INDEX.

Hudson County Circuit Court

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MARIA PRAHM, *Plaintiff,* *vs.* PRUDENTIAL INSURANCE COMPANY OF AMERICA, a corporation of the State of New Jersey. *Defendant.*	Action at Law.

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Complaint.

Filed Dec. 7, 1920.

Plaintiff, Maria Prahm, residing at Secaucus, in the County of Hudson and State of New Jersey, says that:

1. At all the times herein stated defendant was and still is a corporation of the State of New Jersey.

2. On June 18th, 1920, in consideration of the payment to defendant by one Otto Prahm, deceased, late of Secaucus of a premium of $44.00 and of like sum to be paid to it by him annually for a period of twenty years, during his life, made its policy of insurance in writing, a copy of which is annexed hereto, and thereby insuring the life of the said Otto Prahm, in the sum of $1,000.00.

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3. Plaintiff herein is designated in said policy of insurance as the beneficiary of the said Otto Prahm, since deceased.

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4. On September 15th, 1920, said Otto Prahm died.

5. Said Prahm performed all the conditions of said contract of insurance on his part and till his death paid all premiums.

6. Said policy of insurance provided that liability would extend only to premium paid, if insured met death by suicide. No other exceptions of liability were reserved in said policy.

7. Said Otto Prahm died from natural causes and not by suicide.

8. Plaintiff made due proof of the death of said Otto Prahm in accordance with the provisions of the said policy and otherwise performed all conditions of said policy on her part.

9. The amount of said insurance has not been paid. Plaintiff demands as damages $1,000.00 with interest from September 15th, 1920.

LEWIS B. EASTMEAD,
Attorney for Plaintiff.

Notice to the within named defendant:

IN CASE THE WITHIN SUMMONS AND COMPLAINT ARE SERVED UPON YOU PERSONALLY then take notice that if you intend to make a defence to this action, you must file an Affidavit of Merits within ten days from the date of service hereof upon you, and must file your answer within twenty days from the date of such service, and in default of the filing of such affidavit and answer, judgment will be entered against you. Lawful service upon a corporation is deemed personal service for the purpose of this notice. (P. L., 1912, p. 394, Rule 56)

LEWIS B. EASTMEAD,
Plaintiff's Attorney.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA.

In consideration of the application for this policy, which is hereby made part of this contract, a copy of which application is attached hereto, and of the payment in the manner specified, of the premium herein stated, hereby endows and insures the person herein designated, as the Insured, for the amount named herein, payable as specified, subject to the provisions on the second and third pages hereof, which are hereby made part of this contract.

THE INSURED—OTTO PRAHM.

AMOUNT OF INSURANCE—ONE THOUSAND DOLLARS, payable at the Home Office of the Company, in Newark, New Jersey, twenty years after the date hereof on the eighteenth day of June, 1940, provided the insured be then living and this policy be then in force; or immediately upon receipt of due proof of the prior death of the Insured while this policy is in force.

PAYABLE to the Insured, if living twenty years after the date hereof, or, in case of the prior death of the Insured, to Maria Prahm, beneficiary, Mother of the Insured. If there be no beneficiary living at the death of the Insured the amount of insurance shall be payable to the executors, administrators, or assigns of the Insured, unless otherwise provided in the policy. The right to change the beneficiary has been reserved by the Insured.

Annual premium forty-four and 40/100 Dollars, payable on the delivery of this policy, the receipt whereof is hereby acknowledged, and a like amount payable thereafter, annually at the Home Office of the Company, or as provided under the

heading, General Provisions, on the second page hereof, in exchange for the Company's receipt on or before the eighteenth day of June, in every year during the continuance of this policy, until twenty full year's premiums shall have been paid, or until the prior death of the Insured.

10 IN WITNESS WHEREOF, the said Prudential Insurance Company of America, at its office in the City of Newark, New Jersey, has caused this policy to be signed by its Presidents and its Secretary, and to be duly attested this eighteenth day of June, one thousand Nine Hundred and twenty.

FORREST F. DRYDEN,
President.

20 (SEAL)

WILLARD I. HAMILTON,
Secretary.

Attest:

C. C. REDINGTON.

Age 20.

Twenty year endowment Policy, Annual Divi dends, Premiums payable for Twenty years. Total and permanent disability Provision. Waiver of Premiums. Payment of Insurance in Installments

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HUDSON COUNTY CIRCUIT COURT.

MARIA PRAHM, *Plaintiff,* *vs.* PRUDENTIAL INSURANCE COMPANY OF AMERICA, a corporation. *Defendant.*	Action at Law.

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Affidavit of Merits.

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

J. H. OLMSTED, being duly sworn on his oath deposes and says, that he is the Superintendent of the above named defendant, in the Jersey City District, and for the purpose of making this affidavit, agent of defendant, in the above stated cause, and that he believes that the defendant has a just and legal defense to said action on the merits of the case.

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J. H. OLMSTED.

Subscribed and sworn to before me this }
eighth day of December, 1920. }

PHILIP T. LYONS, JR.,
Master in Chancery,
of New Jersey.

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HUDSON COUNTY CIRCUIT COURT.

MARIA PRAHM,

Plaintiff,

vs.

PRUDENTIAL INSURANCE COMPANY OF AMERICA, a corporation.

10

Defendant.

Answer.

Filed Dec. 9, 1920.

Defendant, The Prudential Insurance Company of America, a corporation of the State of New Jersey, having its principal office at Newark, New Jersey, says that:

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FIRST DEFENSE:

1. It admits paragraph one.

2. It admits the allegation of paragraph two that on June 18th, 1920, it issued a policy of insurance on the life of Otto Prahm, but denies that the copy of policy annexed to said complaint, and referred to in paragraph two, is a complete copy of the contract of insurance.

3. It admits paragraphs three and four.

4. It denies the allegation of paragraph five, six and seven.

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5. It admits that proofs of death of said Otto Prahm were furnished the company, but denies the allegations of paragraph eight that all other provisions of said policy and all conditions were performed, as alleged in paragraph eight.

6. It admits the allegations of paragraph nine.

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SECOND DEFENSE:

1. To induce the defendant to issue said policy of insurance said Otto Prahm signed an application to the defendant for said policy of insurance on his life.

2. In said application said Prahm declared and represented to the defendant that he had never had consumption. 10

3. That the defendant, relying upon said declaration and representation of said Otto Prahm and believing the same to be true, issued said policy of insurance.

4. That the declaration and representation so made by said Otto Prahm that he never had consumption were false and fraudulent to the knowledge of said Prahm. 20

5. That said Prahm by and through said false and fraudulent representation, procured said policy from the said defendant, and said Policy is void and of no effect.

THIRD DEFENSE:

1. Said application for insurance so signed by said Otto Prahm, and which by the terms of said policy was made part of the contract of insurance, contained the following declaration:

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> "I hereby declare that all the statements and answers to the above questions are complete and true, and I agree that the foregoing, together with this declaration, as well as the statements and answers made or to be made to the Company's Medical Examiner, shall constitute the application and become a part of the contract of insurance hereby applied for, and it is further agreed that the policy herein applied for shall be accepted

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subject to the conditions and provisions t
in contained, and said policy shall not t
effect until the same shall be issued and
delivered by the said Company, and the first
premium paid thereon in full, while my
10 health, habits and occupation are the same
as described in this application."

2. In said application and Medical Examination, made part of said application and part of said contract of insurance, the said Otto Prahm was asked the question.

"Have you ever had consumption?" And replied thereto: "No."

20 3. The declarations and representations so made by the said Prahm that he had never had consumption were false and fraudulent, to the knowledge of said Prahm.

4. That said Prahm secured said policy from said defendant by and through said false and fraudulent representations, and said policy is void and of no effect.

FOURTH DEFENSE:

1. Defendant repeats paragraph one of the Third Defense.

30 2. In said application and Medical Examiner's Report said Prahm stated that he had lost ten (10) pounds weight within the year previous to May 20th, 1920, but the cause of said change was harder work.

. That the declaration and representation that the cause of said loss of weight of said Prahm was harder work, were false and fraudulent to the knowledge of said Prahm.

4. That the said cause of change was the
40 sickness of said Prahm, denied in said application.

5. That said Prahm procured said policy of insurance from said defendant by and through said false and fraudulent representation, and said policy is void and of no effect.

FIFTH DEFENSE:

1. Defendant repeats the allegations of paragraph one of the Third Defense. 10

2. In said application said Prahm declared and represented that he was employed by the Federal Ship Building Company.

3. That said declaration and representation so made by said Prahm that he was employed by the Federal Ship Building Company were false and fraudulent, to the knowledge of said Prahm.

4. That said Prahm procured said policy of insurance from said defendant by and through said false and fraudulent representations, and said policy is void and of no effect. 20

SIXTH DEFENSE:

1. In said application and Medical Examiner's Report said Prahm was asked the following question: "Give the names of all physicians who have attended you within the past three years, on what dates and for what complaints." Said Prahm answered as follows: "Dr. Brandenburg, 1917, Boil, Rt. Elbow, Catarrh, Throat and ear, for past two years." 30

2. In said application said Prahm declared and represented to said defendant that he had not been attended by any physician other than Dr. Brandenburg for the ailments above stated.

3. That defendant relying upon said declaration and representation, and believing the same to be true, issued said policy of insurance.

4. That said declaration and representation so made by said Prahm that he had not been at- 40

tended by any physician other than Dr. Brandenburg, for Boil, rt. elbow, Catarrh, Throat and ears for past two years, were false and fraudulent, to the knowledge of said Prahm.

5. That said Prahm procured said policy of insurance from said defendant by and through said false and fraudulent representations and said policy is void and of no effect.

SEVENTH DEFENSE:

1. Defendant repeats the allegations of paragraph one of the Third Defense.

2. That in and by the said declaration it was agreed by the parties to said contract of insurance that said policy should not take effect until the same should be issued and delivered by said Company, while the health, habits and occupation of said Prahm were the same as described in said application.

3. That the said health, habits and occupation of said Prahm at the time of the issuance and delivery of said policy were not the same as described in said application to the knowledge of said Prahm.

4. That said policy under the terms of said contract of insurance did not take effect and that the same is void and of no effect.

EIGHTH DEFENSE:

1. Defendant repeats the allegations of paragraph one of the Third Defense.

2. Said Prahm in said application represented and stated to said defendant that he had never had asthma, habitual cough, spitting of blood, consumption, dizziness, loss of consciousness, persistent neuralgia, rheumatism, discharge from ear, palpitation of heart.

3. That the declarations so made by said Prahm were false and fraudulent to the knowledge of said Prahm.

4. That said Prahm procured said policy of insurance from said defendant by and through said false and fraudulent representations, and said policy is void and of no effect. 10

NINTH DEFENSE:

1. Defendant repeats the allegations of paragraph one of Third Defense.

2. That in and by said application said Prahm represented and declared to said defendant that his present occupation was an electrician.

3. That defendant relying on said declaration and believing the same to be true, issued said policy of insurance. 20

4. That said declaration and representation so made by said Prahm that his occupation was electrician were false and fraudulent, to the knowledge of said Prahm.

5. That said Prahm procured said policy of insurance from said defendant by and through said false and fraudulent representation, and said policy is void and of no effect.

TENTH DEFENSE:

1. Defendant repeats the allegations of paragraph one of Third Defense. 30

2. In said application and declaration made to the Medical Examiner said Prahm declared and stated that he had never had any serious illness.

3. That the defendant relying on said declaration and believing the same to be true, issued said policy of insurance.

4. That said declaration and representation so made that he had never had any serious illness 40

were false and fraudulent, to the knowledge of said Prahm.

5. That said Prahm procured said policy of insurance from said defendant by and through said false and fraudulent representations, and said policy is void and of no effect.

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ELEVENTH DEFENSE:

1. Defendant repeats the allegations of paragraph one of Third Defense.

2. That in said application and declaration made to Medical Examiner said Prahm declared, in answer to the question "Are you now in good health?", that he was in good health.

3. That the defendant, relying on said declaration and representation and believing the same to be true, issued said policy of insurance.

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4. That said declaration and representation made by said Prahm that he, at the time of signing said application, and making said declaration to the Medical Examiner, was in good health, were false and fraudulent, to the knowledge of said Prahm.

5. That said Prahm procured said policy of insurance from said defendant by and through said false and fraudulent representations and said policy is void and of no effect.

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RANDOLPH PERKINS,
Attorney for Defendant.

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HUDSON COUNTY CIRCUIT COURT.

MARIA PRAHM, *Plaintiff,* *vs.* PRUDENTIAL INSURANCE COMPANY OF AMERICA, a corporation. *Defendant.*	Action at Law.

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Reply.

Filed Dec. 21, 1920.

Plaintiff, Maria Prahm, replying to the several defenses set forth in the answer of the defendant says:

REPLY TO FIRST DEFENSE:

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1. She admits that the copy of policy annexed to her complaint is not complete insofar as certain provisions on page 2 and 3 of said policy are concerned, they being however referred to in page 1 of said policy which is set out in full in the complaint.

