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Notice of Appeal

NEW JERSEY SUPREME COURT.

RICHARD H. DUFF, Administrator of the Estate of John Sullivan, deceased, *Plaintiff-Respondent,* *vs.* PRUDENTIAL INSURANCE COMPANY OF AMERICA, *Defendant-Appellant.*	*Action at Law.* *Notice of Appeal.*

To

Messrs. HERSHENSTEIN & FINNERTY,
Attorneys of Plaintiff-Respondent.

Sirs:

TAKE NOTICE that the defendant appellant appeals to the Court of Errors and appeals from the whole of the judgment entered in this cause.

Respectfully,

RANDOLPH PERKINS,
Attorney of Defendant-Appellant.

Dated, December 7, 1916.

Grounds of Appeal

NEW JERSEY COURT OF ERRORS AND APPEALS.

RICHARD H. DUFF, Administrator of the Estate of John Sullivan, deceased, *Plaintiff-Respondent,* *vs.* PRUDENTIAL INSURANCE COMPANY OF AMERICA, *Defendant-Appellant.*	*Action at Law.* *Grounds of Appeal.*

The Appellant states the following grounds of appeal:

1. The Supreme Court erroneously reviewed the findings of fact made by the trial judge in the District Court.

2. The Supreme Court reversed the judgment of the District Court, notwithstanding there was evidence to support the judgment of the District Court.

3. The Supreme Court erred in holding that the findings of the District Court did not support the judgment in favor of defendant.

4. The Supreme Court erred in holding that the hospital records were improperly admitted in evidence.

5. The Supreme Court erred in reviewing and weighing the evidence to identify the insured with

Grounds of Appeal

John Sullivan alleged to have been treated in the hospital.

6. It was error for the Supreme Court to hold that the false statement of John Sullivan in the application for the policy of insurance that he, Sullivan, had never suffered from consumption, did not vitiate the policy.

7. It was error for the Supreme Court to hold that the clause avoiding the policy unless the insured was in sound health at the time it was written was not relied upon by defendant.

8. By the proofs it appeared that John Sullivan was not in sound health at the date of the policy.

9. The Supreme Court erred in deciding that the policy sued on was not avoided by the existence of a former policy on the life of the insured.

10. The Supreme Court erred in holding that Exhibit P-2 was not an assignment and did not avoid the policy.

11. The Court erred in reversing the judgment of the District Court on findings of fact as follows:

(a) Insured was not in sound health at date of policy;

(b) Policy was assigned by the insured;

(c) Policy was procured through fraudulent statement in application.

RANDOLPH PERKINS,
Attorney for Defendant-Appellant.

Summons

FIRST DISTRICT COURT SUMMONS

State of New Jersey,
County of Hudson, } ss:
City of Jersey City,

(L. S.)

The State of New Jersey, to the Sergeant-at-Arms of the First District Court of the City of Jersey City or to any Constable of said County:

Summon The Prudential Inurance Company to appear before the First District Court of Jersey City, to be held at the City Hall, corner Grove and Montgomery Streets, in said City on the thirtieth day of November One Thousand Nine Hundred and Fifteen, at ten o'clock in the forenoon to answer unto Nellie Bennett, administratrix of John Sullivan, deceased, in an Action upon Contract. Demand Five Hundred ($500.00) Dollars.

WITNESS, Charles L. Carrick, Esq., judge of said First District Court at Jersey City, aforesaid, the 19th day of November, in the year One Thousand Nine Hundred and Fifteen.

(A True Copy.)

Clerk.

CHARLES M. EGAN,
No. 15 Exchange Place,
Jersey City, N. J.,
Plaintiff's Attorney.

State of Demand

FIRST DISTRICT COURT OF JERSEY CITY, NEW JERSEY

CHARLES L. CARRICK, ESQ., *Judge.*

NELLLIE BENNETT, Administratrix of the goods, etc., of John Sullivan, deceased, *Plaintiff,*	*On Contract.*
vs.	*State of Demand.*
THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, a corporation, *Defendant.*	

The plaintiff demands of the defendant the sum of Five Hundred ($500) Dollars in an action upon contract for that,

WHEREAS on the 21st day of September, 1914, in consideration of the payment to the defendant by the said John Sullivan, in his lifetime, of a weekly premium of twenty cents (20c), and a like sum to be paid by him, weekly thereafter, during his life; the defendant then and there entered into a contract of insurance in writing, and thereby insured the life of said John Sullivan, to the amount of Five Hundred ($500.00) Dollars; which said sum the said defendant agreed to pay to the legal representatives of said John Sullivan, upon his death.

The said John Sullivan duly performed all the conditions of said contract of insurance on his part, and paid said weekly premium.

State of Demand

The said John Sullivan died on or about the 13th day of June, 1915. The plaintiff has made due proof of the death of the said John Sullivan, deceased, to the defendant, in accordance with the requirements of the said contract of insurance, and she has otherwise performed all the conditions of said contract on her part; notwithstanding the said defendant refused to pay and still refuses to pay the amount of insurance due upon said contract of insurance.

Judgment will be claimed for the amount of Five Hundred ($500) Dollars.

CHARLES M. EGAN,
Attorney for Plaintiff.

HERSHENSTEIN & FINNERTY,
Substituted as Attorneys for Plaintiff.

Record of Case

FIRST DISTRICT COURT OF JERSEY CITY

Before
CHARLES L. CARRICK, ESQ., *Judge.*

State of New Jersey,
Hudson County,
City of Jersey City, } No. 99087.

NELLIE BENNETT, Administratrix, etc., of John Sullivan, deceased,
Plaintiff,
vs.
THE PRUDENTIAL INSURANCE COMPANY,
Defendant.

Upon Contract,
Demand $500.

Charles M. Egan, Plaintiff's Attorney.
Randolph Perkins, Defendant's Attorney.
Hershenstein & Finnerty, substituted attorneys for plaintiff.

A summons was issued November 19th., A. D., 1915, returnable November 30th, 1915, at ten o'clock in the forenoon at the Court Room of said Court. The Constable returned the summons as follows, viz: I served the within summons November 22d, 1915, on Ida Boyd, cashier and agent in charge of the defendant's principal office by reading the same to her and delivering to her a copy thereof. John H. Masker, Constable.

Plaintiff's demand was filed November 15th, 1915.

December 28, A. D., 1915, the plaintiff did not appear and the defendant not appearing and the trial of the cause was proceeded with as follows:
and by the Court marked "Not Moved."

Record of Case

March 30th, 1916, both parties appearing, the trial of the cause was proceeded with as follows:

By agreement of parties the proceedings were amended to be in the name of Richard H. Duff, administrator, plaintiff.

By agreement of parties, Messrs. Hershenstein & Finnerty were substituted as attorney for plaintiff.

On the part of the plaintiff Nellie Bennett was sworn and testified. Letters of administration, One Policy, One Premium book, One proof of Death, One Application and One Report of Examiner were offered and received in evidence.

On the part of the defendant Richard H. Duff, Margaret Gibney, Bertha Pollock, Elizabeth Haynes, James P. Kelly and Frank D. Kenny were sworn and testified. One Check, One Policy, One Chart and One Hospital Record were offered and received in evidence.

Whereupon the Court rendered a judgment in favor of the Prudential Insurance Company, defendant, and against Richard H. Duff, administrator of John Sullivan, deceased, plaintiff.

April 19th, 1916, Notice of Appeal bond filed by plaintiff.

I, James N. Braden, Clerk of the First District Court of Jersey City, Charles L. Carrick, Esq., Judge, do hereby certify that the foregoing is a true copy of the Summons, State of Demand, Substitution and Transcript of a Record of said Court.

In Witness Whereof, I do hereby set my hand as Clerk of the said Court and affix the seal of the said Court this twenty-third day of May, One Thousand Nine Hundred and Sixteen.

JAMES N. BRADEN,
Clerk.

(District Court Seal.)

Notice of Appeal

(Filed April 17, 1916.)

FIRST DISTRICT COURT OF JERSEY CITY

RICHARD H. DUFF, Administrator of the Estate of John Sullivan, deceased, *Plaintiff,* *vs.* PRUDENTIAL INSURANCE COMPANY OF AMERICA, *Defendant.*	*Notice of Appeal.*

To Prudential Insurance Company of America or Randolph Perkins, Its Attorney:

Sirs: TAKE NOTICE that the Plaintiff, Richard H. Duff, hereby appeals to the New Jersey Supreme Court from the judgment of the First District Court of Jersey City rendered in the above stated action on the thirteenth day of March, 1916.

HERSHENSTEIN & FINNERTY,
Attorneys for Plaintiff.

State of Case

(Filed May 20, 1916.)

FIRST DISTRICT COURT OF JERSEY CITY

RICHARD H. DUFF, Administrator of the Estate of John Sullivan, deceased, *Plaintiff,* *vs.* PRUDENTIAL INSURANCE COMPANY OF AMERICA, *Defendant.*	*On Contract on Appeal. Case No. 100158.*

The attorneys of the respective parties, plaintiff and defendant, being unable to agree upon the form of the case on appeal, and having applied to me, Charles L. Carrick, Judge of said Court, within the time limited by law, as extended by order made herein, I do hereby settle the case as follows:

The action was founded upon the defendant's industrial policy of insurance No. 36,950,815, dated September 21st, 1914, in the amount of $244.00, upon the life of John Sullivan. The policy, by its terms, is payable to the executor or administrator of the insured. It contains a provision that it shall be void if there be in force upon the life of the insured an industrial policy previously issued by the company, unless the policy as issued contains an endorsement, signed by the president or secretary, authorizing this policy to be in force at the same time; or if the policy be assigned.

The trial was before the Court without a jury. The defendant admitted the issuing of the policy,

and the plaintiff called as his sole witness on the case in chief Mrs. Nellie Bennett, residing at No. 224 Coles Street, Jersey City, with whom the decedent was living at the time he was taken to the City Hospital, where he died. He had lived in Mrs. Bennett's household three years and four months.

On the plaintiff's call, the defendant produced the decedant's application for insurance, dated September 21st, 1914, which contained a denial that he had ever suffered from consumption, spitting of blood and certain other disorders specified; the certificate of Dr. Tidwell, dated June 17th, 1915, filed in behalf of Nellie Bennett, claiming payment under the policy, wherein the doctor, answering the 15th question upon the printed from, stated that the deceased had consumption, and answering the 16th question on the printed form, stated the immediate cause of death to have been pulmonary tuberculosis; also an affidavit purporting to be signed by the decedent, sworn to May 24th, 1915, assigning unto Mrs. Nellie Bennett, of No. 224 Coles Street, Jersey City, the insurance to be paid under the policy in question; also the claimant's certificate, sworn to by Nellie Bennett, stating, among other things, that the decedent had been insured on the policy herein sued upon, also upon an earlier policy No. 25,866,969; also a certificate of identity, sworn to by one Mary Franklin, June 16th, 1915, stating that the decedent resided at No. 224 Coles Street, Jersey City, and that he died June 13th, 1915, at the City Hospital.

For the defense, the plaintiff Richard H. Duff was called and testified that he had received payment, as administrator of the deceased, of policy No. 25,866,969, which bore date April 12th, 1909. He further testified that the decedent lives at No.

