Errata
This section belongs with case 2.

New Jersey Court of Errors and Appeals

FERBUARY TERM, 1932.

Between

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,
Complainant-Appellant,

and

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

On Appeal from Chancery.

BRIEF FOR COMPLAINANT-APPELLANT.

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

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

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

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

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

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

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

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

For example, the Court said:

> "* * * the only thing I am concerned with particularly is whether or not on the date of the policy this man was in sound health. He might have been ill years before, yet be in sound health on the date of the policy" (p. 55, bottom).
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> "I will overrule all line of testimony except the condition of the man's health at the time of the issuance of the policy. I wouldn't care whether he was a cripple or sick before. The only question is whether the man at the time this policy took effect was alive and was in sound health. The policy says, 'This policy shall not take effect if the insured died before the date hereof, or if on such date the insured be not in sound health.' That's the gist of the action as I see it" (p. 56, bottom).
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> "The only fraud you can show from the policy is that the man at the time of the issuance of the policy was not of sound health. If you can show that it would be a fraud" (p. 57, l. 27).
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> "I will overrule it for every purpose and the reason I am overruling it is that the policy of insurance was issued December 3,

> 1928, and as I stated before, the only question aside from the validity of the receipt, is whether the man at the time of the issuance of the policy was alive and of sound health, *and any statements made in an application or other paper upon which the policy is predicated is immaterial* because the policy says: 'This policy contains the entire contract between the parties hereto.' " (p. 66, l. 13).

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

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

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

POINT.

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

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

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

> "This policy contains the entire contract between the parties hereto."

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

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

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

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

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

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