 1928.

Q. Did you know Mr. Thomas Niland? A. I did.

Q. Did you ever write an application of insurance for Thomas Niland—that is for insurance in your company on the life of Thomas Niland? A. Yes.

20 Q. Do you remember when you wrote that application? A. No.

Q. I show you what purports to be an application and ask you if that's the application——

Mr. Susskind: I object to any reference to the application.

The Court: I will sustain the objection.

Mr. Nugent: On what ground?

Mr. Susskind: On the ground of the statute of 1925.

30 The Court: I will sustain it on the ground it is immaterial.

By Mr. Nugent:

Q. At the time that you wrote the application for Thomas Niland did you ask him this question: "What is your present condition of health"? A. Yes.

Q. And what did he say? A. I don't remember what he said but as the application is answered——

40

Alfred Macchi, for Complainant—Direct.

Mr. Susskind: I object to that part of it.

The Court: If you want to object arise and state the grounds.

Mr. Susskind: I object, it is not responsive.

The Court: I will overrule the objection because that is not a legal ground. 10

Mr. Susskind: What was the question?

(Last question read by stenographer.)

Mr. Susskind: I object to the answer because he does not know.

The Court: If he doesn't he will say so.

By Mr. Nugent:

Q. Did you ask him when he was last sick? 20

The Court: I said that was not admissible. How do you expect to get anything on the application in?

Mr. Nugent: I want to get it in on the record.

The Court: It is on the record.

By Mr. Nugent:

Q. Did you ask him whether or not he had any physical defect or deformity? 30

The Court: I will overrule all line of examination based on an application.

By Mr. Nugent:

Q. Do you remember where Thomas Niland lived at that time you called on him? A. No, I don't remember.

Q. Will this paper writing refresh your recollection as to where that particular Thomas Niland lived at that time? 40

Alfred Macchi, for Complainant—Direct.

Mr. Susskind: I object.

The Court: What is the objection?

Mr. Susskind: It is immaterial.

10 The Court: I will sustain the objection upon the ground that nothing contained in that application is material to the issue I am trying.

Mr. Perkins: It is for the purpose to evidence where Thomas Niland was residing.

20 The Court: I will overrule it for every purpose and the reason I am overruling it is that the policy of insurance was issued December 3, 1928, and as I stated before, the only question, aside from the validity of the receipt, is whether the man at the time of the issuance of the policy was alive and of sound health, and any statements made in an application or other paper upon which the policy is predicated is immaterial because the policy says: "This policy contains the entire contract between the parties hereto."

Mr. Perkins: The purpose is to identify Thomas Niland and not to put it in evidence.

30 The Court: I will overrule it.

Mr. Perkins: Can I use a paper signed by the insured as to where the insured lived?

The Court: I will overrule it.

Mr. Perkins: It is part of the identification of Thomas Niland.

The Court: I will overrule it.

Mr. Nugent: That's all.

Mr. Susskind: No questions.

40

Hyman Frieman, for Complainant—Direct.

HYMAN FRIEMAN, a witness being sworn in behalf of complainant.

Direct examination by Mr. Nugent:

Q. Doctor, are you a regularly licensed physician of the State of New Jersey? A. Yes, sir.

Q. Were you at one time connected with the Bayonne Hospital? A. Yes, sir.

Q. Are you still there? A. Not in the capacity I was at that time. I am still connected with the hospital as a member of the staff.

Q. Do you remember a patient in the hospital by the name of Thomas Niland? A. I do.

Q. Did you know Thomas Niland? A. Well, I knew him during the time he was in the hospital.

Q. How long to your knowledge had he been in the hospital? A. He was in the hospital from 9/22/29 to 10/29/29, I think.

Q. Do you know whether he was in the hospital before those dates? A. He was in the hospital.

By the Court:

Q. Are you referring to a record? A. No.

Q. What are the records you have in your lap there? A. This is a record of Thomas Niland while he was in the hospital.

Q. I am asking you whether you have occasion to refer to it or are you testifying without it. A. I have records in my own handwriting that will refresh my memory, but he was in the hospital two years ago.

By Mr. Nugent:

Q. At the time he was admitted to the hospital did you get a history from him? A. Yes, I have a history here in my handwriting and signed by myself, and I have a physical examination.

Hyman Frieman, for Complainant—Direct.

Q. You are referring to what is known as personal history and physical examination. Will you read, doctor, into the record exactly what that physical examination was?

By Mr. Susskind:

10 Q. Just a minute, doctor. Is that all in your handwriting? A. Yes.

Q. How about this here, referring to the top part of the sheet? A. Just this portion was filled in by the clerk—final diagnosis. But there is a diagnosis of my own in my own handwriting.

Q. Is that all your handwriting (indicating)? A. Yes, signed by myself.

20 By Mr. Nugent:

Q. Will you read that part, doctor, which is in your handwriting? A. The history I have down for him is as follows——

By Mr. Susskind:

Q. Are you reading what you have written yourself? A. What I have written myself.

Q. You don't know yourself to what it refers? A. I know it refers to a history I took of Thomas Niland.

30 Q. But what is on the top is not written by you? A. I am not reading that.

Q. You are reading now what you have written in your own handwriting? A. Yes.

Mr. Nugent: I wish to call attention to the answer to the bill that counsel admitted he was in the hospital but he didn't know for what particular illness he was treated for at the time previous to October, 1929.

40

Hyman Frieman, for Complainant—Direct.

He admits he was in the hospital at the time of the final illness. Thomas Niland was admitted about the middle of September, 1929, and——

The Court: What the doctor is referring to is something that occurred in September, 1929. How can that be material to December 3, 1928, the date of the issuance of the policy?

10

Mr. Nugent: If your Honor please there is a connection between the evidence of the previous witnesses and what this doctor will testify to.

The Court: All right, there is no objection.

A. This part—"Admitted to the hospital——"

20

By the Court:

Q. Are you reading it now? A. Do you want it verbatim?

Q. Yes. A. "Patient admitted to hospital complaining of pains in abdomen for the past two days during which time he had vomited a number of times. He claims he had not been drinking for the last few days but had been an excessive imbibor of alcohol previous to that. He has been feeling weaker lately so that he found it impossible to go to work. Also he has been treated for ulcerations of both legs. On examining him we found the following: General appearance—Adult. White. Male of 48. Complains of abdominal pains and headaches.

30

Q. 48 you say? A. Yes.

Q. The policy of insurance says the insured's age next birth was 56. I suppose there may be

40

Hyman Frieman, for Complainant—Direct.

some question it is the same man. A. I notice here——

Q. Just read what you have there. Don't be putting any interpolations. A. Examination of Head—Scalp negative. Eyes—Pupils small and equal. Reacts slightly to light. Nose and Ears—
10 Negative. Mouth—Tongue thickly coated. Teeth—Stained and in bad condition.

By Mr. Nugent:

Q. Is this part of the record made by you too (indicating)? A. Yes. No distension or pulsation of the veins nor adenophy. That means no disease of the glands of the neck. The Heart—The
20 apex in the fifth space in the mid auricular line of poor quality, distant and feeble. Rhythm regular. No murmurs or thrills. The lungs are clear throughout except in the right lower base. Abdomen—No masses, tenderness or rigidity. Extremities—There are two irregular deep large ulcerations over the lower anterior aspect of the left leg and one irregular ulceration over the middle of the right leg anterior which is covered by a greenish exudate over which were creeping many maggots and from which a terrific stench
30 emanated. There is an area of both fat and an area of erythema surrounding the ulcers. Reflexes normal. Genitals negative. Pulse good quality.

Q. Doctor, at the time did you get any history from Thomas Niland of these ulcers? A. At the time we got a history.

By the Court:

Q. If you did you wrote it down? A. Yes, I did. In the history he was complaining of ulcers of the
40 leg.

Hyman Frieman, for Complainant—Direct.

Q. You have written it down? A. Yes. The duration of the ulcers was not obtained from him at the time; just that he was complaining of ulcers of both legs.

Q. They were observable were they? A. Oh, yes.

10

By Mr. Nugent:

Q. How long doctor, from your own knowledge, had this man been suffering from ulcers?

Mr. Susskind: I object. He isn't qualified to answer that.

The Court: I will sustain the objection. Furthermore, does an ulcer constitute a man of unsound health? This case comes down to the question of whether or not this man was of unsound health at the time of the issuance of the policy. One of the doctors here has testified that the fact the man did suffer from ulcers did not indicate he was of unsound health.

20

By Mr. Nugent:

Q. From your knowledge of medicine and your own personal knowledge of these ulcers and your examination and treatment of them, would you say a man who was suffering from these particular ulcers was of unsound health?

30

The Court: I will overrule the question as of September, 1929.

By Mr. Nugent:

Q. How long had this man been suffering from ulcers, doctor?

Mr. Susskind: I will object to it.

40

Hyman Frieman, for Complainant—Direct.

The Court: I don't think it is material,
but I think I will let it in.