REPLY TO SECOND DEFENSE:

1. Plaintiff admits paragraphs 1 and 2 of the second defense.

2. As to the allegation of paragraph 3 of the Second Defense, plaintiff has no knowledge or information sufficient to form a belief.

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3. Plaintiff denies paragraphs 4 and 5 of the Second Defense.

REPLY TO THIRD DEFENSE:

1. Plaintiff denies that the application for insurance signed by said Otto Prahm contained

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the declaration set forth in paragraph 1 of the Third Defense, insofar as its phraseology is concerned. Plaintiff says that the said declaration of the said Otto Prahm reads as follows:

"I hereby declare that all the statements and answers to the above questions are complete and true, and I agree that the foregoing, together with this declaration, as well as the statements and answers made or to be made to the Company's Medical Examiner, shall constitute the application and become a part of the contract of insurance hereby applied for, and it is further agreed that the policy herein applied for shall be accepted subject to the PRIVILEGES and provisions therein contained, and said policy shall not take effect until the same shall be issued and delivered by the said company, and the first premium paid thereon in full, while my health, habits and occupation are the same as described in this application."

2. Plaintiff admits paragraph 2 of the Third Defense.

3. Plaintiff denies paragraph 3 of the Third Defense.

4. Plaintiff denies paragraph 4 of the Third Defense.

REPLY TO FOURTH DEFENSE:

1. Plaintiff repeats the allegations of paragraph 1 of the Reply to the Third Defense.

2. Plaintiff admits paragraph 2 of the Fourth Defense.

3. Plaintiff denies paragraphs 3, 4 and 5 of the Fourth Defense.

REPLY TO FIFTH DEFENSE:

1. Plaintiff repeats the allegations of para-

graph 1 of the Reply to the Third Defense.

2. Plaintiff admits paragraph 2 of the Fifth Defense.

3. Plaintiff denies paragraphs 3 and 4 of the Fifth Defense.

REPLY TO SIXTH DEFENSE: 10

1. Plaintiff admits paragraphs 1 and 2 of the Sixth Defense.

2. As to the allegations in paragraph 3 of the Sixth Defense plaintiff has not sufficient information or knowledge to form a belief.

3. Plaintiff denies paragraphs 4 and 5 of the Sixth Defense.

REPLY TO SEVENTH DEFENSE: 20

1. Plaintiff repeats the allegations of Paragraph 1 of the reply to the Third Defense.

2. Plaintiff admits Paragraph 2 of the Seventh Defense.

3. Plaintiff denies Paragraphs 3 and 4 of the Seventh Defense.

REPLY TO EIGHTH DEFENSE:

1. Plaintiff repeats the allegations of Paragraph 1 of the reply to the Third Defense.

2. Plaintiff admits Paragraph 2 of the Eighth Defense. 30

3. Plaintiff denies Paragraphs 3 and 4 of the Eighth Defense.

REPLY TO NINTH DEFENSE:

1. Plaintiff repeats the allegations of Paragraph 1 of the reply to the Third Defense.

2. Plaintiff admits Paragraph 2 of the Ninth Defense.

3. As to the allegations of Paragraph 3 of the Ninth Defense plaintiff has not sufficient knowledge or information to form a belief. 40

Reply.

4. Plaintiff denies Paragraphs 4 and 5 of the Ninth Defense.

REPLY TO TENTH DEFENSE:

1. Plaintiff repeats the allegations of Paragraph 1 of the reply to the Third Defense.

10 2. Plaintiff admits Paragraph 2 of the Tenth Defense.

3. As to the allegations in Paragraph 3 of the Tenth Defense, plaintiff has not sufficient information or knowledge to form a belief.

4. Plaintiff denies Paragraphs 4 and 5 of the Tenth Defense.

REPLY TO ELEVENTH DEFENSE:

1. Plaintiff repeats the allegations of Para-
20 graph 1 of the Reply to the Third Defense.

2. Plaintiff admits Paragraph 2 of the Eleventh Defense.

3. As to the allegations in Paragraph 3 of the Eleventh Defense, Plaintiff has no knowledge or information sufficient to form a belief.

4. Plaintiff denies Paragraphs 4 and 5 of the Eleventh Defense.

LEWIS B. EASTMEAD,
Attorney for Plaintiff.

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HUDSON COUNTY CIRCUIT COURT.

MARIA PRAHM, *Plaintiff,* *vs.* PRUDENTIAL INSURANCE COMPANY OF AMERICA, a corporation. *Defendant.*	Action at Law.

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Notice of Appeal.

TO RANDOLPH PERKINS, ESQ.,
Attorney of Defendant.

TAKE NOTICE that the plaintiff appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause on the following grounds:

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1. The answer of the defendant disclosed no defense, because Otto Prahm was an infant and the defendant had actual knowledge of his infancy and could not therefore disaffirm the policy sued upon, said privilege being only available to the infant.

2. A verdict for the plaintiff should have been directed, because Otto Prahm was an infant and the defendant had actual knowledge of his infancy and could not therefore disaffirm the policy sued upon, said privilege being only available to the infant.

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3. The question of fraud in connection with statements in an application for life insurance is for the jury to determine.

4. The direction of a verdict for the defendant was erroneous, because where the statements of

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the insured by the terms of the policy are to be deemed representations and not warranties, the question of fraud in connection therewith is a jury question.

5. Whether certain answers to questions in an application for life insurance are fraudulent, is for the jury and it is error for the Court to take the case from the jury.

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LEWIS B. EASTMEAD,
Attorney for Plaintiff.

HUDSON COUNTY CIRCUIT COURT.

MARIA PRAHM, *Plaintiff,* *vs.* PRUDENTIAL INSURANCE COMPANY OF AMERICA, a corporation, *Defendant.*	Action at Law.

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Rule for Judgment.

This action was tried before Judge Luther A. Campbell with a jury at the Hudson Circuit, on March 22-23, 1921.

This cause having been heard and evidence submitted by direction of the Court they returned their verdict as follows:

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They say they find for the defendant and against the plaintiff.

Whereupon it is adjudged that the defendant recover of the plaintiff its costs which are taxed at Fifty Dollars and forty-three cents.

Judgment entered March 23rd, 1921.

LUTHER A. CAMPBELL,
Judge.

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HUDSON COUNTY CIRCUIT COURT.

MARIA PRAHM,

Plaintiff,

vs.

PRUDENTIAL INSURANCE COMPANY OF AMERICA, a corporation.

Defendant.

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BEFORE:

HON. LUTHER A. CAMPBELL, Judge and a Jury.

APPEARANCES:

LEWIS B. EASTMEAD, ESQ., for Plaintiff.
RANDOLPH PERKINS, ESQ., for Defendant.

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Tried March 22d, 1921.

MR. EASTMEAD: If the Court please, I respectfully move to strike out the defendant's answer, on the ground that the plaintiff was an infant and that the defendant company had actual notice of the fact of his infancy, and that in a contract with an infant the only party who can disaffirm the contract is the infant, and the party contracting with an infant cannot disaffirm. Contracts with an infant are only voidable at the option of the infant party.

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THE COURT: Motion denied.

MR. EASTMEAD: Exception.

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MARIA PRAHM, having been first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. EASTMEAD:

Q. Mrs. Prahm, you are the plaintiff in this action? A. Yes, sir.

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Q. And were you last year the mother of a boy by the name of Otto Prahm? A. Yes, sir.

Q. And did your son—do you know whether your son had any insurance in the Prudential Insurance Company?

MR. PERKINS: In order to make this brief, I will admit the whole thing. I admit the execution and delivery of the policy now about to be offered in evidence and the payment of the premiums and the death of the insured as shown in the proofs of death, and I produce them and also admit them, if you wish.

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MR. EASTMEAD: Do you further admit that the policy has not been paid?

MR. PERKINS: Surely; and that the policy has not been paid.

MR. EASTMEAD: I think that is all, then. (Witness excused.)

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Policy offered in evidence and marked Exhibit P-1.

Proofs of death offered in evidence and marked Exhibits P-2, P-3, P-4.

THE COURT: You are not contesting the sufficiency of proofs?

MR. PERKINS: No, sir.

MR. EASTMEAD: We rest.

DEFENDANT'S CASE.

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ANTHONY G. SACCO, having been first duly sworn testified as follows:

DIRECT EXAMINATION BY MR. PERKINS:

Q. Did you know Otto Prahm? A. Yes, sir.

Q. You treated Otto Prahm, didn't you? A. Yes, sir. 10

Q. Will you give us the dates of the treatment? A. I first saw Mr. Prahm March 28th, 1920, at his home, then I saw him on February 8th and a few times after that up to June, 1920.

Q. And how many times did you attend him, say, from the first time in 1920, that you attended him up to, say, the 9th of May, 1920? A. Oh, about a half dozen times. 20

Q. He was suffering from some illness? A. Why, he only had nose bleed, with catarrh of the ear drums.

Q. And when you went to his house in Secaucus did you see his mother? A. Yes, sir.

Q. And when was the first date of your treatment? A. March 28th, 1920.

Q. How long duration was that nose bleed? A. I think it was about two days.

Q. Continuously? A. No, not continuously; it was an ooze.

Q. And how long after that did you treat him again? A. He came up to the office eight days afterwards. 30

Q. And what did you treat him for that time? A. Just to see that he was well.

Q. What did you treat him for? A. Just to see whether his nose had stopped bleeding.

Q. And when did he call again? A. I saw him about a month after that again.

Q. Where was that? A. At the office.

Q. Did you know he was coming that time? A. Yes, I told him he was suffering from catarrh 40

of the tubes leading into the ears and I thought I could probably help his catarrh of the drums.

Q. How long duration would you say that catarrh of the tubes leading to the ear was? A. Probably half a year; probably a year.

Q. You mean previous to the time you treated
10 him? A. Yes, sir.

Q. What did you do for the inflammation or catarrh of the tube leading into the ear? A. Just inflated the nose.

Q. Is that the eustachian tube? A. Yes, sir.

Q. That is a tube runs from the inner ear to the mouth? A. Yes, sir.

Q. And he was suffering from catarrh of that tube, called the eustachian tube, which runs from
20 the inner ear to the mouth? A. Yes, sir.

Q. On both sides? A. Yes, sir.

Q. How many times did you treat him for it altogether? A. About four times.

Q. And that would be in January, 1920? A. I saw him about four times after March 8th for his ears.

Q. Well, you saw him on March 8th for his ears? A. No, on March 8th I examined his nose to see whether the bleeding had completely stopped.

Q. Was that bleeding in any way connected with the difficulty he had with the eustachian
30 tube? A. It was due to catarrh of the nose.

Q. And you say the first time you attended him the bleeding continued about two days? A. About two days.

Q. Did you treat him at all for the catarrh of this tube the first time you attended him? A. No, sir.

Q. Now, can you give us the dates of the attendance previous to the ninth of May; would you say four times? A. I saw him about every
40 three weeks.

Q. Beginning when? A. Beginning March 8th.

Q. When did you last see him? A. I saw him —I do not exactly remember—May or June.

Q. Well, about what part of the month would it be, May or June? A. I cannot recollect.

Q. What was he suffering from then? A. Only the catarrh of the drums. 10

Q. Only the catarrh of the drums? A. Yes, sir.

Q. Was that chronic? A. Well, you call it chronic after six weeks duration.

Q. Would you say it had been in existence from six months to a year? A. Yes, sir.

Q. So that you would call this chronic? A. Yes, sir.

Q. He never got well of that, did he? A. I left him quite improved. 20

Q. I said, he never got well, did he? A. No, sir.

MR. EASTMEAD: I object to that; I do not see how he knows if he did not attend him.

THE COURT: I presume the question covers the period in which he treated him, whether he recovered from that particular illness or not.

MR. EASTMEAD: I will withdraw the objection.

MR. PERKINS: That is all. 30

CROSS EXAMINATION BY MR. EASTMEAD:

Q .Dr. Sacco, when you were first called into this case you were called into consultation by Dr. Brandenburg, were you not? A. Yes, sir.

Q. You were not consulted by Mr. Prahm direct, were you? A. No, sir.

Q. And therefore, when Mr. Prahm says that—

MR. PERKINS: We will object to the argumentative form of the question. 40

MR. EASTMEAD: I will withdraw it.

Q. You were then hired through his attending physician, Dr. Brandenburg?

MR. PERKINS: I object. In the first place I don't think it makes a particle of difference who hired him or how he was hired. The question is whether he was treated by a physician.

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MR. EASTMEAD: There is a difference between treatment and attendance.

THE COURT: How is that of any materiality?

MR. EASTMEAD: Of course, the defense sets up in their application that his name is not mentioned; this particular doctor's name is not mentioned.

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MR. PERKINS: We say that he falsely and fraudulently represented that he was not attended by any physician except Dr. Brandenburg and that he was attended by Dr. Sacco.

MR. EASTMEAD: We admit he treated him, but I am simply trying to show how he was brought in; that he was not brought in by the deceased.

