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SURREBUTTAL.

COMPLAINANT'S EXHIBITS.

DEFENDANT'S EXHIBITS.

Notice of Appeal.

(Filed January 12, 1926.)

In Chancery of New Jersey

Between

THOMAS SARDO,
Complainant-Respondent,

and

FIDELITY & DEPOSIT COMPANY OF MARYLAND,
Defendant-Appellant.

On Bill, etc.
On Appeal.

The defendant hereby appeals from the whole of the final decree made in this Court, in the above stated cause, on December 29th, A. D. 1925, to the Court of Errors and Appeals in the last resort in all cases.

Dated January 6, 1926.

WALL, HAIGHT, CAREY & HARTPENCE,
Solicitors for and of Counsel with Defendant.

I conceive there is good cause for appeal in the above stated cause.

JOHN A. HARTPENCE,
Of Counsel with Defendant.

Proof of Service.

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

MATTHEW T. HILLICK, JR., being duly sworn according to law on his oath deposes and says:

That he is in the employ of Wall, Haight, Carey & Hartpence the solicitors for and of counsel with the defendant-appellant within named; that on Friday the 8th day of January, 1926, he served a copy of the within notice of appeal upon Messrs. Ward & McGinnis, solicitors for the complainant-respondent within named by delivering to, and leaving with, the person in charge of their office, at their said office at No. 160 Market Street, in the City of Paterson, New Jersey, said copy. Said service was made on or about the hour of 10:30 on said day.

MATTHEW T. HILLICK, JR.

Sworn to and subscribed before me
this 9th day of January, A. D. 1926.

GROVER J. CAREY,
Notary Public of New Jersey.

Service of a copy of the within is hereby acknowledged this 8th day of January, 1926.

STEIN & STEIN,
Counsellors at Law,
126 Market St.,
Paterson, N. J.

Petition of Appeal.

(Filed February 1, 1926.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between THOMAS SARDO, Complainant-Respondent, and THE FIDELITY & DEPOSIT COMPANY OF MARYLAND, Defendant-Appellant.	On Bill, etc. On Appeal from Chancery.

To the Honorable the Court of Errors and Appeals, of the State of New Jersey, in the last resort in all causes:

The petition of The Fidelity & Deposit Company of Maryland, the appellant in the above-entitled cause respectfully shows that:

1. Petitioner finds it is aggrieved by a final decree made in the Court of Chancery of New Jersey by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date December 29th, 1925, in a certain cause in said Court of Chancery, wherein the said Thomas Sardo was complainant and petitioner was defendant in this respect, to wit; that the said decree adjudges, among other things, that a certain policy of insurance No. 6111250 bearing date the 13th day of June, 1923, and issued by the defendant (the petitioner) to the complainant (the respondent), be

reformed by striking therefrom the word "securities" and inserting therein the word "jewelry" so that the said policy shall be a policy of insurance and indemnity from the loss as provided in said policy of "money and jewelry," and that the said complainant have his costs taxed and that a counsel fee of $300 be allowed to solicitors of said complainant.

2. Petitioner appeals from the said decree of the Chancellor which decrees as aforesaid upon the ground that the same is erroneous in that the said decree, instead of decreeing as aforesaid, should have adjudged and decreed that the said policy of insurance should not be reformed and that said costs and counsel fee should not have been allowed as aforesaid, and should have adjudged and decreed that the bill filed by said complainant in the cause aforesaid should be dismissed, with the allowance of costs and counsel fee to the said defendant.

Petitioner therefore prays that the said decree of the said Chancellor may be reversed, set aside, and for nothing holden and that petitioner may have such other relief in the premises as to this Honorable Court shall seem proper.

WALL, HAIGHT, CAREY & HARTPENCE,
Solicitors for and
of Counsel with Appellant.

JOHN A. HARTPENCE,
Of Counsel.

Endorsed:

"Filed Jan. 26, 1926,
Thomas F. Martin,
Clerk."

Proof of Service.

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

MATTHEW T. HILLICK, JR., being duly sworn, on his oath says that he served a true copy of the within petition of appeal on Ward & McGinnis, on January 29, 1926, at 11:20 A. M., by leaving same at their office, No. 160 Market Street, Paterson, N. J., with a person in charge thereof; and also upon Stein & Stein, on the date aforesaid at 11:30 A. M., by leaving same at their office, No. 126 Market Street, Paterson, N. J., with a person in charge thereof.

MATTHEW T. HILLICK, JR.

Sworn to and subscribed before
me this 30th day of January,
1926, at Jersey City, N. J.

ALFRED F. CONNAY,
Master in Chancery
of New Jersey.

Bill of Complaint.

(Filed November 20, 1924.)

IN CHANCERY OF NEW JERSEY.

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

The complaining shows unto your Honor, your orator, Thomas Sardo, of the City of Paterson, County of Passaic, and State of New Jersey, who brings this bill against the Fidelity and Deposit Company of Maryland, a corporation of the State of Maryland, and thereupon your orator shows:

1. That on the 13th day of June, 1923, the defendant issued to the complainant a certain policy of insurance, referred to in said policy as "Messenger and Office Robbery Policy," which policy bears No. M6111250, and wherein and whereby the said defendant, for the consideration of forty ($40.00) dollars, payable to with in advance, undertook and agreed to indemnify the complainant, referred to in said policy as "assured," amongst other things, from all loss sustained by complainant by robbery, and loss sustained inside the premises of the complainant, which premises were designated in said policy as No. 318 Market Street, in the City of Paterson, County of Passaic, and State of New Jersey; the said policy to run from the 13th day of June, 1923, until the 13th day of June, 1924, at twelve o'clock noon, standard time.

2. The said policy further provided that the insurance granted under said policy in said respect should apply during the hours of seven in the morning until twelve o'clock, midnight. For greater certainty as to the terms and conditions of said policy, complainant begs to refer to said policy.

3. Your orator further shows that at the time he purchased said insurance or entered into said contract of insurance as aforesaid, it was understood and agreed between him and the said defendant, by its duly authorized agent that the business of your orator was that of jeweler at the place aforesaid; and that the property to be insured against was "money and jewelry."

4. Your orator further shows that notwith-

standing the terms and conditions under which the said contract was made, as last aforesaid stated, the said defendant through mistake or accident, issued the policy aforesaid to your orator, but indemnified your orator for a loss of "money and securities," and not "money and jewelry," as the said policy should have set forth.

5. Your orator further shows that he was not cognizant of said error until he later ascertained the same as hereinbefore set forth.

6. Your orator further shows that on the 20th day of May, 1924, during the hours covered by said policy of insurance, and at 9:15 P. M., to wit, a robbery occurred in and upon the premises of your orator, whereby your orator was robbed of a large quantity of jewelry, of the value of to wit, $9,000.

7. Your orator, upon happening of said robbery, duly notified the said defendant, and its duly authorized agent, and in all respects complied with the terms of said policy and demanded from the said defendant indemnity for the loss of jewelry; said loss being sustained to him as said robbery aforesaid.

8. The said defendant refused to pay the loss sustained by your orator or any part thereof, and thereupon your orator commenced an action in the New Jersey Supreme Court, at the Passaic Circuit Court, alleging the issuance of said policy for the sum of $8,000, the happening of the robbery, and the loss sustained, and the refusal of the defendant to pay, and thereupon the defendant filed an answer averring that they did not insure complainant against the loss of jewelry but only "money and securities."

9. Your orator avers that he will not be able to prosecute successfully his said action at all, unless the policy of insurance aforesaid is reformed so that the same shall provide for indemnity for loss of robbery of "money and jewelry" instead of "money and securities."

10. Your orator has frequently and in a friendly manner applied to the defendant to rectify the said mistake in said policy, or to pay your orator his loss, by treating the policy as being a policy of insurance for loss of "money and jewelry," but the said defendant has refused to do so.

In consideration whereof for as much as your orator is without relief, excepting in this Court, to the end, therefore, that the said Fidelity and Deposit Company of Maryland, a corporation of the State of Maryland, may answer this bill, but without oath, and that he set forth under what facts and circumstances the said policy was issued by it, with all its recitals as aforesaid; that the said policy of insurance may be decreed to have been issued in the form in which it was issued by mistake or accident; that the same may be, by a decree of this Honorable Court, reformed, so that the said policy shall provide for the indemnifying of complainant from loss of "money and jewelry" instead of "money and securities," as in said policy set forth; that the defendant be restrained from entering a judgment by default against your orator for failure to file a reply to the Special Defenses of the Answer in the action, in the Supreme Court, until this Court shall have made further order in the matter; and that your orator shall have such further and other relief as may be equitable and just.

May it please your Honor, the premises considered, to grant unto your orator the State's writ of subpoena, issued out of and under the seal of this Court, to be directed to the defendant the Fidelity and Deposit Company of Maryland, a corporation of the State of Maryland, on a certain day and under a certain penalty therein expressed to be and appear before your Honor in this Honorable Court, then and there to answer the premises and to abide by and perform such order and decree as shall seem meet.

WARD & McGINNIS,
Solicitors and of Counsel with
Complainant.

Answer and Counterclaim.

(Filed December 29, 1924.)

IN CHANCERY OF NEW JERSEY.

Between

THOMAS SARDO,
Complainant,

and

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
Defendant.

} On Bill, &c.

The answer of the defendant the Fidelity and Deposit Company of Maryland, a corporation of the State of Maryland to the bill of complaint of the complainant Thomas Sardo.

This defendant, answering the bill of complaint, says that:

1. It admits that it issued to the complainant, on the 13th day of June, 1923, a certain policy of insurance, which policy bears number M6111250, and wherein and whereby, for the consideration of forty dollars ($40.00), which said amount was paid to defendant by complainant, it undertook and agreed to indemnify the complainant, therein designated as the Assured, for all loss by him of certain property, designated as money and securities, from within the assured s premises, designated in said policy as number 318 Market Street, in the City of Paterson, County of Passaic, and State of New Jersey, but only in, and to the extent of, a sum not exceeding eight thousand dollars ($8,000.00), for the term beginning June 13, 1923, and ending June 13, 1924, at 12 o'clock noon, standard time, upon the terms and conditions, and within the hours, in said policy expressly set forth, and for greater certainty of which reference to said policy is hereby made. All other and inconsistent allegations in Paragraph 1 of the bill of complaint are denied.

2. It admits Paragraph 2 of the bill of complaint.

3. It admits that the business of complainant, at the time of the issuance of said policy, was that of jeweler. All other and inconsistent allegations of Paragraph 3 of the bill of complaint are denied.

4. It denies Paragraph 4 of the bill of complaint.

5. It has no knowledge or information sufficient to form a belief as to the allegations of Paragraph 5 of the bill of complaint.