A. I can't say exactly how long the man had been
suffering, but——

10 The Court: If you can't say, don't guess.
 The Witness: Not from the history.

By the Court:

Q. Can you say from any other source? A.
Yes, from the ulcers.

Q. Don't guess. A. It is my opinion.

Q. All right, give us your opinion. A. From
the appearance of the ulcers at the time he came
into the hospital it appeared he had been suffer-
ing with those ulcers for some time. I would say
20 for months. It could go as high as six or eight
 months. Ulcers at that time would certainly in-
 capacitate an individual——

The Court: I will strike that part out.
I didn't ask that.

By Mr. Nugent:

Q. Now, doctor, would you say that a man suf-
fering for six or eight months with those par-
30 ticular ulcers was of sound health?

Mr. Susskind: I object to it, your Honor.

The Court: I will sustain the objection
because I am not concerned with conditions
of this man's health in September, 1929.
He said he examined him in September,
1929.

By Mr. Nugent:

40 Q. Was Thomas Niland of sound health at the
 time you examined him? A. No, he was not, for

Hyman Frieman, for Complainant—Direct.

the reason he came to the hospital to get treatment for his condition.

Q. And his condition was ulcers? A. Ulcers and also certain symptoms which he complained of which perhaps—

The Court: I am not concerned with your guesses. You as a medical man ought to know. 10

The Witness: No, I don't know.

The Court: I don't want your perhaps or guesses.

The Witness: If you can get any man up here to testify—

The Court: We have had them here.

The Witness: I can't say positively; nor anybody else can say. 20

The Court: I will strike out about anybody else. Speak for yourself.

By Mr. Nugent:

Q. Doctor, from your knowledge of the case in your opinion is there any other disease from which this man suffered? A. I made a diagnosis at the time of a chronic myocarditis.

By the Court: 30

Q. Why didn't you put it in the history? A. I did.

Q. There a isn't word in the history about it. A. Something there on poor quality.

Q. If this man had chronic myocarditis at the time you examined him why didn't you say so? A. Chronic myocarditis—ulceration of the legs.

Q. You didn't read that? A. It is my handwriting. 40

Hyman Frieman, for Complainant—Direct.

Q. Why didn't you put it in the history? A. I was reading the physical examination.

Q. How long would you say he was suffering from chronic myocarditis? A. I don't know. I couldn't tell you exactly how long he suffered.

10 By Mr. Nugent:

Q. Doctor, in your opinion how long had this man been suffering from chronic myocarditis?

Mr. Susskind: Your Honor, I will object to it.

The Court: I will overrule the objection. I want to hear what he will say.

A. The duration of it is problematical.

20

By Mr. Nugent:

Q. In your opinion. A. In my opinion the man was suffering from chronic myocarditis for at least a year previous to the time I examined him in the hospital.

By the Court:

Q. Now how do you fix that period of one year?

30 A. Because the examination of his heart would not disclose the facts we elicited unless it had been over a long period of time.

Q. Why would you say a period of one year rather than fourteen months? A. It may have been fourteen months.

Q. Or ten months? A. It may have been, but I put it at one year.

Mr. Nugent: That's all.

40

Hyman Frieman, for Complainant—Direct.

By the Court:

Q. You attended him apparently up to the date of his death, didn't you? A. Yes, sir.

Q. Did you find any other condition with respect to that chronic myocarditis at that time with reference to his heart or anything pertaining to it? A. So far as his heart was concerned we put him down as a chronic myocarditis. 10

Q. What's your name? A. Frieman. I don't think I signed the death certificate.

Q. You were not a physician at that time? A. Yes.

Q. A graduate physician? A. Yes.

Q. How long had you been a graduate physician at that time in September, 1929? A. Six months.

Q. What is this language on Exhibit C-4 following the words chronic myocarditis as to the cause of death? A. Suppurative. 20

Q. That means pussy? A. Yes.

Q. What's the next? A. Cellulitis.

Q. What does that mean? A. Genitalia.

Q. What is the definition of that? A. Genitalia means a puss infection of the exterior organs of reproduction.

Q. That has nothing to do with the heart? A. No. Chronic myocarditis we call that. That's a condition; disease develops later on. 30

Q. He could not have developed it later on because he died October, 1929? A. Before it was developed.

Q. How long before he died was it he suffered from that condition, if you know? A. 10/25/29 he developed the condition.

Q. Now read the certificate and see if the doctor who signed it doesn't say five days? A. I don't know what it refers to. 40

Hyman Frieman, for Complainant—Cross.

Q. It says five days, doesn't it? A. Yes, it says five days and he died 10/29/29, which means in five days.

Cross-examination by Mr. Susskind:

10 Q. How many cases of ulcers have you treated?
The Court: You mean up to that time?

By Mr. Susskind:

Q. How many cases of ulcers have you treated?
A. I couldn't give you the exact figure.

Q. Well, approximately? A. I don't know. We have quite a few ulcer cases over in Bellevue Hospital.

20 Q. How many did you handle up to that time?
A. I couldn't tell.

The Court: I don't see it is material. I am not concerned about that.

By Mr. Susskind:

Q. What are the symptoms of chronic myocarditis? A. Subjectively?

By the Court:

30 Q. How would you determine a case of chronic myocarditis? A. First of all there would be the subjective and the objective symptoms that the patient would have. Subjectively it would be his complaints, and the patient would complain of getting tired very easy and inability to exert himself even to climbing up a flight of stairs. He would become breathless very easy and there would be a gradual failing in health. He may or may not get pains or palpitations of the heart.

40

Hyman Frieman, for Complainant—Cross.

He may not get that or he may. The most important thing on examination is the quality of the heart sounds as you listen to the heart with a stethoscope. If the sounds are feeble and distant and difficult to hear we would say there is something wrong with the heart mechanism and put it down as myocarditis.

10

Q. When you speak of rhythm do you mean palpitation? A. How the beats are coming from the heart, whether they come rhythmically or whether they are irregular.

Q. In your diagnosis you said the rhythm— A. Was regular. Which does not disprove the fact he had chronic myocarditis at the time.

Q. So, if it was regular, it might indicate he might have it? A. With chronic myocarditis the rhythm may be regular at all times.

20

By Mr. Susskind:

Q. Was his heart enlarged? A. According to my examination the heart was not enlarged. The heart need not be enlarged.

By the Court:

Q. How did you determine that? A. By feeling for the apex beat, that is, the apex of the heart itself, and see if it is displaced in any way.

30

Q. You measure, don't you, if you want to be accurate? A. To be accurate you have to have an X-ray. The heart is measured, but it is a very inaccurate way of measuring the heart.

By Mr. Susskind:

Q. Isn't it the fact the heart is always enlarged in a case of chronic myocarditis? A. It is not the fact. It is only in the case of definite heart-

40

Hyman Frieman, for Complainant—Cross.

failure where the heart is dilated or the heart is enlarged. It may be hypertrophy but it may not be enlarged.

Q. Doctor, just one more question. Would you say from your observation this chronic myocarditis condition was of one year's standing?

10 A. It might be over one year's standing.

Q. With regard to the ulcers you testified you thought they related back or had started about six or eight months back? A. Yes.

Q. It is possible it was three months? A. No, sir. Three months duration would not have such an appearance.

By the Court:

20 Q. How about four months? A. It might.

Q. And how about five months? A. I think eight months would probably be nearer.

Q. You say that, but we are trying to find out. A. Eight months, yes.

Q. Why would you say it was more than five months? A. It am trying to recall the appearance of the ulcers at that time. I recall the ulcers very distinctly because they were really so bad and smelled so.

30 Q. That may occur within a month as to the smell? A. But the hardness around the ulcers.

Q. How long would that indicate that had formed—the hardness? A. It would take months.

Q. How many months? A. I don't think it is fair to differentiate between five, six or eight.

Q. You said eight. I am trying to find out why you said it. A. It is difficult to say five.

Q. You are giving your best idea? A. I am giving my opinion on it.

Hyman Frieman, for Complainant—Cross.

By Mr. Susskind:

Q. What was the chief complaint on which he was admitted to the hospital at that time? A. Weakness and the pain in the legs—the ulcers.

Q. Didn't you testify the complaint was abdominal— A. Abdominal pains.

Q. Is there any relation between that and ulcers? A. No.

Q. Do you know what he died from? A. Yes.

Q. What? A. From chronic myocarditis, terminal uremia and suppuration of the genitals.

By the Court:

Q. If you attended the man at the time of his death why didn't you sign the death certificate? It is customary, isn't it? A. No, it isn't. The one in control, the house surgeon, can sign the death certificate for all deaths which occur in the house.

Q. No matter how many patients die in the hospital the house surgeon signs the certificate? A. Yes.

By Mr. Susskind:

Q. Will you explain to the court what the relation between uremia and myocarditis is? A. There is no relation at all.

Q. Wasn't uremia the cause of his death—obstruction of the kidneys? A. It is hard to say.

Q. In your opinion would you say the condition of uremia had more to do with his death than the varicose ulcers? A. You mean the ulcers of the leg?

Q. Yes. A. I would say it did, yes.

Mr. Susskind: That's all.