224 Coles Street, Jersey City; that he did not know of his having lived with Mrs. Gibboney on Grove Street.

Margaret Gibbony was called as a witness for the defendant and testified that she knew the decedent and went to his funeral; also that she knew Mrs. Nellie Bennett. The witness had been living for seven years at No. 477 Grove Street. The defendant never lived with her, but came frequently to her house and she helped him, as also did her family. She knew that he had been in the City Hospital, but could not say whether he had been there twice. She had gone to see him in the City Hospital in June, 1915, and also once some time before. She could not say in what ward he was. She had loaned small sums of money to him off and on, and did not get to see him at the tuberculosis sanitarium.

Berthold Pollock, a practicing physician, and county director of the tuberculosis hospital, testified that he knew John Sullivan as a patient in the hospital. He produced the records of the tuberculosis hospital which showed that John Sullivan entered the City Hospital October 20th, 1913, giving the address No. 477 Grove Street, c/o Margaret Gibboney, a friend. The witness examined him thoroughly, found he was suffering from pulmonary tuberculosis, involving both lungs, the case was a serious one. He produced the official chart kept in the tuberculosis hospital, which was received in evidence, against the plaintiff's objection. The chart showed that the patient was discharged November 2, 1913. Condition on discharge, "walked out," The witness further stated that he had no personal recollection of the case, and relied upon the hospital records.

Elizabeth Hynes, chief clerk of the Jersey City

Hospital, was sworn as a witness for the defense. She stated that she had charge of the records of the Jersey City Hospital, which she had been subpoenaed to produce. She produced a card showing the admission of one John Sullivan, of No. 224 Coles Street, Jersey City, to the hospital August 27th, 1913, whose disease was diagnosed as tuberculosis, and who left October 20th, 1913, having been transferred to the County Tuberculosis Hospital at Laurel Hill.

The witness also produced a card showing the second admission of John Sullivan to the City Hospital, June 1st, 1915, his residence being stated as on the prior occasion, who died June 13th, 1915, his illness being diagnosed as pulmonary tuberculosis.

The witness stated that she did not remember John Sullivan, that she did not personally know him before he came to the hospital, nor did she know when he left.

The plaintiff's attorney objected to the testimony of both of the prior witnesses as to the facts stated upon the cards, and to the admission of the cards as immaterial, incompetent and irrelevant, and that the cards were not properly proved by the persons who made the entries. The testimony of the witnesses was received, and the cards were admitted against this objection, and exceptions noted.

James P. Kelly, a witness called on the part of the defendant, testified that he was superintendent of the Jersey City office where the proofs of death were received. That the liability on policy No. 25,866,969 had been paid by the company; that the original application for the policy in suit and also for the prior policy, went through the witness office.

In rebuttal, the plaintiff then re-called Mrs. Nellie Bennett and asked her whether during the time John Sullivan was living at her house she knew him at any time to be suffering from tuberculosis. This question being objected to, it was excluded against the plaintiff's objection.

The witness was then asked if John Sullivan ever stated to her that he was suffering from tuberculosis, which question was likewise objected to, excluded, and the plaintiff's objection noted.

The Court found as follows:

1. The policy of insurance was duly issued September 1st, 1914, insuring the life of John Sullivan. All the payments required by the policy were made from said date until the time of the death of the insured, June 13th, 1915. The premiums were accepted by the company, as were also the premiums under the previous policy of insurance, without any objection, and the defendant did not notify the insured that the policy in suit was not acceptable to it.

2. Due proof of the death of the insured was furnished to the defendant company.

3. The previous policy of insurance upon the life of the insured was paid by the defendant company.

4. The insured was suffering from pulmonary tuberculosis from August 27th, 1913.

5. The statement made by the insured in his application that he had never suffered from consumption, in view of the previous history of the case, I found to have been a wilful untruth, which vitiates the policy and prevents recovery thereunder.

6. The prior insurance policy upon the life of the deceased contained no endorsement, signed by

the president or secretary, authorizing the policy in suit to be in force at the same time.

7. Prior to the death of the insured, an assignment of the policy in suit had been made to Nellie Bennett.

Judgment was thereupon rendered in favor of the defendant. Paintiff's attorney then objected to the judgment rendered in favor of the defendant, and to the finding of the Court that the misstatement of the insured, or the issuance of a previous policy, or the assignments of this policy, in any wise worked a forfeiture of the right of the plaintiff to recover under the policy.

Case settled and signed by me this eighteenth day of May, A. D., 1916.

CHARLES L. CARRICK,
Judge.

Exhibit P-1

Policy of Insurance

Date Sept. 21, 1914.
36 950 815

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA

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 person herein designated as the Insured shall reach the age of seventy-five years,

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,

immediately upon receipt of due proof of the death of the Insured during the continuance of this Policy, will pay at its Home Office, Newark, New Jersey, the amount of benefit herein specified, to the executors or administrators of the Insured, unless payment be made under the provisions of the next succeeding paragraph.

Exhibit P-1

FACILITY OF PAYMENT. It is understood and agreed that the said COMPANY may make any payment or grant any non-forfeiture privilege 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, if the Insured be more than fifteen years of age at the date of this Policy, 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 privilege to any or either of them shall be conclusive evidence that such payment or privilege 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.	Amt. of benefit	weekly premium
JOHN SULLIVAN	38	$244.00	$.20

If the insured shall die within six months from the date hereof, the amount of benefit will be reduced one-half.

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.

POLICY WHEN VOID. This Policy shall be void if there be in force upon the life of the Insured an Industrial Policy previously issued by this Company, unless the policy first issued contains an endorsement signed by the President or the Secretary, authorizing this Policy to be in force at the same time; or if the Policy be assigned; or if the said weekly premium shall not be paid according to the terms hereof.

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

Exhibit P-1

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 law of the State in which the same is issued. No agent has power in behalf of the Company to make or modify this or any other contract of insurance, to extend the time for paying a premium, to waive any forfeiture, or to bind the Company by making any promise, or by making or receiving any representation or information.

MISSTATEMENT OF AGE. If the age of the Insured be misstated the amount payable under this Policy shall be such as the premiums would have purchased at the correct age.

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 the benefit 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.

REVIVAL OF POLICY. If this Policy lapse for non-payment of premium, it will be revived within one year from the date to which the 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 revival shall not take effect unless at the date hereof the Insured is living and in sound health.

INCONTESTABILITY. If the Insured shall die one or more years after the date hereof, and if all due premiums shall have been paid, this Policy shall be incontestable.

NON-FORFEITURE PRIVILEGES

IF THIS POLICY LAPSE for non-payment of premium after premiums have been duly paid for three full years, the Insured, without any action upon his or her part, will become entitled to Extended Insurance for the respective term indicated in the following schedule; the amount of insurance payable if death occur within said period shall be the same amount as that which would have been payable if this Policy had been continued in force. 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 either to receive a Paid-up Life Policy or payment in cash as specified in such schedule; provided, however, that 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 privilege reduced by such indebtedness shall provide according to the mortality table hereinafter specified.

Exhibit P-1

Extended or Paid up Life Policy or Cash Surrender Value	yrs. : : :	wks.								
Premiums Paid for	/ 3 yrs.		/ 4 yrs.		/ 5 yrs.		/ 6 yrs.		/ 7 yrs.	
Extended or Paid up	yrs.	wks.	yrs.	wks.	yrs.	wks.	yrs.	wks.	yrs.	wks.
	2	—	3	4	4	17	5	4	5	40

Extended or Paid up Life Policy: The extended insurance dated from the date to which premium has been paid and is the same for any amount of the weekly premiums.

Life Policy	$3.70	$5.70	$8.10	$9.70	$11.20

These Paid up Life Policies are for each five cents of weekly premium; for a premium of three cents the policies are three-fifths of these amounts.

or Cash Surrender Value	None	None	None	None	None

These Cash Surrender Values are for each five cents of weekly premium; for a premium of three cents the values are three-fifths of these amounts.

Premiums paid for	8 yrs.		/ 9 yrs.		/ 10 yrs.		/ 11 yrs.		/ 12 yrs.	
	yrs.	wks.	yrs.	wks.	yrs.	wks.	yrs.	wks.	yrs.	wks.
	6	28	7	16	8	—	8	32	9	8

same clause as above.

Paid up Life Policy	8 yrs. / $13.00	9 yrs. / $14.90	10 yrs. / $16.80	11 yrs. / $18.60	12 yrs. / $20.40

same clause as above.

Cash Surrender Value	None	None	$9.10	$10.29	$11.50

same clause as above.

13 yrs./	14 yrs./	15 yrs./	16 yrs./	17 yrs./	18 yrs./	19 yrs./	20 yrs.
9 33	10 1	10 19	10 33	10 44	11 1	11 8	12 6
$22.20	23.90	25.60	27.30	28.90	30.50	32.00	35.00
12.73	13.98	15.24	16.53	17.83	19.14	20.47	23.34

Same clause as above.

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

The surrender values under this Policy are based upon the Standard Industrial Mortality Table with three and one-half per cent interest per annum, and the net value of any such sur-

Exhibit P-2

render value, for the first nineteen years, is at least equal to the entire reserve on this Policy according to the foregoing standard, less a percentage (not more than two and one-half) of the amount insured by the Policy; thereafter, such net value is the entire reserve by said standard.

In computing benefits 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' premiums 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.

FORREST F. DRYDEN,
President.

Willard I. Hamilton,
Secretary.

Exhibit P-2

State of New Jersey,
County of Hudson. } ss:

John J. Sullivan of #224 Cole Street, Jersey City, N. J., of full age being duly sworn according to law says that he is the assured under policy #36950815 of the Prudential Insurance Co. of America and does hereby make it his act and wish that upon his death the said insurance be paid to Mrs. Nellie Bennett of #224 Cole Street, Jersey City, N. J.

JOHN J. SULLIVAN, (L. S.)

Witness
Joseph W. Hoban

Sworn and subscribed to before me
this 24th day of May, 1915.
Joseph W. Hoban,
Notary Public.

Exhibit P-3

Certificate of death

NOTE: Claimants must have this Certificate of Death filled out by the attending physician without expense to the Company.

THE PRUDENTIAL INSURANCE CO. OF AMERICA

Incorporated as a Stock Co. by the State of N. J.

HOME OFFICE, NEWARK, NEW JERSEY

ATTENDING PHYSICIAN'S CERTIFICATE OF DEATH

This certificate must be filled out with ink in the handwriting of the physician who attended deceased during the last illness.

BE CAREFUL TO GIVE CORRECT AGE AT DEATH

1. Name of deceased in full
John Sullivan
2. Residence
224 Cole St.
3. Apparent age at death
37 years
4. Correct age at death
37 years
5. Race, (white or colored)
White
6. Occupation
Driver
7. Place of death,
Jersey City Hospital
8. Date of death
June 13, 1915
Sex, Male
9. Date of your first visit of prescription in last illness
June 1st, 1915
10. Date of your last visit
June 13th, 1915
11. Had you previously attended deceased No
If so, when?
For what?
12. (*a*) Did you view remains?
Yes.
(*b*) Did you report the death to the Board of Health?
Yes.
13. Give the names of any other physicians who have attended the deceased? Dr. Thos. Connolly
14. If deceased received medical treatment at a hospital or other institution, please specify.
No
15. Did deceased have consumption?
Yes
16. State the immediate cause of death
Pulmonary tuberculosis
State contributing cause of death.
17. Was death caused directly or indirectly by intemperance?
No
18. State the duration of illness from personal knowledge
From the history of case,
2 mos.
How was history obtained
19. Have you furnished a certificate for any other company or do you know of insurance in any other company

Exhibit P-3

(give Name)
JOHN HANCOCK.

I hereby certify that the answers above given are full and true.

Dated, June 17th, 1915.