6. It denies Paragraph 6 of the bill of complaint.

7. It denies Paragraph 7 of the bill of complaint.

8. It admits that it refused to pay complainant the loss alleged to have been sustained by him; and it further admits that on or about September 9th, 1924, an action was instituted by complainant against defendant, in the New Jersey Supreme Court, Passaic County, in which complainant alleged the making of a certain policy of insurance by defendant, to the amount of eight thousand dollars ($8,000.00); the happening of a robbery; the sustaining of a loss by complainant; and the failure of the defendant to make good to complainant the alleged loss or any part thereof. It also admits that defendant filed an answer in said action averring, among other things, that said policy of insurance indemnified complainant in a sum not exceeding $8,000. for loss by robbery of certain property mentioned and described in said policy as "money and securities"; and that none of the property mentioned and described in complainant's alleged proof of less, except the sum of $40. in money, of which he alleged he had been robbed, was covered by said policy of insurance. All other and inconsistent allegations in Paragraph 8 of the bill of complaint are denied. For greater certainty reference is hereby made to said answer.

9. It admits Paragraph 9 of the bill of complaint, but avers that the matters therein alleged do no constitute a sufficient ground to move this Honorable Court to grant complainant the relief prayed for in his said bill of complaint.

10. It admits that it has refused to pay complainant the loss he alleges, but denies all other

and inconsistent allegations in Paragraph 10 of the bill of complaint; and it avers that there is no such mistake in said policy as is alleged by complainant, and that said policy was issued in the form, and contains the terms, provisions and conditions, applied for by complainant and as were assented to and accepted by him.

And defendant, further answering said bill of complaint, says that:

11. Said policy of insurance contained, among other things, the following provision:

> "Notice of loss. D. The assured upon knowledge of any loss shall give immediate notice thereof by telegraph to the Company at its home office in Baltimore, Maryland, or to a duly authorized agent of the Company."

And defendant avers that complainant, upon knowledge of the loss alleged to have been sustained by him, failed and neglected to give immediate notice thereof by telegraph to the company (this defendant) or to a duly authorized agent thereof, whereby complainant became barred of any recovery which he might otherwise have had upon said policy.

12. In his application for said policy of insurance complainant declared the following statement to be true, in consideration of which, among other things, said policy of insurance was issued:

> "The assured has no other burglary, theft or robbery insurance except as herein stated: No exceptions."

And defendant avers that complainant, at the

time said declaration was made and said policy issued, had other burglary insurance, covering the property within the premises aforesaid, and mentioned in his alleged proof of loss, whereby and by reason whereof said policy became, was and is void and of no effect.

13. In his application for said policy of insurance complainant declared the following statement to be true, in consideration of which, among other things, said policy of insurance was issued:

> "The assured has not sustained, or received indemnity for, a loss by burglary, theft or robbery within the last five years, except as herein stated: No exceptions."

And defendant avers that complainant, at the time said declaration was made and said policy issued, had sustained, or received indemnity for, a loss by burglary, theft or robbery within the last five years prior thereto, whereby and by reason whereof said policy became, was and is void and of no effect.

Defendant prays that the prayer of said bill of complaint be not granted, and that defendant be hence dismissed, with its costs in this behalf most unjustly sustained.

And defendant, by way of counterclaim against the complainant, says that:

1. Paragraphs 1 to 13, inclusive, of the foregoing answer, are here repeated and made a part hereof.

2. So long as said policy of insurance shall remain outstanding, and said action at law in the New Jersey Supreme Court remain pending, defendant will be greatly embarrassed, hindered and

harassed by false, unfounded and litigious claims by complainant most unjustifiably based thereon, and will be put to large expense and inconvenience in contesting and defending same.

The defendant, therefore, prays:

1. That the complainant Thomas Sardo may answer this counterclaim, but without oath, and each statement made herein.

2. That the policy of insurance hereinbefore mentioned and described, issued by defendant to complainant on June 13th, 1923, be declared to be null, void, inoperative and of no effect, and that the complainant may be decreed to deliver up said policy for cancellation.

3. That said action at law in the New Jersey Supreme Court, Passaic County, brought by complainant against defendant, be perpetually restrained.

4. And that such other and further relief may be granted defendant as to this Honorable Court, under the circumstances, may be deemed equitable and just.

WALL, HAIGHT, CAREY & HARTPENCE,
Solicitors for Defendant the Fidelity and Deposit Company of Maryland.

Affidavit of Service.

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

Matthew T. Hillick, Jr., being duly sworn according to law on his oath, says that on January 2, 1925, at about the hour of 1:30 P. M. he served a certi-

fied copy of the answer and counterclaim of which the annexed is a copy on Ward & McGinnis, solicitors for complainant, by leaving the same at their office, 160 Market Street, Paterson, New Jersey, with a person in charge thereof.

MATTHEW T. HILLICK. JR.

Sworn to and subscribed before me, at Jersey City, N. J., this 5th day of January, A. D., 1925.

GROVER J. CAREY,
(Seal) Notary Public of N. J.

Answer to Counterclaim.

(Filed January 26, 1926.)

IN CHANCERY OF NEW JERSEY.

Between

THOMAS SARDO,
Complainant,

v.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
Defendant.

On Bill., etc.

The answer of Thomas Sardo complainant, to the counterclaim of the defendant.

This complainant answering such counterclaim avers that all the matters alleged in the bill of complaint, to which Paragraphs 1 to 13 of the defendant's answer referred, are herein repeated as if set forth at length, as the complainant's answer to

the said matters alleged in Paragraphs 1 to 13 aforesaid.

Further, answering said counterclaim, denies the matters and things set forth in Paragraph 11 of the defendant's answer.

This complainant further answering also denies all the matters and things in said counterclaim, which are inconsistent or traverse by denial the matters and things set forth in the bill of complaint.

This complainant further answering denies the the matters in the second paragraph. This complainant further answering denies that the defendant is entitled to the relief prayed for in this counterclaim.

As to said counterclaim, this complainant claims to be hence dismissed, with his reasonable costs and charges in this behalf most wrongfully sustained.

WARD & McGINNIS,
Solicitors of Complainant.

Memorandum-Opinion.

(Filed November 16, 1925.)

IN CHANCERY OF NEW JERSEY.

Between

THOMAS SARDO,
Complainant,

and

FIDELITY & DEPOSIT COMPANY OF MARYLAND,
Defendant.

On bill for reformation; on pleadings and proofs.

Messrs. WARD and MCGINNIS, for the complainant.

Messrs. WALL, HAIGHT, CAREY and HARTPENCE, for the defendant.

LEWIS, V. C.:

The facts in this case are as follows: Thomas Sardo the complainant, went to his broker Mr. Lederer, and told him he wanted to insure his money and jewelry. Lederer then took him to Mr. Newman, a soliciting agent of the Fidelity and Deposit Company of Maryland, the defendant. They told Newman that they wanted a policy of insurance on the money and jewelry of the complainant. Newman said he would communicate with his company in Newark and find out what could be done, because he had no authority himself to write a policy. Newman then sent a written application

to the office of the insurance company in Newark. That application was not produced in evidence. Mr. Brush, who is now the general agent of the Newark office, went down to Paterson to look through the store of Sardo. He entered the store and saw the jewelry in the place. Upon examination, Brush admitted that there were no securities in the store of Sardo the complainant, and that all he had there was jewelry. He admitted that the complainant Sardo, had nothing to insure except jewelry, so far as he was concerned. He then returned to Newark and telephoned to Newman that the company would issue a policy covering money and securities only; and a policy covering money and securities was afterwards sent to Newman for countersignature and delivery to the assured. Newman said that he glanced at the policy and saw that it covered money and securities only, but that he interpreted it in his own mind to also cover jewelry. He thereupon handed it to Sardo's broker, Mr. Lederer, who, in turn, delivered it to Sardo. Neither Sardo nor his broker read the policy. Prior to the expiration of that policy a robbery occurred and a large amount of jewelry was stolen from Sardo's place of business. About a month after the robbery the policy was renewed in the same form. Sardo says that he did not read the second policy, and that the first that he knew that he was not covered for money and jewelry was when the defendant filed an answer, some months later, in an action at law, commenced by Sardo against the insurance company for the payment of the policy; which set up as a defence that the policy did not cover money and jewelry, but that it covered money and securities only. Thereupon the present bill was filed in this Court for the

reformation of the policy on the ground of mutual mistake; the bill averring that it was the intention of both complainant and defendant that a policy was to be issued insuring Sardo against loss of money and jewelry, but that through mistake, the policy was issued to cover money and securities, instead of money and jewelry. The insurance company denies that there was any mistake and asserts that it specifically refused to cover jewelry, and intended to issue the policy which was issued, namely, to cover money and securities, and that there was no mutual mistake.

The bill contains no allegation of fraud, nor is that issue raised by the pleadings and proofs.

The policy of insurance was issued by the defendant on June 13, 1923, for one year, and was designated as "Messenger and Office Robbery Policy, "No. M-6111250, insuring against loss of "money and securities." The premium, amounting to $40.00, was paid by the assured. The jewelry of which the store was robbed is alleged to be of the value of $9,000, which was $1,000 in excess of the insurance under the policy referred to.

The theory of mutual mistake upon which complainant appears to base his claim for relief is, that the complainant contracted with Mellor Newman for the issuance of a hold-up policy on his jewelry shop, and that Newman was concededly the agent of the defendant; and that this is shown by letterheads and cards given by the defendant to him, Newman, in which he is termed their agent. Complainant further contends, that it is proved by letters received by Mr. Newman in the course of his business, one of which accompanied the policy issued to complainant, and called for Mr. Newman's counter-signature, that Mr. Newman

was clothed with apparent authority to act for the company; that as agent he contracted with the complainant; and that the defendant attempted to take the benefit of that contract by writing up the policy for complainant; hence, that the act of Mellor Newman was the act of the corporation, if done within his authority or the apparent scope of his authority, and that it follows that there was a mutual mistake.

The ordinary layman is not a trained lawyer nor an insurance expert. That was decided in the case of Radawansky *v.* The Scottish Union Insurance Company, 126 Atlantic Reporter,, 657.

The next proposition is, that the doctrine of *caveat emptor* does not apply to insurance. That was decided by Vice-Chanceller Lane in the case of Giammares *v.* Allemenia Fire Insurance Co., 105 Atlantic Reporter, 611.