THE COURT: That you have shown.

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Q. What was the last time you examined Mr. Prahm, doctor? A. I have forgotten whether it was the month of May or June.

Q. And you were only up to his home on one occasion? A. Yes, sir.

Q. And you treated him for some sort of catarrh? A. Why, he was suffering from bleeding from the nose.

Q. And you say that was a catarrhal affection? A. Yes, sir.

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MR. EASTMEAD: That is all.

Witness excused.

ALBERT STROBEL, having been first duly sworn, testified as follows:

(After the swearing of this witness and before the previous witness resumed his seat):

MR. PERKINS: Do you admit the doctor's qualifications? 10

MR. EASTMEAD: Yes.

DIRECT EXAMINATION BY MR. PERKINS:

Q. You are a duly licensed chiropractor? A. Yes.

Q. How long have you been practicing here? A. Last location since I am back from the army, a year and a half. 20

Q. Where do you practice? A. 17 Irving Street.

Q. Large practice up there? A. I consider it fairly large.

Q. Did you know Otto Prahm? A. I did.

Q. When did you first meet him? A. April 17th.

Q. What year? When did you first meet the man? A. Professionally, April 17th, 1920.

MR. EASTMEAD: Did I understand the witness to say "professionally" that time? 30

WITNESS: Yes.

MR. EASTMEAD: I question the answer at this time.

THE COURT: Will you make clear to me what you mean as the distinction between "attending" and otherwise.

MR. EASTMEAD: This is a different situation from the last witness.

THE COURT: I don't want to pass on your

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objection unless I know clearly what you mean. Do I understand you to claim that there is a legal difference and distinction as between attending—a physician attending and a physician treating?

10 MR. EASTMEAD: That is not the situation with regard to this witness. The situation with regard to this particular witness is, the witness on the stand now is a chiropractor. He is not a physician. Now, the courts have laid down in this State that when there is any ambiguity in the construction of a life insurance policy, it is to be placed strictly against the company; and when they ask for all physicians that does not include chiro-

20 practors. That means medical physicians, as I understand it, and therefore when the Congressman seeks to bring in a chiropractor in connection with that statement in the application for the policy, I interpose this objection for the purpose of having your Honor rule on it.

THE COURT: What do you say about it, Mr. Perkins?

MR. PERKINS: As I have not come to that point yet he is a little fore-handed with it.

30 THE COURT: Go ahead, ask the next question.

Q. Where did you see Prahm? A. He came to my office.

Q. How many times did he come there? A. I have had him for several months under my care.

Q. Beginning when? A. April 17th, 1920.

Q. Ending when? A. End of July.

Q. Was he well or sick when he came to your office?

40 MR. EASTMEAD: I object now.

THE COURT: Why?

MR. EASTMEAD: Because I understand that what the Congressman is trying to show now is that Otto Prahm was attended by other physicians than Doctor Bradenburg during the time specified.

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MR. PERKINS: Cannot he answer the question?

MR. EASTMEAD: I do not admit his qualifications.

THE COURT: As a layman, aren't there certain circumstances under which he would know whether he were sick or not?

MR. EASTMEAD: Yes, but that is not proper testimony.

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THE COURT: Are you raising the question of attending physician or consulting?

MR. PERKINS: I want to show by this gentleman that Mr. Prahm was not well as he represented he was, and second, that he treated him.

MR. EASTMEAD: I submit that—

THE COURT: As a physician or not?

MR. PERKINS: As a chiropractor.

THE COURT: Is he a physician in the sense it is used in law?

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MR. PERKINS: That is a problem. He is recognized by the law of this State. He is authorized to treat people. Personally, I do not frequent them myself.

THE COURT: They are not given the same title as a doctor of medicine, are they? They don't get the M. D., do they?

MR. PERKINS: They are called "doctor." I have not asked any question that is objectionable.

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THE COURT: In other words, up to the

present you are simply asking him questions which would apply to any layman, is that the position?

MR. PERKINS: Yes. sir.

(Question repeated.)

THE COURT: What is your objection?

10 MR. EASTMEAD: It calls for a conclusion as a chiropractor or as a physician.

MR. PERKINS: Strike the question out.

Q. Did you have any conversation with Otto Prahm in which he stated to you anything about his physical condition?

MR. EASTMEAD: I object on the ground that Otto Prahm is deceased and any con-

20 versation—

THE COURT: Objection overruled.

MR. EASTMEAD: I will withdraw the objection.

Q. (Repeated by stenographer) Did you have any conversation with Otto Prahm in which he stated to you anything about his physical condition?

MR. EASTMEAD: I object unless a time is specified.

30 Q. Any time, beginning from the first visit?

MR. EASTMEAD: When was that?

THE COURT: April 17th, 1920. (Addressing witness.) The question is, did he have any conversation with you regarding his physical condition?

WITNESS: He did.

Q. State to the Court and to the jury, if you please, what he said. A. He complained to me

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about ear trouble and could not hear; also he gets dizzy and pains between the eyes; always sleepy—my records show.

MR. EASTMEAD: I object to what the records show.

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Q. Doctor, did he request you to treat him? A. He did—well, I would say, adjust him.

Q. Did he pay you to adjust him? A. He did, yes.

Q. And what did you do toward adjusting him? A. I tried to eliminate the catarrhal condition that existed in the head, with satisfactory results a few weeks later, where he said he could hear a clock tick a few feet away from him.

20

Q. How many times did he come to you for adjustment? A. Probably thirty or forty times.

Q. And what did you do in a physical way to adjust his body? A. I tried to the best of my ability.

Q. Tell us actually what you did. A. I tried to get—

Q. Not what you tried to do, but what you did. Manipulate him? A. I manipulated his spine.

Q. You manipulated his spine? A. Yes.

Q. Thirty or forty times? A. Yes.

Q. Starting when? A. April 17th.

30

Q. And ending when? A. July 30th, I guess.

Q. Did you have a conversation with Prahm in which you told him about his physical condition? A. Well, you mean after examination?

MR. EASTMEAD: I object, unless you specify the time.

MR. PERKINS: If the Court please, the objection is entirely improper. I asked him if he had a conversation. If he says "yes" I will fix a time.

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WITNESS: You mean the day he called at the office?

THE COURT: At any time.

WITNESS: Oh, yes.

10 Q. Can you fix any dates when you told him anything about his physical condition? A. Well, on April 30th, he came to me and I found he must have taken some very strong stimulant of some kind that caused nephritis.

Q. Did he have nephritis then? A. Not when he came to me, but after a few adjustments. If you will allow me, I will—

Q. After April 30th? A. Yes.

Q. How shortly? A. On April 30th I examined 20 him again and found he had inflammation of the right kidney.

Q. Did you tell him anything about his condition? A. I did. I accused him of—

Q. Did you tell him anything about his condition? A. I told him—

MR. EASTMEAD: That calls for a yes or no answer.

THE COURT: Did you tell him anything about his condition, yes or no?

30 WITNESS: Yes.

Q. What did you tell him about his condition? A. I told him he must have abused his physical condition one way or another.

Q. Did you tell him what was wrong with him physically? A. I believe I did; I am not sure.

Q. Then don't answer. Did you tell him he was suffering from nephritis? A. I did.

Q. That was the 30th of April, 1920? A. Yes, sir.

40 MR. PERKINS: That is all.

CROSS EXAMINATION BY MR. EASTMEAD:

Q. Now, you are not a physician, are you, Mr. Strobel? That is, a medical physician? A. No, sir.

Q. And have you the dates that you adjusted Mr. Prahm, as you say? A. Yes, sir. 10

Q. Just let me have those dates. A. The first time was April 17th and up to July, the end of July, at my office.

Q. How often? A. Approximately thirty times, I should say.

Q. Haven't you got a record of each visit? A. Yes, sir.

Q. Suppose you let us have the dates. A. It was every day from April 17th until the end of July, except Thursdays and Sundays. 20

Q. April 17th, every day until the end of July, except Thursdays and Sundays? A. Yes, sir, it would be more than thirty, I guess.

Q. How do you call that thirty times? A. I just mentioned it—if I had had time to count them—

Q. You have been guessing? A. Why, certainly.

Q. Have you been guessing about nephritis too? A. No, sir; I can still distinguish the condition, that is, recognize the condition. 30

Q. What is nephritis? A. Inflammation of the kidneys.

Q. Do you consider yourself competent to tell nephritis? A. Well, it looked like it to me.

Q. I didn't ask you that. Do you consider yourself competent to pass on it as a chiropractor? A. I think so.

Q. Isn't that rather a matter for a M. D.? A.

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Well, I have had to learn the same thing in the schools I went to.

MR. EASTMEAD: I think that is all.

Witness excused.

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10 LEO M. BRANDENBURG, having been first duly sworn, testified as follows:

MR. PERKINS: You admit the doctor's qualifications?

MR. EASTMEAD: We admit it.

Q. What is your profession? A. Physician.

Q. And where do you practice, professionally? A. In Secaucus.

20 Q. Did you know Otto Prahm? A. I did.

Q. Do you know when you first treated Otto Prahm? A. It was some time in April.

Q. 19— A. 1920. I don't remember the exact date; I have not had time to refer to it.

Q. Do you recall Dr. Sacco— A. Yes, sir.

Q. —being there? A. Yes, sir.

Q. How many times was he there at the same time you were? A. I believe at the house—I believe he was there once or twice. I called him in consultation the day after I was called in to

30 see the case.

Q. Do you know when you first attended Mr. Prahm? A. I don't recall the time. It was some time during the spring before I went away. I left the country for over three months. Before I went away.

Q. When did you last treat Prahm? A. Right before he died, in September.

Q. Well— A. It was in September, 1920.

Q. Did he ever get over the condition for which you first treated him? A. Yes.

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Q. You think he did. A. Yes, as far as I know. I am not a specialist in this line, but as far as I am concerned he complained of no condition of the original trouble for which Dr. Sacco treated him.

Q. What did you treat him for last? A. I treated him for acute endocarditis. 10

THE COURT: What is that, doctor?

WITNESS: Endocarditis.

THE COURT: So that the jury will understand.

WITNESS: Inflammation of the heart valves. Inflammation of the interior lining or membranes of the heart. 20

CROSS EXAMINATION BY MR. EASTMEAD:

Q. About the month of May, did you visit Mr. Prahm? A. No, sir.

Q. In April, I believe you said? A. The early part of April.

Q. And what did you consider his condition around that time? A. His condition, I thought, was fairly good.

Q. That was in April of last year? A. I was not called to treat him continuously, but his general condition at the time was good. His only trouble at the time was what Dr. Sacco treated him for, and he treated him in consultation under my direction. 30

MR. EASTMEAD: That is all.

(Witness excused.)

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EDWARD VAN ROMER, having been first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. PERKINS:

Q. Where do you live? A. I live in Carlstadt
10 now.

Q. Did you know Otto Prahm? A. I did.

Q. How long did you know him? A. Four years and a half, until he died.

Q. Did you live in the same house? A. I lived in the same house, but not that long.

Q. How long did you live in the same house with him? A. With him, about three years.

Q. Were you living in that house when he died?
20 A. I moved at the same time, the same day he died.

Q. What kind of a house was this you lived in? A. A two story house. We had the basement and the parlor floor and Mr. Prahm lived above us.

Q. Do you know whether or not Mr. Prahm was working during the spring of 1920? A. 1920, in the spring?

Q. Yes. A. He was not, to my knowledge.

Q. Where did he spend most of his time? A. Home, at that time.

Q. What part of home? A. Upstairs and down
30 in the yard. He used to go down there to take a sun bath in the corner of the yard on a board, with a pillow under his head.

Q. During the spring of 1920, and the early summer of 1920, how often did you see him take sun baths in the yard? A. When it was nice weather almost every morning when me and my wife went down about nine or ten o'clock to our place of business. Sometimes my wife went ahead of me and I wouldn't go until 11 or 12 o'clock.

40 Q. Did you know whether Prahm was well or sick?

MR. EASTMEAD: Objected to.

THE COURT: He can answer if he does or does not know. How he gets his knowledge is another question. (Addressing witness.) It is simply a question of whether you know or do not know that Mr. Prahm was sick. 10

WITNESS: He was sick, according—

THE COURT: Do you know, or don't you know?

WITNESS: Yes.

Q. Now, how do you know? A. Because he used to keep me and my wife awake with coughing upstairs.

Q. From what time to what time? A. Well, two o'clock, one o'clock, we used to go home; 12 o'clock, sometimes three o'clock in the morning. 20

Q. During what months did he keep you awake at night by his coughing? A. The latter part of February when Dr. Bradenburg was there and another gentleman, the doctor. Both Mr. and Mrs. Prahm had been sick—

Q. Just answer the question. What months is the question, February, 1920? A. February he had a very severe cold, as far as I know.

Q. How about March? A. The same thing.

Q. Did he keep you awake nights in March, 1920? A. Yes, sir. 30

Q. How about April, 1920, keep you awake then? A. Right along. Even worse those times. Later on in the spring he got worse. I cannot specify exactly the times.

