on two cases, *Basen v. Clinton Trust Co.,* and *Newman v. Asbury Park & Ocean Grove Bank.*[12] Both of these cases are distinguishable from the present case. In the *Basen* case the plaintiff accepted the plan proposed and under the plan he received 50% of his deposits in cash. In the *Newman* case the court found that the plan was fair and equitable, and did not use the word "estoppel" in its opinion. In the present case plaintiff neither accepted the plan, nor was the plan fair and equitable. The mere fact that plaintiff maintained a deposit account with defendant, of new funds, after the reopening of defendant bank, should not be held against plaintiff as an estoppel barring this suit. The facilities of the bank were open to the public at large, and plaintiff had as much right as anyone else to deposit with defendant. This action was in no way connected with acceptance or refusal to acquiesce in the plan of reorganization. Plaintiff's failure to take action to prevent subordination agreements made by defendant was due to defendant's failure to disclose the full details of the plan. All told, there was no substantial basis for the finding of an estoppel against plaintiff.

Since there was no substantial non-federal ground for the decision of the court, and there was a substantial federal question on which the decision of the court should have been based, the jurisdiction of the United States Supreme Court would appear to have been established.

Insurance—Fraud—Election of Remedies—Res Adjudicata.—Defendant, as named beneficiary, obtained a judgment at law on a policy of insurance issued upon the life of the defendant's mother by the complainant insurer who defended the law action on the grounds that the policy had been issued as a result of fraudulent misrepresentations, suppression and concealment by the insured of certain facts material to the risk respecting illnesses, medical treatment, hospitalization, condition of health, etc. The complainant had in the law action asked for a declaratory judgment by counterclaim to cancel the policy under R. S. 1937,

12. Basen v. Clinton Trust Co., 115 N.J.L. 546, 181 A. 67 (E. & A. 1935); Newman v. Asbury Park & Ocean Grove Bank, 120 N.J.L. 122, 198 A. 286 (E. & A. 1937).

2:26-66 et seq., N.J.S.A. 2:26-66 et seq., which was denied. Complainant then filed a bill in equity praying for a decree voiding the policy and restraining the collection of the judgment at law. Decree prayed for was entered. Defendant appealed. *Held*: *Affirmed. Metropolitan Life Insurance Company v. Tarnowski,* 130 N.J.L. 1, 20 A. 2d 421 (E.&A. 1941).

The chief issues involved in the principal case are: (1) does chancery have jurisdiction to restrain the enforcement of a judgment at law on the ground that equitable fraud has been committed; (2) is the judgment of the law court res adjudicata and, therefore, binding on a court of equity where the defense in the action at law was fraudulent misrepresentation and concealment of material facts; (3) did complainant's action in defending the law suit constitute an election of remedy so as to debar his petition in equity.

In considering these issues, we must bear in mind the well known and practically universal procedure followed by insurance companies in writing applications as well as the rules of law. Every one who has purchased an insurance policy knows that the agent is required by his company to secure certain information regarding the applicant by using printed application blanks furnished by the company, each question on the blank requiring an answer and also requiring the applicant to sign after the blank has been filled in. On receipt of this application blank, the company either accepts or rejects the application, basing its decision on the information supplied in the signed application. In some instances the company waives physical examination and in others it is required, and where a physical examination is made, the examining physician's report is considered in conjunction with the signed application. If a material misrepresentation as to the physical condition or past illnesses of the applicant is made and the company, relying on the misrepresentation, issues the policy, will our courts deny equitable relief simply because the company has failed in its effort to establish legal fraud as a defense to the action seeking to enforce payment under the terms of the policy?

It is well settled in this state that chancery has jurisdiction in all cases of fraud except where the fraud is in the making of a will.[1] Where

1. Schoenfeld v. Winter, 76 N.J.Eq. 511, 74 A. 975, (Ch. 1909); Anderson v. Eggers, 63 N.J.Eq. 264, 49 A. 579, 55 L.R.A. 570 (E. & A. 1901).

the jurisdiction of courts of law and equity for the redress of frauds is concurrent, equity should entertain the cause and determine it on its merits, provided adequate relief cannot be obtained at law.[2] The evidence in the principal case clearly established material misrepresentations although conscious fraud was not proven. If equity does not take jurisdiction, the judgment at law will be enforceable and the wrongdoer will profit by his wrongful act. Where such a situation exists, it is clearly within the province of the Court of Chancery to enter a restraining order.[3]

New Jersey follows the broad English doctrine that equity has jurisdiction over every case of fraud with one exception, that of fraudulent wills.[4] Following that doctrine our courts have granted relief where an

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2. See note 1; also see Krueger v. Armitage, 58 N.J.Eq. 357, 44 A. 167 (Ch. 1897); Polhemus v. Holland Trust Co., 61 N.J.Eq. 654, 47 A. 417 (E. & A. 1900).