Now, a man is not debarred from relief merely because he does not read the policy, and in this case the evidence is, that the complainant was an ignorant man and that he relied upon the representations of his broker and the agent of the company that the policy which would be delivered would be that which he ordered. And it is admitted by the agent of the company that he understood the order; and that the policy ordered was a policy to protect the jewelry and not the securities. The evidence further shows, that in compliance with complainant's order, the agent of the company communicated with the general agent of the defendant. In the absence of any proof to the contrary, the presumption is, that the agent of the company in the performance of his duty to his principal did communicate the kind of a policy that the complainant ordered. The evidence

shows, that shortly after the order was given the general agent of the company called upon the complainant and inspected the stock of merchandise of the complainant, and that at no time, either prior or subsequent to the delivery of the policy, did the general agent of the company either by word or conduct indicate that the policy to be delivered or actually delivered was different from the policy ordered.

In view of these facts the complainant had a right to expect that the defendant would issue to him a policy which he had ordered; and he had the further right to rely upon the fact that the policy which was delivered to him was, in fact, the policy which he had ordered.

It further appears, that notwithstanding complainant's claim that he had been misled by the agent of the company; and that the policy issued was not the one he ordered, the company, nevertheless, retained the premium and has at no time made any offer to return the same. So that even assuming that the company was perfectly innocent in the matter, its retention of the premium under these circumstances, and with knowledge of these facts, operated as an estoppel, and as a ratification. The principal cannot retain the benefits of the agent's acts even though it was unauthorized, and at the same time disclaim liability.

The situation herein disclosed in some respects resembles the situation in the case of Commercial Insurance Company *v.* New Jersey Rubber Company, 61 N. J. Eq., 446. In that case Vice-Chancellor Emery held, that in equity as well as at law, the retention of the pro rate proportion of the premium as on a valid policy, is an affirmance of the validity of the policy. This case was one to

reform a fire policy and to enjoin an action at law; and also to restrain an action at law on the policy. It was claimed by the insurer that the policy was void because of cancellation; but the Court held that notwithstanding such cancellation the retention of the unearned premium by the company was an affirmance of the policy.

Applying the principle in that case to the instant case, the contention of the insurance company that there was no policy in force for the reason that the minds of the parties did not meet, with knowledge of all the facts, estops them from asserting the defense of "*nudum pactum.*"

It is well established, that where one of two innocent parties must suffer from the fraud of a third person, the loss ordinarily falls upon the one whose act enables such fraud to be committed.

Corpus Juris, page 10, Vol. 27.

That the presumption is, that the agent has communicated the facts of plaintiff's order to the principal is sustained by Story on Agency.

Accepting and retaining the benefit obtained by a principal under an unauthorized contract of the agent with full knowledge, may be held to be a ratification.

Dunston Lithograph Co. v. *Borgo,* 87 Atl., 334.

There is no doubt in my mind, that Sardo, Lederer and Newman all believed that the policy of insurance was to cover the jewelry in the store. They all agreed on that. Their testimony was very positive, and very convincing to the mind of the Court. The story told by Mr. Brush seems to

be rather incredible, that the company was willing to insure money and securities to the amount of $8,000, without actually knowing what money and securities he had. Certainly money and securities are much more easily handled than jewelry. The only serious question remaining in my mind is, whether Sardo was bound to discover from a reading of the policy that it did not cover his jewelry, and I am of the opinion, that the fact that he did not discover, by the reading of the policy, that it did not so cover the jewelry, is not fatal to his case.

The prayer of the bill will, therefore, be granted, and the policy will be reformed in accordance with the prayer. I will so advise.

Decree.

(Entered and filed December 29, 1925.)

IN CHANCERY OF NEW JERSEY.)

THOMAS SARDO, Complainant, and FIDELITY & DEPOSIT COMPANY OF MARYLAND, Defendant.	On Bill to Reform Policy.

Upon this matter being opened to the Court by Ward & McGinnis, solicitors and of counsel with complainant, in the presence of John A. Hartpence, of Wall, Haight, Carey and Hartpence, solicitors and of counsel with defendant, and upon reading the pleadings and hearing the proofs in the cause,

from all of which it appears that the defendant on the 13th day of June, 1923, issued to the complainant a certain policy of insurance referred to in said policy of insurance as, "Messenger and Office Robbery Policy," No. -M-6111250, wherein for the consideration therein mentioned, the defendant undertook to assure and indemnify the complainant from loss sustained by robbery within the premises of the complainant known and designated in the policy as No. 318 Market Street, in the City of Paterson, County of Passaic and State of New Jersey, upon which premises the complainant conducted a jewelry store; and it appearing that the policy further provided that the period of indemnity should be between the 13th day of June, 1923, at noon until the 13th day of June, 1924, at noon, and during said time defendant would indemnify the complainant from the loss by robbery between the hours of seven in the morning and twelve midnight; that said insurance was intended by the policy to be an insurance of indemnity for all loss of "Money and jewelry" by robbery; and it further appearing that the said policy of insurance did not in language assure against loss of "Money and jewelry," but used the language in place thereof of "Moneys and securities"; and the complainant having alleged by his bill that the use of the word "Securities" was a mistake, and that the contract of insurance as made between complainant and defendant covered loss of "Money and jewelry," and not "Moneys and securities"; and the complainant having filed his bill praying for a reformation of the contract or policy of insurance above referred to by striking out therefrom the word "Securities," and inserting the word, "Jewelry," so that the said policy

would conform to the true intent and meaning of the parties as contracted between them, viz., a contract of insurance of indemnity for loss of "Money and jewelry"; and the Court upon hearing proofs and being satisfied that a mistake was in fact made to the injury of the complainant in the use of the word, "Securities," instead of "Moneys":

It is thereupon on this 29th day of December, 1925, on motion of Ward & McGinnis, solicitors of the complainant, ordered, adjudged and decreed, that the said policy of insurance, bearing date the 13th day of June, 1923, No. 6111250, and issued by the defendant to the complainant be reformed by striking therefrom the word "Securities" and inserting therein the word, "Jewelry," so that the said policy shall be a policy of insurance and indemnity from the loss as provided in said policy of "Money and jewelry."

Further ordered, adjudged and decreed that the complainant have his costs taxed and that a counsel fee of three hundred dollars, be allowed the solicitors of the complainant.

Respectfully advised,

E. R. WALKER,

C.

VIVIAN M. LEWIS.

Testimony.

IN CHANCERY OF NEW JERSEY.

Between THOMAS SARDO, Complainant, and FIDELITY AND DEPOSIT COMPANY OF MARYLAND, Defendant.	On Bill to Reform; Answer and Counterclaim.

Transcript of testimony taken in the above entitled cause, at the Chancery Chambers, Paterson, New Jersey, on the fourteenth day of April, nineteen hundred and twenty-five, before Hon. Vivian M. Lewis, Vice Chancellor.

APPEARANCES:

WARD & MCGINNIS, Esqs., for the Complainant.

Messrs. WALL, HAIGHT, CAREY & HARTPENCE, for the Defendant.

Mr. McGinnis: The object of the bill of complaint is to compel the reformation of a policy of insurance No. M-611250 in this respect: the policy of insurance was issued covering indemnity as to moneys and securities, and it should have been to cover the jewelry in the jewelry shop. There was a hold-up; highwaymen came in one night and held up Sardo; Sardo then brought action against the company in the Supreme Court, and they claimed they were not covered.

The Court: How much was the loss claimed?

Mr. McGinnis: We filed this bill to reform the policy of insurance, our contention being that we applied to their agent for such security—we wanted a policy to protect us from robbery, and that is the kind of policy that should have been given to us, and that is the kind of policy we supposed we had. The robbery took place about eleven months after the policy was issued. We never ordered such a policy as is covered by the form here. It was a jewelry business and nothing but a jewelry business.

THOMAS SARDO, the above named complainant, being duly sworn, testified as follows:

Direct examination by Mr. McGinnis:

Q. You are the complainant in this case? A. Yes, sir.

Q. Where do you live? A. 228 Graham Avenue, Paterson.

Q. How long have you been a resident of Paterson, New Jersey? A. About 16 years.

Q. What is your business? A. Jewelry.

Q. How many years have you been in that business? A. About 16 years.

Q. Did you have a jewelry business in the year 1923? A. Yes, sir.

Q. Where did you carry on that business? A. 318 Market Street, Paterson, N. J.

Q. Was there a robbery in your store? A. Yes, sir.

Q. What was the date of that? A. May 20, 1923, or 1924.

Q. Which was it? A. About eleven months after I had the policy.

Q. 1924, it was? A. Yes, sir.

Q. Previous to that robbery had you applied for a policy of insurance? A. Yes, sir.

Q. With the Fidelity and Deposit Company of Maryland? A. Yes, sir.

Mr. Hartpence: Objected to; he is calling for a conclusion now. I think he might state to whom he applied.

Q. You did apply for insurance? A. Yes, sir.

Q. To whom did you apply? A. First I went to Mr. Lederer and he took me to Mr. Mellor Newman.

Q. Where was Mr. Mellor Newman's office? A. 126 Market Street, fourth floor.

Q. Did you see Mellor Newman? A. Yes, sir.

Q. Who was with you? A. With Mr. Lederer.

Q. What did you ask Mr. Mellor Newman for?

Mr. Hartpence: Objected to as immaterial and irrelevant and incompetent. Now, he is going to testify what took place between himself and Mr. Newman, and he has not shown yet that anything he applied for to Mr. Newman can in any way have any bearing on this defendant.

The Court: He has not established the agency as yet; I will allow the question.

Mr. Hartpence: There is one other objection, that this doubtless led to an application being made, a written application; it seems to me that anything that took place prior to that application is incompetent and immaterial. I will overrule the objection; proceed.

E COURT.

Q. (Question withdrawn.) What conversation

did you have with Mr. Mellor Newman in reference to getting a policy of insurance?

Mr. Hartpence: I make the same objection.

By the Court:

Q. What did you do in connection with the issuance of the policy? A. I spoke to Mr. Newman.

Q. What did you do; did you sign your papers? A. No, sir.

Q. Proceed. A. And I spoke to him to get me a policy for "hold-up on jewelry"—

The Court: Is that called a hold-up policy now?

Mr. McGinnis: Yes, sir.

Further direct:

Q. Tell us the whole conversation you had? A. And I told him I was very afraid, and I wanted to be covered, my jewelry, on hold-ups, because I saw too many hold-ups going on around the United States; and also I told him that every creditor that came into my store, they asked me, "If you want to get your credit extended, you will have to have your jewelry covered."

Q. Is that all that was said? A. Yes, sir.

Q. What did Newman say? A. He said, "All right, I will get you a policy to cover the jewelry."

Q. Did you see Mr. Newman again after you got the policy? A. Yes, sir.

Q. And how long after this first visit was that? A. I was dropping in at all times and asking him about the policy; and later on, he showed me some kind of correspondence he had from the company.