CROSS EXAMINATION BY MR. EASTMEAD:

Q. You have a bitter personal grudge against the Prahm family, haven't you? A. I object to that question. 40

THE COURT: Just answer.

A. No, I have not.

THE COURT: Of course your characterization of it may be one reason why—

10 Q. How long did you live with Mr. Prahm? A. Four years and a half.

Q. And never had any trouble with him? A. No, sir.

Q. During the year 1920, you never had any trouble with him? A. He had trouble with me, yes.

Q. He had trouble with you? A. Yes, sir.

Q. Did you ever have any trouble with him? A. No, sir.

20 Q. Did you ever borrow any money off him?

MR. PERKINS: I object.

MR. EASTMEAD: If your honor please, I can show—

THE COURT: I suppose the question of bias might apply.

Q. Did you ever owe him any money? A. I will answer the question when I can state it specifically. This is the first time I have known the gentleman in all the days of my life. I have

30 never seen him.

THE COURT: You probably don't understand. You will be protected if the question put to you is not a proper one.

WITNESS: It is not right.

THE COURT: It is not for you to judge if it is right or not.

Q. (Repeated by stenographer) Did you ever owe him any money? A. I did.

40 Q. And you owed him some last year, didn't you? A. I did.

Q. Did you pay it back to him? A. No sir, he never asked me for it.

Q. But he sued you for it, didn't he? A. No, he didn't. You cannot prove it; you have no legal action.

Q. Weren't you sued in the Hoboken District Court; and weren't you directed to make payments of $20 a month to me? A. This is the first time I have seen you here. 10

Q. I didn't ask you whether you had seen me or not. A. And you sued me for non-payment of rent, and I was never asked for the rent until after you sued me.

Q. But I sued you for $500 on behalf of Mr. Prahm last year in September, didn't I? A. You were going to. 20

Q. I did. You were served with a process? A. Yes.

THE COURT: You are only to answer the question put to you and nothing more.

MR. PERKINS: I don't think the questions are proper.

WITNESS: They are not.

Q. (Repeated by stenographer) You were served with a process? A. Yes. 30

Q. There is a payment due from you to Mr. Prahm, isn't there? A. You can have it now.

THE COURT: Don't let's get into an argument about it. Is there a payment due from you to Mr. Prahm?

WITNESS: Yes; he can have it now.

Q. And you were threatened with dispossess proceedings by Mr. Prahm last year for failure to pay rent, were you? A. I was not. You sued me for non-payment of rent, or tried to, and I 40

was told, and so after I had your orders, your papers. Mrs. Prahm asked me the first time for the rent in four years and a half. It was the first time I was asked.

Q. Had you paid your rent before? A. I always paid it regularly, yes, sir.

10 Q. And you finally moved out of Mr. Prahm's house as a result of my action in that case? A. I did.

Q. Yet you have no spleen at all against the Prahm's? A. No, I have not.

THE COURT: As much as they have against you?

WITNESS: Of course, he is trying to get after

20 me.

RE-DIRECT EXAMINATION BY MR. PERKINS:

Q. Has any feeling you might have in your mind or in your heart concerning Mr. Prahm caused you to tell an untruth in this case? A. None whatsoever.

RE-CROSS EXAMINATION BY MR. EASTMEAD:

Q. You testified to a lot of coughing in April. I believe you heard Dr. Brandenburg say he was

30 in fairly good condition—

MR. PERKINS: I object; this is not re-direct.

THE COURT: Go ahead.

Q. You stated you heard coughing different nights in April? A. I did.

Q. And you heard Dr. Bradenburg say that Otto Prahm was in fairly good condition at the time, did you not? A. Maybe he was.

40 Q. Yes or no.

MR. PERKINS: I object—

A. Maybe he was.

MR. PERKINS: One minute, I object; it is wholly immaterial in this case and improper examination.

THE COURT: I don't know what he is going to say.

MR. PERKINS: I object to the question. Whether he heard anything in this Court room has nothing to do with this trial.

THE COURT: What is the purpose of your question?

MR. EASTMEAD: I want to test his veracity.

THE COURT: You must keep in mind that the jury presumptively has all of this testimony in its mind.

MR. EASTMEAD: That is all.

Witness excused.

ANNA DORA HIRSCHBACH, having been first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. PERKINS:

Q. Where do you live? A. Secaucus.

Q. Did you know Otto Prahm? A. Yes, sir.

Q. Have you any resentment or feeling about the Prahms in any way? A. Well, we never had anything.

Q. How long had you known Otto Prahm? A. Well, I tell you; I only know him from the time he lived in the house next door to us.

Q. Did he live there when he died? A. Yes, sir.

Q. And how long had you lived next door to him? A. Well, it was only four years, or three

years that they moved up—

Q. Did you see him during the spring of the year he died; 1920? A. Well, I could not tell you that for truth; I only seen him the hot summer months; he was sitting in the yard in the sun.

10

Q. Was that 1920? A. 1920.

MR. PERKINS: That is all.

MR. EASTMEAD: There will be no cross examination.

Witness excused.

(Court adjourned.)

March 23rd, 1920, 10 a. m.

20

MR. PERKINS: I would like to place on the record an admission made by way of stipulation. It is this: It is stipulated and agreed between the parties that the plaintiff, and the plaintiff admits, that the Insured, Otto Prahm, terminated his service with the Federal Ship Building Co. during the week February 15th, 1919, and was not thereafter in the employ of the Federal Ship Building Company. We rest.

30

PLAINTIFF'S MOTION TO DIRECT A VERDICT.

MR. EASTMEAD: I would like to move at this time for a direction on the same grounds as my original motion to strike out the answer at the inception of the case, and on the further ground that it is the special policy of the State to protect an infant, and that had the legislature intended to take away any of the rights of an infant that they would have done so by express legislation as they did in the act which authorizes an

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infant to make deposits with a trust company, in which it is especially provided that the infant shall be subject to the same disabilities as an adult. The statutes regarding contracts of insurance with an infant, cited by Mr. Perkins, counsel for the Prudential Insurance Company, does not contain any such provisions and does not state that in such contracts the infant shall be bound the same as an adult.

THE COURT: The statute relating to bank accounts does not limit the age of the minor at all, does it?

MR. EASTMEAD: I believe it says "any infant." On these grounds, I now ask for a direction of a verdict in favor of the plaintiff.

THE COURT: I will decline to direct a verdict. I think the section of the Insurance Act, which is 104 of the Compiled Statutes, page 2872, has for its purpose the placing of any minor or infant of the age of 15 or upward in the same position, to all intents and purposes, in dealing with an insurance company, as though he or she were an adult. That is the only conclusion I can take from that section.

MR. EASTMEAD: I pray an exception.

DEFENDANT'S MOTION TO DIRECT A VERDICT.

MR. PERKINS: I move for a direction of a verdict in favor of the defendant, on the ground that it has been proved by the defendant, and there is no evidence to the contrary that can go to the jury, that the contract was induced by the false and fraudulent misrepresentation of Otto Prahm. They consist, in general, of the following: False

and fraudulent representation, to the fact that he had not been attended by any other physician within three years than Dr. Brandenburg; false and fraudulent representation, that at the time he made the application he was in good health; the false and fraudulent representation, that at the time he made the application he was employed as an electrician by the Federal Ship Building Company. On the further ground that the contract of insurance is made up of the policy and the application and the medical examiner's report; that the policy is issued in consideration of the application for the policy which is hereby made part of the contract; copy of which is annexed. That this declaration by the applicant for insurance, Otto Prahm, was false to his knowledge, and fraudulent.

THE COURT: There will be a direction of a verdict in favor of the defendant.

MR. EASTMEAD: I pray an exception, on the ground that the question of fraud or misrepresentation in the application is a question for the jury, and it is error for the Court to direct a verdict.

Exhibit P-1.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA.

IN CONSIDERATION of the Application for this Policy, which is hereby made part of this contract, a copy of which Application is attached hereto, and of the payment, in the manner specified, of the premium herein stated, hereby endows and insures the person herein designated as the Insured, for the amount named herein, payable as specified, subject to the provisions on the second and third pages hereof, which are hereby made part of this contract.

THE INSURED—OTTO PRAHM.

AMOUNT OF INSURANCE—One Thousand Dollars, payable at the Home Office of the Company, in Newark, New Jersey, twenty years after the date hereof, on the eighteenth day of June, 1940, provided the Insured be then living and this Policy be then in force; or immediately upon receipt of due proof of the prior death of the Insured while this Policy is in force.

PAYABLE To the Insured, if living twenty years after the date hereof, or, in case of the prior death of the Insured, to MARIA PRAHM, Beneficiary, Mother of the Insured.

If there be no Beneficiary living at the death of the Insured the amount of insurance shall be payable to the executors, administrators or assigns of the Insured, unless otherwise provided in the Policy. The right to change the Beneficiary has been reserved by the Insured.

ANNUAL PREMIUM—Forty-four and 40/100 Dollars, payable on the delivery of this Policy,

the receipt of which premium is hereby acknowledged, and a like amount payable thereafter annually at the Home Office of the Company, or as provided under the heading "General Provisions" on the second page hereof, in exchange for the Company's receipt on or before the eighteenth day of June, in every year during the continuance of this Policy, until twenty full years' premiums shall have been paid, or until the prior death of the Insured.

10

IN WITNESS WHEREOF, the said THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, at its office in the City of Newark, New Jersey, has caused this Policy to be signed by its President and its Secretary, and to be duly attested, this eighteenth day of June, one thousand nine hundred and twenty.

20

FORREST F. DRYDEN,
President.

WILLARD I. HAMILTON,
Secretary.

ATTEST:
C. C. REDINGTON.

Age 20

Twenty-Year Endowment Policy—Annual Dividends. Premiums Payable for Twenty Years.

30

Total and Permanent Disability Provision: Waiver of Premiums, Payment of Insurance in Instalments.

GENERAL PROVISIONS.

PAYMENT OF PREMIUMS.—This Policy is based upon the payment of premiums annually in advence, but if premiums be made payable in quarterly or semi-annual instalments, any future instalments of the premium for the current policy

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

GRACE IN PAYMENT OF PREMIUMS.—In the payment of any premium under this Policy, except the first, a grace of thirty-one days without interest will be allowed, during which time the Policy will remain in force, but if the Policy shall become a claim within the grace period the unpaid premiums for the then current policy year shall be deducted from the amount of insurance payable.

CHANGE OF BENEFICIARY.—If the right to change the Beneficiary has been reserved and if the Insured shall have attained to majority according to the laws of the State in which the Insured resides, the Insured may at any time while this Policy is in force, by written notice to the Company at its Home Office, change the Beneficiary or Beneficiaries under this Policy, such change to be subject to the rights of any previous assignee and to become effective only when a provision to that effect is endorsed on or attached to the Policy by the Company, whereupon all rights of the former Beneficiary or Beneficiaries shall cease.

ASSIGNMENTS.—Any assignment of this Policy must be in writing, and the Company shall not be deemed to have knowledge of such assignment unless the original or a duplicate thereof is filed at

the Home Office of the Company. The Company will not assume any responsibility for the validity of an assignment.

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

SUICIDE.—If within one year from the date hereof the Insured shall die by suicide—whether sane or insane—the liabilities of the Company shall not exceed the amount of the premiums paid on this Policy.

INCONTESTABILITY.—This Policy shall be incontestable after one year from its date, except for non-payment of premium.

INDEBTEDNESS.—Any indebtedness to the Company on account of this Policy will be deducted in any payment or payments or in any settlement under the Policy.

REINSTATEMENT.—If this Policy be lapsed for non-payment of premium it will be reinstated any time after the date of lapse, provided the Endowment period has not expired, upon written application and payment of arrears of premiums with interest at the rate of five per cent. per annum, together with the reinstatement of all indebtedness, provided such indebtedness be not greater than the loan value of this Policy at the time of application for such reinstatement, and provided evidence of the insurability of the Insured satisfactory to the Company be furnished.

MODIFICATIONS, ETC.—No condition, provision or privilege of this Policy can be waived or modified in any case except by an endorsement hereon signed by the President, one of the Vice Presidents, the Secretary, one of the Assistant Secretaries, the

Actuary, the Associate Actuary or one of the Assistant Actuaries. No modification or change shall be made in this Policy except such as is in accordance with the laws of the State 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.

BASIS OF RESERVE AND COMPUTATIONS.—The reserve upon this Policy for which funds are to be held, exclusive of any reserve on account of disability insurance, shall be computed upon the American Experience Table of Mortality with three and one-half per cent. interest per annum by the net level premium method. All computations in accordance with the terms of this Policy involving net premiums or reserve values based on a mortality table and interest shall be made upon the basis here stated.

ENTIRE CONTRACT CONTAINED IN THIS POLICY.