Mr. Nugent: That if the Court please completes the complainant's case.

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Robert Stewart, for Defendant—Direct—Cross.

DEFENDANT'S CASE.

ROBERT STEWART, recalled in behalf of defendant.

Direct examination by Mr. Susskind:

10 Q. Doctor Stewart, in your treatment of varicose ulcers have you ever known anybody to die from them? A. No.

Q. Would you say that varicose ulcers is a local condition, or one affecting the constitution of one's health? A. Mostly local.

Mr. Susskind: That's all.

Cross-examination by Mr. Perkins:

20 Q. You say that a man doctor suffering from varicose ulcers is in sound health? A. He may be.

The Court: He didn't say so.

Mr. Perkins: When your Honor examined him——

30 The Court: Are you getting back to that point? You are only cross-examining him on matters brought out on defendant's direct examination. The doctor in this examination has not said what you are indicating.

By Mr. Perkins:

Q. What is an ulcer doctor? A. An ulcer is an inflammation or excitement of the skin on a certain part of the body—the breaking down of the tissue.

40 Q. From your examination of the ulcers on the body of Niland could you tell how long he had them? A. I could not.

Thomas Nilan, for Defendant—Direct.

Q. Were they of some years? A. I could not tell unless he told me.

Q. Was there some evidence of an operation upon him? A. No.

Q. Do you know whether these ulcers had ever been cured or not? A. I could not tell.

Q. When he left your institution he was still suffering from them was he not? A. Yes. 10

Mr. Perkins: That's all.

THOMAS NILAN, a witness being sworn in behalf of defendant.

Direct examination by Mr. Susskind:

Q. Mr. Nilan, Thomas Nilan the deceased in this case was your uncle? A. Yes, sir. 20

Q. And how long had he been a neighbor of yours? A. While he was boarding with my mother for over twenty years.

Q. And you were very friendly with him? A. Yes, sir.

Q. Did you ever know him to be sick? A. No, sir.

Q. Was he a man who worked regularly? A. Yes, sir. 30

Mr. Perkins: I object. It is quite immaterial from the mouth of a lay witness.

The Court: As to whether he was working?

Mr. Perkins: No, as to whether he was sick.

The Court: I will overrule the objection. There was no objection made when the question as to sickness was propounded. 40

Thomas Nilan, for Defendant—Direct.

By Mr. Susskind:

Q. Has he ever lost time at work?

10 The Court: How am I concerned with that? I am only concerned with the fact that this man was or was not of sound health on December 3, 1928.

By Mr. Susskind:

Q. Mr. Nilan, did you know whether or not your uncle was in poor health or sound health on December 3, 1928?

Mr. Perkins: I object.

The Court: I will sustain the objection.

20 By Mr. Susskind:

Q. Was he working at that time? A. Yes, sir.

Mr. Perkins: I object.

The Court: I will permit him to say he was working. He said yes.

By Mr. Susskind:

Q. He was not confined to his home?

30 Mr. Perkins: I object to the form of the question.

The Court: I will sustain the objection.

By Mr. Susskind:

Q. Was he confined to his home because of illness?

Mr. Perkins: I object because it calls for a conclusion.

40 The Court: I will sustain the objection.

Thomas Nilan, for Defendant—Cross.

By Mr. Susskind:

Q. Was there anything wrong with his physical condition?

Mr. Perkins: I object because it calls for a conclusion of a lay witness.

The Court: Objection sustained.

Mr. Susskind: That's all.

10

Cross-examination by Mr. Perkins:

Q. How near this man did you live? A. Only about a block away.

Q. Do you remember when he was in the Bayonne Hospital? A. Yes.

Q. He went down there September, 1928? A. Yes.

Q. How long was he down there?

20

Mr. Susskind: I object.

The Court: I will sustain the objection because it is not proper cross-examination.

Mr. Perkins: I would like to make this man my witness, your Honor.

The Court: I will let you make him your witness.

By Mr. Perkins:

30

Q. Do you remember when he was down in the Bayonne Hospital there? A. Yes.

Q. Do you remember how many times he went down there? A. No, sir.

Q. Do you remember there was something the matter with his legs? A. There was something the matter with his foot.

Q. With his leg? A. Yes.

Q. Did you go down to see him there? A. Yes.

Q. How many times did you go to see him in the hospital? A. About twice I believe.

40

Thomas Nilan, for Defendant—Cross.

Q. This was 1928? A. I believe that was the time.

Q. Do you remember what doctor was treating him down there? A. No, sir.

Q. How many times was he in the Bayonne Hospital suffering from some illness in 1928? A. I couldn't say.

Q. How many times did you see him in the Bayonne Hospital? A. I saw him about twice.

Q. Where was he then when you saw him? A. Lying on a cot.

Q. In one of the wards? A. In a ward.

Q. Lying on a bed? A. Yes, sir.

Q. Do you remember what part of 1928 it was? A. It was about the early part I think of 1928.

Q. February or March or April, 1928? A. Possibly February.

Q. And when was the second time you went down and saw him there? A. It was late in the summer time.

Q. And was he laying on a cot in the hospital then? A. Yes.

Q. And suffering from some trouble with his leg? A. He was supposed to have pneumonia then.

Q. What doctor sent him there? A. He went there with a cold himself.

Q. Do you know whether any doctor sent him there? A. No doctor sent him there.

Q. Did he say he was suffering from pneumonia when you saw him there? A. No, sir.

Q. Did he tell you how long he was suffering from pneumonia? A. No, sir.

Mr. Perkins: That's all.

Thomas Nilan, for Defendant—Re-direct.

L. Morganstein, for Defendant—Direct—Cross.

Re-direct examination by Mr. Susskind:

Q. Was he ever treated by a doctor outside of the time he went to the hospital? A. No, sir.

Q. Did he work regularly for a period before—

10

The Court: That is not proper examination of his witness.

Mr. Susskind: That's all.

LOUIS MORGANSTEIN, a witness being sworn in behalf of defendant.

Direct examination by Mr. Susskind:

20

Q. Doctor, do you remember Thomas Niland, the deceased in this case? A. Yes, sir.

Q. Did you treat a Thomas Niland in the Bayonne Hospital? A. Yes, sir.

Q. Do you remember when he was admitted or not? A. He was admitted during my internship.

Q. That was the period between August, 1927, and July, 1928? A. Yes.

Q. Do you remember treating him during that period? A. Yes.

30

Q. Did you find any chronic myocarditis condition about him? A. From my examination of him several times I didn't find any evidence of heart condition.

Mr. Susskind: That's all.

Cross-examination by Mr. Perkins:

Q. When was the first time you examined Niland? A. If I recall correctly he came in September of that year.

40

Louis Morganstein, for Defendant—Cross.

Q. Which year? A. 1927.

Q. What did you treat him for? A. Simple varicose ulcer of the leg.

Q. That was in 1927? A. Yes.

Q. When did you treat him again? A. I would have to refresh my memory of it.

10 Q. How many times did you treat him? A. Several times.

By the Court:

Q. Several times between September, 1927, and July, 1928? A. That's right.

By Mr. Perkins:

20 Q. Did you ever treat him after July, 1928? A. No, sir.

Q. Did you ever see him after July, 1928? A. Yes.

Q. Where? A. He was in the clinic of the Bayonne Hospital after that and I saw him eight or ten times thereafter.

Q. In the hospital? A. In the clinic.

Q. So after July, 1928, you saw him six or eight times in the clinic of the hospital? A. Yes.

30 Q. For treatment? A. No. I think he was working around the hospital.

Q. When you say you saw him you did not treat him? A. No, sir.

Q. Did you ever treat him after July, 1928? A. No.

Q. Did you ever make a physical examination after July, 1928? A. No.

Q. Have you any knowledge of his medical condition after July, 1928? A. No, sir.

Mr. Perkins: That's all.

40

Oral Conclusions.

By the Court:

Q. You saw him working around there? A. Yes.

Mr. Susskind: That's all. Your Honor, one of my defenses was on the ground of laches. I have to be a witness myself on that. 10

The Court: I can't see any point in the laches. You might just as well disregard it. I had occasion to deal with that in the case of Keystone Dairy Company v. New York Life Insurance Company and Aetna Insurance Company v. Sussman. The fact that a suit is started in one court, and the complainant goes into the Court of Chancery, does not militate against him. 20

Mr. Susskind: All right. That's the defendant's case.

Mr. Perkins: That concludes the case on the part of complainant.

The Court: I will hear you.

Mr. Perkins: I don't believe there is any use of us arguing the case. I believe your Honor has made up your mind.

The Court: I have an impression, based on the proofs of the case, but you may be able to change it. Do you want to be heard? 30

Mr. Perkins: No.

Mr. Susskind: I am satisfied to submit.

The Court: In this case I am firmly of the opinion that the complainant has failed to substantiate the case presented to the court in its behalf. The complainant apparently labored under the impression that it would have a right in this case to resort, by way of proof, to an application for in- 40

Oral Conclusions.