Q. Was there anything said in that correspond-

ence, do you know, about anybody inspecting the jewelry shop? A. Yes, sir.

Q. For the company? A. Yes, sir.

Mr. Hartpence: Objected to as to what was said in the correspondence, for the double reason I have already given; and second, if there is any correspondence, it seems to me it should be produced.

Q. (Question withdrawn.) Did a man come to inspect your jewelry shop? A. Yes, sir.

Q. Did that man state where he was from? A. From Newark, New Jersey.

Q. Did he say whom he represented? A. Yes, sir.

Q. Whom?

Mr. Hartpence: Objected to. I don't want to be captious about it—

The Court: The objection will be sustained.

Q. Did you get a policy of insurance delivered to you? A. Yes, sir.

Q. Who gave it to you? A. Mellor Newman.

Q. Is that the policy of insurance which I show you, a policy entitled "Fidelity and Deposit Company of Baltimore, Maryland, messenger and office robbery policy No. M-611250"; is that it?

Mr. McGinnis: I offer it in evidence.

Mr. Hartpence: May I see it just a moment, Senator, please? (Mr. Hartpence examines it.) All right?

The Court: That was the policy that was issued, no doubt about it.

Mr. Hartpence: It appears to be the policy, so far as I can tell.

(Marked "Exhibit C-1.")

Q. And it was after this policy was given to you that the robbery occurred? A. Yes, sir.

Q. Did you read this policy? A. No, sir.

Q. This policy provides here, that you are insured against loss of moneys and securities; did you intend to take any insurance out against loss of securities? A. No, sir.

Mr. Hartpence: Objected to; the question is, what he did.

Q. Did you have any securities in your place? A. Not at all.

By the Court:

Q. Did you have a bank account? A. Yes, sir, in the United States Trust Company and the Franklin Trust Company.

Q. What did you ask insurance for? A. To cover the jewelry; that is the only thing.

Q. In what way did you put it to the agent? A. I asked Mr. Newman to have a policy issued on the jewelry and nothing else.

Q. Why didn't you read your policy when you got it? A. It is pretty hard for me to understand the policy.

Mr. McGinnis: I think we are all guilty of that.

The Court: I don't think so.

Mr. McGinnis: I never read my insurance policies—that is off the record.

Q. Didn't you tell him what you wanted covered by the insurance policy? A. Yes, sir.

Q. What did you say? A. I said "I want to cover the jewelry."

Further direct:

Q. That is the conversation you had with Mellor J. Newman which you have told us about? A. Yes, sir.

Q. You said you had no securities in your place? A. No, sir.

Q. Did you ever keep securities in your place? A. No, sir.

Mr. Hartpence: Objected to as irrelevant, incompetent and immaterial.

By the Court:

Q. Whom did you pay the premium to? A. I don't recollect, but I think to Mr. Newman I gave the check.

The Court: Have you the premium check to show the policy is in force?

Mr. Hartpence: We admit in the answer that everything was paid.

Q. When did you first find out that this policy did not protect you against loss in jewelry robbery? A. Ninety days after the hold-up, when I started the suit; and the answer that I got through Mr. Stein was that I was not covered on jewelry.

Cross examination by Mr. Hartpence:

Q. You took out another policy of the same kind on June 13, 1924, at the expiration of the one that has been offered in evidence, from the same company? A. Yes, sir, I did.

Mr. Hartpence: Have you got that policy with you, Senator?

(Receives it from Mr. McGinnis.)

Mr. Hartpence: Counsel for complainant

produces the policy of 1924, and we ask to have it marked for identification; that is a renewal policy of this same thing.

The Court: Let it go in evidence; why not?

(Marked "Exhibit D-1.")

Q. Who was Mr. Letterer that you refer to? A. He is my broker.

Q. Insurance man? A. Yes, sir.

Q. Where is he located? A. 126 Market Street, fourth floor, Paterson, N. J.

Q. How long had he acted as your insurance broker? A. This is the first policy through Mr. Letterer, as far as I recollect.

Q. And you said, as I understood you, that Mr. Letterer took you to Mr. Newman? A. Yes, sir.

Q. Had you ever been to Mr. Newman before for any insurance? A. No, sir.

Q. Then you had a conversation with Mr. Newman—dropping in to see him once in a while thereafter; and eventually you got this policy that is marked "C-1"? A. I don't understand what you mean.

Q. Marked as an exhibit in the case, the one dated June 13, 1923? A. Yes, sir.

Q. And you never read that policy? A. No, sir.

Q. And did not know what it contained until after you had asked the Fidelity and Deposit Company of Maryland to pay your burglary loss; and then they declined to pay it? A. Yes, sir.

Q. Then you started a suit? A. I started a suit before then.

Q. Did you start a suit before you asked the company? A. After I waited ninety days, I started a suit.

Q. And their defense, among other things, set up that the policy that you had gotten, did not cover your jewelry? A. Yes, sir.

Mr. McGinnis: Objected to as incompetent, irrelevant and immaterial.

The Court: Objection overruled.

Q. That was the first you knew that your policy did not cover jewelry? A. Yes, sir.

The Court: The records would speak for themselves.

Q. How long have you been in that business—the jewelry business? A. 16 years.

Q. Here in Paterson? A. Yes, sir.

Q. All that time? A. Yes, sir.

Q. And at the time this first policy was written in 1923, in what part of the building was your store? A. 318 Market Street.

Q. In what part of the building? A. It is a store.

Q. The first floor? A. Yes, sir, ground floor.

Q. Are you still there? A. Yes, sir.

Q. How many rooms has that store?

Mr. McGinnis: Objected to.

The Court: Objection overruled.

A. There is a store and two rooms in the rear of the store.

Mr. Hartpence: He stated that somebody went to inspect the premises, and that was all that was said about it on direct examination.

Mr. Ward: This is merely to reform the contract, and the civil suit is to recover under the policy.

The Court: He is now asking for reformation in the court of equity?

Mr. Ward: Exactly.

Q. You said in your direct examination, that after you had spoken to Mr. Newman, somebody came to your premises to inspect them? A. After he showed me the correspondence from the company, somebody came to my store from Newark, New Jersey.

Q. What was his name? A. I don't remember his name.

Q. What did he do when he got there? A. He examined the premises, and he wanted to see all the jewelry I had in the place. I opened the safe for him, to show him the jewelry.

Q. You don't know who he was? A. No, sir, I don't remember.

Q. Nor where he came from? A. He told me he came from Newark, New Jersey.

Q. And knowing only that about him, you let him examine all your premises, even to opening the safe for him? A. Yes, sir.

By the Court:

Q. Did you have any other policy on besides this? A. Not at the time.

Q. Did you at any time? A. Six months afterwards I did have another policy for burglary on jewelry.

Q. Did you read that policy? A. No, sir.

Q. How do you know it was on jewelry? A. That is what I asked for.

Q. Where is that policy? A. After the hold-up they cancelled it.

Q. After the hold-up they cancelled it? A. Yes, sir.

Q. But this policy was alive? A. Yes, sir.

Q. Have you got that policy? A. Yes, sir.

Q. How do you know it was on jewelry? A. That is what I asked for, for jewelry.

Q. Did you read the policy when you got it? A. No, sir.

Further cross:

Q. What company was that with?

Mr. McGinnis: Objected to as immaterial.

The Court: The objection is overruled; it affects his credibility.

Q. Whom did you negotiate it with? A. With the Phoenix Indemnity Company.

Q. You say you took that out six months after you took out this first one with the Fidelity and Deposit Company of Maryland? A. Yes, sir.

Q. That Phoenix policy was in effect at the time of the robbery of the jewelry? A. Yes, sir.

Q. And you say that one covered jewelry?

The Court: No, he did not say that; I asked him the question on that point for the purpose of seeing whether he had read that policy; and he said he did not know from reading it, but that he asked for a policy covering jewelry. The reason I propounded the question was to find out whether he read the second policy, and he said he did not.

Q. And was it your understanding that that Phoenix policy was to cover the jewelry in your premises there on Market Street? A. Supposed to be for jewelry, but I don't know anything wrong

with it like this one; I asked for it to cover jewelry.

Q. That company paid you for the loss of this jewelry, didn't it?

Mr. McGinnis: Objected to.

Mr. Hartpence: We set up in our answer this: (Sets forth the answer).

The Court: I am going to allow it. Renew your question.

By the Court:

Q. Were you paid any loss on this alleged hold-up under the second policy?

Mr. Ward: Objected to on the ground that it is incompetent, irrelevant and immaterial and not a part of this case.

Q. Were you paid any loss under this policy which you have mentioned as being cancelled?

Mr. Ward: That was for burglary; this other policy was for burglary.

Further cross:

Q. How did you come to lose the jewelry that you now claim you are entitled to be paid for by the Fidelity and Deposit Company of Maryland?

Mr. Ward: Objected to.

The Court: Objection overruled.

Q. How was it done? A. People came into the store, and they held me up.

Q. How? A. At the point of a gun and a knife, and they took me to the back and they tied me up, and then I don't know what happened.

Q. Was there anyone there with you at the time? A. Yes, sir.

Q. Who was there with you? A. Mr. Carmina.

Q. What was his business there? A. Barber.

Q. What was he doing there? A. Sitting down there.

Q. These men came into your store, didn't they? A. Yes, sir.

Q. And that is where this alleged theft of your jewelry took place? A. Yes, sir.

Q. Right there in your store? A. Yes, sir.

By the Court:

Q. Did they hit you? A. No, sir.

Further cross:

Q. What time of day was that? A. Around a quarter of nine.

Q. In the evening? A. Yes, sir.

Q. Had you closed your store for the day then?

Mr. McGinnis: We do not think they should use this case as a pumping expedition for their Supreme Court action now pending.

Mr. Hartpence: We deny that; we are merely cross examining on the direct examination.

The Court: The objection is overruled. Irrespective of any robbery or anything else, if you thought there was a mistake in the issuance of your policy, you would have a right to come in to court and ask that it be reformed; no doubt about that.

Q. You closed your store then at nine o'clock? A. About nine.

Q. And about 9:15 these people came in and did this that you refer to? A. Yes, sir.

Mr. Hartpence: We will call upon the other side to produce the Phoenix Indemnity Company policy.

Mr. Ward: Here it is; I imagine this is it.

Q. Where did you get that? A. From Mr. Simon Glass.

Mr. Ward: W object to the production of this policy; we admit we have it in our possession, but we object to producing it.

The Court: Objection overruled.

Q. Is that the policy, Mr. Sardo? A. Yes, sir.

Mr. Hartpence: I have called for it and it is produced; that puts it in evidence, I suppose.

Mr. Ward: I object to its going into evidence.

The Court: Objection overruled.