This Policy together with the Application, a copy of which is attached hereto, contains and constitutes the entire contract between the parties hereto, and all statements made by the Insured shall in the absence of fraud be deemed representations and not warranties, and no statement shall avoid the Policy or be used as a defence to a claim thereunder unless it be contained in the Application for the Policy and unless a copy of such Application be endorsed upon or attached to the Policy when issued.

"Here follow dividend provisions."

"Here follow provisions as to permanent disability—waiver of premiums—payment of insurance."

"Here follow Loan Provisions."

APPLICATION FOR INSURANCE IN **The Prudential Insurance Company of America,** Home Office, Newark, New Jersey

Incorporated under the laws of the State of New Jersey

FORREST F. DRYDEN, President

NUMBER **3314765**

1 What is your full name? (Please print.)
OTTO PRAHM

2 What is your present occupation or occupations? Explain exact duties.
ELECTRICIAN, LESS THAN 220 VOLTS

3 Do you intend changing your present occupation? (If yes, state particulars.)
No

4 Are you engaged in or have you any intention of engaging directly or indirectly in aviation or submarine work?
No

5 Do you intend living or traveling in Alaska or in any other possessions of the United States, or in any country except the United States or Canada? If so, give particulars.
No

6 Do you carry Government insurance?
No

7 Are you now insured in this or any other company or association? Give full particulars. If in this Company, give policy numbers also. No

Name of Company	Amount	Kind of Policy	Policy Number if in this Company	Year of Issue

8 Where were you born? (State or Country)
NEW JERSEY

9 When were you born? Month. Day. Year.
NOV. 2 1900

10 Approximate birthday?
20

11 Are you married?
No

12 What kind of policy is desired? (Use such terms as Whole Life, 20-Payment Life, or 20-Year Endowment, etc.)
20 YEAR ENDOWMENT

13 To whom is this insurance to be payable at your death? (Full name.) (Please Print.)
MARIA PRAHM

Age of Beneficiary: 56

Relationship to Applicant: MOTHER

Present residence: As above

25 Do you wish the privilege of changing the beneficiary? Answer yes or no. Yes

14 (PLEASE PRINT.)
No. 175 Street HUBER
City or Town SECAUCUS
County HUDSON State N. J.

15 (PLEASE PRINT.)
No. Street
City or Town KEARNEY State N. J.
Name of firm or employer FEDERAL SHIP BLDG. CO.
Nature of business SHIP BUILDING

16 To what address are premium notices or other communications to be sent? (If this question is not answered they will be sent to the residence address.) (Please print.)
—

17 Where have you lived during past three years? (State address in full.)
As above

18 Has any company or association ever declined to grant insurance on your life? If answer is yes, give name of company and date.
No

19 Has any company or association ever modified your application either in amount, kind or premium? If so, give name of company, date, and nature of modification.
No

20 Are you negotiating, or have you applied for other insurance on your life at this time in this or any other company or association? If so, give name of company or association and amount.
No

21 Note.—State here any request in connection with the insurance proposed.
—

22 Amount of insurance? $1000.

23 Is premium to be paid annually, semi-annually or quarterly? Ann.

24 What amount have you paid in advance on account? $5.00

I HEREBY DECLARE that all the statements and answers to the above questions are complete and true, and I agree that the foregoing, together with this declaration, as well as the statements and answers made or to be made to the Company's Medical Examiner, shall constitute the application and become a part of the contract of insurance hereby applied for, and it is further agreed that the policy herein applied for shall be accepted subject to the privileges and provisions therein contained, and said policy shall not take effect until the same shall be issued and delivered by the said Company, and the first premium paid thereon in full, while my health, habits and occupation are the same as described in this application.

Witness to Applicant's signature: Albert Dabbel of Asst. Supt.

Full signature of the person whose life is to be insured: x Otto Prahm

Dated at Secaucus, N. J. this 7th day of May, 1920

GRD 18—REV 2-19 GRD-5-19

GRD 72—REV 4-19

DECLARATIONS MADE TO THE MEDICAL EXAMINER

In continuation of and forming a part of my application to The Prudential Insurance Company of America

1a. What is your present occupation, kind of business, position held and length of time so engaged?
Electrician (House wiring). 1 1/2 yrs.

b. Do you intend changing your present occupation? (If yes, state particulars.)
No.

c. What other occupations have you followed, and how long in each?
Laborer. 4 yrs.

d. Are you now, have you ever been, or have you any intention of engaging in the manufacture, sale or handling of malt or spirituous liquors? (If yes, give full particulars.)
No.

2a. When were you born? Day 2 Month Nov. Year 1900

b. Age nearest birthday? 20.

3a. What quantity do you use of (daily average) / If not daily, what average?
Malt Liquors? ..... None
Wines? ..... None
Spirits? ..... None

b. Have you ever used malt or spirituous liquors to excess? (If yes, give full particulars.)
No

c. Have you ever used Opium? No Chloral? No Cocaine? No Or any narcotic drug? No
(If yes, give full particulars.)

d. Have you ever taken any of the so-called cures for drinking or for the drug habit? If yes, when?
No.

4a. Has any Company or Association ever declined to grant insurance upon your life? No.
Name of Company or Association, and date.

b. Granted—but your application to a less sum or a different kind, or at a higher premium than that for which you applied?
No
Name of Company or Association, and date.

5a. How long have you lived in the city or town in which you now reside?
20 yrs.

b. Have you ever sought or been advised to seek a change of climate for your health? (If yes, state when and for what reason.)
No.

6. Do you live with, or have you, within one year, lived with or been closely associated with a consumptive? (If yes, give full particulars.)
No.

7a. Have you ever
1. Received a serious injury? No
2. Undergone operation? No
3. Had any serious illness? No

b. Give date, full history, nature of illness, time disabled and results.

8. ARE YOU NOW IN GOOD HEALTH? Yes

9. Give names of all physicians who have attended you within the past three years; on what dates and for what complaints.
Dr. Brambelow. 1917 bad eye. Dr. Elson. Tonsils & throat. 1919 yes

10. Have you ever had—(answer Yes or No.)

Asthma?	No	Acute rheumatism?	No	Fistula?	No
Habitual cough?	No	Chronic rheumatism?	No	Gall stones or colic?	No
Pleurisy?	No	Gout?	No	Rupture?	No
Spitting of blood?	No	Discharge from ear?	No	Disease of bladder or prostate?	No
Consumption?	No	Habitual headache?	No	Disease of kidneys?	No
Diabetes?	No	Palpitation of heart?	No	Kidney colic or stones?	No
Epilepsy?	No	Shortness of breath?	No	Stricture?	No
Insanity?	No	Appendicitis?	No	Syphilis?	No
Loss of consciousness?	No	Chronic diarrhea?	No	Cancer?	No
Paralysis?	No	Disease of anus or rectum?	No	Tumor?	No
Persistent neuralgia?	No	Dyspepsia?	No	Ulcer on any part of body?	No

11. FAMILY RECORD

	If Living: Age	If Living: State of Health	If Dead: Age	Cause of Death	How Long Sick	Date of Death	Previous Health
Father,	64	Good					
Mother,	58	Good					
Brothers, (Number 6)	22	Good					
	24	Good					
	30	Good					
	32	Good					
	34	Good					
Sisters, (Number 0)							

QUESTIONS TO BE ANSWERED IF APPLICANT IS A WOMAN. (If never married, answer only questions 12a, 14a, b and c.)

12a. Who is dependent upon you for support? (State ages.)

b. Number of children had? ..... Age of oldest? ..... Youngest? .....

13a. Are you pregnant? If so, how far advanced?

b. Have you ever had a miscarriage?

c. Have you since had a labor of full term?

14a. Have you ever had a tumor or any disease of the breast?

b. Have you ever had uterine or ovarian disease?

c. Have you passed the climacteric? If yes, when?

15a. Husband's occupation?

b. Is he insured in this Company?

c. Is he in good health?

d. If dead, cause and date.

16. Give date, full history, nature of illness, time disabled and results.

17a. Have your eyesight and hearing been good? Yes

b. Glasses? Yes

c. How much? 10 dis.

d. Cause of change? Harder work.

e. Is change progressive? If not, how long has weight been stationary? Yes

Any additional statement of the applicant may be written here.

I HEREBY DECLARE that all the statements and answers to the above questions are complete and true, and I agree that they shall form a part of the contract of insurance applied for, and I expressly waive, on behalf of myself and of any person who shall have or claim any interest in any policy issued hereunder, all provisions of law forbidding any physician or other person who has attended or examined me, or who may hereafter attend or examine me, from disclosing any knowledge or information which he thereby possesses.

Dated this 9 day of May, 1920

x Otto Prahm x
Applicant's Signature.

PLEASE BE SURE THAT ALL QUESTIONS (ABOVE AND BELOW THIS LINE) ARE FULLY ANSWERED—DASHES OR DITTO MARKS ARE NOT ACCEPTABLE ANSWERS

"Here follow Non-Forfeiture provisions."

"Here follow table of Loan, and non-forfeiture values."

"Here follow provisions as to modes of settlement at maturity."

Exhibit P-2.

10

IDENTITY STATEMENT.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA
Home Office, Newark, N. J.
FORREST F. DRYDEN, President.

Sept. 27, 1920.

This statement must be made by a person of legal age, intimately acquainted with, but not related to, the deceased, who has seen the remains and is not interested in the insurance.

20

1. Name of deceased insured: Otto Prahm.

2. Date of death: Sept. 15th, 1920.

3. How long have you known insured? 3 years.

4. What had been insured's several occupations? Electrician.

5. What was the age of insured? (State source of information) 20.

6. Married or single? Single.

7. Where did insured die? 175 Huber St., Secaucus, N. J.

8. Have you seen the remains? Yes.

30

9. Do you know the deceased to have been the person whose life was insured in the policy of insurance upon which the claim is based? Yes.

10. Are you related to insured? No.

11. Are you interested, in any way, in the payment of insurance on the life of the deceased? No.

Signature CHARLES J. PRENGER,

40

Exhibit P-2.

Age—39. Occupation—Store keeper,
Post-office address, 199 Huber St.,
Secaucus.

UNDERTAKER'S STATEMENT.

1. Name of deceased insured: Otto Prahm.

10 2. When and where did you bury deceased? Date—Sept. 19, 1920. Place—In yard N. J. Crematory.

3. Were you personally acquainted with insured? Yes. 4. Did you personally identify the body? Yes.

5. What age or date of birth was inscribed on coffin plate? Nov. 2, 1899, age 20 years.

6. State source of information regarding age:
20 By family.

Signature CHARLES DARKE,
Post office address—670 Bergenline Ave.,
W. N. Y.

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

On this 17th day of Sept. 1920, personally appeared before me the above named CHARLES DARKE, who subscribed the foregoing statement before me and made oath that the foregoing an-
30 swers are each and all true.

OTTO A. GRIESBACH,
(SEAL) Notary Public of N. J.

AGENCY CERTIFICATE.

1. Name of deceased: OTTO PRAHM.

2. Did you see any record of insured's birth? No.

3. Were you personally acquainted with the insured? Yes.

40

4. Have you viewed the remains? Yes. 5. Did you identify the body as that of the insured? Yes.

6. Are you satisfied that the deceased is the person insured under this policy or policies described in claimant's statement? Yes.

7. Do you consider the claim just and at what age do you recommend payment? Yes. Age 20. 10

8. Is policy enclosed with proof of death? (If no, state who holds it) Yes.

9. A What was the amount of last premium collected? Policy No. 3314765—$44.40.

B On what date was premium due? June 18, 1920.

Exhibit P-3.

20

ATTENDING PHYSICIAN'S STATEMENT.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA
Home Office, Newark, N. J.
FORREST F. DRYDEN, President.

Sept. 27, 1920.

1. Full name of deceased insured. OTTO PRAHM.

2. Date of death. Sept. 15, 1920.

3. Place of death. 175 Huber St., Secaucus, N. J. 30

4. Occupation. Electrician.

5. How long have you known the insured? 10 yrs.

6. Did deceased ever consult you previously to last illness? (If so, for what diseases and when?) Yes, tonsilitis.

7. On what date were you first consulted regarding impairment of health which, directly or indirectly, caused death? Aug. 10, 1920. 40

Exhibit P-3.

8. From history obtained, what was date of inception of disease causing death? A. Aug. 10, 1920.

9. Date of your last visit or treatment. Sept. 15, 1920.

10 10. What was the immediate cause of death? Acute endocarditis.

11. What were the contributing causes of death? Cardiac Collapse.

12. Was death due to accident, suicide or homicide? (If yes, give full particulars.) No.

13. Was death caused, directly or indirectly, by use of intoxicating liquors, opium or other drug? No.

20 14. Did deceased have tuberculosis in any form? No.

15. Was deceased treated by any other physician or at any hospital or other institution prior to, during or subsequent to your attendance? (If so, give particulars.) No.

16. Was there a post-mortem examination or a coroner's inquest held? (If so, give particulars.) No.

17. State fully and particularly any other facts or circumstances bearing on the case. (If more
30 space is needed for reply, use reverse side.)