3. In Union Water Co. v. Kearn, 52 N.J.Eq. 111, 27 A. 1015 (Ch 1893), Pitney, V. C., stated: "The power of this court to deal with any matter brought before it does not depend upon the nature or character of the issue to be tried or question to be determined; but it depends upon the nature of the right to be administered and enforced, and the character of the remedy necessary or appropriate to its enforcement. If the right to be enforced be one properly cognizable by a court of equity, and the remedy necessary to enforce it be such as only a court of equity can administer, then a court of equity has jurisdiction, and the circumstances that, in the course of its administration, it has to deal with questions of law and fact of whatever nature they may be, does not stand in its way. . . . So, in the course of its administration of equitable rights, it will deal with and determine questions of forgery and perjury and criminal fraud, though it will not exercise criminal jurisdiction to correct and punish the party guilty of either. It will prevent the fraudulent wrongdoer from enjoying the fruits of his wrong doings, but it will not otherwise punish him for his wrongful act, unless it involves a contempt of the court. So, in cases of mistakes, in correcting them, it will inquire into all questions of fact and law which arise, precisely as a court of law would do in an action arising on the same facts. In fact, I know of no class of questions of fact or law which this court has not in the past, and may not in the future, be called upon to deal with, if necessary and proper to do so in order to administer an equitable right or apply an equitable remedy."

4. 2 POMEROY, EQ. JUR., Sec. 912: "The English doctrine is fully settled by an unbroken line of decisions extending to the present day

insurer, who sought to cancel a life insurance policy on the ground of fraud in the procurement thereof, was able to show material misrepresentations but was unable to establish conscious or intentional fraud,[5] and it has also been held that a misrepresentation in securing a policy for insurance, although made innocently, will not prevent rescission of the contract of insurance on the ground of such misrepresentation.[6] Equity will relieve from false representations in securing an insurance policy, whether they were made intentionally or through mistake.[7]

Where the party has equitable rights not cognizable in a court of law,

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that, with one remarkable exception (fraudulent wills), the jurisdiction of equity exists in, and may be extended over, every case of fraud, whether the primary rights of the parties are legal or equitable, and whether the remedies sought are equitable or simply pecuniary recoveries, and even though courts of law have a concurrent jurisdiction of the case, and can administer the same kind of relief. . . . The only question, therefore, presented to an English court is, not whether the equitable jurisdiction exists, but whether it should be exercised."

5. In Anderson v. Eggers, *supra,* note 1, Mr. Justice Dixon makes this pertinent observation: "But New Jersey is distinguished from her sister states by her adherence to the standards of the mother country respecting both rights and remedies in equity, and I know of no constitutional or statutory provision or judicial decision in this state which can be regarded as withholding or withdrawing from our Court of Chancery any jurisdiction possessed by its English prototypes. True, the jurisdiction of equity in cases of fraud remediable at law has not been much invoked, but that may be accounted for in large degree by the less expensive, equally efficient, and in former times, more speedy remedy secured in the courts of law. When resorted to, however, the jurisdiction of equity has not been doubted."

6. See *supra,* note 5. See also Pacific Mutual Life Insurance Company v. Rosenthal, 122 N.J.Eq. 155, 192 A. 742 (Ch. 1937); Metropolitan Life Insurance Company v. Lodzinski, 124 N.J.Eq. 357, 1 A. 2d 859 (E. & A. 1938); Travelers Insurance Company v. Evslin, 111 N.J.Eq. 527, 139 A. 520 (Ch. 1927).

7. Hahn v. Metropolitan Life Insurance Company, 116 N.J.L. 126, 183 A. 146 (E. & A. 1936); Aetna Life Insurance Company v. Sussman, 111 N.J.Eq. 358, 162 A. 132 (Ch. 1927); Prudential Insurance Company of America v. Merritt, Chapman & Scott Corporation, 111 N.J.Eq. 166, 162 A. 139 (Ch. 1932); Hubbard v. International Mercantile Agency, 68 N.J.Eq. 434, 59 A. 24 (Ch. 1904); Dawson v. Leschziner, 72 N.J.Eq. 1, 65 A. 449 (Ch. 1907); Mazzolla v. Wilkie, 72 N.J.Eq. 722, 66 A. 584

which would in a court of equity have prevented such an adjudication as was made in the court of law,[8] the judgment at law will interpose no obstacle to redress in equity since the court of law had no proper jurisdiction of the subject matter forming the basis of redress in equity.[9] Setting up a merely equitable defense in a suit at law will not debar him from setting it up in a court of equity against the judgment obtained in the law court.[10] Nor is a party denied such remedy because he did not test the accuracy of the action of the law court in overruling his defense by a review on error. He may accept the ruling of the law court and later pursue his remedy in equity.[11]

Since equitable fraud is not cognizable in a court of law but is peculiarly within the jurisdiction of a court of equity, the judgment at law is not res adjudicata of the issue raised in equity, for merely equitable fraud will restrain enforcement of a judgment at law even though legal fraud in respect of the same matters has been pleaded in the action at

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(Ch. 1907); Commercial Casualty Insurance Company v. Southern Surety Company, 100 N.J.Eq. 92, 135 A. 511 (Ch. 1926), *aff'd,* 111 N.J.Eq. 738, 138 A. 919 (E. & A. 1927).