(Marked "Exhibit D-2.")

Q. Haven't you had other burglary or hold-up insurance on your jewelry and the things covered by your policy with the Fidelity and Deposit Company of Maryland, prior to the time that you took out the policy with the Fidelity and Deposit Company?

Mr. Ward: Objected to as incompetent, irrelevant and immaterial, and not cross examination.

The Court: Objection overruled; it affects the credibility.

A. A long time before.

Q. How long? A. Five years, ten years, sixteen years; I cannot remember.

Q. Have you had any other losses by burglary or robbery prior to the time you took out the policy with the Fidelity and Deposit Company in June, 1923? A. No, sir.

Q. None whatever? A. Not before that policy, no, sir.

Q. You have had no other robbery or loss by theft prior to the time you took out that policy with the Fidelity and Deposit Company? A. No, sir.

Mr. Hartpence: If your Honor will pardon me just a moment, please.

The Court: Certainly.

Redirect examination by Mr. McGinnis:

Q. There was no other hold-up policy on your store at the time you took out this policy, "Exhibit C-1"? A. No, sir.

SAMUEL LEDERER, being duly sworn, testified as follows:

Direct examination by Mr. Ward:

Q. What is your business? A. Real estate and insurance.

Q. Whereabouts is it conducted? A. 126 Market Street.

Q. Do you know Mr. Sardo? A. Yes, sir.

Q. How long have you known him? A. About five years.

Q. Has he ever done any busines with you, insurance business? A. Only one policy.

Q. When was that? A. I believe in the year 1923; that is the policy.

Q. Is this the policy about which the business was done at that time? A. Yes, sir.

Q. Showing you "Exhibit C-1"? A. Yes, sir. I have a record of that policy in the office; I could send for it.

Q. Did you write the policy out? A. No, sir, I brokeraged it.

Q. Whom did you have your relationship with regarding the policy? A. Mellor Newman.

Q. When Sardo came to you, what did you do? A. I took him into Mr. Newman's office—that was directly down the hall from me; that was Mr. Mellor Newman.

Q. What was done and said there?

Mr. Hartpence: Objected to as incompetent, irrelevant and immaterial; same objection as before.

The Court: Objection overruled.

A. I took Mr. Sardo in to Mr. Newman's office, and I said, "Mellor, I want to get a hold-up policy in case Mr. Sardo is held up, or his men in the store during business hours, for jewelry.

Q. What did Mr. Newman say? A. He said, "I will let you know; I will have to take it up with the company.

Q. After that, was anything done by you in reference to the matter? A. Mr. Sardo came into my office, and I said, "Go in to see Mr. Newman, until Mr. Newman brought me the policy.

Q. He brought that policy? A. Yes, sir, and I entered it in my register.

Q. Did you get any percentage as broker? A. Yes, sir.

Q. Showing you "Exhibit C-1?" A. Yes, sir; I kept a record of it, so that when there was a renewal I would get my percentage.

Q. The policy to which you refer that was de-

livered to you by Mr. Newman, is "Exhibit C-1?" A. Yes, sir.

Q. Thereafter was there any renewal of that policy? A. Yes, sir.

Q. And when, Mr. Lederer? A. At the expiration of that, because Mr. Newman himself must have mailed it to Mr. Sardo, because Mr. Newman sent me a check for the commission.

Q. You knew it was still alive as long as you got your commission? A. Yes, sir.

Cross examination by Mr. Hartpence:

Q. You shared your commission with Mr. Newman? A. He shared his commission with me.

Q. How long have you known Mr. Sardo? A. About five years, I should judge, probably six years, I think six years. I have bought jewelry from Mr. Sardo myself.

By the Court:

Q. Was it good? A. Yes, sir.

Further cross:

Q. You were merely the insurance broker? A. At that time I was; since then I am a direct agent of the Eagle and the Commonwealth, and also the Royal; at that time I was the direct agent of the Commonwealth of New York.

Q. Do you know where Mr. Sardo had his business? A. Yes, sir.

Q. Where was that? A. On Market Street—the number I don't remember.

Q. In Paterson? A. Yes, sir.

Q. And your office is also in Paterson? A. 126 Market Street, and he is at the other end of the city.

Samuel Lederer, redirect.

Q. Did you know that there had been a loss later on sustained by Mr. Sardo? A. Yes, sir, I saw it in the newspapers.

Q. That is all you knew about it? A. Yes, sir. Then Mr. Sardo came down to me and told me "I had a loss." And then I went in to Mr. Newman, which I would do with anybody, as it was up to him.

Q. You went to see Mr. Newman about the loss, and then you had nothing further to do with it? A. No, sir.

Q. So that at the time the application was made to you by Mr. Sardo for the insurance, you simply took him in and turned him over to Mr. Newman? A. Yes, sir.

Q. And when he told you he had sustained a loss, you again turned him over to Mr. Newman? A. Yes, sir.

Q. And you had nothing further to do with it? A. No, sir.

Redirect examination by Mr. Ward:

Q. At the time that this policy was taken out, or at least at the time you heard the first conversation between Newman and Sardo, was anything said about insuring money and securities?

Mr. Hartpence: Objected to.

A. No, sir.

Q. What, if anything, was to be insured? A. The jewelry, because Mr. Sardo said, "There is a lot of hold-ups; my creditors are forcing me to take out a hold-up policy, or the man behind the counter, to cover two people."

Recross examination by Mr. Hartpence:

Q. Did you receive this policy which has been

marked Exhibit C-1"—that is, the first Fidelity policy, from Mr. Newman? A. Yes, sir, and then I handed it to Mr. Sardo in an envelope.

Q. Did you read it? A. No, sir, I don't read any policies.

Q. When your policy comes in to your client, don't you look to see if that is the policy that he thought he was going to get? A. No, sir, all I do is to take the man's name, the date of the policy, the date of the expiration, and what it is, and I believe if I sent for my book you would find it marked "Hold-up."

Q. You simply assumed it was, then, and did not read it to find out if it was the policy that your client had asked you to get for him? A. No, sir.

Q. And you did not see the renewal policy at all? A. No, sir, except I noted, when he sent me the check, I noted in my register account when that policy would expire.

Q. So that, at that time of the renewal, also, you had no knowledge whatever and took no steps to ascertain whether or not the renewal policy covered the loss that your client had asked you to get him a policy for? A. No, sir.

Q. Did you at any time later on, after the renewal had been made, learn in any way that these two policies covered money and securities and did not cover jewelry? A. After Mr. Sardo had started suit, he came to me and said, "That is a fine policy you wrote for me—I don't carry any securities—you know I came in here to get a hold-up policy"; and I said, "That is what your policy reads"; and he said, "You read this"; and then I read it, and it covered money and securities.

MELLOR NEWMAN, being duly sworn testified as follows:

Direct examination by Mr. Ward:

Q. Your business is what? A. Sergeant-at-Arms of the Paterson District Court.

Q. In the year 1923, what was your business? A. I was an insurance broker and agent.

By the Court:

Q. What companies did you represent, if any; did you represent this company?

Mr. Hartpence: Objected to as incompetent and not binding.

Q. Did you negotiate any insurance for the Fidelity and Deposit Company of Maryland? A. Yes, sir, the majority of my bonding insurance I done with the Fidelity and Deposit Company of Maryland.

Q. What was your connection with that company?

Mr. Hartpence: Objected to.

The Court: Why not show him the policy and ask him if he negotiated the policy.

Q. I show you "Exhibit C-1" and ask you if that policy was issued by you? A. It was issued by the company through me.

Q. Did you make the application for the policy yourself? A. Yes, sir.

Q. Who saw you about making the application? A. Mr. Sardo and Mr. Lederer.

Q. I show you a signature on the bottom of the policy, on the bottom of the second page of the policy, countersigned by Mellor J. Newman; whose signature is that? A. My signature.

Q. Now, when Mr. Sardo and Mr. Lederer came to you, tell the Court what conversation they had with you.

Mr. Hartpence: Objected to on the same ground.

The Court: Objection overruled.

A. Mr. Lederer came in and introduced Mr. Sardo to me, and they both, in their conversation, asked me to give Mr. Sardo a policy, a hold-up policy, covering him against jewelry. I asked Mr. Lederer and Mr. Sardo both what the man's business was, and one or the other of them said that he was in the jewelry business; and I asked if there was any other business that he was in, and they told me "No." I said, "Before I can issue a policy I must take it up with the company and it may be a while before the policy arrives"; that I could not bind them until he actually had the policy. So I inquired what kind of a policy he wanted, and then took it up with Mr. Brush.

Q. What, if anything, did they say that they wished covered by this policy? A. Mr. Sardo said he wanted his jewelry covered against holdups; that it affected his credits in New York; that salesmen would ask him if he was covered with insurance.

Q. Did you take the matter up with the defendant—the Fidelity and Deposit Company of Maryland? A. Yes, sir.

Q. Through whom? A. Mr. Brush, the manager of the Newark office.

Q. Did you have any correspondence with him? A. Yes, sir.

Q. Have you got that correspondence? A. I have as much as I could find of it.

The Court: Let us have it.

The Witness: This is all the stuff I have appertaining to the case that I can find.

Mr. Ward: His Honor suggests I show it to you, Mr. Hartpence.

Mr. Hartpence: I don't care to see it unless you offer it.

Q. Are these letters in response to letters written by you? A. Letters and telephone calls.

Mr. Ward: I now call upon the defendant to produce the letters written by Mr. Newman in relation to this policy, or the issuance of it.

Mr. Hartpence: I produce a letter, dated May 21, 1924, signed "Mellor J. Newman," and that is the only one that we have; that is all our files contained.

Mr. Ward: The 1923 letters are those that we wish produced by the defendant company.

Mr. Hartpence: I have produced the only one we have.

Further direct:

Q. I show you a letter dated March 14, 1923, on the letterhead of the Fidelity and Deposit Company of Maryland, directed to "M. J. Newman, 126 Market Street, Paterson, N. J.," and ask you if you received that letter? A. Yes, sir.

Mr. Hartpence: May I see it, Mr. Ward.

(Mr. Hartpence examines it.)

Mr. Hartpence: No objection.

(Marked "Exhibit C-3.")

Mr. Ward: I will read "Exhibit C-3."

(Reads "Exhibit C-3.")

Q. Thereafter, did anyone come from the Fidelity and Deposit Company of Maryland to the Newark office with reference to this matter?

Mr. Hartpence: Objected to as calling for a conclusion. I don't mind his asking if anyone came, but this calls for a conclusion right away.

Q. Do you know whether or not anyone came from the Fidelity and Deposit Company of Maryland, from Newark, New Jersey? A. A representative from the Fidelity and Deposit Company called at my office about twice every month.