18. When and where did you receive your medical diploma? Baltimore Medical College, Baltimore, Md., 1912.

Signed LEO W. BRANDENBURG, M. D.,
Office address 781 Humboldt St.,
Secaucus, N. J.

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

40

On this 23rd day of Sept., 1920, personally appeared before me the above named Leo W. Brandenburg, who suscribed the foregoing statement before me and made oath the foregoing answers are each and all true.

CHARLES E. WILHELM,
Commissioner of Deeds of N. J.

10

Exhibit P-4.

CLAIMANT'S STATEMENT.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA
Home Office, Newark, N. J.
FORREST F. DRYDEN, President.

Oct. 14, 1920.

1. No. of Policy 3314765. Amount $1,000.

2. Full name of deceased? OTTO PRAHM. 20

3. Date of death. Sept. 15, 1920.

4. Legal residence at time of death. 175 Huber St., Secaucus, N. J.

5. Insured's occupation. Electrician.

6. Insured's date of birth. Nov. 2, 1900.

7. State source from which date of birth was obtained. (Family record, certificate of birth or other records should be referred to.) Claimant's statement.

8. Have any proceedings under any bankruptcy law ever been instituted by or against the insured, or has insured made any assignment or executed any deed for the benefit of creditors? No. 30

9. What other insurance was in force on the life? (Give name of Company and amount of insurance.) Prudential Industrial $240.00.

10. How many children survive the insured, and what are their ages? None.

40

Exhibit P-4.

11. Are you related to the insured, and how? Mother.

12. What is the date of your birth? May 6th, 1862.

The person executing this statement represents
10 to The Prudential Insurance Company of America that no proceedings under any bankruptcy law have ever been instituted by or against him (or her) nor has he (or she) at any time made any assignment or executed any deed for the benefit of creditors.

Dated, Sept. 17th, 1920.

Witness: ALBERT DAHLLOF.

Signature MARIA PRAHM,

20 Post office address 175 Huber St.,

Secaucus, N. J.

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New Jersey Court of Errors and Appeals.

MARIA PRAHM, *Plaintiff,* *vs.* THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, *Defendant.*	Action at Law. On Appeal from Hudson Circuit Court.

10

BRIEF OF LEWIS B. EASTMEAD, FOR PLAINTIFF-APPELLANT.

20

Statement.

This is an appeal taken by the plaintiff from a judgment for defendant entered on March 23, 1921, by direction of the Court.

The plaintiff was the mother and beneficiary of one Otto Prahm, on whose life, the defendant, Prudential Insurance Company of America, wrote a policy of insurance in the amount of One Thousand ($1,000.00) dollars. The first annual premium amounting to Forty-Four dollars and forty cents ($44.40), was paid by the said Otto Prahm to the defendant who accepted the same and issued the policy on June 18, 1920 (Exhibit P-1 set forth on pages 43 to 49 inclusive). Said Otto Prahm died on September 15, 1920, and due proofs of death were submitted to defendant (Exhibits P-2, P-3 and P-4, pages 49 to 54 inclusive). Said Prahm at the time of his death was nineteen years and eleven months of age.

30

Defendant refused to pay the amount due under said policy and this action was brought by Maria

40

Prahm, the beneficiary named in said policy to recover the amount due thereunder.

The case was tried before Hon. Luther A. Campbell, Circuit Court Judge and a jury for two days, and upon the conclusion of the trial the jury were directed by the Court to find a verdict for the defendant, to which due exception was taken and allowed.

In opening the case for the plaintiff, I moved that the answer of the defendant be stricken out on the ground that the said Otto Prahm, deceased, was an infant and that the defendant company had actual notice of the fact of his infancy and that in a contract with an infant the only party who can disaffirm the contract is the infant and the party contracting with an infant cannot disaffirm. The motion was denied and exception duly taken and allowed (p. 19).

At the conclusion of the case, I moved for a direction of a verdict in favor of the plaintiff on the same grounds. The Court denied the motion and exception was duly taken and allowed (pp. 40-41).

A motion for a direction of a verdict for the defendant was then made on the grounds that certain answers in the application were false and fraudulent (p. 42).

The Court thereupon directed a verdict for the defendants to which exception was duly taken and allowed (p. 42).

POINT I.

The answer of the defendant should have been stricken out as it disclosed no defense, because Otto Prahm was an infant and the defendant had actual knowledge of his infancy and could not therefore disaffirm the policy sued upon; said privilege being only available to the infant. 10

"A policy of insurance taken out by a minor on his own life is recognized as a valid contract voidable only at the instance of the minor, and if not avoided by him during minority, the Company will be held liable thereon."

14 R. C. L., 229, citing

Union Central Life Insurance Co. vs. Hilliard, 63 Ohio St., 478; 59 N. E., 230; 81 A. S. R., 644; 53 L. R. A., 462; 57 L. R. A., 496. 20

"It has been held that if he dies before reaching majority, his warranties in the application are not a defense to the company against its liability."

14 R. C. L., 229, citing

O'Rourke vs. John Hancock Insurance Co., 23 R. I., 457; 50 At., 834; 91 A. S. R., 643; 57 L. R. A., 496. 30

"It is sufficient to say that a contract with a minor is voidable only, and that at his election. The other contracting party cannot avail itself of the lack of power on the part of the minor to conclusively bind himself as a reason for refusing performance on his part."

Union Central Life Insurance Co. vs. Hilliard, 63 Ohio State Reports, page 478; 59 N. E., 230; 53 L. R. A., 462.

40

"A contract of life insurance is not binding on an infant, but such a contract is voidable only and not void."

22 Cyc., 589, citing

Simpson vs. Prudential Insurance Co., 184 Mass., 348; 68 N. E., 673; 100 Am. St. Rep., 643; 63 L. R. A., 741.

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"An infant is not bound by his warranties in an application for life insurance and the insurer cannot defend an action on the policy by proving their falsity."

O'Rourke vs. John Hancock Mutual Life Insurance Co., 23 R. I., 457; 50 Atl., 834, cited in 22 Cyc., 589, Note 30.

"The beneficiary in an insurance policy on the life of a minor is not prevented from recovery thereon because of false warranties in the contract, if he did not procure the insurance with knowledge of them."

20

O'Rourke vs. John Hancock Mutual Life Insurance Co., 23 R. I., 457; 50 Atl., 834.

"It was argued by the company that the answer of infancy was a privilege personal to him and could not be taken advantage of by any one else. The court said undoubtedly this is a general rule, but its chief application is for the PROTECTION OF THE INFANT in cases where an adult seeks to avoid a contract on that ground, where the contract has not been disaffirmed by the infant. To apply the rule to this case would amount to holding the contract good during the minority of the infant because the policy being on his life no suit could be brought on it until after his death." Ibid.

30

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POINT II.

A verdict for the plaintiff should have been granted at the close of the case because said Otto Prahm was an infant and defendant had actual knowledge of his infancy and therefore had no legal defense to said action.

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The authorities cited in Point I are applicable to Point II, and are therefore not cited here, but are respectfully urged also in support of this Point.

The court in denying to direct a verdict, cited Section 104 of the Insurance Law (2 C. S., 2872), P. L., 1907, page 138. It is respectfully argued that this section was passed only to keep infants from disaffirming contracts of insurance and that it was not intended to permit the adult or *sui juris* party to a contract with an infant to disaffirm it.

20

The section referred to reads as follows:

> "In respect of insurance heretofore or hereafter issued upon the life of any person not of the full age of twenty-one years, but of the age of fifteen years or upwards for the benefit of such minor, or for the benefit of the father, mother, husband, wife, child, brother or sister of such minor, the assured shall not, by reason only of such minority be deemed incompetent to contract for such insurance or for the surrender of such insurance or to give a valid discharge for any benefit accruing or for money payable under the contract."

30

In this connection it is well to read the Statute which authorized infants to deposit money in banks, etc., and which is somewhat analogous in character to the statute just cited. It reads as follows:

> SECTION 2—"Any infant thus depositing with a bank or trust-company shall be subject in all transactions connected therewith,

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AS BETWEEN HIMSELF OR HERSELF AND SUCH BANK OR TRUST COMPANY TO ALL THE OBLIGATIONS, EQUITIES AND DEFENSES TO WHICH AN ADULT PERSON WOULD BE SUBJECT IN SIMILAR TRANSACTIONS." P. L., 1910, page 762, C. S., 2823, par. 82.

It will be noted that this act specifically states that such infants shall be subject to the same
10 OBLIGATIONS, EQUITIES AND DEFENSES AS AN ADULT BUT ONLY AS BETWEEN HIMSLF OR HERSELF AND HIS DEPOSITORY.

The insurance law above quoted contains no such provision and does not state that the infant SHALL BE SUBJECT TO THE SAME OBLIGATIONS, EQUITIES AND DEFENSES AS AN ADULT.

It is therefore respectfully urged that the said act simply prohibits the infant from disaffirming
20 his contract of insurance and recovering the premiums.

In this case the infant is NOT SEEKING TO DISAFFIRM THE CONTRACT, and it is further urged that the defendant has no right so to do.

POINT III.

The question of fraud in connection with statements in the application is for the jury and it is error for the Court to take the case from the jury.

30

The alleged false and fraudulent representations relied upon by counsel for the defendant in his motion for a direction of a verdict for the defendant were as follows (pp. 41-42):

1. False and fraudulent representations to the fact that Otto Prahm had not been attended by any other physician within three years than Dr. Brandenburg (p. 42).

2. False and fraudulent representations that at the time he made the application he
40 was in good health (p. 42).

3. False and fraudulent representations that at the time he made the application he was employed as an electrician by the Federal Shipbuilding Company.

Taking these allegations *seriatim*: * * * Allegation number 1 is based on question and answer No. 9 in the declarations to medical examiner (p. 48), which reads as follows:

10

"9. Give names of all physicians who have attended you within the past three years. On what dates and for what complaint. Ans. Dr. Brandenburg, 1917, Boil at right elbow. Catarrh, throat and ears, for past two years."

The evidence in the case showed that Otto Prahm had been treated by one Dr. Sacco who had been CALLED INTO CONSULTATION BY DR. BRANDENBURG AND NOT BY OTTO PRAHM. Page 23, lines 33 to 37.

20

Dr. Brandenburg continued to be the attending physician and Dr. Sacco as his *consultant*. It is therefore submitted that the answer to said question was true as the question asked only the names of *attending physicians*.

"If in the questions and answers there is any ambiguity for which the company is responsible it is to be resolved against the company in determining whether the answers are false."

25 Cyc., 800, citing

30

Mackinnon vs. Fidelity Insurance Company, 72 N. J. L., 29, 60 Atl., 180.

There was also evidence that Otto Prahm had been treated by a chiropractor named Albert Strobel. It is submtited that inasmuch as a *chiropractor* is not a PHYSICIAN, treatment by one need not be stated in answer to a question asking for names of *physicians*.

"The word *physician* is defined to mean a

40

person who has received a degree of doctor of medicine from an incorporated institution; one lawfully engaged in the practice of medicine."

30 Cyc., 1544.

It will thus be seen that although a chiropractor uses the title doctor, he is no more a physician than a dentist, optometrist, or chiropodist, who all use the same title.

ALLEGATION NUMBER 2 is based on question and answer No. 8, in the declarations to medical examiner, which read as follows:

"No. 8. Are you now in good health? (Ans.) Yes."

There was absolutely no evidence to show that Otto Prahm had or knew he had any illness or sickness, except as disclosed in answer to question No. 9, viz: "catarrah, throat and ears, for past two years." This question immediately follows question No. 8, as to applicant's health, and defendant certainly had full knowledge thereof.

If there was any doubt as to the truth or falsity of the answer to question No. 8, it is entirely a jury question, and it was error for the court to take the question from the jury.

"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."

Mr. Justice Fort in *Henn vs. Metropolitan Life Insurance Co.*, 67 N. J. L., 310; 51 Atl., 689, quoting *Hampton vs. Insurance Co.*, 65 N. J. L., 265; 47 Atl., 433, 52 L. R. A., 344.

"Where there is a conflict in the evidence or lack of conclusive and unquestioned proof of the falsity of a warranty the question is one for the jury. THERE MUST EXIST NO RATIONAL THEORY UPON WHICH THE JURY MIGHT FIND THE NON-FALSITY OF THE ANSWERS OF THE INSURED BEFORE THE COURT CAN DIRECT A VER-

DICT, for the defendant. If the question asked relates to a matter upon which the insurer should know that the insured could not have the knowledge to fully answer, the warranty will not be held to be more than a warranty in the fair sense of the question namely to the belief of the insured". Ibid.

"Proof that the insured had occasionally consulted a physician for minor matters will not make false a statement by the insured that he had no usual medical attendant. To a question which asked 'State family physician and each one who has given the party medical attendance,' the answer was 'have none'. It appeared that a physician had attended the applicant for imflammation of the eyes and again for another complaint. HELD WHETHER SUPPRESSION OF NAME OF PHYSICIAN WAS FRAUDULENT WAS FOR THE JURY."