10 surance which was very likely the founda-
 tion of the policy of insurance issued by the
 complainant on December 3, 1928. The
 view of the court is that this policy of in-
 surance here in question is clearly distin-
 guishable from the ordinary policies of
 insurance that come to the attention of the
 courts from time to time wherein the policy
 has annexed to it a copy of the application
 upon which the policy is founded and in
 which cases the parties are bound by the
 matters contained in the policy and in the
 application as an entire contract. In this
 particular case the policy in question says:
 "This policy contains the entire contract
20 between the parties hereto." Under the
 heading "Preliminary Provision" con-
 tained in the policy, it is said: "This Policy
 shall not take effect if the insured die be-
 fore the date hereof, or if on such date the
 insured be not in sound health, but in either
 event the premiums paid hereon, if any,
 shall be returned." Now, in my judgment,
 the complainant has failed to prove in this
 case that at the time of the issue of this
 policy the insured was not in sound health.
30 There is no question about the insured
 being alive at the time the policy was is-
 sued; the period of time to which the pro-
 visions must relate is the time of the issue
 of the policy. My view is, and I have stated
 it heretofore throughout the case, that the
 complainant is confined in this case to show-
 ing that at the time this policy was issued—
 December 3, 1928—the insured was not in
 sound health. The complainant has failed
40 to prove such to be the fact. The testimony

Oral Conclusions.

of Thomas Nilan is that the insured was working on December 3, 1928, the date of the issue of the policy of insurance in question. The doctors who testified here disagree as to what the man died of. Counsel for the complainant offered in evidence Exhibit C-4, which indicates the insured died as a condition therein described. Another certificate offered by the complainant says the insured died of disease therein mentioned, and the doctor in reading the history of the case mentioned nothing about chronic myocarditis. Doctor Stewart, who was offered as a witness in behalf of complainant, testified he examined one Niland while under his care in 1928, when he was an inmate of the Hudson County Hospital, and at that time the man had no evidence of chronic myocarditis. The record of death which was offered in evidence by complainant seems to indicate from a statement contained therein that the decedent suffered from chronic myocarditis for a period of two years. Other matters are mentioned therein as additional reasons for the cause of death. It appears from said certificate the decedent only suffered five days. I have determined that the complainant has failed in its proof to sustain its averments in its bill. I will dismiss the bill. I will advise a decree for defendant on his counterclaim.

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20

30

40

Exhibit C-4.

(Opposite) 

E. 64

Board of Health and Vital Statistics

— OF THE —

COUNTY OF HUDSON, N. J.

No 6438

Court House

Jersey City,

January 6th 1930

A Transcript from the Record of Deaths IN THE COUNTY OF HUDSON

Vol. 27 Page 73 No. 3613 of Burials.

DATE OF DEATH		FULL NAME OF DECEASED		AGE		
October 29 th 1929		Thomas Milan		Y	M	D
53		1		11		
Single, Married, Widow, Widower	COLOR	OCCUPATION	BIRTHPLACE	How long resident in this State		
Widower	White	Laborer	Ireland			
FATHER'S NAME		FATHER'S BIRTHPLACE				
Thomas		Ireland				
MOTHER'S NAME		MOTHER'S BIRTHPLACE				
Ellen Murphy		Ireland				
PLACE OF DEATH		CAUSE OF DEATH				
Bayonne Hospital 86 W 12 th St		chronic myocarditis sym suppurative cellulitis, external scutella 5 days				
LENGTH OF SICKNESS		PLACE OF BURIAL				
		Holy Name Cem				
UNDERTAKER		MEDICAL ATTENDANT				
J. P. Lively		M. J. Karsch M.D.				

I, WM. A. PORCELL, Registrar of Vital Statistics of the County of Hudson, State of New Jersey, do hereby certify that the transcript of the record of the death of Thomas Milan hereto attached, is a true and correct transcript of the record of the return originally made according to law.

Wm A Porcell
Registrar of Vital Statistics.

BOARD OF HEALTH
AND
VITAL STATISTICS

OF THE
COUNTY OF HUDSON
OFFICE IN COURT HOUSE

TRANSCRIPT OF THE RECORD
OF THE DEATH OF

.....
N. B.—If for any reason this transcript is unsatisfactory, have it corrected with original on file either in this office or the State Bureau, Vital Statistics, Trenton, N. J.

Exhibit C-5.

(*Opposite*) 

Date

DEC. 3
1928

76 479 408

The Prudential

Insurance Company of America

THE
PRUDENTIAL
HAS THE
STRENGTH OF
GIBALTAR

In Consideration of the payment of the weekly premium herein specified, on or before each and every Monday during the continuance of this Policy or until the anniversary date of the Policy immediately preceding the seventieth anniversary of the birth of the Insured, will pay at its Home Office, Newark, New Jersey, immediately upon receipt of due proof of the death of the Insured during the continuance of this Policy, the amount of insurance herein specified, to the executors or administrators of the Insured, unless payment be made under the provisions of the next succeeding paragraph; subject to the "General Provisions" on the second page hereof, which are hereby made part of this contract.

FACILITY OF PAYMENT.—It is understood and agreed that the said Company may make any payment or grant any non-forfeiture provision provided for in this Policy to any relative by blood or connection by marriage of the Insured, or to any person appearing to said Company to be equitably entitled to the same by reason of having incurred expense 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 or grant of such provision to any or either of them shall be conclusive evidence that such payment or provision has been made or granted to the person or persons entitled thereto, and that all claims under this Policy have been fully satisfied.

PRELIMINARY PROVISION.—This Policy shall not take effect if the Insured die before the date hereof, or if on such date the Insured be not in sound health, but in either event the premiums paid hereon, if any, shall be returned.

SCHEDULE.

Name of Insured	AGE NEXT BIRTHDAY	Amount of Insurance	Weekly Premium
THOMAS NILAND	56 If incorrect, notify Company	\$500-	\$1.00

Loss of Eyesight or Limbs.—If the Insured while this Policy is in full force and effect and while there is no default in the payment of premium shall sustain a physical impairment such as specified below, total and permanent disability shall be deemed to exist and the disability benefit hereinafter provided shall be granted immediately upon receipt of due proof of such impairment: in event of the loss by severance of one hand or one foot, an amount equal to one-half of the amount of insurance shall be paid in cash; or in event of the loss by severance of two hands or two feet, or one hand and one foot, or the permanent loss of the sight of both eyes, an amount equal to the full amount of insurance shall be paid in cash; and in either event no further premiums shall be required thereafter and the Policy shall be endorsed as fully paid-up for the amount of insurance as specified in the Schedule above. The amount payable in cash under this provision on account of disability as herein defined shall in no event exceed an amount equal to the full amount of insurance under this Policy.

DIVIDEND PROVISION.

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 in the form of a paid-up addition to the amount of insurance.

(Notice to Policyholder.—Owing to the low rate of premium at which policies of this nature are issued, the surplus accruing thereon will probably not be sufficient to enable the Company to credit any dividend to this Policy before the fifth year.)

NON-FORFEITURE PROVISIONS.

If this Policy lapse for non-payment of premium after premiums have been duly paid for three full years or more, the Insured, without any action upon his or her part, will become entitled to non-participating Extended Insurance for the respective term specified in the following table. The amount of insurance payable if death occur within said term shall be the same amount as that which would have been payable if this Policy had been continued in force, except as to dividend additions subsequent to the date of lapse.

Or, in lieu thereof, the Insured may surrender the Policy within three months after such lapse and will then be entitled at his or her option to receive either a non-participating Paid-up Life Policy or payment in cash as specified in the following table.

If there be any indebtedness under this Policy, such indebtedness will be deducted from the Cash Surrender Value, or the term of the Extended Insurance or the amount of the Paid-up Life Policy will be reduced to such term or amount as the net single premium value of the respective provision reduced by such indebtedness shall provide according to the mortality table hereinafter specified.

3 Yrs.	4 Yrs.	5 Yrs.	6 Yrs.	7 Yrs.	8 Yrs.	9 Yrs.	10 Yrs.	11 Yrs.	12 Yrs.	13 Yrs.	14 Yrs.	15 Yrs.	16 Yrs.	17 Yrs.	18 Yrs.	19 Yrs.	20 Yrs.
Yrs. Wks.	Yrs. Wks.	Yrs. Wks.	Yrs. Wks.	Yrs. Wks.	Yrs. Wks.	Yrs. Wks.	Yrs. Wks.	Yrs. Wks.	Yrs. Wks.	Yrs. Wks.	Yrs. Wks.	Yrs. Wks.	Yrs. Wks.	Yrs. Wks.	Yrs. Wks.	Yrs. Wks.	Yrs. Wks.
3 3	4 6	5 4	5 50	6 41	7 30	8 19	9 10	10 7	11 15	12 48	POLICY PAID-UP						
The Extended Insurance period dates from the date to which premiums have been paid and is the same for any amount of weekly premium.																	
\$4.10	\$5.70	\$7.40	\$9.10	\$10.70	\$12.40	\$14.20	\$16.00	\$17.90	\$19.80	\$21.90	POLICY PAID-UP						
These Paid-up Life Policies are for each five cents of weekly premium.																	
None	None	None	None	None	None	None	\$11.80	\$13.37	\$15.05	\$16.87	\$19.48	\$19.73	\$19.97	\$20.21	\$20.44	\$20.66	\$20.88
These Cash Surrender Values are for each five cents of weekly premium.																	