Signature, H. F. Tidwell, M. D.
Address, Jersey City Hospital

Witness
Anna M. Duffy

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AFFIDAVIT

State of New Jersey, }
County of Hudson. } ss:

Personally appeared before me the above named, H. F. Tidwell, a physician in active practice and made oath that the foregoing statements by him made are true, and that he has concealed no material fact from the company.

Sworn and subscribed this 17th day of June, 1915.

LEO E. DUFF,
Commissioner of Deeds of New Jersey.

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This affidavit not required when claim is for less than $500.00 except by request of the company.

CLAIMANT'S CERTIFICATE

1. Name of deceased: John Sullivan; occupation of deceased: Driver.
2. Residence at time of death: 224 Cole Street, Jersey City, N. J.
3. Claimant's name: Nellie Bennett
4. No. of Policy: 36950815
5. Post office address: 224 Coles Street, Jersey City, New Jersey.

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6. Relationship of claimant to deceased, no relation
7. Age of claimant: 37 years.
8. Occupation of claimant: housework
9. When did deceased die: year 1915; month don't know day
10. When was deceased born? don't know
11. If deceased was married, is widow or widower alive? Single. Who pays burial expense? Claimant. Who paid premiums? Claimant. For how long? Life of policy.
12. Did deceased leave any children, if so, how many? Single.
13. Is either or are both of the parents of deceased alive? Both dead.
14. Are any brothers or sisters of deceased living? No.

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Exhibit P-3

15. Was deceased insured under policies in this company other than those specified above, if so, give number: ♯25866969, ♯380629977

16. If insured in other companies, give names of companies, dates of policies, amounts payable and names of claimants. Don't know.

Date 16th day of June, 1915.

Signature of Claimant: NELLIE BENNETT.

Witness
Jas. E. H. Sheridan

Certificate of Identity

I hereby certify that for the past seven years, I have known John Sullivan and that he has resided at ♯224 Coles Street, Jersey City, N. J. during the last four years and followed the occupation of driver for a period of years, and that he died on the 13th day of June, 1915 at City Hospital. I also certify that I viewed the remains, and that I last saw deceased alive at ♯224 Coles Street, Jersey City, N. J., on or about the 1st day of June, 1915 at which time he appeared to be 28 years of age. I also certify that I am not a relative of the deceased, nor in any way interested in the insurance payable on the above life.

Signature, MARY FRANKLIN,
Address ♯304 12th. Street,
Jersey City, N. J.
Occupation: housework, Age 42 yrs.

Witness
Jas. E. H. Sheridan,
Date 17th. day of June, 1915.

Affidavit

State of New Jersey, }
County of Hudson. } ss:

Be it remembered that on this 16th day of June, A. D., 1915, personally appeared before me this above named Mary Franklin and on her oath deposes and says that the certificate of identity by her oath above made and subscribed is full and true to the best of her knowledge and belief.

LEO E. DUFF,
Commissioner of Deeds for N. J.

Exhibit P-3

UNDERTAKER'S CERTIFICATE

See claim on policy #25866969

INFORMATION TO BE FURNISHED WHERE CLAIMANT IS OTHER THAN FATHER OR MOTHER? BROTHER OR SISTER, HUSBAND OR WIFE.

1. Did claimant present book and policy? Yes.
2. Did claimant pay premiums? Yes.
3. If so, for how long? Since policy was issued.
4. Has claimant a beneficiary form or assignment of any kind? Yes.
5. If so, attach the same to claim papers. Attached.
6. Have claimant furnish itemized statement, sworn to, of expense incurred on behalf of the deceased. Attached.
7. Is claimant responsible for undertaker's bill? Yes, with other claimants on other policies.
8. Attach itemized copy of same. Attached.
9. Has any objection been raised by any near relative to our paying claim to claimant named? No.
10. Is claimant paying prem. on any other policies on the lives of non-relatives, if so, give numbers, no.
11. Submit letter stating under what circumstances policy and book came into the possession of the claimant and any further particulars. Attached.

CERTIFICATE OF ADJUSTER

1. Agent I. Barrows. Assist. Superintendent: Jas. E. H. Sheridan Jersey City District.
2. Have you examined Agent's Life Register and found policy to be in force? Yes.
3. Has there been revival by lien otherwise? If so, when? Cash revival, March 29th, 1915.

A. Date of birth: Not known.

C. Is there a record of birth No. Did you see it No.

4. Have you personally viewed the remains of deceased? No.
5. Were you well enough acquainted with the insured to identify body? No.
6. Race: White. Country of Birth: U. S. A.
7. Are you satisfied that the deceased is the same person insured under the attached policy? Yes
8. Do you consider the claim a just one, see form 5927.
9. If a just claim, at what age next birthday when insured do you recommend payment? See age on #38062977.
10. Have you submitted Form 5927, if policy is less than one year old and health, at date of policy, questionable? Attached.

I hereby certify that I have personally investigated the particulars of the within claim this 17th day of June, 1915.

JAS. E. H. SHERIDAN,
Asst. Sup.,
Office at Jersey City.

Exhibit P-4

Application for Insurance

36 950 815
Dated September 21st, 1914

Agent J. McLoughlin
Asst. Supt. E. Rodenmaker District, Jersey City.

Application for insurance in

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA

Home Office, Newark, N. J.

Questions to be answered by the person whose life is proposed for insurance if age is 16 NEXT birthday or over, but if younger, by the Parent or Guardian.

1. Full name of person to be insured: JOHN SULLIVAN. No. 224 Coles Street, Jersey City, Top floor. Does applicant live in tenement on rear of lot? No. Does applicant live in basement? No. How many rooms occupied by family? Four. How many members of family, including boarders? Six.

2. If employed, firm name and address: E. Sullivan, 244 Henderson St.

3. Date of Birth, November 25th, 1876.

Age next birthday, 38.

Amount of insurance, $244.00.

Weekly premium, $.20.

7. Place of Birth U. S. A.

Race: White

Sex: male

Married or single. Single.

Occupation, driver.

12. Is life proposed now insured in this Company? If so, state numbers of policies and amounts. No. Is life proposed now insured in any other company? If so, for what amount? No.

13. Has life proposed ever been rejected or postponed by this or any other Company? If so, by what Co.? No. Has life proposed been insured in this company and policy lapsed? If so, give policy number or any other information that will enable the Home Office to locate it. No.

14. What is the present condition of Health? Good. When last sick? Of what disease? Nothing serious. Does any physical or mental defect or infirmity exist? No.

15. Height and weight. 5 ft. 9 in. 159 lbs.

Has either parent or any brother or sister died of Consumption? No.

17. Have you ever used liquor to excess? No.

Exhibit P-4

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? If so, state disease. No.

I hereby apply for insurance for the amount herein named, and I declare that the answers to the above questions are complete and true, and were written opposite the respective questions by me, or strictly in accordance with my directions. 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, and that the policy which may be granted by the Company in pursuance of this application, shall be accepted subject to the conditions and agreements contained in such policy. I further agree that no obligation shall exist against said company on account of this application, although I may have paid premiums thereon, unless said Company shall issue a policy in pursuance thereof, and the same as delivered to me.

Signature of Applicant: JOHN SULLIVAN.

Witness,
J. B. McLoughlin
Dated this 9th day of Sept. 1914.

Agent's Certificate

This certificate in all cases be signed by the agent himself after the above questions are all answered and he has seen the party whose life is proposed for insurance and is satisfied that same is a first-class risk. It must also be signed by the Asst. Superintendent if he secured the application.

A. Is the applicant a relative of yours? No. State relationship: None.

B. What amount of premiums have you collected in advance? $.20.

I certify that I have this 9th day of Sept., 1914 personally seen and questioned the applicant herein named and I recommend the company to accept the risk.

J. B. McLOUGHLIN,
Agent.

Inspection Report

A. What do you believe to be the age of the applicant next birthday 28

B. Is there reason to suspect intemperate habits, or, if female, immoral life? No.

C. Are the Home surroundings sanitary? Yes.

D. Race White

E. Has applicant ever been rejected? No.

Exhibit D-1

F. Did applicant sign this application on other side: Yes.
G. Where did you personally see applicant: Home.
G. When: 19/9/14.
H. Does applicant appear in good health: Yes.
Remarks: None.
Signature of party inspected John Sullivan.
I certify that my answers to the above questions are true and that applicant signed in my presence.

LEWIS DERLIN.

Exhibit D-1

Record of Laurel Hill Sanitarium

Name John Sullivan, Date, October 20th, 1913 No. 642
Age: 32 years.

Referred by City Hospital.

Address: Street, Grove. Number 477 Floor 2 left Care of Margaret Gibney, a friend. Sex, Male. Marital state, Single. Color white Nativity American of Father, Ireland, Of Mother, Ireland, Religion R. C. Occupation, laborer, formerly Working No. In U. S. life yes. In Jersey City, life yes. A citizen, yes.

Family History: Previous history: Breast Fed, Measles. Alcohol, Mod; Tobacco, none; Drug habit, no; Exposure to infection, no.

Previous Treatment: Sanitorium Present symptoms and duration, two months. Cough, yes; Expectoration, Scanty; Character Watery Haemoptysis no. Pain Chills, no Fever, no Night sweats yes, loss of flesh yes Digestion good, appetite Good; Bowels regular.

Physical examination: Temperature 100.4 of Pulse 130; Resp 28 Weight 145. General appearance Emaciated; Pupils Equal Skin Dry, Scars no teeth canious. Left Lung Sputum Positive Urine Reg.

L. H. S. sanitorium 10/20/13 Date Discharged 11/2/13
Condition on discharge Walked out.

Exhibit D-2

Record Jersey City Hospital.

Record of Patient to be kept by the Superintendent.

Name: Sullivan, John — Birthplace U. S. Color White,
Age: 32 — Religion, Catholic.
Address: 224 Cole Street, — Admission, date Aug. 27th, 1913.
Occupation, laborer — Admitted by Dr. Aimone
Single, Time in Jersey City, Life:
Received: Walked in
Placed in Ward No. 6

RECORD OF ILLNESS

Hospital Div: Medical
Diagnosis T. B. C.
Results: Improved Oct. 20th, 1913.
House Dr. Davidson.
Attending Dr. McLean.

Jersey City Hospital

Record of patient to be kept by the Superintendent

Name, Sullivan, John — Birthplace, U. S. Color White.
Age 37 — Religion, Catholic.
Address 224 Cole Street, — Admission, date June 1st, 1915
Occupation, Driver — Admitted by Dr. Markowitz
Single, Time in Jersey City, life
Received from ambulance.
Placed in Ward No. 5
Died, date of death, June 13th, 1915.

RECORD OF ILLNESS

Hospital Div. Medical — House, Dr. Flaherty
Diagnoses Pulmonary tuberculosis — Visiting Physician House Dr. Tidwell

Rule Extending Time to File Reasons

NEW JERSEY SUPREME COURT

RICHARD H. DUFF, Administrator of the Estate of John Sullivan, deceased, *Plaintiff-Appellant,* *vs.* PRUDENTIAL INSURANCE COMPANY OF AMERICA, *Defendant-Appellee.*	*Rule.*

APPLICATION being made to me by Hershenstein & Finnerty, attorneys for the above named plaintiff-appellant, for an extension of time within which to file the specifications of determinations for reversal on appeal in the above matter and it appearing that a State of the Case has not as yet been agreed upon by the parties or prepared by the Trial Court,

It is on this twenty-ninth day of April, 1916, ordered that the time of the said plaintiff-appellant for the filing of the said specifications of determinations for reversal be and the same is hereby extended to the fifteenth day of May, 1916.