Henn vs. Metropolitan Insurance Co., Ibid.

"The question of false statements in an application for insurance is for the jury, the evidence being conflicting and a rational doubt of their falsity."

Marzulli vs. Metropolitan Life Insurance Co., 81 N. J. L., 166; 78 A., 1051.

ALLEGATION No. 3 is based on question and answer No. 15, in the application which is as follows:

"15 BUSINESS ADDRESS.
No. Street
City or Town: Kearney. State: New Jersey.
Name of firm or employer: Federal Shipbuilding Co.
Nature of business: Shipbuilding."

Also on question and answer No. 2 in the application which is as follows:

"No. 2. What is your present occupation or occupations. State exact duties. Ans. Electrician less than 220 volts" (See p. 48).

There was no evidence, that plaintiff's occupation was not correctly stated as electrician, but it was admitted by the plaintiff at the trial that said Otto Prahm was not employed by the Federal Shipbuilding Co. at the date of the application (p. 40, ll. 20 and 29).

It is submitted that question No. 15 calls for the business address and not the present employer and further that the error in answering the same was entirely immaterial and could not affect the risk assumed by the defendant.

> "A misrepresentation or concealment to affect the policy must be made with intent to defraud."
>
> *Dewees vs. Manhattan Insurance Co.*, 34 N. J. L., 244 (5 Vr.).
>
> "Immaterial representations in an application for life insurance to avoid a policy must be made with intent to defraud."
>
> *Dewees vs. Manhattan Life Insurance Co.*, 34 N. J. L., 244.
>
> "Where the company alleges mishepresentations on the part of the insured the burden of proving such misrepresentation is on the company" 25 Cyc., 928, citing *Trenton Mutual Life Insurance Co. vs. Johnson,* 24 N. J. L., 576.

POINT IV.

Where the statements of the insured by the terms of the policy are to be deemed representations and not warranties the question of fraud in connection therewith is a jury question.

The policy contained the following provisions:

All statements by the insured shall, in the absence of fraud be deemed representations and not warranties. Exhibit P-1, page 47, lines 29 to 32.

"Where all statements of insured are in the absence of fraud to be deemed representations and not warranties, policy cannot be avoided by reason of false representations of insured unless they were wilfully false, fraudulent and misleading and made in bad faith. *Insurance Co. vs. Isom* (Okl.), 173, Pac., 841; *Sharrer vs. Ins. Co.* (Kan.), 171 Pac., 622.

"Where fair minded men might honestly differ as to the conclusions to be drawn from facts whether controverted or uncontroverted the question at issue should go to the jury" *McCarthy vs. Metropolitan Life Insurance Co.,* 75 N. J. L., 887; 69 Atl., 170 citing *Bennett vs. Busch,* 67 N. J. L., 188.

POINT V.

We respectfully submit that the judgment below should be reversed.

LEWIS B. EASTMEAD,
Of Counsel with Appellant.

PRESS OF FREMONT PAYNE, 80 Washington Street, New York City.

New Jersey Court of Errors and Appeals

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MARIA PRAHM, Plaintiff-Appellant, vs. PRUDENTIAL INSURANCE COMPANY OF AMERICA, a corporation of the State of New Jersey, Defendant-Respondent.	Action at Law On Appeal from the Hudson County Circuit Court.

20

BRIEF FOR DEFENDANT-RESPONDENT.

Facts.

This is an appeal taken from the action of the trial judge in the Hudson County Circuit Court in refusing to grant plaintiff's motion to strike 30 out defendant's answer, and in directing a verdict for the defendant at the close of the whole case.

Plaintiff brought suit to recover the proceeds of a policy of insurance issued by the defendant Company in the sum of $1,000 on the life of plaintiff's son, one Otto Prahm.

At the time of the issuance of the policy, the insured was in his twentieth year. He died before attaining his majority, his exact age at death being 40

nineteen years and eleven months. The application for the policy was made on the 9th day of May, 1920; the insured died on the 15th day of September, 1920.

The defenses set up in the answer, and on which the defendant relied on the trial, were based upon the allegation that the insured procured the issuance of the body by divers false and fraudulent representations, made by the insured in his application for the policy.

Before trial the plaintiff moved that the answer of defendant be stricken out:

> "On the ground that the plaintiff was an infant and that the defendant Company had actual notice of the fact of his infancy, and that in a contract with an infant the only party who can disaffirm the contract is the infant, and the party contracting with the infant cannot disaffirm. Contracts with an infant are only voidable at the option of the infant party."

This motion was denied.

Defendant thereupon admitted on the record the execution and delivery of the policy in suit, the payment of the premiums, the death of insured as shown by the proofs of death, and the non-payment of the proceeds of the policy. Plaintiff rested her case on these admissions.

Defendant then in its own case offered plenary evidence of the fraud and misrepresentations of the insured in his application for the policy. The details of this evidence will be set forth under the appropriate head.

The evidence thus adduced by the defendant was not answered in any way. The giving of testimony ended with the closing of defendant's case; there

was no rebuttal. In this posture defendant moved for the direction of a verdict in favor of defendant and against the plaintiff, and the Court granted the motion.

The points therefore to be considered on this argument are those arising from the Court's refusal to strike out the answer, and the Court's action in directing a verdict for the defendant. 10

POINT I.

There was no error in the refusal of the trial judge to strike out the answer because of the infancy of the insured.

We submit that all the authorities cited under this point in plaintiff's brief have no force whatever in this appeal. They are all precedents foreign to this State and arose entirely apart from any statute such as that which is in force in New Jersey. 20

The statute we refer to is Section 104 of the New Jersey Insurance Law (2 C. S., 2872), P. L., 1907, page 138, which reads as follows:

> "In respect of insurance heretofore or hereafter issued upon the life of any person not of the full age of twenty-one, but of the age of fifteen years or upwards, for the benefit of such minor, or for the benefit of the father, mother, husband, wife, child, brother or sister of such minor, the assured shall not, *by reason of such minority be deemed incompetent to contract for such insurance* or for the surrender of such insurance, or to give a valid discharge for any benefit accruing or for money payable under the contract." 30 40

But the plaintiff argues that this statute was passed "only to keep infants from disaffirming contracts of insurance and that it was not intended to permit the adult or sui juris party to a contract with an infant to disaffirm it." This is argument by fiat: There is certainly nothing in the statute to sustain such a contention. On the contrary, it would appear from certain of the terms in the statute that the legislative intent was not altogether to "keep infants from disaffirming contracts of insurance," because the act provides not only that the infant shall be deemed competent to contract for insurance, but also "for the surrender of such insurance, or to give a valid discharge for any benefits accruing," etc.

Considering, however, the merits of the general question of infancy as it arises in this connection, we submit that the only disparity, so far as this controversy is concerned, between the rights under a contract of a minor, and the rights of one sui juris, arises by reason of the defective contractual competency of the minor. In other words, it is entirely a matter of the incompetency of the minor existing because of his minority. But the statute removes the disparity by curing the incompetency of the minor.

That the Legislature acted with a view to the full effect of the statute is apparent from its qualifying provisions. It removes the incompetency of minors only in respect of contracts for insurance made for the benefit of themselves or near relatives, and then only in the case of minors *above the age of fifteen years.*

The statement occurs in plaintiff's brief that the Legislature intended by this act no more than the prevention of disaffirmance by infants. Obviously, that contention is not sound. But it makes apparent the real nub of this question. The Legisla-

ture certainly did not intend to prevent the infant from disaffirming a contract that had been imposed upon him by fraud, and plaintiff would probably never admit that the Legislature did so intend. By making the infant, within the terms of the statute, competent to contract, the Legislature to that extent removed the disparity between infants and adults, and it follows that the sui juris party necessarily has a right equal to that of the infant, to disaffirm the contract on the ground of fraud. 10

In the present case the disaffirmance is based entirely upon the fraud of the minor, who was, at the time of his alleged misrepresentations, nineteen years of age.

In plaintiff's brief effort is made to make infancy a refuge for fraud-doers. Plaintiff cites the case of O'Rourke vs. John Hancock Mutual Life Insurance Co. (R. I.), 50 Atl., 834, as holding that 20

> "An infant is not bound by his warranties in an application for life insurance and the insurer cannot defend an action on the policy by proving their falsity."

Such a precedent is of no force here. Any effect of the doctrine concerning an infant's incapacity to contract, which would make the privilege of infancy not a sword, but a shield, is now entirely defeated in this State by the decision of this Court in LaRosa vs. Nichols, 105 Atl., 201. In that case it is held that in law as well as in equity the infant in accountable for his fraudulent misrepresentations under the operation of the doctrine of equitable estoppel. 30

The Rhode Island case of O'Rourke vs. John Hancock Mutual Life Insurance Company, supra, has not been an acceptable precedent in the country. The case was expressly repudiated by the 40

highest court in Kansas, in Metropolitan Life Ins. Co. vs. Brubaker, 96 Pacific, 62. There the Court said on this subject:

> "This contract was not disaffirmed by the minor. It is binding upon him until disaffirmed, and the Court knows of no one who can exercise the right to disaffirm except the minor. But if the plaintiff be allowed to represent the minor, the same consequences must follow as if the minor had acted. The contract of insurance is an entirety, and the statute gives the minor no right to disaffirm provisions which he finds burdensome, and to enforce those which are to his advantage. If any material portion of the contract be disaffirmed, unexecuted provisions fall. The warranty is an integral part of the contract. It is an indispensable condition of liability on the part of the insurer. If the warranty be disaffirmed, liability on the contract must necessarily be destroyed. The contract cannot be disaffirmed, and then money be taken from the company by virtue of the contract, when the return of such money, if it were in the minor's hands, would be a necessary element of disaffirmance. The Rhode Island case is disapproved."

The defense in the present case is based on the fraud and deceit of the insured.

In 1 Williston on Contracts, Section 245, it is said (page 481):

> "It is conceded in all the cases that an infant is as a rule liable for his torts, and there is no valid reason why he should not be liable for false and fraudulent representations as

fully as for other torts, nor if he is in general liable for his deceits is there any reason to distinguish the case where the injurious consequence of the deceit is entering into an unenforceable contract from cases where the injurious consequences are of a different nature. The reasoning generally given in cases which protect the infant 'that infants are liable for their torts, yet the form of action does not determine their liability, and they cannot be made liable when the cause of action arises from a contract, although the form is ex delicto' does not meet the difficulty. *The infant is not held liable on his contract either in form or substance if he is held liable for deceit.*"

POINT II.

There was no error in the direction of a verdict for the defendant.

The only evidence adduced by the plaintiff at the trial below was that contained in the admissions by the defendant of the mere formalities of plaintiff's case. The defendant then offered plenary evidence to establish the respective defenses set up in its answer. *And there was no rebuttal.* Those defenses which are pertinent to the argument of this point are as follows:

FIRST.

That insured induced the issuance of the policy by the false and fraudulent representation that the loss of ten pounds weight within the year previous to his application for the

policy was due to harder work. (Case, page 8, line 30, et seq.; page 48.) The truth being that said loss of weight was due to sickness and disease, by reason of which the assured was unable to work.

SECOND.

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That insured induced the issuance of the policy by falsely and fraudulently representing to the defendant that at the time of the application for the policy he was employed by the Federal Shipbuilding Company (Case, page 9, line 10, et seq.; page 48). The truth being that he was unemployed by reason of sickness and disease.

THIRD.

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That insured induced the issuance of the policy by falsely and fradulently representing to defendant that during the three years prior to the application for the policy, the only physician by whom he had been attended was Dr. Brandenburg in 1917, for "boil right elbow, catarrh throat and ear for past three years" (Case, page 9, line 25, et seq.; page 48). The truth being that insured had in the period indicated, been also attended by Doctor Sacco and Dr. Strobel.

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FOURTH.

That insured induced the issuance of the policy by falsely and fraudulently representing to the defendant that he had never had, among other things, dizziness (Case, page 10, line 32, et seq.; page 48). The truth being that

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he had suffered from dizziness and had submitted to a long period of professional treatment for the cure of that disorder, among others.

FIFTH.

That insured, in his application for the policy, falsely and fraudulently represented to the defendant that his occupation at that time was that of electrician (Case, page 11, line 15, et seq.; page 48). The truth being that insured had then no occupation and was incapacitated for the pursuit of any occupation by reason of sickness and disease. 10

SIXTH.

That insured in his application for the policy, falsely and fraudulently represented to the defendant that he was at that time in good health (Case, page 12, line 11, et seq.; page 48). The truth being that he was then suffering from sickness and disease which then, and for a long time prior thereto, had incapacitated him for daily employment. 20

The application for the policy of insurance upon which the representations above set forth were made by insured, appears in the printed case at page 48. 30

Now, we will take these defenses, each in its turn, and cite the evidence produced by the defendant to establish them.

FIRST.