NOTE.—Tables of Automatic Extended Insurance, Paid-up Life Policies and Cash Surrender Values after twenty years will be furnished on request.

The basis of the non-forfeiture values is the net reserve according to the Standard Industrial Mortality Table with three and one-half per cent. interest per annum. The figures in the above tables up to the end of the twentieth year include a surrender charge of not more than two and one-half per cent. of the amount of insurance. Should the amount of insurance be increased by dividend additions the reserve thereon shall be included with the net reserve on which the non-forfeiture values are based and the total surrender charge shall not be more than two and one-half per cent. of the total amount insured. At the end of twenty years and thereafter no surrender charge is made.

In computing values from the foregoing tables, due allowance will be made for each completed quarter of a year's premiums paid over and above the full number of years there indicated.

This Policy contains the entire contract between the parties hereto.

In Witness Whereof, the President and the Secretary of said Company have signed this Policy at its Home Office in the City of Newark, N. J., on the above date.

William J. Hamilton
Secretary.

Edward W. Buffum
President.

WHOLE LIFE POLICY. PREMIUMS TERMINATING AT AGE 70. ANNUAL DIVIDENDS. DISABILITY BENEFITS.

IND 15000 11-24

(OVER)

This Policy, if not satisfactory to the Insured, may be surrendered within two weeks after its date at the Branch Office of the Company. The premium receipt book accompanying this Policy, and the premiums paid hereon will be returned.

GENERAL PROVISIONS

Payment of Premiums.—All premiums are payable at the Home Office of the Company, but may be paid to an authorized representative of the Company; such payments to be recognized by the Company must be entered at the time of payment in the premium receipt book belonging with this Policy. If for any reason the premium be not called for when due it shall be the duty of the policyholder, before said premium shall be in arrears four weeks, to bring or send said premium to the Home Office of the Company or to one of its district offices.

Period of Grace.—Should the Insured die while the premium on this Policy is in arrears for a period not exceeding four weeks, the Company will pay the amount of insurance provided herein, subject to the conditions of the Policy, but after the expiration of the said period of grace the Company's liability under this Policy shall cease, except as herein provided.

Incontestability.—After this Policy shall have been in force, during the lifetime of the Insured, for one full year from its date, it shall be incontestable, except for non-payment of premium, but if the age of the Insured be misstated, the amount payable under this Policy shall be such as the premium would have purchased at the correct age.

Policy When Void.—If at the time of the issuance of this Policy there be in force upon the life of the Insured hereunder an Industrial policy or policies issued by this Company, this Policy shall be void unless it contains an endorsement, signed by the President or Secretary, permitting this Policy to be in force concurrently with such other policy or policies previously issued; but it is expressly stipulated that the issuance of this Policy without such endorsement shall not be considered a waiver of this provision should there be then in force any Industrial insurance policy or policies previously issued by this Company upon the life of the Insured hereunder.

If for any cause this Policy be or become void, all premiums paid hereon shall be forfeited to the Company except as provided herein.

Reinstatement.—If this Policy lapse for non-payment of premium, it will be reinstated within one year from the date to which premiums have been duly paid upon payment of all arrears, provided evidence of the insurability of the Insured satisfactory to the Company be furnished, but such reinstatement shall not take effect unless at the date thereof the Insured is living and in sound health.

Modifications, 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 or Province 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 forfeiture, or to bind the Company by making any promise, or by making or receiving any representation or information.

IMPORTANT NOTICE TO POLICYHOLDER

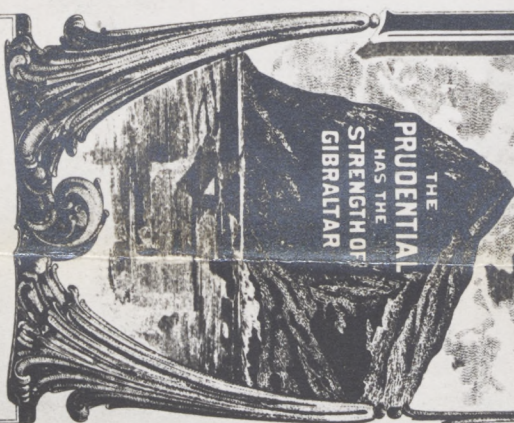
If it becomes impossi-
ble to continue the
payment of premiums,

PRESERVE THIS POLICY

because of the pro-
tection which may be
afforded under its pro-
visions.

READ THE NON-FORFEITURE PROVISIONS IN YOUR POLICY

Prudential



INSURANCE Efficiency OF AMERICA

FOUNDED BY
JOHN F. DRYDEN
PIONEER OF INDUSTRIAL
INSURANCE IN AMERICA

INCORPORATED IN NEW JERSEY
NEW YORK OFFICE: 100 NASSAU ST.

New Jersey Court of Errors and Appeals

FEBRUARY TERM, 1932.

Between

THE PRUDENTIAL INSURANCE
COMPANY OF AMERICA,
Complainant-Appellant,

and

THOMAS NILAN, Administrator of
the Estate of Thomas Niland,
deceased,
Defendant-Appellee.

On Appeal from
Chancery.

BRIEF FOR COMPLAINANT-APPELLANT.

On December 3, 1928, The Prudential Insurance Company issued a policy of life insurance on the life of Thomas Niland. The policy is of the type issued without a medical examination, the insurer relying upon the truth of the statements contained in the application.

The insured, Thomas Niland, died on October 29, 1929; ten months after the policy had been procured.

Suit was instituted for the cancellation of the policy on the ground that it was procured by the fraud of the insured as demonstrated in the answers made by him to the questions contained in his application. These questions pertained to the applicant's present and past condition of health; and the presence of any mental defects or infirmities, and to his having previously suffered from any or all of the diseases therein listed.

The bill had annexed to and made a part of it, a copy of the application.

Notwithstanding this ground and basis of suit, the Court below forbade any reference to, or use of, the application as evidence in the case, just as if the policy had been in some way procured without ever having been applied for. The Court in this ruling relied upon a provision of the policy by which its taking effect was contingent upon the insured's being "alive and in sound health" at the time of its issuance. The Court was induced by this provision again and again to declare that nothing was material except that which had a bearing upon the insured's health at the time the policy was issued. But it seems not to have occurred to the Court that the questions presented did not turn upon contractual provisions of the policy, but upon fraud in its procurement. When an application is the means used for the procurement of a policy of insurance, and the pretenses upon which the issuance of that policy is sought are confined to statements made by the insured in that application, how can the falsity of such pretenses and the fraud that is consequent thereon, be shown except by the application itself? It is precisely this showing that the Trial Court would not permit.

The policy, in accordance with statutory requirement, contained the entire contract. The application was not annexed to it, nor was there any reference to it in the policy. Though nothing in the Court's pronouncement indicates it, it is, nevertheless, possible that here, too, there may have been a misconception that the provisions of Section 4, Chapter 179, P. L. 1925, prevented the use of the application in complainant's suit. But, the law is clearly settled by decisions of this Court, as hereafter shown, that the statute in question has no such effect; and that, though not attached

to the policy and thus not made part of it, the application may, nevertheless, in the absence of reference to it in the policy, be used for the purpose for which complainant sought to use it in the present case.

As will be seen, there can be no doubt as to the nature and purpose of the ruling herein complained of, nor of the reason upon which the Court based that ruling. The repeated efforts of the complainant-appellant to introduce evidence of statements made in the application, were met by the persistent ruling of the Court that such evidence was immaterial, and that the Court's only concern was the condition of the health of the insured on the date the policy issued.

For example, the Court said:

" * * * the only thing I am concerned with particularly is whether or not on the date of the policy this man was in sound health. He might have been ill years before, yet be in sound health on the date of the policy" (p. 55, bottom).

"I will overrule all line of testimony except the condition of the man's health at the time of the issuance of the policy. I wouldn't care whether he was a cripple or sick before. The only question is whether the man at the time this policy took effect was alive and was in sound health. The policy says, 'This policy shall not take effect if the insured died before the date hereof, or if on such date the insured be not in sound health.' That's the gist of the action as I see it" (p. 56, bottom).

"The only fraud you can show from the policy is that the man at the time of the issuance of the policy was not of sound health. If you can show that, it would be a fraud" (p. 57, l. 27).

"I will overrule it for every purpose and the reason I am overruling it is that the policy of insurance was issued December 3, 1928, and as I stated before, the only ques-

tion aside from the validity of the receipt, is whether the man at the time of the issuance of the policy was alive and of sound health, *and any statements made in an application or other paper upon which the policy is predicated is immaterial* because the policy says: 'This policy contains the entire contract between the parties hereto.' " (p. 66, l. 13).