On motion of Hershenstein & Finnerty, Attorneys for Plaintiff-Appellant.

SAMUEL KALISCH,
J. S. C.

Rule Extending Time to File Reasons

NEW JERSEY SUPREME COURT

RICHARD H. DUFF, Administrator of the Estate of John Sullivan, deceased,
Plaintiff-Appellant,
vs.
PRUDENTIAL INSURANCE COMPANY OF AMERICA,
Defendant-Appellee.
} *Rule.*

Application being made to me by Hershenstein & Finnerty, attorneys for the above named Plaintiff-appellant for an extension of time within which to file the specifications of determinations for reversal on appeal in the above matter and it appearing that State of the Case has not as yet been agreed upon by the parties or prepared by the Trial Court.

It is on this thirteenth day of May, 1916, ordered that the time of the said plaintiff-appellant for the filing of the said specifications of determinations for reversal be and the same is hereby extended to the 22d of May, 1916.

On Motion of Hershenstein & Finnerty, Attorneys for Plaintiff-Appellant.

FRANCIS J. SWAYZE,
Judge.

I do hereby consent to the entry of the above order.

RANDOLPH PERKINS,
Atty. for Deft.-Appellee.

Reasons

(Filed May 22, 1916.)

NEW JERSEY SUPREME COURT

RICHARD H. DUFF, Administrator of the estate of John Sullivan, deceased, *Plaintiff-Appellant,* *vs.* PRUDENTIAL INSURANCE COMPANY OF AMERICA, *Defendant-Appellant.*	*Action at Law on Appeal from District Court.*

The following is a specification of the determinations and directions of the First District Court of Jersey City, New Jersey, in this cause in which the plaintiff is dissatisfied in point of law.

1. The Court erred in finding that prior to the death of the insured, an assignment of the policy in suit had been made to Nellie Bennett.

2. The Court erred in admitting in evidence the records of the City Hospital and of the Tuberculosis Hospital.

3. The Court erred in finding that the statement made by the insured in his application that he had never suffered from consumption in view of the previous history of the case, was a wilful untruth which vitiates the policy and prevents recovery thereunder.

4. The Court erred in finding that the insured

was suffering from pulmonary tuberculosis from August 27th, 1913.

5. The Court erred in finding that the prior insurance policy upon the life of the deceased worked a forfeiture of the right of the plaintiff to recover under the policy in question.

6. The Court erred in refusing to permit the attorney for the plaintiff to ask witness, Mrs. Nellie Bennett, "During the time John Sullivan was living at your house, did you know him at any time to be suffering from tuberculosis?"

7. The Court erred in refusing to permit the attorney for the plaintiff to ask witness, Mrs. Nellie Bennett, "Did John Sullivan ever state to you that he was suffering from tuberculosis?"

8. There was no evidence in the cause to warrant a finding of a wilful untruth in the statement made by the insured in the application for insurance.

9. The Court erred in finding that the statement in the application for insurance that the plaintiff had never suffered from consumption was a wilful untruth, vitiates the policy and prevents recovery thereunder, in that said application was not a part of the contract.

10. The Court erred in treating the statement made by the insured in the application for insurance as part of the contract.

11. The Court erred in giving judgment for the defendant upon the proofs adduced.

12. The Court erred because it did not find the elements of fraud which would vitiate the policy.

13. The Court erred in not giving judgment for the plaintiff upon proofs adduced in the case.

14. The judgment for defendant was in divers other respects erroneous and illegal.

HERSHENSTEIN & FINNERTY,
Attorneys for Plaintiff.

Opinion

NEW JERSEY SUPREME COURT.

JUNE TERM, 1916.

Richard H. Duff,
Administrator etc. of
John Sullivan, deceased,

vs.

Prudential Insurance Co.
of America.

Argued June 6, 1916; Decided November 1916.

Appeal from District Court.

Before Justices Garrison, Parker & Bergen.

For the plaintiff-appellant, Charles Hershenstein.
For the defendant-appellee, Randolph Perkins.

Per Curiam:

This was a suit on an "industrial" policy of life insurance, and was tried in the District Court without a jury. The trial court awarded judgment for defendant on the specific ground that the assured had falsely stated in his written application for insurance that he had never suffered from consumption, and this, in the language of the court it "found to have been a wilful untruth, which vitiates the policy and prevents recovery thereunder." There were two other findings, not stated as being *rationes, decidendi,* but which appellee argues will support the judgment, viz: that there was a prior policy in the same company not endorsed with authority for this later policy to be in force at the same time; contrary to a provision of the policy in suit, and also that the assured had assigned the policy, though by the terms thereof such assignment would make it void.

We incline to think that there was error in the admission of hospital records tending to show that "John Sullivan" was treated for consumption, especially as the officials who made the records were not sworn, and there was little or no evidence to identify the assured with the John Sullivan alleged to have been treated in the hospitals. But apart from this we are unable to see that the false statement in the application, if it was false, vitiated the policy in the absence of proof that the company was

induced to write the policy through fraud. The policy does not refer to the application in any way, and by its express terms contains the entire contract between the parties. Hence if a false statement made before it was issued is to be a defence, it ought to appear that it was intended to induce and did 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 clause voiding the policy unless the assured is in sound health at the time it was written, is not relied on and is not alluded to in the decision.

With respect to the existence of a prior policy, and assignment of the policy in suit, the contract provision is this:

> "Policy When Void. This policy shall be void if there be in force upon the life of the insured an Industrial Policy previously issued by this Company, unless the policy first issued contains an endorsement signed by the President or the Secretary, authorizing this policy to be in force at the same time; or if the policy be assigned; or if the weekly premium shall not be paid according to the terms hereof."

As to the prior policy, the case is substantially though not precisely similar to Melick v. Metropolitan Life Ins. Co., 84 N. J. L. 437, affirmed, 85 N. J. L. 727, in which the determining factor was the continued acceptance of weekly premiums by the Company. Such was the case here, as the court expressly found, and in view of this we consider the Melick case controlling.

Lastly the alleged assignment.

The original is not before us and so we cannot tell whether it was on a form furnished by the Company under the provisions in the policy for convenience of payment. It reads as follows:

State of New Jersey, }
County of Hudson. } ss:

John J. Sullivan of #224 Cole Street, Jersey City, N. J., of full age being duly sworn according to law says that he is the assured under policy #36950815 of the Prudential Insurance Co. of America and does hereby make it his act and wish that upon his death the said insurance be paid to Mrs. Nellie Bennett of #224 Cole street, Jersey City, N. J.

John J. Sullivan, (L. S.)

Witness: Joseph W. Hoban.

Sworn and subscribed to before me
this 24th day of May, 1916.
Joseph W. Hoban, Notary Public.

This seems to be an affidavit of the assured expressing his desire as to what shall be done with the proceeds of the policy in case of his death. It is not a present transfer of the policy. Rather it is a quasi testamentary disposition of the proceeds

and as such invalid because not executed as a will. See 25 Cyc. 895; Bartlett v. Goodrich, 36 N. Y. Sup. 770. An order for the payment of proceeds in case of death is not a valid assignment without delivery of the policy. Folk v. Jones, 49 N. J. Eq., 484, 497. There is nothing in the state of the case to indicate that Mrs. Bennett had possession of the policy. It is marked Exhibit P. 1, and was presumably put in evidence by the plaintiff. The finding that "an assignment had been made" seems to be a conclusion of law probably based on the production by the company of the affidavit given above. For the reasons given we conclude that legally there was no assignment.

None of the grounds relied on being sufficient to support the judgment it must be reversed, and a new trial ordered.

New Jersey Court of Errors and Appeals

RICHARD H. DUFF, Administrator of the Estate of John Sullivan, deceased,
Plaintiff-Respondent,

vs.

PRUDENTIAL INSURANCE COMPANY OF AMERICA,
Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT.

On August 27th, 1913, a sick man "walked in" (Case, p. 29, top) at the Jersey City Hospital and was placed in Ward Number 6. He gave his name as John Sullivan; birthplace, United States; color, white; age, 32; religion, Catholic; address, 224 Coles Street; occupation, laborer; single; time in Jersey City, life.

His case was diagnosed as tuberculosis. For two months he remained in the hospital—until October 20th, 1913, when he was transferred to the Tuberculosis Sanitarium at Laurel Hill. (Hospital Record, p. 29, middle; Sanitarium Record, p. 28, middle, and District Court Findings, p. 15, top.)

Upon his arrival at the sanitarium he gave his name as John Sullivan; birthplace, United States; color, white; age, 32; religion, Roman Catholic; address, 477 Grove Street, care Mrs. Gibboney, a friend; single; time in Jersey, life. (Exhibit D-1, p. 28.) He was examined personally by Doctor

Pollak, County Director of the Tuberculosis Sanitarium, and was found to be suffering from "pulmonary tuberculosis, involving both lungs; the case was a serious one." (P. 14, middle.) On November 2d, 1913, this sick man "walked out." (P. 28, bottom.)

On June 1st, 1915, history repeats itself with a little variation. The sick man does not "walk in" to the hospital. The record shows: "Received from ambulance." Name, John Sullivan; birthplace, United States; color, white; age, 37; religion, Catholic; address, 224 Coles Street; occupation, driver; single; time in Jersey City, life. Died June 13th, 1915."

When not actually in a hospital this man sojourned in the household of one Nellie Bennett, at No. 224 Coles Street, Jersey City. (P. 13, top.) Others, besides Mrs. Bennett, aided this sick man. Margaret Gibboney, whose address he gave at the sanitarium and whom he called friend, testified that "the decedent never lived with her, but came frequently to her house and she helped him, as also did her family. * * * She loaned him small sums of money off and on." (P. 14, top.)

A few months after he "walked out" of the Tuberculosis Sanitarium at Laurel Hill something prompted John Sullivan to make application to the Prudential Insurance Company for more insurance on his life. He was already carrying an Industrial Prudential policy No. 25866969. (P-3, p. 24, top.)

In order to procure this additional insurance John Sullivan signed an application in which he said:

> "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."

For some reason he neglected to inform the Company that he had consumption, and had been in the Jersey City Hospital and the Tuberculosis Sanitarium at Laurel Hill and that he was already insured in the Prudential. He not only failed to inform the Company of these facts, but for some reason known to himself he stated with great positiveness that he was not at all insured in the Prudential, and that his health was good and that he never had a serious disease. When the direct question was put to him, "Has life proposed ever suffered from consumption?" he answered with a firm "No." (Exhibit P-4, p. 27, top.) In this application, in which he declared the answers were complete and true, and in which he agreed that the answers, with this declaration, should form the basis of a contract of insurance, he did not disclose that he had been examined at the Tuberculosis Sanitarium by Doctor Pollak and that in his presence Doctor Pollak had, at the time of the examination, made a chart showing in red ink that both of Sullivan's lungs were seriously affected with tuberculosis.

A policy was "granted in pursuance of this application." (Exhibit P-4, p. 27, top.) That policy is now being sued on in this cause. Nellie Bennett, from whose house Sullivan walked to the City Hospital on August 27th, 1913, and from whose house, on June 1st, 1915, he was taken to the City Hospital in an ambulance, paid all of the premiums, from the first to the last. (P. 25, top.) The policy is No. 36950815. There is no evidence that the policy was ever actually delivered to John Sullivan. It came from the possession of Nellie Bennett, who filed all of the proofs of death as

"claimant." After filing the proofs and claiming the proceeds of the policy under an assignment, she instituted the present suit; the Summons, in which she mistakenly calls herself "administratrix of John Sullivan," runs in her name, likewise the State of Demand and the Record of the Case in the District Court.