The representation of the insured in his application for the policy, that the loss of weight 40

therein stated, was due to harder work was the clearest deception. He was at the time, and had for a long period prior thereto, been incapacitated for work. The witness who lived in the same house with him testified that he had not been working at all; that during the entire Spring of 1920 (the application for the policy was made May 9th, 1920), the insured spent his time at home, "upstairs and downstairs in the yard; he used to go down there to take a sun bath in the corner of the yard on a board with a pillow under his head" (Case, page 34, lines 20-40). The insured over a year and two months before his application for the policy, had terminated that which he stated to be his employment at the time of his application for the policy (Case, page 40, lines 20-30).

SECOND.

The representation by assured that he was at the time of his application for the policy employed by the Federal Shipbuilding Company, was also in itself clearly and designedly deceptive. The defendant proved that at the time, as above stated, assured had not been employed by the Federal Shipbuilding Company since February, 1919 (Case, page 40, lines 20-30); whereas the application for the policy was made on May 9th, 1920. The deceptive and fraudulent character of this representation is made even more apparent by the fact that it was given in answer to the question which sought the "business address" of assured, the "name of his firm or employer," and the "nature of the business" (Case, page 48). This representation could not by any fair or reasonable inference, have been the re-

sult of honest mistake, since, at the time of the application, the insured *had had no relation whatever with the Federal Shipbuilding Company for more than fourteen months* (Case, page 40, lines 20-30).

THIRD.

During the period of three years in which the assured stated in his application he had been attended by only one physician, Dr. Brandenburg, he had also been attended by Doctors Sacco and Strobel. From March, 1920, up to the time of the application for the policy in the following May, Doctor Sacco had attended the insured "about a half dozen times" (Case, page 21, line 20). Doctor Sacco saw him "about every three weeks" (Case, page 22, line 40). The other physician, Doctor Strobel, was a duly licensed chiropractor (Case, page 25, line 15). This doctor treated the insured from April 17th, 1920 (Case, page 25, line 28, et seq.), until the end of the following July (Case, page 26, line 37). It was directly in the middle of this period that the insured applied for the policy, and during the period he had called upon this physician and obtained treatment probably "thirty or forty times" (Case, page 29, line 21). The insured called upon the chiropractor seeking the aid of the latter's science, and on April 30th Doctor Strobel examined the insured and found him suffering from nephritis or inflammation of the right kidney (page 30, line 20). At that time Doctor Strobel told the insured that he was suffering from nephritis (Case, page 30, line 7), though in his application for the policy the insured specifically denied that

he had ever had any disease of the kidneys (Case, page 48). When the insured came to Doctor Strobel seeking treatment he "complained about ear trouble and could not hear; that he gets *dizzy* and pains between the eyes; always sleeping" (Case, page 29, lines 1-10). In his application for the policy insured expressly denied that he had "ever had *dizziness* (Case, page 48).

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FOURTH.

That the representation by insured in his application that he had never had dizziness was false and knowingly so, is clearly established by the testimony adduced by the defendant at the time that insured had complained to Doctor Strobel of dizziness and sought particularly his aid for that disorder (Case, page 29, lines 1-10).

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FIFTH.

The insured's representation in the application for the policy that his occupation was that of electrician, was shown to be knowingly false, by evidence that he was at the time not occupied at all (Case, page 34, line 20, et seq.), and by proof that he had not been employed by the Corporation whose name he gave as that of his employer, for upwards of fourteen months (Case, page 40, lines 20-30).

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SIXTH.

Insured represented that he was in good health. The defendant, by the evidence above cited, showed clearly at the trial, that he was constantly, for the period of at least two

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months prior to the application, under the attendance of physicians, *two of whom he did not disclose;* that he was practically an invalid; that by reason of his condition, he was incapacitated for work; that he had in fact, during that time, been attended by physicians many times, all of which was in no wise disclosed by him to his insurer.

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As to the full effect in fraud of the false representations of the insured, we submit that nothing could be more convincing than a comparison of a summary of these false representations as proved by defendant, with a true statement of what the representations of the insured to the defendant must have been if truly and honestly made. To wit, truthful representations would have disclosed to the defendant that

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The applicant for insurance was not employed:

That insured, therefore, had no business address and was thus not employed by the Federal Shipbuilding Company, nor by anyone else.

His occupation at that time was not that of electrician, but that insured then had no occupation whatever.

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That insured was, and had been afflicted with dizziness and kidney trouble.

That insured was not in good health, and was then undergoing a course of professional treatment for physical disorder and disease which in all covered a period of upwards of two months and involved, altogether, between forty and fifty treatments, which course of treatment the insured, himself, sought at the hands of Doctor Strobel.

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We are aware of the point plaintiff makes concerning certain details of the defendant's proof, viz.: that as to whether or not Doctor Sacco was really an "attending physician," and whether or not Doctor Strobel was a "physician" in a sense to satisfy the purposes of this controversy. The pertinent inquiry here, however, is: What in the requirements of plain honesty, was there to absolve the insured from making to the defendant Company from which he sought life insurance, the same representations relative to his health that he had made to the chiropractor, Doctor Strobel, from whom he sought help against disease? And his treatment at the hands of Doctor Strobel covered a period of more than two months, during which occurred the insured's application for the policy.

The question resolves itself into the proposition that, taking all of the false representations together, as proved by the defendant, showing conclusively as they do, a somewhat co-ordinated scheme to impose deception upon the defendant, there was no error, in the utter absence of conflicting testimony, in preventing the case from going to the jury and directing a verdict for the defendant.

It cannot be too strongly urged that the plaintiff offered no rebuttal to defendant's testimony. If insured were actually employed, plaintiff must have known it, and, presumably, might have adduced testimony accordingly; if he had not been under the constant care of physicians, testimony to that effect could likewise have been given; if he had at no time complained of dizziness, for which he sought treatment, that, too, might have been shown. The misrepresentations as to the insured's business address and employment were openly admitted (Case, page 40, lines 20-30).

The authorities cited by plaintiff under this head are not in point.

In MacKinnon vs. Fidelity Insurance Company, 72 N. J. L., 29, the question before the Court was one having to do only with the ambiguity of the language used in the formulation of one or more of the questions in the policy. In the present case guage used in the formulation of one or more of the questions in the policy. In the present case there can be no question of any difficulty on that score. The summary of insured's false representations, and the questions in response to which these representations were made, preclude in common sense the raising of any question of ambiguity.

Plaintiff refers also to the case of Henn vs. Metropolitan Life Ins. Co., 67 N. J. L., 310. We submit that within the definitions of that case there "was no rational theory upon which the jury might have found the non-falsity of the answers of the insured"; and "that there was no rational doubt of the falsity" of the details of insured's statements, involving assertions of fact which were in their nature most intimately known to him, and the summary of which conclusively shows a general scheme to deceive the defendant. Unlike the Henn case (supra), the question in the present controversy is not confined entirely to specific representations as to the existence or non-existence of named diseases. Here the general deceptive scheme was made manifest by defendant and remained uncontradicted on the part of the plaintiff. Furthermore, in the Henn case, it must not be overlooked, there was a clear conflict in the evidence.

In the case of Marzulli vs. Metropolitan Life Insurance Company, 81 New Jersey Law, 166, cited by plaintiff, there was evidence "pro et con" given by the respective parties.

In the case of McCarthy vs. Metropolitan Life Insurance Company, 75 New Jersey Law, 887, un-

der the defenses raised by the defendant there, the testimony offered, in its nature, was clearly inconclusive of the facts sought to be established.

In the present case there was no contradiction of the facts, and the inferences reasonably to be drawn from them cannot be in doubt.

10 "Verdict is properly directed when the facts are not in dispute and the inferences from them are not in doubt."

Belcher vs. Manchester Building & Loan Association, 74 N. J. L., 833.

As to the effect of insured's misrepresentations relating to the attendance upon him of the other physician, see:

20 Hanrahan vs. Metropolitan Life Insurance Company, 72 N. J. L., 504;
Fish vs. Metropolitan Life Insurance Company, 73 N. J. L., 619;
Metropolitan Life Insurance Company vs. McTague, 49 N. J. L., 587.

As to the character of Dr. Strobel as a "physician," we refer the Court to Chapter 4 of the Laws of 1920, which provides for the examination and
30 licensing of persons to pursue in this State, the practice of the cure and treatment of diseased conditions in the human body by the therapeutic system known as chiropractic. This Act took effect March 3rd, 1920.

It is important in determining the good faith of the insured in withholding from his application any statement of the name of Doctor Strobel, to consider that the insured, being affected with bodily ills and disorders—one of them being dizziness,
40 which he expressly denied—prior to the making of

the application, sought the curative aid and assistance of Dr. Strobel as his physician, and submitted to his treatment on some forty or fifty consecutive occasions.

Indeed, upon the question of good faith of insured in making a negative answer as to medical attention, etc., it is immaterial whether or not the physician consulted was really licensed to practice at all. 140 N. Y. Supp., 211.

Plaintiff in his brief, in discussing the suppression of the truth of the attendance of Dr. Sacco upon the insured, makes a point of the fact that Dr. Sacco had been called in consultation by Dr. Brandenburg and not by the insured. The fact is, that Dr. Sacco, though his attendance may have been induced by Dr. Brandenburg in the first instance, became an attending physician of the insured and he continued to attend insured. The latter called at Dr. Sacco's office and Dr. Sacco called a number of times at the home of the insured. All this, once the attendance by Dr. Sacco ensued, was carried on entirely independent of any relation between Dr. Brandenburg and the insured (Case, pages 21 to 23).

The deceptive misrepresentations of the insured in the present case, in the absence of any contradictory or qualifying proof whatever, must be held to compel the reasonable conclusion—which a jury might not lawfully reject—that in their sum they amount to a "wilful untruth"; and the fact, furthermore, that the defendant Company asked the questions to which it received these false replies, shows the materiality of the questions. Duff vs. Prudential, 90 N. J. L., 646, at 648.

The observation of this Court in the latter case is pertinent here.

> "What could be the purpose of insured's making a statement which was a wilful un-

truth about his health, which he must have known was important and material, if it was not to deceive." Ibid at 648.

And in the present case, not only did insured state wilful untruths as to his health specifically, but he also stated wilful untruths, which in their nature do not relate directly to his health, but which add to the deceptive effect of the untruths relating to his health, and without which the defendant has detected the untruth of the statements which insured did make concerning his health. We refer here to the false representations relating to employment, business address, occupation, etc.

On the question of the materiality of the misrepresentations of the assured, we quote from the recognized standard work on Insurance "Joyce on Insurance," as follows:

> "It is said that a misrepresentation must be of a fact material to the risk. While it is true that a misrepresentation will avoid the policy if it is of a fact actually material to the risk, it is not true that it must be material to the risk as such in all cases. *It need not actually have any bearing upon the state or condition of the subject matter.* The rule already given concerning what constitutes a material fact in cases of concealment is generally applicable here. The question is, Did the fact or circumstance represented or misrepresented operate to induce the insurer to accept the risk or to accept it at a less premium? If it offers a false inducement which is acted upon in either case, the insurer being misled or deceived, the representation is material. *And this is so if the truth would have disclosed a*

fact increasing or materially changing the risk as understood and agreed upon to be taken, or if, had the truth been known, the insurer would have materially modified the terms of the contract, or have rejected the risk or charged a higher premium, *or if the representation was calculated to mislead and does mislead.*" Vol. III, Sec. 1892.

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Citing the New Jersey case of Franklin Fire Insurance Co. vs. Martin, 40 N. J. L., 568.

From the same author we quote:

"If the misrepresentation is calculated to mislead or deceive, it is material."

(Sec. 1896, page 3064) Citing: The New Jersey case of McVey vs. Grand Lodge, Ancient Order United Workmen, 53 N. J. L., 17.

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In the latter case of McVey vs. Grand Lodge, etc., the opinion is by Chief Justice Beasley. The case bears, in point of fact, an interesting parallel to the present one, and in ascertaining the effect in fraud of the misrepresentations made in that case—in spite of the fact that the Supreme Court did conclude that they were not warranties, but representations merely—the Court says, at page 19:

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"No one can doubt that if the truth had been offered with respect to the particulars in question, the medical examiner would not have accredited the application, and that the Society would have rejected so exceptionable a candidate."

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Bearing on this question of materiality, we would call the Court's attention to the fact that the application for the policy (Case, page 48) contains the provision that the *statements and answers in the application contained shall form a "part of the contract of insurance."*

10 THE POLICY OF INSURANCE IN THIS CASE WAS VOID AB INITIO.

The application for the policy, *and which is a part of the contract of insurance*, provides that the "policy shall not take effect until the same shall be issued and delivered by the Company and the first premium paid thereon in full *while my health, habits and occupation are the same as described in this application*" (Case, page 48).

20 The evidence adduced by the defendant clearly shows that at no time between the making of the application and the death of the insured, were the health, habits and occupation of the insured as described in the statements made by him in the application for the policy.

Respectfully submitted,

RANDOLPH PERKINS,
30 Counsel for Prudential Insurance Co.,
Defendant-Respondent.

JOHN F. DREWEN, JR.,
Of Counsel.

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