And, in the conclusions delivered orally at the termination of the hearing, the Court again said:

"The complainant apparently labored under the impression that it would have a right in this case to resort by way of proof to an application for insurance, *which was very likely the foundation of the policy of insurance issued by complainant on December 3, 1928.* * * * My view is and I have stated heretofore throughout the case that the complainant is confined in this case to showing that at the time this policy was issued—December 3, 1928—the insured was not in sound health" (pp. 87 and 88, bottom, italics ours).

Thus we have the Court below restricting the proofs of the allegations of fraud, as stated in the bill, to the soundness of health of the insured on the date of the issuance of the policy, and disregarding, and terming as immaterial, endeavors to show fraud in procuring the policy.

POINT.

It was error to exclude proof of the answers made by the insured in his application.

The cause made out by the complainant's bill concerned itself almost entirely with the fraudulent answers made by the insured in his application, upon which the policy was issued. It is the

fraudulent procurement of the policy that is the issue and not the soundness of health of the insured on the date of the policy, as the Court below ruled. The application and its contents should have been dealt with by the Court as any other writing or evidence should have been which tended to prove the alleged fraud. Undoubtedly the Court misconceived the true meaning of the provision of the policy which says:

“This policy contains the entire contract between the parties hereto.”

This provision is merely a compliance with the requirement of Section 4, P. L. 1925, chapter 179. This act of the Legislature is a re-enactment of Section 4, P. L. 1907, page 134, which this Court, in the case of *Duff v. Prudential Insurance Company*, 90 N. J. L. 646, held did not preclude the introduction of an unattached application as evidence of fraud when the application is not referred to in the policy. The company in that case defended on the same grounds which the complainant-appellant urges for relief in its bill in this case.

This point was again squarely before this Court in *Brunjes v. Metropolitan Life Insurance Company*, 91 N. J. L. 296. The application for one of the policies in the action was not annexed to or made part of the policy, and no reference was made in the policy to it. The lower Court had admitted it in evidence as proof of fraud, and its so doing was assigned as error. The action of the Trial Court was held proper.

The thing is all too apparent to require argument. But we are moved in conclusion to say at least that if the Trial Court's action is to stand as precedent, the corollary must be nothing less than the subversion of those elementary principles

by which fraud and its proof in relation to contracts of every character are made effective.

We respectfully submit that the entire decree dismissing complainant's bill should be reversed.

PERKINS, DREWEN & NUGENT,
Solicitors for and of Counsel with
Complainant-Appellant.

New Jersey Court of Errors and Appeals

Between

THE PRUDENTIAL INSURANCE COM-
PANY OF AMERICA,
Complainant-Appellant,

and

THOMAS NILAND, Administrator
of the Estate of Thomas Ni-
land, deceased,
Defendant-Appellee.

On Appeal from
the Court of
Chancery.

BRIEF FOR DEFENDANT-APPELLEE.

The complainant in this suit seeks to void a policy of insurance issued by it on the life of Thomas Niland on the ground that it was procured by fraud, in that the insured gave false answers to the questions in the *application* signed by him relating to the condition of his health, and on the further ground that the insured was not in sound health at the time the policy was issued.

On final hearing, the Vice-Chancellor excluded all testimony relating to the application or to the condition of health of the insured at the time the application was signed, and limited complainant's proof to the condition of health of the insured on the date of the issuance of the policy. On that issue, the Vice-Chancellor found against the complainant. He determined that the complainant had failed to prove that the insured was not in sound

health on the date of the issuance of the policy and advised a decree dismissing the bill. The appeal is from this decree. The Vice-Chancellor found (State of Case, p. 88) :

“The complainant has failed to prove in this case that at the time of the issue of this policy the insured was not in sound health. * * * My view is * * * that the complainant is confined in this case to showing that at the time this policy was issued—December 3, 1928—the insured was not in sound health. The complainant has failed to prove such to be the fact. * * * I have determined that the complainant has failed in its proof to sustain its averments in the bill” (p. 89).

The appellant bases this appeal on just one point, viz.: “that it was error to exclude proof of the answers made by the insured in this application” and cites two cases in support of its contention, *Duff v. Prudential* and *Brunjes v. Metropolitan*.

It is respectfully submitted that it was not error to exclude testimony relating to the application and that the two cases cited do not sustain appellant’s contention.

In the *Duff* case, the application differed materially from the application in the instant case. That application contained the following statement:

“I hereby apply for insurance for the amount herein named, and I declare that the answers to the above questions are complete and true. * * * I agree that said answers, with this declaration *shall form the basis* of a contract of insurance between me and the Prudential Insurance Company of America. * * *”

There is no such provision in the application in the instant case. On the contrary, it contains this provision (Case, p. 7) :

“I hereby apply for insurance for the amount named herein and I agree that any policy that

may be granted by the Prudential Insurance Co. of America in pursuance thereof, shall be accepted by me, subject to the conditions and agreements contained *in said policy*."

The point involved in the present appeal was not directly dealt with in the *Duff* case. The District Court in that case found as a fact that the insured had made a wilfully fraudulent statement in his application concerning the condition of his health. The Supreme Court in deciding upon the effect of the statement concerning his health in the application said:

"This policy does not refer to the application in any way, and by its expressed terms contains the entire contract between the parties. Hence if a false statement made before it was issued is to be a defense, it ought to appear that it was intended *to induce and would induce the Company to make the contract*. There is no claim that it did; the Company may have been aware of its falsity all the time."

The argument before the Court of Errors and Appeals concerned itself with the correctness of the conclusion of the Supreme Court as to whether or not there was sufficient evidence to sustain the finding of the District Court that the statement as to health was wilfully fraudulent and whether or not the Company had relied upon these statements in issuing the policy. The question as to the admissibility of the application in evidence was not directly decided, and if considered at all, was merely incidentally passed upon.

In the *Brunjes* case, the application expressly provided that *every answer therein must be true, or the policy would be void*. The complainant, in the instant case, makes no claim that there is any such provision in the application which it sought

to introduce in evidence. As a matter of fact, the provision in the application, which is set forth above, furnishes strong testimony to the contrary. We repeat it:

"I hereby apply for insurance for the amount named herein, and I agree that any policy which may be granted by the Prudential Insurance Company of America in pursuance thereof, shall be accepted by me, subject to the conditions and agreements contained *in said policy*."

If this means anything, it means that nothing in the application shall affect the policy after it (the policy) is issued, and that the relationship between the parties would then be governed only by the conditions and agreements contained in the policy.

The application further provides, as appears from the bill of complaint, that if death occurred after the signing of the application and before the issuance of the policy, payment would be made of the amount of the insurance, provided the insured was in sound health on the date of the application, indicating an intention that the provisions of the application shall govern until the policy is issued and *only until then*, and that thereafter the *policy* itself constituted the *sole* contract between the parties. This provision clearly indicates an intention on the part of the Company to rely upon the protection afforded by the application until the policy was issued, and thereafter to rely solely upon the provisions of the policy.

In the *Brunjes* case, furthermore, the *policy* differed materially from the policy in this case. That policy contained this provision:

"Unless otherwise stated in the blank space below in a waiver signed by the Secretary, *this policy is void* if the insured before its date has been rejected for insurance by this or any

other company, order or association, or has been attended by a physician for any serious disease or complaint, or has had before said date any pulmonary disease, or chronic bronchitis, or cancer or disease of the heart, liver or kidneys."

The application also differed materially from the application in the instant case because it contained the following:

"To induce the Metropolitan Life Insurance Company to issue a policy, and as consideration therefor, I agree, on behalf of myself and of any other person who shall have or claim interest in any policy issued under this application, as follows:

"Wherever nothing is written in the following paragraph, it is agreed that the declaration is true without exception.

"* * * Every answer must be true, or the policy will be void."

The distinction between the *Brunjes* case and the case here on appeal is that in the former the policy itself contains warranties similar to those embodied in the application, thus making the application material to the issue there involved, and in addition to that, the application contained the express warranty that the policy, which was to be issued in consideration of the statements made, was to be void unless every answer therein was true, thus seeming to indicate that the application and the policy together made up the contract. In the present case, there appears to have been an abandonment or waiver of the application upon the issuance of the policy.

The facts in the *Duff* and *Brunjes* cases seem to differ materially from the facts in the instant case, and the point involved in this appeal does not seem to have been fairly raised and argued and directly passed upon by this Court. In any event, if the *Duff* and *Brunjes* cases do hold what the appellant

claims for them, then we respectfully submit that the question should be re-examined by this Court in the light of the facts in the instant case and the principle unequivocally stated upon due consideration of those facts which, as has been pointed out, differ materially from the facts of the cases cited. The most that can be said of the cited cases is that there is *dicta* in them tending to give some support to the appellant's contention, but the principle involved is too important to be determined and established by *dicta* in cases in which the facts are variant.

Under the circumstances of THE INSTANT CASE, did the Trial Court err in excluding testimony relating to the application and the answers therein contained? If it did, the decree should be reversed. If not, then the decree should be affirmed. That is the sole question before this Court.