The present plaintiff did not come into the suit, nor did his attorneys, until four months after the issuing of Summons, when "the proceedings were amended to be in the name of Richard H. Duff, Administrator, Plaintiff." (P. 10, top.)

The policy by its express terms contains the entire contract between the parties. The Company accepted Sullivan as a risk without a physical examination and relying entirely upon the truthfulness of his representations as expressed in his signed application.

The contract of insurance contains various provisions, one of which is:

> "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, premiums paid thereon, if any, shall be returned." (P. 18, middle.)

Under that provision, if Sullivan was not in sound health on September 21st, 1914, the policy did not take effect, and the premiums are returnable.

Another provision of the policy is:

> "POLICY WHEN VOID. This policy shall be void if there be in force upon the life of the insured an Industrial policy previously issued by this Company, unless the policy first issued

> contains an endorsement signed by the President or the Secretary authorizing this policy to be in force at the same time; or if the policy be assigned."

Under this provision, if the policy became void, the premiums paid are forfeited to the Company. (P. 18, bottom.)

Shortly after the policy was issued, Sullivan, or someone for him, procured another policy from the Prudential, No. 380629977. (P. 24, top.)

Just a week before Sullivan was taken from Nellie Bennett's house to the hospital in the ambulance, June 1st, 1915, someone realized the importance of finding out to whom the insurance money was payable under the terms of the policy. This matter is regulated by the policy (p. 17, bottom) making the proceeds payable to the executors or administrators of the insured. Then came into existence the interesting legal document described as P-2 (p. 21, bottom).

It must have been evident that unless an assignment were procured, Nellie Bennett had paid all the premiums for naught. By P-2, Sullivan makes it "his *act* and wish" that upon his death (which occurred three weeks later) the insurance be paid to Nellie Bennett.

In the trial in the District Court the substituted plaintiff, Richard H. Duff, Administrator, offered Nellie Bennett as his sole witness. He also offered in evidence the policy (P-1), the Assignment (P-2), the application for insurance (P-4) and the proofs of death (P-3). The District Court before whom all of the witnesses appeared and testified, and before whom the plaintiff's exhibits, as well as the defendant's, were carefully considered, gave judgment in favor of the defendant.

The case was tried March 30th, 1916. Nearly two months later, May 18th, 1916, the District Court Judge was called upon to settle the case.

Upon appeal to the Supreme Court, the judgment of the District Court was reversed on grounds which, with all due respect to that Court, I am called upon to attack.

I.

The reversal was based on the findings by the Supreme Court (p. 34, bottom) that

> "There was little or no evidence to identify the insured with the John Sullivan alleged to have been treated in the hospital."

The proofs of death were offered in evidence on the part of the plaintiff and show conclusively the identity of John Sullivan, the insured, with the John Sullivan, "alleged to have been treated in the hospitals."

The certificate of death (Exhibit P-3, p. 22) described the insured as follows:

"1. Name of deceased in full—John Sullivan.
"2. Residence—224 Coles Street.
"3. Apparent age at death—37 years.
"4. Correct age at death—37 years.
"5. Race—White.
"6. Occupation—Driver.
"7. Place of death—Jersey City Hospital.
"8. Date of death—June 13, 1915.

The same evidence that proved that John Sullivan, the insured, died, proved that he was treated in the Jersey City Hospital, *and died there.*

Plaintiff's case depended upon *this identity.* Nellie Bennett submitted proofs of it and testified

that the John Sullivan who died in the Jersey City Hospital was the insured. Margaret Gibboney went to his funeral. "She knew that he had been in the City Hospital, but could not say whether he had been there twice. She had gone to see him in the City Hospital in June, 1915, and also once some time before." * * * "She had loaned him small sums of money off and on, and did not get to see him at the Tuberculosis Sanitarium." (P. 14, top.)

The last time that Sullivan went to the hospital was June 1st, 1915, where he died June 13th, 1915. If Margaret Gibboney went to see him in the City Hospital in June, 1915, and *also once, sometime before,* it must have been on the occasion when he was there previous to June, 1915, namely, in August, September and October, 1913.

Is it conceivable that there were two John Sullivans, both residing at 224 Coles Street, Jersey City; both born in the United States; both white; both age thirty-seven; both drivers; both Roman Catholic; both single; both living all his lifetime in Jersey City, as shown by the records of the Jersey City Hospital and the Laurel Hill Sanitarium; both of whom died of tuberculosis in June, 1915?

Of course, the fact is that at the trial in the District Court the identity of John Sullivan treated at the hospitals and the John Sullivan, the insured, who died in the Jersey City Hospital on June 13th, 1916, was not questioned.

II.

The Supreme Court erred in absolutely disregarding the 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."

Instead of giving full effect to the provisions of the contract, the Supreme Court in its opinion said:

> "The clause voiding the policy unless the assured is in sound health at the time it was written is not relied on, and is not alluded to in the decision." (Opinion, p. 33, top.)

That clause was and is relied on; it was urged and vehemently argued by counsel at the trial. It was the main defense.

Nowhere does it appear in the Record that the defendant did not rely upon it.

If resort is had to a presumption, it ought to be presumed that both sides were relying upon their rights as expressed in their contract.

Of course, the difficulty arises out of the method of stating the case on appeal. Seven weeks after the trial (from March 30th to May 18th) a very busy District Court is called upon to determine the facts.

This failure to allude to the preliminary provision does not have the effect of striking it out of the policy.

The Court has before it the policy containing the provision that it shall not take effect if on its date (September 21st, 1914) John Sullivan be not in sound health. The District Court, whose duty it was to determine questions of fact, found that John Sullivan was suffering from pulmonary tuberculosis on September 21st, 1914.

Only one result can follow.

III.

The Supreme Court erred in finding that the false statements in the application did not vitiate the policy.

The Supreme Court said:

> "If a false statement made before it (policy) was issued is to be a defense, it ought to appear that it was intended to induce and did induce the Company to make the contract. There is no claim that it did."

Do the facts justify the Supreme Court in finding that there is no claim that the false statements by Sullivan were intended to induce and did induce the Company to make the contract?

Plaintiff introduced the application in evidence and it was marked Exhibit P-4. (P. 26.)

By that application Sullivan represented:

> "I hereby apply for insurance for the amount herein named, and I declare that the answers to the above questions are complete and true, and were written opposite the respective questions by me, or strictly in accordance with my directions. 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, and that the policy which may be granted by the Company in pursuance of this application shall be accepted subject to the conditions and agreement contained in such policy."

In view of that signed statement by John Sullivan, put in evidence by the plaintiff as part of his case, it is astonishing to read in the opinion of the Supreme Court that "If a false statement made before it (the policy) is to be a defence, it ought to appear that it was intended to induce or did induce the Company to make the contract. There is no claim that it did."

Of course, there was a claim that it did. It was argued fully before the trial court, and the trial court found, as a fact, that the policy was based on the statements made in the application and that the statements in the application were intended to induce and did not induce the company to make the contract. Furthermore, the trial court found, as a fact, that the statement made by the insured in his application that he had never suffered from consumption to have been a wilful untruth. (Case, p. 16, bottom.)

IV.

The Supreme Court, in its opinion, said:

> "There is nothing in the state of the case to indicate that Mrs. Bennett had possession of the policy."

Among the proofs of death submitted to the Company by Nellie Bennett and offered in evidence by the plaintiff as part of his case is Exhibit P-3, which calls for information to be furnished where the claimant is other than father or mother, brother or sister, husband or wife. The first question is:

> "1. Did claimant present book and policy? A. Yes.
>
> "2 Did claimant pay premiums? A. Yes.
>
> "3. If so, for how long? A. Since the policy was issued."

Who can justify the statement in the *per curiam* opinion that "there is nothing in the state of the case to indicate that Mrs. Bennett had possession of the policy?" Mrs. Bennett presented to the Company with her proofs of death the policy, and

represented that she had paid all of the premiums since the policy was issued. This was long before the Administrator was appointed. After she presented the proofs and the policy and the premium receipt book she sued on the policy and appears as the plaintiff in the Summons, State of Demand and Record of the Case, and she held that position from the beginning of the suit, November 19th, 1915, until March 30th, 1916, when, by agreement of the parties, she was dropped out as plaintiff, and Richard H. Duff, Administrator of Sullivan, was made a party and conducted the suit thereafter.

Nellie Bennett was the only witness called by the plaintiff, and while she was on the stand the first thing offered in evidence by the plaintiff was Exhibit P-1, the policy of insurance.

The plaintiff has absolutely concluded himself that the policy was in the possession of Nellie Bennett at the time of the filing of the proofs and proceeded from her possession to the Company.

The judgment of the District Court should be sustained on the following ground:

I.

THE POLICY DID NOT TAKE EFFECT, BECAUSE AT THE TIME OF ITS DATE, SEPTEMBER 21ST, 1914, THE INSURED WAS NOT IN SOUND HEALTH.

Whether the insured was or was not in sound health on that date is wholly a question of fact, and it was the duty and province of the trial judge to decide the question of fact.

Facts found by the District Court will be presumed to rest on competent proofs when nothing appears to the contrary. *Home Coupon Exchange vs. Goldfarb,* 78 N. J. L. 146.

In the case of *Dordoni vs. Hughes,* 83 N. J. L. 355, the Supreme Court, citing the above case, with approval, said:

> "Since all the evidence is not returned to this Court, but only extracts, from which it is, for that reason, impossible for us to say that the finding was not properly reached from the facts proven."

In the present case the plaintiff below failed to have the State of the Case settled by the District Court Judge from March 30th, 1916, the date of the trial, until May 18th, 1916, so that State of the Case contains a very brief reference to the testimony.

Notwithstanding this fact, it is sufficiently clear from the State of the Case (without for a moment considering the exhibits) that John Sullivan was not, on the date of the policy, September 21st, 1914, in sound health.

If the identity of the insured with the Sullivan treated in the hospital be admitted for a moment, of course, it was conclusively proved that he was not in sound health. The question of identity, of course, was a question of fact for the Judge, and with the mass of evidence before him proving the identity, not one word of which was denied by the plaintiff, the Judge, very correctly, found that Sullivan was Sullivan.

In addition, we have the evidence of Margaret Gibboney, who went to his funeral. She visited him in the Jersey City Hospital in June, 1915, "and also once some time before * * *." She did not get to see him at the Tuberculosis Sanitarium.

The fact that Margaret Gibboney visited John Sullivan in the hospital before June, 1915, coupled with the fact as shown by the hospital record that John Sullivan, of 224 Coles Street, was admitted

August 27th, 1913, his case diagnosed as tuberculosis; remained in the Jersey City Hospital until October 20th, 1913, when he was transferred to the Laurel Hill Sanitarium, makes the conclusion inevitable that Margaret Gibboney visited him there sometime in 1913.

There is not the slightest doubt that the same man, John Sullivan, was transferred from the Jersey City Hospital to the Laurel Hill Sanitarium on October 20th, 1913, and that he was the man who Doctor Pollak personally examined. The witness (Doctor Pollak) "examined him thoroughly, and found that he was suffering from pulmonary tuberculosis, involving both lungs; the case was a serious one."