Q. And you knew this man personally? A. Yes, sir.

Q. And you knew him to be the representative of the company? A. Yes, sir.

Q. Now, did this representative do anything with reference to the Sardo application? A. I don't remember the case in detail, but I know there was a lot of correspondence and telephone conversations up to the time I got the policy.

Q. What did the representative do? A. He asked me questions in regard to the assured.

Q. Do you know whether or not any inspection was made by this representative? A. I don't know; they asked me where his business was.

Q. I show you letter dated June 19, 1924, which is not of very great importance, but was written in reference to Mr. Sardo's policy; was that received by you? A. Yes, sir.

Q. From the company? A. Yes, sir.

Mr. Ward: I offer this in evidence.

Mr. Hartpence: It appears to relate to the renewal policy. It has no reference to the writing of the original policy in June, 1923.

Q. I show you a letter dated June 14, 1923, and ask you if that was received by you from the company? A. Yes, sir.

Mr. Ward: I offer that.

(Marked "Exhibit C-4.")

Mr. Ward: I will read it. (Reads "Exhibit C-4.")

Q. Now, this policy to which you have testified, "Exhibit C-1," did that or not come with that letter? A. It came at the same time with the policy.

Q. I showed you a moment ago this letter of June 19, 1924, and you stated that came from the company? A. Yes. sir.

Mr. Ward: I now offer that in evidence.

Mr. Hartpence: It applies to the renewal and not to this policy which is under process of reformation.

The Court: All right.

(Marked "Exhibit C-5.")

Mr. Ward: I will read "Exhibit C-5."

(Reads "Exhibit C-5.")

By the Court:

Q. Now, Mr. Newman, did you examine the policy when you got it? A. Yes, sir.

Further direct:

Q. At the time that you received this policy, "Exhibit C-1" from the defendant in this case, had you any authorization to act for them? A. Yes, sir.

Q. And was that authorization in writing or not? A. Yes, sir.

Mr. Hartpence: Objected to as calling for a conclusion as to whether or not he had an authorization.

By the Court:

Q. How did you come to act for them? A. They forwarded me an order to fill out, giving me the privilege to write a burglary insurance.

Further direct:

Q. Have you that authorization, can you produce it? A. I cannot find it.

Q. Have you looked for it.

The Court: Whatever authorization he had he should bring it.

Mr. Ward: I ask the defendant to produce the copy of that authorization.

Mr. Hartpence: We have none in our files.

The Court: Have you sent to your chief office for it?

Mr. Hartpence: We have sent for it to the home office, and we cannot find any such authorization.

Q. Tell us what that authorization was.

Mr. Hartpence: Objected to as immaterial, irrelevant and incompetent.

The Court: Objection overruled; you cannot produce the original; he says he cannot find the copy.

A. I might add, that I took it up with the office directly next door to me, who, I believe, also have power to write burglary insurance; and I told them how I got authority from the Fidelity and Deposit Company to write burglary insurance, and he said—

Mr. Hartpence: I object to all this.

The Court: It is a voluntary statement.

A. We got the agent's full permission.

Mr. Hartpence: We don't object to that. I object to the statement by this witness of anything that appertains to the contents of what he states is a written paper.

Q. Have you tried to find the authorization? A. Yes, sir.

Q. And you have been unable to find it? A. That is it.

Q. And from where did you get this authorization? A. From somebody in the company, I believe it was from Maryland.

Q. And was it or not, from the Fidelity and Deposit Company of Maryland? A. Yes, sir.

Q. Don't you know from whom this was in Baltimore, Maryland? A. Yes, sir.

Q. Was it from there you got the authorization? A. Yes, sir.

Q. For how long a period of time were you connected with this company?

Mr. Hartpence: Objected to.

Mr. Ward: Question withdrawn.

Q. For how long a time were you connected with this company after receiving the authorization that you have mentioned?

Mr. Hartpence: Objected to.

A. I have never received any word that I was not connected with it.

Q. How long ago did you receive that authorization? A. 1923.

By the Court:

Q. Have you written other policies for the same

character of insurance for the company? A. No, sir, I did not do a big business.

Q. What was the authorization that you had—the written authorization, so far as you remember the contents of it? A. It allowed me to write burglary insurance—limited me to burglary insurance; that is why I took it up with the office next door, William F. McDermott.

Q. Were you paid your full agent's commissions on this insurance? A. Yes, sir.

Q. By whom? A. They sent me a bill, and I deducted my commissions, and then they sent me a receipt that I paid the premium.

Further direct:

Q. I ask you whether or not the policy which has been marked "Exhibit C-1," and which you have stated was enclosed in the letter of June 19, 1923, was issued by you in accordance with the instructions of that letter? A. Yes, sir.

Q. And was it countersigned by you in accordance with the instructions contained in the letter from the defendant company—the letter marked "Exhibit C-4"? A. Yes, sir.

Cross examination by Mr. Hartpence:

Q. I show you this letter, dated May 21, 1924, and ask you if that is your signature? A. Yes, sir, that was written by me or with my consent; I believe it is the stenographer's writing.

Mr. Hartpence: I ask that it be marked for identification.

(Marked "Exhibit D-3 for identification.")

Q. Now, I show you the policy "Exhibit C-1," and the letter "Exhibit C-4," which you state accom-

panied the policy when you received it, and I ask you what you did to this policy "C-1," after you received it with the letter "C-4"? A. I countersigned it and entered it in my book, and turned it over to the broker.

Q. Was that Mr. Lederer? A. Yes, sir.

Q. Is that all you did with it? A. I entered it in my book and looked the policy over and countersigned it and gave it to Mr. Lederer; I don't recall anything else that I did.

Q. Now, the letter "C-4" states: "I am enclosing herewith the above-mentioned policy, issued as of June 13th, premium amounting to $40.00 will be charged to your account. Kindly countersign this policy; copy of same is enclosed for your files. Thanking you for this business, I am, Very truly yours, F. Fitzgerald, Burglary Department." There is nothing in that letter which directs you to issue that policy, is there?

Mr. Ward: I object.

Mr. Hartpence: He stated on his direct examination that he issued the policy.

The Court: That is not my recollection of the matter.

Mr. Hartpence: I should like to have the testimony read at this time. I say he did not issue the policy; he merely countersigned it.

Mr. McGinnis: He countersigned and delivered it to the broker.

Q. Now you say you looked the policy over and then delivered it to Mr. Lederer? A. Yes, sir.

Q. Didn't you notice at that time the policy covered money and securities? A. Yes, sir.

Q. And not jewelry; did you call Mr. Lederer's attention to the fact that it covered moneys and securities and not jewelry? A. No, sir, I did not.

Q. Did you have anything to do with the renewal policy marked "D-1"—issued June 19, 1924? A. The company sent the renewal directly to me, I think.

Q. Is that you signature to it? A. Yes, sir.

Q. "Mellor J. Newman"? A. Yes, sir.

Q. Do you recall what you did with that after you got it? A. I entered it in my book and called up Mr. Sardo and told him his renewal was here for burglary insurance or hold-up insurance, and he came down with the check and I gave him the policy.

Q. Did you read the policy? A. Yes, sir.

Q. You saw it was in the same form as the preceding one? A. Yes, sir.

Q. Did you call that to the attention of Mr. Sardo at that time? A. Not that item, no, sir.

Q. How did you come to write this letter, May 21, 1924, marked "Exhibit D-3 for identification"; what led you to write it?

Mr. Ward: Objected to.

The Court: Objection overruled.

By the Court:

Q. Have you seen the letter? A. What is the date of the policy?

Q. June, 1923. A. At this time I was sergeant at arms of the District Court, and I was not bothering with any other insurance only renewals that were on my book, and I asked the girl in the office every month to get my renewals in, and we would go over the books together and see what were due next month, and I would have them renewed.

Further cross:

Q. How did you come to write the letter?

The Court: The letter is not in evidence.

A. I cannot give you a definite answer.

Q. Did Mr. Sardo come in to see you prior to the writing of this letter? A. I don't recall it; if I could see some more correspondence—

Q. When did you first learn that Sardo had sustained a loss? A. He came in and told me his place was robbed.

Q. Then what did you do? A. Notified the company.

Q. Is not this the letter you wrote, notifying the company about that—read it— A. (Witness reads it.) I beg your pardon—

Q. I thought you had not read it; I wanted to be sure that you had.

By the Court:

Q. Is that the letter you wrote to the company? A. Yes, sir.

Further cross:

Q. Wrote this letter as the result of Mr. Sardo's notifying you of the loss? A. Yes, sir.

Q. Did you ever talk to Mr. Brush about the issuing of this policy in June, 1923, the first policy, "C-1"? A. I believe so.

Q. Do you know whether any inspection of the premises of Mr. Sardo was made? A. I don't know.

Q. You don't know? A. No, sir.

Q. And you don't know who made it if it was made? A. No, sir, but I believe I talked to Mr. Brush about it, but whether there was ever an inspection made, I cannot say.

Q. Did Mr. Sardo inform you that any such inspection had been made? A. I don't recall.

Q. Do I understand from your statement on the direct testimony, that this is the only policy of this kind that you ever did issue? A. That is the only one against the jewelry store; I have other burglary policies, or I had other burglary policies.

Q. But this was the only one you had issued for Mr. Sardo against the jewelry store? A. Yes, sir; I have various other burglary insurance that I had at the time for other clients.

Q. But not of Mr. Sardo? A. No, sir, that was the only policy.

Redirect examination by Mr. Ward:

Q. The $40.00 premium, that was paid? A. Yes, sir.

Mr. Ward: I now call the Court's attention to the fact that that portion of the letter written by the Fidelity and Deposit Company on March 14, with reference to the issuing of this policy, refers to this: "For protection against hold-ups while the store is open, a hold-up policy can be written at the rate of $5.00 per thousand"; and now we rest.

Mr. Hartpence: We will offer this letter of May 21, 1924, "D-3 for identification." It was produced on a call by counsel for complainant, and put it in evidence; in the second place, it is offered for the purpose of showing the relations between Mr. Newman and Mr. Sardo particularly.

Mr. Ward: The first statement is not so.

Mr. Hartpence: I will refer to the record and stand by it.

The Court: The objection is overruled.

DEFENSE.

GEORGE H. BRUSH, being duly sworn, testified as follows:

Direct examination by Mr. Hartpence:

Q. What is your position, Mr. Brush? A. At the present time?

Q. Yes. A. Manager of the Fidelity and Deposit Company of Maryland, in Newark, New Jersey.

Q. What was your business in the month of June, 1923? A. I was covering the field at that time as a special representative of the Fidelity and Deposit Company of Maryland.