In construing the agreement between these parties, the Court will, of course, have in mind the well-established principle that the law does not favor forfeitures and that the language of a contract should be construed most strongly against the party using it. This is especially true of insurance policies. 9 C. J. 1096.

In case of an ambiguity in the terms of a policy, that meaning should be given which is most favorable to the assured.

In the case of *Hampton v. Hartford Fire Insurance Co.*, 65 N. J. L. 265, this Court said:

"The Court will never seek for a construction of a forfeiture clause in a policy which will sustain it if one which will defeat it is reasonably deducible from the terms or words used to express it."

Subdivision 4 of Section 1 of Chapter 179 of the Laws of 1925 (p. 437) provides that no policy of life insurance shall be issued unless it contains:

"A provision that the policy shall contain the entire contract between the parties and nothing shall be incorporated therein by reference to any constitution, by-laws, rules, application or other writing, unless the same are endorsed upon or attached to the policy when issued, and all statements purporting to be made by the insured, shall, in the absence of fraud, be deemed representations and not warranties."

This statute further provides that any waiver of this provision shall be void.

The policy in question did contain the following provision:

"This policy contains the entire contract between the parties hereto."

In the face of this express provision that the policy contains the entire contract between the parties, and the further statutory provision that nothing shall be incorporated in a policy by reference to any application or other writing, unless the same is endorsed upon or attached to the policy when issued, the appellant sought to introduce in evidence the application signed by the insured, and attempted to prove that the answers therein contained were false. The application in this case was not attached to the policy nor endorsed thereon.

This question was considered in the case of *Mees v. Pittsburgh Life & Trust Co.*, 169 App. Div. 86, 154 N. Y. S. 650, in which the Court said:

"It is proper, however, to say that, should it develop on the trial that it is in fact a New York contract, the defense pleaded, namely, fraudulent representations of the insured in his application for the policy as to his health, habits, and other insurance, cannot be sustained inasmuch as the application or statements of insured are not attached to and made

a part of the policy as required by Section 58 of the Insurance Law (Laws 1909, c. 33). We concur in the construction placed on this, Section 58 of the statute in *Murphy v. Colonial Life Insurance Co. of America*, 83 Misc. Rep. 475, 145 N. Y. S. 196; affirmed 163 App. Div. 875, 147 N. Y. S. 565."

Section 58 of the New York Insurance Law above referred to is as follows:

"Every policy of insurance issued or delivered within the State on or after the first day of January, 1907, by any life insurance corporation doing business within the State shall contain the entire contract between the parties and nothing shall be incorporated therein, by reference to any constitution, by-laws, rules, applications or other writings unless the same are endorsed upon or attached to the policy when issued; and all statements purporting to be made by the insured shall in the absence of fraud be deemed representations and not warranties. Any waiver of the provisions of this section shall be void."

This is exactly like our own statute. In the case of *Murphy v. Colonial Life Insurance Co. of America*, 83 Misc. Rep. 475, 145 N. Y. S. 196; affirmed 163 App. Div. 875, referred to in the citation above, the Court said:

"The application was not indorsed on the policy or attached thereto and for that reason the learned court below excluded evidence as to the application and as to the alleged falsity of the answers said to be contained therein. This ruling was made in reference to Section 58 of the Insurance Law.

"I think that the ruling of the court below is sustained by the case of *Becker v. Colonial Life Insurance Co.*, 153 App. Div. 382. I had occasion to express the same view in *Aaronson v. N. Y. Life Insurance Co.*, 81 Misc. Rep. 228, although my learned colleagues held that

the representations made to induce the issuance of the policy, whether oral or in a paper not attached to the policy, may, if material, be relied upon by the insurer to defeat a recovery.

"This interpretation seems to me to nullify the statute and prevent the accomplishment of its remedial purposes."

To permit the complainant to do what it undertook to do in the instant case, would, in effect, be equivalent to rewriting the contract between the parties. The parties had expressly and unequivocally agreed that the policy contained their entire contract. The statute says that it is the entire contract unless the application is attached to the policy or endorsed on it. For the Court now to say that the policy is not the entire contract, not only overrides the statutory provision, but, in effect, writes a new contract for the parties essentially different from the one they had made themselves.

The statute expressly interdicts the incorporation in the policy of the application by reference, unless the application is endorsed upon or attached to it. There was no such reference, endorsement or attachment in this case, and for this Court now to say that the application *is* part of the contract, is to do the very thing the statute declares should *not* be done.

"By weight of authority, the failure of the company to comply with the statute precludes it from showing that statements of insured in the application are false and fraudulent."

32 C. J. 1119, Section 219.

But appellant's counsel argues that neither of these provisions apply and that these contentions are invalid because there was no contract of insurance—that there had never been any contract

of insurance because of the alleged fraud practiced upon the Company by the insured in procuring the policy. But this is sheer sophistry. The fact is that a contract of insurance *was* executed and delivered. The fact is that an agreement was entered into between the parties which contains an express provision that it contains all of the terms of agreement between them, and *that* provision is just as binding as any other provision of the agreement. Parties to an agreement have just as much right to bind themselves with respect to the time and manner of its enforcement or restrictions as to defenses which may be interposed in case of a breach as they have to contract with respect to any other subject-matter, and the parties in this case having expressly agreed to be limited to what is contained within the four corners of the policy, there is no reason why the Court should rewrite the contract after it has been executed. The appellant cannot complain of this because it could have preserved to itself the right to do what it is now seeking to do by simply attaching the application to the policy and thereby incorporating it therein.

It waived its right to raise that question by failing to attach the application to the policy.

Appellant cannot plead ignorance. It could have made the application part of the contract. It chose rather to issue its policy containing a provision that it embodied the entire contract between the parties, and now seeks to open up the contract so that it may be permitted to add something to it which it presumably advisedly failed to include at the time of its execution.

The statute under consideration was very thoroughly analyzed and considered in the case of *Archer v. Equitable Life Assurance Society*, 218 N. Y. 18, 112 N. E. 433, in the following language:

"The false and inducing statements set forth in the second defense were not incorporated in the policy when issued. The appellant asserts and argues that the section does not relate to or affect its right to declare and have adjudged void the policy, because the fraud of the insured, as alleged, entered into it, and fraud is a defense to any contract. The respondent asserts and argues that the section prohibits the defendant from invoking, as a defense, fraudulent representations of the insured, entering into the extent or estimate of the risk, which are not incorporated in the policy when issued. We are to determine which assertion is valid.

"* * * We may consider, in addition to the language, the relevant conditions existing when it was adopted, the evils it was designed to remedy and the reasons for and the spirit of the enactment. * * * The courts are bound to enforce an enacted intent no matter how inartistically or inaccurately it has been expressed. They may not, however, through construction, enact an intent which the legislature has not expressed at all (*Furey v. Gravesend*, 104 N. Y. 405).

"Two conditions existing at its adoption the statute was plainly intended to remove. The one, the contract might, by a stipulation or reference within it, make a part of itself instruments, stipulations, statements and agreements of the insured, which the policy did not contain. The other, the statements of the insured which were made a part of the contract by reference, indorsements or otherwise, or declared or agreed by the insured to be true were warranties.

"A third condition existed * * * the warranties and representations made by persons insured * * * were * * * retained continuously and exclusively by the insurers. The insured persons neither had nor received duplicates or copies. They had not incentive or opportunity, from having their statements before them, through incorporation in the

policy, to examine and correct any errors in them arising through mistake, carelessness, ignorance or fraud, or to terminate the policy. Frequently they or their beneficiaries became first conscious of the errors, after payment of the premiums or dues through a period of years, when they were alleged by the insurers, in avoidance of the obligations to pay the sums insured. We have concluded that the legislature intended to remove and has removed by the section, this condition.

"It is clear that the legislature enacted by the section that the policy, that is, the paper or document, should contain, physically, the entire contract. All of the stipulations, agreements, or statements constituting the contract must be placed, through the delivery of the policy, in the possession of and be and remain accessible to the insured * * *

"* * * *The conditions which induced the legislature to require that all the stipulations and terms of the contract should appear within the policy would naturally have induced it to require that the conditions which are the basis of the contract and upon which its validity depends should, likewise, appear upon the face of the policy.*

* * * * *

"The section is remedial. It modifies rules of the common law. That law is, that in determining whether or not a statute abrogates or modifies a rule of the common law, the construction of the statute must be strict; when, however, a remedial statute does replace in whole or in part common-law rules, it must be given an application, liberal and within its language, commensurate with its purpose. In the requirements that the policy should contain the entire contract and that all statements purporting to be made by the insured shall in the absence of fraud be deemed representations and not warranties, the legislature enacted, through implication, that all statements made by the assured shall be purported by or made to appear upon, the face of the policy.

* * * * *

"The defense * * * averred that the policy was issued by the defendant in reliance upon statements, representations and answers of the insured pertaining to his previous medical history and family record and to his physical condition at and prior to the date of his application for the policy, which were fraudulently not full and fair and effected concealments material to the risk, and the defendant relied upon them as made. THE STATEMENTS, REPRESENTATIONS AND ANSWERS WERE NOT INCORPORATED IN THE POLICY. This defense could be established only by proof of them. Inasmuch as they could not be proven for the reasons already stated, the defense is not sufficient in law upon the face of it."