The proofs of death submitted to the Company by claimant and introduced in evidence by the plaintiff as part of his case showed that John Sullivan, of 224 Coles Street, age 37, white, driver, died at the Jersey City Hospital June 13th, 1915, and that the immediate cause of death was pulmonary tuberculosis. (Exhibit P-3, Case, p. 22.) This same exhibit shows that John Sullivan was in the Jersey City Hospital and was treated there for tuberculosis from June 1st, 1915. This is definitely tied up with the last record of the Jersey City Hospital which shows that John Sullivan, birthplace, United States; color, white; religion, Catholic; address, 224 Coles Street; age, 37; occupation, driver; single; time in Jersey City, life; was admitted June 1st, 1915, and died June 13th, 1915. The prior record of the hospital shows that John Sullivan, birthplace, United States; age, 32; religion, Catholic; address, 224 Coles Street; occupation, laborer; single; time in Jersey City, life, was admitted August 27th, 1913, and was transferred October 20th, 1913, to the Laurel Hill Sanitarium.

The Laurel Hill Sanitarium record shows that John Sullivan, received October 20th, 1913; birth-

place, United States; color, white; age, 32; religion, Catholic; occupation, laborer; single; time in Jersey City, life. The physical examination showed: "Temperature, 100.4; pulse, 130; respiration, 28; weight, 145; general appearance, emaciated; pupils, equal; skin, dry; scars, no; teeth, canious; left lung, sputum positive."

This identical John Sullivan was personally examined by Doctor Pollak. The record of his examination consisted of charts which were not printed in the case which were made by Doctor Pollak while he was making the examination, and showed in red ink the involvement of both lungs. The record, D-1, p. 28, was made by Doctor Pollak's assistant under the eye of Doctor Pollak at the time of the examination.

With all of these facts before the District Court Judge he found, as a fact in this case, that it was the same Sullivan and that at the time he procured the insurance he was not in sound health.

Where the Supreme Court varies in finding the fact from the District Court is due wholly to the failure to examine the exhibits, especially plaintiff's exhibits.

II.

THE POLICY WAS VOID BECAUSE THERE WAS IN FORCE UPON THE LIFE OF JOHN SULLIVAN AN INDUSTRIAL POLICY PREVIOUSLY ISSUED BY THE COMPANY, WHICH POLICY DID NOT CONTAIN AN ENDORSEMENT SIGNED BY THE PRESIDENT OR SECRETARY AUTHORIZING THE POLICY SUED ON TO BE IN FORCE AT THE SAME TIME.

That there was such a policy, of course, was not contradicted. It was introduced in evidence by de-

fendant. (Record of Case, p. 10, l. 18.) It had no endorsement.

The plaintiff was called as a witness by the defendant. He testified that he had received payment, as administrator of the deceased, on the former policy, which was No. 25866969, and it bore date April 12th, 1899. (P. 13, bottom.) He identified John Sullivan in that policy with the decedent.

The trial court held, as a matter of fact, that the previous insurance policy on the life of John Sullivan did not contain an endorsement signed by the President or the Secretary authorizing the policy in suit to be in force at the same time.

I respectfully insist that the Supreme Court was in error in holding, in its opinion, "as to the prior policy the case is substantially, although not precisely, similar to the case of *Melick vs. Metropolitan Life Ins. Co.,* 84 N. J. L. 437, affirmed; 85 N. J. L. 727, in which the determining factor was the continued acceptance of weekly premiums by the Company. Such was the case here, as the Court expressly found, and in view of this, we consider the Melick case controlling."

The decision in the Melick case turned on the construction of a forfeiture clause in the policy. The Court, speaking through Judge Garrison, said:

> "The clear implication of this language in view of its concluding clause is that the Secretary by withholding his endorsement as to a prior policy *may affect the validity of such prior policy,* which clearly is not so as matter of law, and is, in any event, a matter alien to the object of the condition which is concerned with the validity not of a prior policy, but of the present policy."

This Court held that the language admitted of two constructions, one of which was unreasonable

and grossly oppressive to the insured, and the other, fair and reasonable to both parties, and very properly held that the language would be construed to have a meaning fair and reasonable to both parties.

The present case is wholly unlike that described in the language of Judge Garrison. Here, it is not sought to void a former policy by failure to endorse in the present contract permission for the former insurance.

This policy is based on an application in which John Sullivan expressly denied that he was insured in the Prudential Company.

> "12. Is life proposed now insured in this Company? If so, state numbers of policies and amounts. A. No." (Exhibit P-4, p. 26, middle.)

The insured having, in answer to an express question, positively denied the existence of former policies in the Prudential, in his application he declared "that the answers to the above questions are complete and true." He further agreed "that said answers, with this declaration, shall form the basis of a contract of insurance between me and the Prudential Insurance Company of America and that the policy which may be granted by the Company in pursuance of this application shall be accepted subject to the conditions and agreement contained in such policy."

One of the conditions contained in the policy was that it should be void if there was in force upon the life of John Sullivan an Industrial policy previously issued by the Company unless the policy first issued contained an endorsement authorizing the policy sued on to be in force at the same time.

This language is not like the language of the

policy in the Melick case, susceptible of two constructions, one of which is unreasonable and grossly oppressive to the insured, and the other fair and reasonable to both.

The language of this clause is clear, and admits of only one construction which is fair and reasonable to both parties. In the Melick case the Court said: "That if, under a policy thus construed, the insurer, having the option to declare it void, permits the insurer to make weekly payments without notice of the exercise of such option and under the impression that such payments are premiums on a valid insurance, the act of the insurer in accepting such payments may amount to a continuing representation to its policyholder that the impression under which the payments were made is the correct one."

The Court based its decision on the principal that "one who, seeing that another is acting under a misapprehension which it is his duty to correct, seeks to profit by it, seeks an advantage from his own wrong." In the present case it was Sullivan who permitted the Company to act under a misapprehension which it was Sullivan's duty to correct; it was Sullivan's duty to tell the truth as to the prior policy. It was he who caused the Company to act under a misapprehension. It was Sullivan who was seeking to profit by the misapprehension and to take advantage from his own wrong. This case is not substantially like the Melick case. It is substantially different. Here we have a sick man who, according to plaintiff's own proofs (Exhibit P-3, p. 23, bottom) had no wife, father, mother, or child. He did have friends who were insuring him against the day of his death, which undoubtedly they saw to be not far distant; friends who were insuring him and paid all of the premiums out of their own pockets; who were speculating on his life; who were making an industry out of Industrial insur-

ance and knowing that it was possible to get Industrial insurance without a medical examination of the insured. By plaintiff's Exhibit P-3 (p. 24, top) it will be seen that after the present policy was issued another was procured, No. 38062977, on the life of the sick man. This is not a case where the policy is susceptible of two constructions.

The Company had a right to rely on the truthfulness of the statements contained in the application, and, relying upon them, it issued the policy in question.

Is it more reasonable to expect John Sullivan to tell the truth in his application for insurance on his life or to expect the Company to thumb back through eleven million policies to find out the truth as to whether there was a former policy or not?

III.

THE DISTRICT COURT WAS JUSTIFIED IN ITS FINDING OF MIXED LAW AND FACT THAT "PRIOR TO THE DEATH OF THE INSURED AN ASSIGNMENT OF THE POLICY SUED UPON HAD BEEN MADE TO NELLIE BENNETT." (17, top.)

At the trial the Court had before it all the witnesses and all of the original exhibits.

As part of the plaintiff's case it had the facts that Nellie Bennett claimed the insurance individually; that she submitted the only proofs of death which were delivered to the Company. These proofs of death were offered in evidence by the plaintiff as part of his case.

The policy was payable "upon receipt of due proof of the death of the insured." Nellie Bennett had the policy and the premium receipt book, and offered the Company her proofs. At the trial the

District Court had before it plaintiff's Exhibit P-3 (p. 25), which contains the following:

> "1. Did claimant (Nellie Bennett) present book and policy? Yes.
> "2. Did claimant pay premiums? Yes.
> "3. If so, for how long? Since the policy was issued.
> "4. Has claimant beneficiary form or assignment of any kind? Yes.
> 5. If so, attach the same to claim papers. Attached."

Exhibit P-2 was the paper which Nellie Bennett attached to her proofs, not as a beneficiary form but as an assignment of the policy.

P-2 is an interesting legal document, and was apparently not, as the Supreme Court naively questioned, furnished by the Company under the provisions of the policy for the convenience of payment. It is only necessary to read it to perceive that it was drawn by an inexperienced hand. What was the intention in the mind of Sullivan and Nellie Bennett at the time he executed this paper? Was it to make a will, or was the intention of the parties to make the insurance over to Nellie Bennett? The facts surrounding the insurance must be taken to throw light upon their intention. The paper does not speak of any other property or of the other two policies which Sullivan was successful in procuring on his life. It deals simply with the policy in suit. It was signed just three weeks before the proceeds of the policy would be payable. It must be kept in mind that Nellie Bennett had paid every penny of the premiums and that the policy was payable by its terms to the personal representative of the insured.

If the policy were not transferred to Nellie Bennett she would not only lose the premiums, but the

proceeds of the policy as well. There is no evidence in the case that John Sullivan ever had possession of the policy. The only possession proved anywhere is the possession of Nellie Bennett, and it is beyond credence that three weeks before the death of John Sullivan this woman, who had financed the policy, did not have possession of it at the time Sullivan signed P-2.

The finding by the Supreme Court that P-2 was not an assignment is based upon the assumption that there is nothing in the State of the Case to indicate that Mrs. Bennett had possession of the policy. No question was ever raised as to who had possession of the policy until suggested in the opinion of the Supreme Court. It was admitted by all parties before the Supreme Court that Exhibit P-3 truthfully stated the fact, namely, that Nellie Bennett had possession of the policy and premium receipt book and delivered them to the Company, and that she attached P-2 as an evidence of the transfer of the policy to her. The words of P-2 were unquestionably intended to transfer the title, because Sullivan makes it his *act* that the insurance be paid to Nellie Bennett.

As a rule any writing indicating the intention to pass the interest in the proceeds of the policy to the assignee is sufficient as an assignment, but a writing indicating testamentary disposition but not valid as a will, cannot be given effect as an assignment. 25 Cyc. 768.

The fact that Nellie Bennett paid all of the premiums creates the presumption that she had possession of the policy; she was not making loans of the premiums to Sullivan; she was paying the premiums for whose benefit—it could not be for the benefit of Sullivan, who could not personally receive the proceeds of the policy? She was paying the premiums for her own benefit.

The policy must have been before the parties when P-2 was signed, because that instrument gives not only the date of the policy, but the number, 36950815.

If Sullivan was trying to make a will he naturally would have mentioned the other policies in the will, and any other property which he might have had. He was simply dealing with the one thing, namely, the proceeds of this policy, and by this instrument he made it his act that Nellie Bennett should have the proceeds.

The question of the assignment was undoubtedly a mixed question of law and fact. On appeal, a judgment that is based upon a conclusion of the District Court upon a mixed question of law and fact if the conclusion is legally inferable from the facts proven will not be reversed. *Burr vs. Adams Express Co.,* 42 Broom. 264; *Dordoni vs. Hughes, supra.*

"Parol evidence of the circumstances and surroundings of the parties, and especially with respect to the identity of the subject-matter, is admissible in exposition of a written instrument." *Sullivan vs. Visconti,* 68 N. J. L. 547, citing 1 Greenl. Evid., 286, 288; 2 Am. & Eng. Encyl. L. 2d ed.) tit. "Ambiguity," 287, 304; Browne Parol Evid., par. 49; Doe d. *Hiscocks vs. Hiscocks,* 5 Mees. & W. 363; 9 L. J. Exch. 27; 2 Eng. Rul. Cas. 718; *Dunn vs. English,* 3 Zab. 126; *Chamberlin vs. Letson,* 2 South. 252; *Rue vs. Rue,* 1 Zab. 369; *Fitch vs. Archibald,* 5 Dutcher 160, 164.