8. Strauss v. Norris, 77 N.J.Eq. 33, 75 A. 980 (Ch. 1910): "Where a representation false in fact has been made, there is this difference between actions at law and suits in equity. At law, to maintain an action in deceit, the representation must *inter alia* be shown to be not only false in fact, but false to the knowledge of the person making it, in other words fraudulent"; citing Cowley v. Smith, 46 N.J.L. 380, 50 Am. Rep. 432 (S. Ct. 1884); Eibel v. Von Fell, 63 N.J.L. 3, 42 A. 754 (S. Ct. 1899), *aff'd,* 64 N.J.L. 364, 48 A. 1117 (E. & A. 1900); Dubois v. Nugent, 69 N.J.Eq. 145, 60 A. 339 (Ch. 1905).

9. Headley v. Leavitt, 65 N.J.Eq. 748, 55 A. 731 (E. & A. 1903): "The rule is that, where the party has equitable rights not cognizable in a court of law, the judgment will interpose no obstacle to redress in equity, since the courts of law had no proper jurisdiction of the subject matter forming the basis of redress in equity. 2 STORY, EQ. JUR. 1673." See also Metropolitan Life Insurance Company v. Stern, 124 N.J.Eq. 391, 2 A. 2d 51 (Ch. 1938).

10. Smalley v. Line, 28 N.J.Eq. 348 (Ch. 1877); Hughes v. Nelson, 29 N.J.Eq. 547 (Ch. 1878).

11. Borcherling v. Ruckelhaus, 49 N.J.Eq. 340, 24 A. 547 (E. & A. 1892); Gallagher v. L. & B. Eagle Brewing Company, 86 N.J.Eq. 188, 98 A. 461 (E. & A. 1916).

law.[12] But equity interferes with judgments at law only where there has been fraud, or a mistake, or accident in procuring the judgment and where the legal remedies are inadequate.[13]

The existence of a complete defense at law, in fraud cases, has never been considered a bar to the exercise of this ancient jurisdiction by the Court of Chancery because "mere defense, however perfect, is not relief."[14] But it is well settled that false representation without intent to deceive is not actionable at law while in equity the misrepresentation of a material fact, though there be no moral delinquency, is deemed to be fraudulent.[15] It is clearly apparent, therefore, that when the defendant in the original action failed to establish legal fraud, it did not deprive itself of the right to proceed in equity.[16] It cannot be deprived of this right by the defense that the judgment at law was res adjudicata since

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12. See *supra,* note 10. Slambovsky v. Cohen, 124 N.J.Eq. 290, 1 A. 2d 456 (E. & A. 1938); Red Oaks, Inc. v. Dorez, Inc., 120 N.J.Eq. 282, 184 A. 746 (E. & A. 1936); Palisade Gardens v. Grosch, 121 N.J.Eq. 240, 189 A. 622 (E. & A. 1937).

13. Clark v. Board of Education, 76 N.J.Eq. 324, 74 A. 319, 25 L.R.A. N.S. 827, 139 Am. St. Rep. 763 (E. & A. 1909); also see Commercial National Trust & Savings Bank, 99 N.J.Eq. 492, 133 A. 703 (Ch. 1926), *aff'd,* 101 N.J.Eq. 249, 137 A. 403 (E. & A. 1927) for a collection of authorities showing when equity may enjoin a party from collecting a judgment at law.

14. Smith-Austermuhl Company v. Jersey Railway Advertising Company, 89 N.J.Eq. 12, 103 A. 88 (Ch. 1918); New York Life Insurance Company v. Steinman, 103 N.J.Eq. 403, 143 A. 529 (Ch. 1928); Cornish v. Bryan, 10 N.J.Eq. 146 (Ch. 1854); Metler's Administrator v. Metler, 18 N.J.Eq. 270 (Ch. 1867), *aff'd,* 19 N.J.Eq. 457 (E. & A. 1867); O'Brien v. Paterson Brewing & Malting Company, 69 N.J.Eq. 117, 61 A. 437 (Ch. 1905); Morgan Realty Company v. Pazen, 112 N.J.Eq. 33, 139 A. 712 (Ch. 1927); Chapin Publicity Company v. Saybrook Holding Corporation, 105 N.J.Eq. 215, 147 A. 490 (E. & A. 1929); Kunz v. Barnegat Pines Realty Company, 109 N.J.Eq. 115, 156 A. 417 (E. & A. 1931).