Q. Where were you located? A. At Newark, New Jersey.

Q. At the branch manager's office? A. Yes, sir.

Q. What was the nature of your work at that time covering the field? A. Handling agencies and individuals on bonds, surety bonds only, and burglary insurance.

Q. You have since become the branch manager? A. Yes, sir.

Q. Who was the branch manager at that time? A. We had a man by the name of Strong before that, but he had left to go to Baltimore, and in the meantime I had been acting.

Q. Did you have anything to do with the insuring of the premises of the complainant in this case, Mr. Thomas Sardo, in Paterson? A. Yes, sir.

Q. What did you have to do with it? A. I made the inspection and recommended the coverage on the premises.

Q. What inspection did you make? A. I came up and looked at the premises, the location and the condition, the physical hazard of the mer-

chandise and property itself, to find out what we would cover.

Q. And did you decide what you would cover? A. Yes, sir.

Q. What?

Mr. Ward: Objected to; he has answered "Yes," but what was the process of his mind, what he thought he was covering, I do not think has any relevancy.

The Court: I think he can say "Yes" or "No."

Q. Did you decide what you would cover? A. Yes, sir.

Mr. Ward: Now, the next question is the one I object to, "What"?

Q. What did you decide to cover?

Mr. Ward: That is the mere process of this man's mind.

By the Court:

Q. Did you tell Mr. Sardo what you would cover? A. At the time I was there Mr. Sardo was not in the store.

Q. Did you see him at all? A. No, sir.

Further direct:

Q. What was the object and purpose of your inspection? A. We make inspections on all burglary risks, and have made them for years, to obtain the physical hazard especially in the various locations; in some locations you would not touch it, and in others you would not take merchandise of one character; you might cover one

class of merchandise or moneys, and yet you would not touch another kind.

Q. How did you come to make this inspection?

Mr. Ward: Objected to as incompetent, irrelevant and immaterial.

The Court: He has been all over that.

By the Court:

Q. Did you see any money there? A. No, sir.

Q. Did you see any securities? A. No, sir.

Further direct:

Q. What did you see there? A. They had a lot of jewelry and jewelry articles, and articles of merchandise.

By the Court:

Q. Whom did you see there in the shop? A. At the time I was in there, there was one man in there and I gave them my card when I went in to make the inspection.

Further Direct:

Q. As a result of your inspection and as a result of what you saw there and the nature of the property that was there, did you come to any decision, and if so, what, with regard to what your company would issue a policy to cover? A. (No answer.)

By the Court:

Q. Did you put in writing any report on this concern? A. Yes, sir, we make a report to the office; it might not be in writing.

Q. Have you got one in writing? A. I don't know.

Further Direct:

Q. As a result of your inspection and examination of the premises of Mr. Sardo, what report, if any, did you make to the company with regard to writing any policy?

Mr. Ward: Objected to.

Q. Did you make it orally or in writing? A. I could not say at this time.

The Court: He made a report orally or in writing.

Mr. Hartpence: There is no report.

The Court: Proceed. He says he made a report.

Q. Did you recommend that a policy be issued to cover jewelry?

Mr. Ward objected to as leading.

By the Court:

Q. What did you recommend; he says he did it orally. Whom did you speak to about it? A. To Mr. Parrish, he was handling the burglary end of it,—or Mr. Fitzgerald.

Q. Did you communicate to the home office? A. No, sir; we do it with the agent here.

Q. Is there any difference between a policy of insurance on money and securities, and on burglary? A. You have an open stock policy on jewelry.

Q. You don't mean to say, that when you entered this jewelry store to make an examination of the store, that you concluded you were insuring money and securities? A. We do lots of them; it is a common thing.

Q. Don't you insure jewelry? A. Lots of times we do; you would not take a jewelry risk that you would take a money and security risk on; a man might come in and grab hold of a handful of diamonds—

Further Direct:

Q. As a result of your inspection and what you reported and recommended to the branch office in Newark, New Jersey, do you know whether a policy was issued on Mr. Sardo's property? A. Yes, sir.

Q. And do you know whether this policy marked "Exhibit C-1" is the one that was so issued? A. Yes, sir.

Q. If a policy had been issued at this time to cover jewelry specifically in Mr. Sardo's store, in what way would that have been designated?

Mr. Ward: Objected to.

By the Court:

Q. I notice that your item here, Item 8, money and securities, under this policy, and refers to Paragraph 2, which Paragraph 2 is to indemnify the assured from all loss for robbery committed during the hours specified; have you got a declaration of the property from the assured? A. Not that I know of.

Q. Do you mean to say you insure securities without a declaration from the assured? A. On a hold-up you cover a lot of securities, they are not specified.

Q. They are never specified? A. Very seldom, unless you have a policy written on one certain security, or one certain jewelry item.

Q. You being the investigating man, you go to a

store, you ask the man—do you assume that you are not to insure his jewelry? A. Yes, sir.

Q. Did anyone there show you any money or securities? A. No, sir.

Q. It is a small shop? A. Yes, sir.

The Court: You can object to that, if you want to.

A. I might send a man out to make an inspection, and he would come back and say he would not cover this or that.

Q. When Mr. Mellor Newman asked you to go to the shop, what did he tell you he wanted you to go there for? A. To cover money and securities.

Q. Didn't he tell you this man ran a jewelry shop? A. He might have done so; we make a lot of inspections for jewelry.

The Court: He must have been a very inefficient agent.

Q. Are not there a number of policies, issued to cover jewelry these days? A. A lot of them are covered, but the physical hazards is being restricted so much that a lot of it remains uncovered.

Q. You don't turn any reputable person down that applies for insurance on jewelry? A. We will turn down to-day at the rate of three out of five.

Q. Reputable men? A. Yes, sir; on jewelry, furs and silks.

Further direct:

Q. Did you talk with Mr. Newman about the issuing of the policy, either the first policy or the renewal policy? A. No, sir, not outside of the telephone conversation that he wanted the jewelry

store covered on the hold-up—money and securities.

Q. When was that telephone conversation? A. That might have been a few days previous to the time the policy was written; the second renewal, I don't know anything about.

Q. In May, 1924, May 20th, what was your business with the company? A. Manager.

Q. May 20, 1924? A. Manager.

Q. You had become the manager? A. Yes, sir.

Q. And when did you first receive word or notice, or learn of the fact that a burglary or robbery or hold-up had taken place in regard to Mr. Sardo's place?

Mr. Ward: Objected to as irrevelant and immaterial.

The Court: Objection overruled.

A. I don't recollect the date that we had the notice of the robbery.

Q. Is that the first notice you got of it—this letter marked "Exhibit D-3 for identification"? A. No doubt that was it, but I don't remember of anything else outside of the letter.

By the Court:

Q. Are you familiar with the rates, at the time of the issuance of this policy? A. Yes, sir.

Q. What is the rate for money and securities? A. Five dollars a thousand. Jewelry on open stock, $30.00; they changed it to fifty shortly after that.

Q. Fifty dollars per what—$30.00 per what? A. At that time the rate on jewelry on open stock was $30.00; at the time the renewal policy was placed the rate was $30.00 a thousand; and a few months

after that, it was raised to $50.00 a thousand on jewelry.

Mr. Hartpence: I ask that that letter "D-1," which was produced by me, be impounded in this court room.

The Court: Put all the exhibits in Mr. Roberts' hands. (Which was done during recess, and they were then returned to counsel.)

Recess to 2 P. M.

AFTER RECESS.

GEORGE H. BRUSH, resumes the witness stand.

Cross examination by Mr. Ward:

Q. Mr. Brush, you knew Mr. Newman, of course? A. Yes, sir.

Q. And you knew that your company had printed stationery for him? A. I don't know that.

Q. Is that your signature (showing witness a paper)? A. I guess it was signed by my stenographer.

Q. And written by your authority? A. That was, yes, sir.

Mr. Ward: I offer this for identification. Marked "Exhibit C-6 for identification."

Q. Do you remember authorizing the statement in this letter? (Reads "Exhibit C-6 for identification.")

Mr. Hartpence: I move to strike that out; it has not been offered; I move to strike it out.

The Court: Strike it out.

Q. That was written at the suggestion of the company, wasn't it, the defendant in this suit?

Mr. Hartpence: Objected to; it will speak for itself.

A. Yes, sir.

Q. And it was signed by you? A. Yes, sir.

Q. And signed by you as manager? A. No, sir.

Q. Were you manager at that time? A. No, sir.

Q. But you had authority to write what was written there?

Mr. Hartpence: I object to it as calling for a conclusion by this person to establish his own agency.

The Court: Objection overruled.

By the Court:

Q. Were you authorized to write that letter? Do you recall that you did write to Mr. Newman about the printed matter and stationery that was printed by the company for him?

Mr. Hartpence: Objected to.

By the Court:

Q. Do you recall writing to Mr. Newman? A. I don't recall any special occasion.

Further cross:

Q. Do you recall having forwarded to him cards of the Fidelity and Deposit Company of Maryland, such as this?

Mr. Hartpence: Objected to.

The Court: Objection overruled.

A. No, sir.

Q. Have you ever seen that card before? A. Not to my recollection.

Q. Did you know that cards were printed by the Fidelity and Deposit Company of Maryland, Fidelity surety bonds, and burglary insurance, Miller J. Newman, agent?

Mr. Hartpence: I object to the question; I have not had a chance to look at it.

Mr. Ward: I offer this in evidence, sir.

Mr. Hartpence: Then I would like to examine it.

(Examines it.) Objected to as incompetent, irrelevant and immaterial. Anyone could print a card.

The Court: I will receive it, noting the objection.

(Card marked "Exhibit C-7.")

Q. Are you not aware of the fact that your company had printed and forwarded to you such cards as that for Mr. Newman, representing him as the agent of the company? A. No, sir.

Mr. Hartpence: I move to strike out the exhibit.

The Court: Let it stand for the present.

Q. Isn't it so that there was stationery forwarded to Mr. Newman, made up by the Fidelity and Deposit Company of Maryland? A. Not that I know of.

Mr. Hartpence: Same objection.

Q. Did you forward any? A. No, sir.

Q. Wasn't it forwarded through your office while you were manager? A. No, sir.

Q. And it is the letter which I show you, and

signed by you, in which you refer to the fact that there was a typographical error made in the printed matter which you would see would be corrected?

Mr. Hartpence: I object.

Mr. Ward: This letter I now offer in evidence.

The Court: Show it to Mr. Hartpence and he may have no objection to it.

Mr. Hartpence: I object to it as incompetent, irrelevant and immaterial; there is no basis laid to show the party who wrote the letter had any authority.

The Court: I shall have to sustain the objection on the ground that it is incompetent; you cannot put it in now.