The rule that if a contract is susceptible of two constructions that one should be adopted which will render it operative, rather than that which would render it void (*Sullivan vs. Visconti, supra*), would require P-2 to be construed to be an assignment, and not a will.

The Supreme Court quotes *Falk vs. Jones,* 49 N. J. Eq. 488-491, to the effect that "an order for the payment of proceeds in case of death is not a valid assignment without delivery of the policy."

That case cited must be read in the light of the reversal by the Court of Errors and Appeals, in *James vs. Falk,* 50 N. J. Eq. 468.

It does hold that, as a rule, it is not necessary that an assignment of a policy of insurance should be in writing. It may be by parol, if there is a valuable consideration and an unconditional delivery of the policy. Citing *Hutchings vs. Low,* 1 Gr. 246; *Allen vs. Pancoast,* Spenc. 68; *Winfield vs. Hudson,* 4 Dutch. 255; *Morris Canal Co. vs. Fisher,* 1 Stock. 667; *Vreeland vs. Van Horn,* 2 C. E. Gr. 137; *Kamena vs. Huelbig,* 8 C. E. Gr. 78; *Marcus vs. Insurance Co.,* 68 N. Y. 625; *Greene vs. Insurance Co.,* 84 N. Y. 572; *Leinkauf vs. Calman,* 110 N. Y. 50.

IV.

AS TO THE ADMISSIBILITY OF THE HOSPITAL RECORDS.

The Supreme Court did not determine that the records were not admissible. It stated: "We are inclined to think that there was error in the admission of hospital records tending to show that John Sullivan was treated for consumption, especially as the officials who made the records were not sworn, and there was little or no evidence to identify the assured with the John Sullivan alleged to have been treated in the hospitals."

As pointed out in the former part of this brief, the identity was not only conclusively established, but was not denied.

The record of the Hudson County Tuberculosis

Hospital was kept under the following provision of law:

> "An Act authorizing the establishment of county hospitals for the treatment of patients suffering from tuberculosis and providing for the maintenance of the same." (P. L. 1910, p. 129.)

Under that Act the superintendent shall be the chief executive officer of the hospital and shall

> "cause a careful examination to be made of the physical condition of all persons admitted to the hospital and provide for the treatment of each patient according to his need and cause a record to be kept of the condition of each patient when admitted and from time to time thereafter."

The Supreme Court was in error in saying that the person who made the record was not sworn. Doctor Pollak actually made the charts while examining the patient. The balance of the record in the Tuberculosis Sanitarium was made under the Doctor's eye while he was examining the patient.

The reason the Supreme Court seems to think there was a question about the admissibility of the evidence was apparently largely based upon the identity of John Sullivan.

The hospital records were properly admitted in evidence.

> "A record or document kept or prepared by a person whose public duty it is to record truly the facts stated therein is, when relevant, admissible as *prima facie* evidence of these facts, even in a controversy between third persons, and this whether or not there exists a statute authorizing such record to be used in evidence

or expressly requiring a record to be kept, and notwithstanding the document consists of statements made extrajudicially by a person not under oath and not subject to cross-examination."

17 Cyc. 306, and cases cited.

In *Hancock vs. Catholic Benevolent Association,* 67 N. J. L. 614, it was held:

"A register of a parish of a Catholic church kept as required by the rules and laws of the church, when produced, is admissible in evidence; and it is of such a public nature that its contents may be proved by an immediate copy duly verified."

Supreme Assembly vs. McDonald, 58 N. J. L. 248, to the effect that a church register of baptisms is admissible in evidence.

The case of *Ribas vs. Revere Rubber Co.* (R. I.), 91 Atl. Rep., p. 58, holds:

"To render a record admissible as evidence there need not be any law or ordinance requiring it to be kept, but it is sufficient if such record be kept by some person in the regular course of his occupation or business.

"A hospital record of the condition and progress of a patient, kept by an interne in the regular course of business, was admissible as evidence of the facts recorded.

"The admissibility of a record does not depend upon its requirement by law. In fact, a great variety of records unquestionably admissible in evidence, as, for instance, the books of mercantile houses, the records of societies and associations, are not kept through any re-

quirement of law or ordinance. It is sufficient if such record be kept by some person in the regular course of his occupation or business, that is, in the course of transactions performed in one's habitual relations with others and as a natural part of one's mode of obtaining a livelihood, including any regular record that would be helpful, though not essential or usual in the same occupation as followed by others. It is only necessary that the keeping of such record should be a natural concomitant of the transaction to which it relates." Citing 2 Wigmore on Evidence, Sec. 1523; *Fisher vs. Mayor,* 67 N. Y. 77; *Kennedy vs. Doyle,* 10 Allen (Mass.), 161.

"In making a record of this character which shall be admissible in evidence it is necessary that the entries therein be made contemporaneously with the facts to which such entries relate." Citing *Chaffee & Co. vs. U. S.,* 18 Wall. 516.

"The term 'contemporaneous' is not construed to mean that a record must be made at the moment of the occurrence, but within such time thereafter as would reasonably make it a part of the transaction." Citing Jones on Evidence (2d ed.), Sec. 319; *Ingraham vs. Bockius,* 9 Serg. & R. (Pa.), 285; *Jones vs. Long,* 3 Watts, 326; *Barker vs. Haskell,* 9 Cush. 221.

"The final objection of the defendant to the admission of the hospital record is that the facts reported to Doctor Peet and by him recorded, were capable of proof by those making such reports, and that they were or might have been called to testify at the trial on behalf of the defendant. We do not think that this is a well-founded objection. As before stated, it deprives the defendant of the corroborative effect of the record upon the testimony of the

witnesses in the event that they were called and testified. The written record should not be excluded upon the ground that the witnesses who made reports to Doctor Peet had also testified at the trial of the case. They are two distinct sources of testimony, each having a value independent of the other." Citing 2 Wigmore on Evidence, Sec. 1544; *Peck vs. Abbe,* 11 Conn. 210.

I respectfully submit that the judgment of the Supreme Court should be reversed.

Attorney for Defendant-Appellant.

DATZ PRESS

New Jersey Court of Errors and Appeals

RICHARD H. DUFF, administrator of the Estate of John Sullivan, deceased,
Plaintiff-Respondent,
vs.
PRUDENTIAL INSURANCE COMPANY OF AMERICA,
Defendant-Appellant.

BRIEF OF PLAINTIFF-RESPONDENT

Facts

The facts as stated by the appellant are not in accordance with the facts as found by the Trial Court who stated the case (Case, pp. 12-17), and for that reason, a brief summary of the facts follows.

The plaintiff, the administrator of the estate of John Sullivan, deceased, brought an action to recover from the appellant the sum of Two Hundred and Forty-four Dollars ($244.00), upon a policy of insurance which does not have any reference to any application having been made by the insured and provides that the policy contains the entire contract between the parties (Case, p. 21, ll. 10-11). Due proof of the death of the in-

sured was made by the plaintiff. The policy of insurance, and the fact that the payments were made thereunder and received by the company without objection until the death of the insured, were admitted by the company. The Insurance Company, for its defense, relied mainly upon the fact that the insured in an application for insurance, wilfully misstated that he did not suffer from tuberculosis. It appeared, also, that a prior policy of insurance was isued upon the life of the insured without having an endorsement made upon it authorizing the policy in suit to be in force. It also appeared that the insured in an affidavit (Case, p. 21, Exhibit P-2), signed before his death, expressed his wish that upon his death the said insurance should be paid to Mrs. Nellie Bennett, and it was further urged by the appellant that the prior policy of insurance without the endorsement thereon and the affidavit, which it claimed was an assignment, were contrary to the provisions of the policy and resulted in a forfeiture of the same. At no time during the trial did the appellant contend that the policy was not in force because the insured on the date of the policy was not in sound health. It is manifest that if this question were raised, the Trial Court would have made a finding upon that point in view of the fact that the Trial Court did make findings upon all of the questions raised by the appellant. In the trial before the District Court, judgment was rendered for the appellant company and upon appeal to the Supreme Court, the judgment in favor of the insurance company was reversed, and a new trial ordered (Case, pp. 34-36). The Trial Court was reversed primarily on the ground that the false statement in the application, if it was false, did not vitiate the policy in the absence of proof

that the company was induced to write the policy through fraud, in view of the fact that the application in no way was made part of the policy. The reversal of that ruling of the Trial Court makes it unnecessary to discuss whether or not there is any identity between the insured and the persons who were in the hospital under the name of John Sullivan, because it is immaterial whether or not the insured misstated the fact of his health in his application of insurance, unless there is a specific finding by the Trial Court that such statement was relied upon by the Insurance Company in issuing its policy, which amounted to a fraud practiced upon it. The appellant (the defendant below), appeals from the judgment of the Supreme Court.

In view of the fact that the appellant did not set out in its brief the grounds of appeal intended to be urged here, in accordance with the rules of this Court, the appellee will consider the questions in the order discussed in the opinion of the Supreme Court and will respectfully urge that the judgment of the Supreme Court in reversing the judgment of the District Court should be affirmed because:

(1) The finding that the "statement in the application for insurance that the plaintiff had never suffered from consumption, was a wilful untruth," does not vitiate the policy and prevent recovery thereunder, in that said application is not a part of the contract.

(2) The prior policy of insurance did not work a forfeiture of the right of the insured to recover.

(3) Prior to the death of the insured, there was no assignment of the policy in suit.

(4) The records of the City Hospital and of the Tuberculosis Hospital were erroneously admitted in evidence.

POINT I

The finding that the "statement in the application for insurance that the plaintiff had never suffered from consumption was a wilful untruth," does not vitiate the policy and prevent recovery thereunder, in that said application is not a part of the contract.

The specific ground upon which the Trial Court awarded the judgment for the defendant was that the insured in his application for insurance in answer to the question whether or not he has ever suffered from tuberculosis answered no, and because of the untruth of this statement, held that recovery cannot be had under the policy of insurance.

The Supreme Court in its opinion holds:

> "That this false statement in the application, if it was false, did not vitiate the policy in the absence of proof that the company was induced to write the policy through fraud. The policy does not refer to the application in any way, and by its express 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 did 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 clause voiding the policy unless the assured is in sound health at the time it was written, is not relied on and is not alluded to in the decision" (Case, p. 34, l. 40; p. 35, ll. 1-10).

This ruling of the Supreme Court is strictly in accordance with the law of this State as we shall now point out. It is important in this connection to examine the policy of insurance (Case, pp. 17-21). There is no application attached, no questions or answers made part of the policy, no reference of any kind made to any application or other statements of the insured and in fact all of these matters are negatived by the express clause contained in the policy that *this policy contains the entire contract between the parties hereto* (Case, p. 21, l. 10). It is, therefore, manifest from the outset that the statement made in the application for insurance, said application not being a part of the policy, is merely a collateral representation, and not a warranty or a condition upon the breach of which the contract is avoided.

> American Polular Life Ins. Co. vs. Day, 39 N. J. L., 89.

This is even true though the application for insurance contains a clause that the insured declares the answers to be true and shall form the basis of a contract of insurance. The very question was decided by the Court of Errors and Appeals in the case of *American Popular Life Ins. Co. vs. Day, supra*:

> "Though the proposal and application contain 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."