A similar situation was presented in the case of *Prudential Insurance Co. v. Connallon*, 106 N. J. E. 251. In that case Vice-Chancellor FIELDER said:

"The evidence satisfies me that the insured was not in sound health either at the date of the application or at the date of the policy and that the above mentioned statements made by him in this application were knowingly false. He died from pulmonary tuberculosis about one year after making the application.

"But the insured's false statements cannot avail the complainant in this contest of the policy because of the provisions of the incontestability clause and for the further reason that *a copy of the application was not annexed to the policy*. The failure of the complainant to attach such copy to the policy prevents it from using its contents against the beneficiary's claim although the beneficiary may use the application to establish the date of issue of the policy, because the complainant's neglect cannot prejudice the beneficiary's rights. * * *

"The policy does not incorporate the application by reference and it must therefore be assumed, as against the complainant, that

the policy alone expresses the contract between the parties (*American, &c., Co. v. Day*, 39 N. J. L. 89); indeed, the quoted clause of the policy so declares."

It is true that the decree of the Court of Chancery was reversed by the Court of Errors and Appeals, 108 N. J. E. 316, but the reversal was on an entirely different ground and in no part of the opinion of the Court of Errors and Appeals is Vice-Chancellor FIELDER's conclusion as to the application challenged or even referred to.

In the case of *American Popular Life Insurance Company v. Day*, 39 N. J. L. 89, at page 94, the Court said:

"Where the parties to an agreement have reduced their contract to writing, that writing, at law, determines what the contract is, and evidence cannot be received to contradict, add to, subtract from or vary the terms of the writing. The policy in this case is the agreement for insurance, and it must be held to contain the agreement, *and all the agreement*, of the parties to it. Though the proposal and application contained an agreement on the part of the insured, that the answers to the questions annexed to them and the accompanying statements, together with the statements made to the examining physician, shall be the basis and form part of the contract, or policy between the insured and the Company, *yet the policy does not directly or indirectly so declare and it will be assumed that all previous negotiations have been superseded and that the policy alone expresses the contract of the parties.*"

As was said by Mr. Justice BLACK in the *Brunjes* case:

"There is nothing mysterious about a policy of life insurance. It is a contract."

We have here a contract which expressly provides that it contains all of the terms of agreement between the parties. The statute further declares that to be the case. The statute further prohibits the inclusion in the contract of the application as any part of it unless the application is endorsed upon or attached to the policy. The Company could have made the application a part of the contract by so doing, but chose not to do so and now wishes to use the application as part of the contract, just as though it had attached it, which would, in effect, be nullifying the statute. It seeks to do so, furthermore, in the face of the provisions of the application, which are quoted in the bill of complaint, in which the insured agrees to accept any policy issued, subject to the conditions and agreements contained in the *policy*, and in the face of the further provision in the application that if death occurs before the policy is issued, but after the application is signed, payment would be made of the amount of insurance, provided the insured was in sound health on the date of the application, indicating a clear intent to differentiate between the two dates and the two instruments and a reliance upon one until the other is issued and thereafter upon the other.

The Trial Court properly excluded the application and testimony relating to the statements therein contained. The appeal should, therefore, be dismissed and the decree affirmed.

Respectfully submitted,

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[5364]

New Jersey Court of Errors and Appeals

Between

THE PRUDENTIAL INSURANCE
COMPANY OF AMERICA,
Complainant-Appellant,

and

THOMAS NILAN, Administrator of
the Estate of Thomas Niland,
deceased,
Defendant-Appellee.

On Appeal
from Chancery.

REPLY BRIEF FOR COMPLAINANT- APPELLANT.

This reply brief is submitted in order to show that the authorities cited in the answering brief of the appellee are either not in point at all, or, where they are, their effect is to sustain the appellant and not the appellee.

In the brief of defendant-appellee he cites as precedent for his contention the case of *The Prudential Insurance Company v. Connallon*, 106 N. J. E. 251. The decision in that case, so far as it pertained to the admissibility of the application in evidence, was based upon a policy provision as follows:

“and no statement shall avoid the policy or be used as a defense to a claim thereunder unless it be contained in the application for the policy, and unless a copy of such application be endorsed upon or attached to the policy when issued.”

The Vice-Chancellor said, in the opinion:

“In the absence of statutory provision or contrary agreement between the parties,

fraudulent statements by the insured, which induced the issuance of the policy, would void it, *but the complainant by its contract, has gone beyond the statutory requirement and has agreed that, failing to endorse on or attach to the policy a copy of the application, no statement in the application 'shall avoid the policy or be used as a defense to a claim thereunder'.*"

This case sustains the appellant, not the appellee.

In the opinion in the case of *Mees vs. Pittsburg Life & Trust Company*, 169 App. Div. 86, 154 N. Y. S. 650, cited by the defendant-appellee, there is no statement of facts to show whether the policy there in suit contained any reference to the application. The opinion clearly discloses that the application was not annexed to the policy, but in the absence of a showing that the policy did not refer to the application, it has no bearing on the point here in issue.

The case of *Becker vs. Colonial Life Insurance Company*, 138 N. Y. S. 491 (1912), was decided upon a policy provision and is therefore not in point. The Court in that case said:

"The parties had a right to stipulate that the inducing cause of the contract was certain specified statements and none others. Having so stipulated, and having attached one application to the policy, if any others were made, the defendant in effect said these are not material and are not relied upon by me."

The policy in that case referred to the application in this manner:

"Is issued in consideration of the application, which is made a part of the policy."

and the copy of the application was not attached.

It is plain, from a reading of the case of *Archer vs. Equitable Life Assurance Society*, 218 N. Y.

18, 112 N. E. 433, cited by defendant-appellee, that the action was one at law turning upon the legal distinction between a representation and a warranty. This case stresses only the endeavor of the legislature of the State of New York to put at an end, by the statute cited, the possibility of holding statements of the insured in an unattached application to be legal warranties for, as such, they are part of the contract. The evil in this respect, at which this legislation was aimed, is obvious. The opinion in the case does not disclose whether or not the unattached application was referred to in the policy.

An interesting situation is disclosed by the case of *Murphy v. Colonial Life Insurance Company*, 145 N. Y. S. 196, and the case of *Aaronson vs. New York Life Insurance Company*, 142 N. Y. S. 568. In the former case, the majority opinion was delivered by Justice Seabury with a dissenting opinion by Justice Bijur, and in the later case the majority opinion was written by Justice Bijur with a dissenting one by Justice Seabury. In this latter case the Court said:

"I find nothing in the case of *Becker v. Colonial Life Insurance Company* to sustain the contention (that since the application was not attached, sec. 58 prevents its use to defeat the policy). On the contrary, the *Becker* case decides, as I read it, that where a policy recites that it is issued '*in consideration of the application therefor, which is hereby made a part of this contract,*' statements made by the assured in other papers or applications are necessarily immaterial as representations. By the express terms of the contract, it is agreed that they have not been relied on, and therefore they cannot be used."

The case of *Becker v. Colonial Life Insurance Company*, 153 App. Div. 382 (N. Y.), referred to, is cited by defendant-appellee in his brief.

In defendant-appellee's brief, he continually uses excerpts from the application as a basis for his argument. The application was held inadmissible at the trial, upon his objection, and the use of it now is improper.

But all this seeking out of authorities in other states is entirely unnecessary. This Court has, on two occasions, squarely decided the point brought up by this appeal. In *Duff v. The Prudential Insurance Company*, 90 N. J. L., at page 647, this Court said:

"The policy itself does not refer to the application for insurance. The statements in the application are not made warranties or conditions. The statute provides: 'All statements, purporting to be made by the insured, shall, in the absence of fraud, be deemed representations and not warranties.' Any waiver of this provision shall be void."

In the case of *Brunjes v. Metropolitan Life Insurance Company*, 91 N. J. L. 297, this Court again said:

*"It is alleged as error that the trial court improperly admitted in evidence the application blank of the deceased containing his signed answers given to the Metropolitan physician and medical examiner and the report of the medical examiner: these are not made part of the policy, and section 4 of the act of 1907, page 134, is invoked, which provides that the policy shall contain the entire contract between the parties and all statements, purporting to be made by the insured, shall, in the absence of fraud, be deemed representations and not warranties. Any waiver of this provision shall be void." * * **

** * * "We think it was not error for the trial court to admit the application blank with the signed answers of the insured and the medical examiner's report in evidence: there*

was no attempt to disprove or controvert the fact that these statements were untrue."

In both of these cases the policies in question did not have the application attached.

We respectfully submit that where, as here, the application was not annexed to the policy and the policy did not refer to the application, it may, nevertheless, be used as evidence of the fraud in obtaining the policy.

PERKINS, DREWEN & NUGENT.
Solicitors for and of Counsel with
Complainant-Appellant.

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