15. Travelers Insurance Company v. Evslin, *supra,* note 6; Eibel v. Von Fell, *supra,* note 8; Dubois v. Nugent, *supra,* note 8; Cowley v. Smith, *supra, note* R.

16. Union Water Company v. Kearn, *supra,* note 3; Commercial Casualty Insurance Company v. Southern Surety Company, *supra,* note 7.

it is now seeking relief from equitable fraud, the determination of which lies solely with a court of equity.[17]

Nor can it be barred on the grounds that it has elected its remedy for the essence of the doctrine of "Election of Remedies" is the conscious choice, with full knowledge of the facts, of one of two or more inconsistent remedies.[18] The interposition of a strictly legal defense to an action at law does not constitute an election of one of two or more inconsistent remedies.[19]

The argument may be advanced that an insurance company should be bound by the representations made in the application, whether true or false because the insurance company could have made an investigation and established the truth or falsity of the representations before issuing the policy. Such procedure would require the insurance company to add this expense to the premium cost, thereby penalizing honest applicants with a higher insurance rate because of the dishonesty of a few would-be policy-holders. We hold no brief for insurance companies for their annual statements bespeak their ability to take care of their own interests, but we believe as a matter of sound public policy that fraud, either legal or equitable, conscious or unconscious, should be restrained,

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17. Headley v. Leavitt, *supra,* note 9; see also cases cited under note 12.

18. Levy v. Massachusetts Accident Company, 127 N.J.Eq. 49, 11 A. 2d 79 (E. & A. 1940); Adams v. Camden Safe Deposit & Trust Company, 121 N.J.L. 389, 2 A. 2d, 361, 364 (S. Ct. 1938); 20 C.J. 21; 18 Am. Jur., sec. 9, page 133.

19. In Adams v. Camden Safe Deposit & Trust Company, *supra,* note 18, the court said: "To make the election conclusive, there must be in fact two inconsistent remedies available to the party seeking enforcement of the claimed right. Neither the mistaken assertion of a right that does not exist nor the unsuccessful invocation of an unavailable remedy operate as a definite remedy. Nor is the principal applicable to bar concurrent and consistent remedies. Kelsey v. Agricultural Insurance Company, 78 N.J.Eq. 378, 79 A. 539 (Ch. 1911). . . . It is also a doctrine imbedded in our jurisprudence that a defendant to an action at law is not, by pleading therein, precluded from equitable relief in matters solely of equitable cognizance, and therefore not available as a defense at law. McMichael v. Barefoot, 85 N.J.Eq. 139, 95 A. 620 (E. & A. 1915); Simon v. Townsend, 27 N.J.Eq. 302."

whether that fraud arose in connection with an insurance policy or the simplest contract.[20]

An insurance policy is unique in that the insured will strain his financial resources to the limit in order to keep the policy in force, and our state has recognized this fact by passing laws regulating the issuance of these policy contracts.[21] Once a policy is issued, the insurance company must be required to live up to the terms of the contract provided the policy was honestly obtained.[22]

We believe that our court, in granting relief in the principal case,[23] as well as others,[24] has dealt justly with complainant and defendant, and that its decision will do much to deter applicants from making dishonest statements. However, we believe that the court should construe each policy strictly and only grant relief where it is clearly apparent the policy would not have been issued if the misrepresentations had not been made.[25]

Statute of Limitations — Action on a Judgment — Part Payment to Toll Statue.—Before the Statute of Limitations had run on a judgment, the judgment debtor made part payments. Plaintiff brought an action on the judgment more than 20 years after its rendition, but less than 20 years after the last part payment. *Held*: Recovery denied. Partial payment of

20. See *supra*, notes 6, 7, 14, 16 and 18.

21. R. S. 17:34-1 to 48 inclusive; N.J.S.A. 17:34-1 to 48 inclusive.

22. Prudential Insurance Company of America v. Connallon, 106 N.J.Eq. 251, 150 A. 564 (Ch. 1930).

23. Metropolitan Life Insurance Company v. Tarnowski, 130 N.J.L. 1, 20 A. 2d 421 (E. & A. 1941).

24. Metropolitan Life Insurance Company v. Lodzinski, *supra*, note 6; Prudential Insurance Company v. Nilan, 111 N.J.Eq. 347, 162 A. 605, 93 A.L.R. 369.

25. Teitelbaum v. Massachusetts Accident Company, 13 N.J.Misc. 811, 181 A. 295 (S. Ct. 1935), *aff'd*, 116 N.J.L. 417, 184 A. 808 (E. & A. 1936); Foster v. Washington National Insurance Company, 118 N.J.L. 228, 192 A. 59 (S. Ct. 1937); Metropolitan Life Insurance Company v. Lodzinski, *supra*, note 6.