See also:

> Vivar vs. Knights of Phythias, 52 N. J. L., 455.

The mere untruth therefore of a statement of the insured will not preclude his recovery. But the Court finds that there was a wilful untruth and that vitiates the policy; but that is not sound law. The law is that where untrue collateral representations are made, there can be no recovery upon the policy of insurance *based upon the representations* unless the insured knew that he was stating an untruth and induced the company to *rely upon his representation.* In other words, the insured must have perpetrated a fraud upon the Insurance Company and he is prevented to recover upon the policy of insurance upon the principle of estoppel *in pais.* The Trial Court, however, did not find nor did the facts warrant the finding of the elements of fraud. It is elementary that there must not only be a false representation and known to be false by the person making it in order to constitute fraud but there must be actual reliance upon that representation by the person to whom it is made. There is no evidence in this case from the facts as found by the Trial Court that the defendant company at any time relied upon the representations in the issuance of the policy in question.

In the case of *Vivar vs. Knights of Phythias,* 52 N. J. L., 456, on page 467, the Court held

> "that where the defense is that the representation collateral to the contract was false and fraudulently made, the gist of the

> defense is the fraud of the plaintiff, *by which the insurer was misled* and induced to make the contract of insurance."

This case goes even further than other cases and holds that even if a statement is made part of the policy its known falsity will not vitiate the policy unless the statement was material to the contract and was deemed so by the insurer.

In all of the cases counsel examined upon the question, the Court held that it is a reliance upon the statements and the representations made in the application which will void the policy if such representations were made falsely and wilfully.

So in *McVey vs. Order of United Workmen,* 53 N. J. L., 17, at page 20, the Court held:

> "They are therefore mere representations, not warranted to be true, not part of the agreement; but being intentionally false, with respect to material matters, *and having misled the society into the making of this obligation,* such obligation is void by force of ordinary legal principles."

Forfeitures are not favored in the law and if by any intendment a ground can be found to defeat them, the Court will apply it.

> Hampton vs. Hartford Insurance Co.,
> 36 Vroom., 265.

In the Supreme Court of the United States, in *Monlor vs. American Life Insurance Co.,* 111 U. S., 355, the Court held:

> "The question asked was, 'Have you ever been affected with any of the following diseases: insanity, gout, rheumatism, palsy, scrofula, convulsions, dropsy, small-pox,

> yellow fever, fistula, rupture, asthma, spitting of blood, consumption and abscesses of the lungs, throat, heart and urinary organs?' The answer was, 'no.' The Court, through Mr. Justice Harlan, says: 'If those who organize and control life insurance companies wish to exact from the applicant as a condition precedent to a valid contract, a guarantee against the existence of diseases, of the presence of which in his system he has and can have no knowledge, and which even skillful physicians are often unable, after the most careful examination, to detect, the terms of the contract to that effect must be so clear as to exclude any other conclusion.''

See:

> Henn vs. Metropolitan Life Ins. Co., 67 N. J. L., 310.

The Court will note that the only evidence from which the Trial Court found that the insured made a wilful misrepresentation was from the "previous history of the case" (Finding #5, Case, p. 16), as based upon the records. From these records, it is impossible to conceive how there could be found as a fact that the misrepresentation was wilful. The most one could find was that the representation was untrue; there seems to us that much more evidence or at least some other evidence of a positive nature must be offered to prove that the insured knowingly made this false statement. As a matter of fact, it is common knowledge that the physicians do not generally tell their patients when they are suffering from a serious disease and unless there was some evidence to show that the insured knew at any time

that he was suffering from tuberculosis, there cannot be any finding that there was any wilful or fraudulent concealment or misrepresentation.

So that in this case, the representation is not a warranty or condition because the application is not made a part of the policy, and if for the sake of argument it may be construed as a wilful misrepresentation, yet it does not vitiate the policy because there is no evidence from the findings of the Trial Court that the Insurance Company ever relied upon any of the statements made by the insured, or deemed it a material representation. Nor was it misled in any way by this representation. As a matter of fact the Court will note that in addition to the application signed by the insured, there was an inspector's report and examiner's report in which it is stated that the applicant appears to be in good health and the agent certified that he had personally seen and questioned the applicant and recommended the company to accept the risk (Case, p. 27, ll. 29-40).

It is therefore clear that the Supreme Court was correct in holding that the falsity, if indeed it was false, of the representation in the application, which is not part of the policy of insurance, does not vitiate the policy in the absence of proof that the Insurance Company relied upon the statement and that such reliance amounted to a fraud practiced upon it. It appears that the appellant in his brief does not question this principle here, but argues that there is evidence that the company relied upon the statement in the application in the issuance of its policy; but it is useless to argue from facts which do not appear in the case and no matter how closely the Trial Court's statement of the case is scrutinized, there cannot be

found any statement that there was any evidence that the insurance company relied upon any representation made by the insured.

POINT II

The prior policy of insurance did not work a forfeiture of the right of the insured to recover.

The Court found as a fact that the premiums were accepted by the Company upon the policy of insurance in question as were also the premiums under the previous policy of insurance without any objection of the defendant and the Insurance Company did not notify the insured that the policy in suit was not acceptable to it (Finding #1, case p. 16).

This finding disposes of the question as to whether the previous policy of insurance works a forfeiture of the policy *sub judice* for the law is well settled in this State that

> "When an insurance company permits the insured to make weekly payments called for by the policy without notice that it exercised the option to declare the policy void because of a previous policy of insurance and creates the impression that such payments are premiums upon a valid policy, the act of the insurer in accepting such premiums amounts to a continued representation to this policy holder that the impression under which payments were made is a correct one."
>
> Melick vs. Metropolitan Insurance Co., 84 N. J. L., 437.
>
> Affrmed 85 N. J. Law., 744.

Counsel for the appellant endeavors to draw a distinction between the facts in the *Melick* case and the facts in the case *sub judice,* but although the facts may be slightly different, the principle of the case is directly applicable to the facts of the present case. The determining factor is the continued acceptance of weekly premiums by the company such as in this case and as the Trial Court expressly found.

The Supreme Court is therefore correct in holding that

> "as to the prior policy, the case is substantially though not precisely similar to *Melick vs. Metropolitan Life Insurance Co.,* 84 N. J. L., 437, affirmed; 85 N. J. L., 727, in which the determining factor was the continued acceptance of weekly premiums by the company. Such was the case here, as the Court expressly found and in view of this we consider the *Melick* case controlling."

POINT III

Prior to the death of the insured, there was no assignment of the policy in suit.

The evidence from which the Court found that there was an assignment of this policy is contained in the affidavit (Exhibit P-2, Case p. 21). The term "assignment" is defined in 4 Cyc., 6 as follows:

> "The term assignment, as ordinarily used, signifies the transfer between living parties of all kinds of property, real, personal and mixed, whether in possession or

> action and whether made by delivery, endorsement, transfer in right or by parol and includes as well the instrument by which the transfer is made as the transfer itself.
>
> "An assignment being a contract, there must of course be two parties, one, the assignor, giving, and the other, the assignee, taking the assignment."

The language of the affidavit is as follows:

> "I, John Sullivan, * * * do hereby make it my act and wish that upon my death the said insurance be paid to Mrs. Nellie Bennett."

It is manifest that this affidavit which the Court construes to be an assignment is not an assignment. It amounts to an attempt at a testamentary disposition although the affidavit itself is not actually a will. It surely is not an assignment of the insurance policy by delivery of the policy to the assignee, Mrs. Nellie Bennett, to assume all rights and obligations under it. This case is brought by the administrator of the deceased who claims the fund as part of the estate and therefore no question can be raised as to assignment because the assignee, if in truth there be an assignee, is not suing upon this policy of insurance.

It is argued by the appellant that in the proof of death, Mrs. Bennett stated that she presented the book and policy, but it does not appear when she obtained possession of the same. In order to procure the payment of the policy, it was necessary to procure the policy, and present it to the company for that purpose. There is no evidence that it was delivered at the time that this affidavit was made.

The Supreme Court, therefore, correctly holds that

> "an affidavit of the insured expressing his desire as to what shall be done with the proceeds of the policy in case of his death, is not a personal transfer of the policy. Rather it is a quasi testamentary disposition of the proceeds and as such invalid because not executed as a will. See 25 Cyc., 895; *Bartlett vs. Goodrich,* 36 N. Y. Sup., 770. An order for the payment of proceeds in case of death is not a valid assignment without delivery of the policy. *Folk vs. Jones,* 49 N. J. Eq., 484, 497. There is nothing in the state of the case to indicate that Mrs. Bennett had possession of the policy. It is marked Exhibit P-1, and was presumably put in evidence by the plaintiff. The finding that 'an assignment had been made' seems to be a conclusion of law probably based on the production by the company of the affidavit given above. For the reasons given we conclude that legally there was no assignment."

The appellant further argues that the finding of the Trial Court that there was an assignment of the policy of insurance was the determination of a mixed question of law and fact, and therefore cannot be disturbed. But that contention is untenable because from the state of the case it appears that the only reference to the assignment was the affidavit hereinabove set forth (Case p. 13, ll. 23-37). The Trial Court states that there was presented an affidavit purporting to be signed by the decedent sworn to May 24th, 1915, assigning unto Mrs. Nellie Bennett, of No. 224 Coles

Street, Jersey City, the insurance to be paid under the policy in question. The Trial Court determined from the affidavit itself, that it was an assignment. It was not, therefore, a determination of a mixed question of law and fact but was the erroneous application of a rule of law to an undisputed state of facts.

POINT IV

The records of the City Hospital and of the Tuberculosis Hospital were erroneously admitted in evidence.

It seems unnecessary to discuss this point because there can be no question but that the Trial Court erred in holding that the mere wilful misstatement of an insured in an application of insurance which is not part of a policy, vitiates the policy. The Supreme Court reversed that ruling and the determination of the Supreme Court is unquestionably sound. If that is true, the question as to the admissibility of the records from which the Trial Court found that the statement in the application was wilfully false, becomes entirely immaterial, because even if legally admissible in evidence, which we deny, it supports a finding to which the Trial Court erroneously applied an incorrect rule of law.

But in view of the fact that the appellant treated the matter in his brief, we advert to the question here. As to the records of the City Hospital there was no evidence that they were made by or under the direction of any officer authorized either by express statute or by the nature of his duties to make it. It may have been made by some clerk without any authority to make the entry. The

only proof in this case was that Miss Hynes, the Chief Clerk of the hospital, had charge of the records. There was no proof under whose direction these records were made nor who furnished the data contained upon the card. Nor is there any evidence that the records were kept accurately.

And the Trial Court in its state of the case, finds that the witness stated that she did not remember John Sullivan, did not personally know him before he came to the hospital nor did she know him when he left (Case p. 15, ll. 20-23). Under those circumstances, the admission of the records of the City Hospital were clearly inadmissible in view of the well settled rule of evidence regarding the admission of records (17 Cyc., 306-7, and cases cited).

The Trial Court also found that the "County Director of the Tuberculosis Hospital" had no personal recollection of the case and relied upon the hospital record to prove the facts therein contained (Case p. 14, ll. 36-40). So that even though the records of this Tuberculosis Hospital were kept in accordance with a statute, there was no evidence that the records which were produced were the records contemplated by the statute or made in a proper manner.

It is therefore respectfully submitted that the judgment of the Supreme Court reversing the judgment of the District Court and awarding a new trial, should be affirmed with costs.

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