Mr. Ward: I shall have to ask your Honor to let me open the main cause.

The Court: All right; I will give both sides the same leeway.

Q. You have stated, however, that you did visit Mr. Newman with reference to this insurance? A. I called on him about once every two weeks.

Q. And you discussed the question of this insurance with Mr. Newman? A. With this particular case?

Q. Yes. A. No doubt he may have called me over the telephone.

Q. Didn't you state this morning on direct examination, that you had talked of this particular insurance with Mr. Newman, and he had told you that it was to cover jewelry, money and securities? A. Money and securities.

Q. Didn't you state jewelry this morning in answer to his Honor's question; didn't you first say

jewelry, money and securities; didn't you, in answer to his Honor's question, first state that Mr. Newman had stated to you that he wanted the jewelry, money and securities covered; didn't you state that in reply to his Honor's question? A. No, sir.

Q. And didn't you later on say, in reply to a question put by counsel for defendant, that it was jewelry, money and securities that Mr. Newman had mentioned to you? A. No, sir.

Q. You knew it was a jewelry store? A. Yes, sir.

Q. And you went up there to look over the stock of jewelry? A. Not necessarily.

Q. You went up there to look over what the store contained? A. Not necessarily what it contained.

Q. That was one of the things you went up there for? A. It might have been.

Q. Was it? You know whether that was one of the things for which you went up? A. I went up to look over the store as a whole.

Q. You didn't start just then to say "jewelry"? A. No, sir.

Q. Didn't you have any idea what you were sent up there to insure, or what you were going to investigate? A. We might have insured any one of four things—

Q. Answer the question. A. Yes, sir.

Q. Hadn't you any idea what you were sent up there to look over? A. Yes, sir.

Q. Were you sent up there to look over the jewelry? A. That was one of the things.

Q. And that was one of the things that had been mentioned to you then? A. I cannot recall that anything was mentioned.

Q. How do you know you were sent up there to investigate the jewelry? A. I was not sent up there to look over the jewelry.

Q. You stated that was one of the things you went up to look over, that you knew that when you went up there. How did you know that, if somebody had not told you about the jewelry? A. We know every risk before we go to look at it.

By the Court:

Q. Do you mean to say Mr. Newman did not tell you what character of store you were going to look at? A. In the inspection of a store you might make a general inspection.

Q. Did not Mr. Newman tell you what character of store you were going to go to? A. A jewelry store, yes, sir.

Further cross:

Q. On your direct examination you said, that when you went up there, that you did inspect the merchandise? A. Yes, sir.

Q. And the merchandise was the jewelry? A. Yes, sir.

Q. And you never asked for any stocks, or any bonds or securities or moneys, did you? A. No, sir.

Q. As a field man, when you go out to make an inspection, does not your inspection include your investigating what you are insuring? A. You mean, itemize it?

Q. No, inspect it. A. Not necessarily.

Q. Do you mean to say, Mr. Brush, that when you go out as a field man to inspect the risk—inspect the property—or what you are insuring—the risk that your company is taking, that you do not

investigate to find out how much there is and what there is? A. If you will let me answer the way I want to, I will answer it. I cannot answer that question the way you put it.

Q. (Question read.) A. We always find out what we can insure or what we want to cover.

Q. When you knew this was a jewelry store when you went up there, you knew that was one of the things that was to be covered—merchandise? A. One of the things that they might want covered.

Q. And you did investigate the stock of jewelry? A. Yes, sir.

Q. But you did not investigate any securities or any money that Mr. Sardo might have? A. No, sir.

Q. How many rooms did this place have? A. You went up two or three stairs, and then the front part of the store was a jewelry store, I think.

Q. How many rooms were you in? A. As I recall it, only one.

By the Court:

Q. What did you see in that room? A. An ordinary cheap jewelry store, and the regular merchandise that goes with jewelry, rings and watches, and things like that?

Q. What in the world were you insuring; what were you insuring? A. The safe.

Q. Cou did not tell me anything about a safe. A. You don't see money and securities.

Q. What did you see in this room; what did you see? A. I saw jewelry, rings, watches, and things like that.

Q. If that is all you saw, what did you insure? A. Money and securities.

George H. Brush, cross.

Further cross:

Q. About which you had no knowledge? A. No, sir.

Q. And about which you made no investigation? A. No, sir.

By the Court:

Q. Do you mean to say, in putting an insurance policy on a man for money, you do not investigate what his receipts are? A. I would write you for $5,000 on your statement that you had money and securities, but I do not see those moneys and securities.

Q. A man you are investigating of this character, wouldn't you naturally, in the course of your business, inquire as to what money he carried? A. No, sir.

Further cross:

Q. You would not ask what securities he had that you were insuring? A. No, sir.

Q. Did you see a safe up there? A. I don't recollect; it is some time ago.

Q. As a matter of fact, your recollection is very poor about this matter, isn't it? A. No, sir.

Q. You said you went up several steps? A. Yes, sir.

Q. You know, as a matter of fact, that this is right even with the ground? A. No, sir.

Q. You don't recollect that? A. No, sir.

Q. You remember the safe being opened, and your being shown the contents of the safe? A. No, sir.

Q. Now, I hope I have refreshed your recollection; do you now remember there was a safe there? A. No, sir.

Q. You don't recall it? A. No, sir, there might have been and there might not.

By the Court:

Q. What report did you make to your company; what report did you make to your company; if you were insuring moneys and securities and you did not find a safe— A. You would cover under a safe policy then.

Q. What report would you make to your company on discovering he had no safe in the place, and he wanted to insure money and securities? A. I would not make a report.

Further cross:

Q. And your company would not issue a policy under those circumstances, if there was no safe? A. You might bank every day and carry your securities in your pocket.

By the Court:

Q. Is there a difference between a burglary insurance and a hold-up insurance? A. Yes, sir.

Q. Does it appear "Hold-up" on the face of the policy?

Mr. Ward: It speaks of robbery, your Honor, of course this would have been a robbery.

Further cross:

Q. Now, you don't remember to whom you made your report, do you? A. In the office?

Q. Yes. A. It was made out as soon as I got back.

Q. You don't recall to whom you made it? A. No, sir.

Q. You don't recall what it was, do you? A. I could not recall word for word what it was.

Q. You don't recall whether you reported a safe being there or not? A. I was not looking for a safe there.

Q. Answer the question. A. No, sir.

Q. You know that you did not send any report to your home office? A. We never do.

Q. In this case you did not? A. No, sir.

Q. And you never spoke to Mr. Sardo about the fact that your company would not insure his jewelry? A. No, sir.

Q. And you never spoke to Mr. Newman and told him that your company would not insure this jewelry, did you? A. We told him we would cover all money and securities.

Q. You never spoke to Mr. Newman, did you, and told him you would not insure the jewelry? A. Yes, sir.

Q. When? A. When we called him back over the telephone within probably a day or so after I was over here.

Q. Did you do that personally? A. I could not say.

Q. So you don't know then, whether anyone ever reported to Mr. Newman that this jewelry would not be insured, do you? A. I do know that.

Q. You don't know who called Mr. Newman up, do you? A. I know that I was talking with him, but I would not say whether I told him what identical coverage he carried at that time.

Q. That is what I asked you; you cannot say that you ever told Mr. Newman that your company would not cover this jewelry? A. Yes, sir.

Q. Didn't you just say you could not tell what

you said to Mr. Newman? A. I said I personally might not have telephoned him on that.

Q. Then you personally don't know, you yourself, what was said to Mr. Newman, do you? A. Only what I said to him, that is all.

Q. And you stated a moment ago that you could not say what you yourself told him about what could be covered by that insurance; that is true, isn't it? You just said it. A. I did not.

Q. Didn't you say that you personally could not tell what you had told Mr. Newman your insurance company would cover in this case? A. I told him we would cover money and securities.

Q. Didn't you just say a moment ago, that you could not personally say what you had told Mr. Newman about the particular things that this insurance would cover; didn't you say that a moment ago? A. I said we told him they would not cover jewelry.

Q. Didn't you say that a moment ago? A. Just what I have repeated.

By the Court:

Q. Don't you, in the usual course of your duties, report to your company at Baltimore? A. No, sir.

Q. Do you exercise the authority to have the policy issued without reporting? A. Yes, sir.

Q. To the agent? A. We write the policy ourselves in Newark, New Jersey.

Q. So the policy in this case came right out of your Newark Office? A. Yes, sir.

Q. And you sent it to Mr. Newman? A. It was sent by our office.

Q. And it did not become effective until is was countersigned by Newman? A. It became effective immediately after it was sent out of our office.

Q. Is it good without his countersign? A. As soon as he got it, the agent would countersign it.

Q. Is it good without his countersign, he having issued it as an agent? A. It has to be countersigned by the rules of the company.

Further cross:

Q. You talked about the rates—insurance—on jewelry, and you have referred to $30.00 a thousand, I believe; now, you issued a book, a rate book, didn't you, your company, and that rate book was given to its different agents, wasn't it? A. Yes, sir.

Q. And Mr. Newman had one of those red books, didn't he? A. I don't know, he probably did.

Q. Now, then, the policy of insurance to which you referred when you quoted the rate of $30.00 a thousand was an open policy? A. Open stock.

Q. Which made that, if the stock were taken in any way, it was insured; that is so, isn't it? A. No, sir.

Q. Then it was not the policy of insurance such as this which confined the taking to robbery and within certain hours, was it? A. No, sir, it was an entirely different form.

Q. So when you were quoting $30.00 and $50.00 you were not referring to this kind of a policy? A. I was referring to an open stock policy.

Q. You were not referring to this kind of a policy, were you? A. No, sir.

Q. Now, as a matter of fact, when your rates were raised they were raised all along the line on all kinds of policies? A. No, sir, they were lowered on some classifications.

Q. Well, when they were raised on jewelry, the rates, they were also raised on money and securi-

ties, were they not? A. I would not know offhand; I know they were raised on certain classifications, and on certain classifications they were lowered.

Q. When you were asked about this robbery having been reported to you, when it was reported to you, you sent a man up to get a list of the jewelry, didn't you? A. No, sir.

Q. Didn't you have a man come up from your company who went over Sardo's books and got a list of the jewelry that had been taken? A. No, sir, I did not do that.

Q. Did anyone else, in behalf of the company? A. I don't know.

Q. And don't you know that there was never a question raised about this policy covering this jewelry until suit was filed against your company? A. No, sir.

Q. Did you personally ever raise any question about this policy not covering the jewelry that had been sold? A. After the robbery, no, sir.

Q. So, then, when you were informed of this robbery, you, as manager of the Newark office, who had issued this policy, never raised any question with Mr. Sardo that this policy did not cover the theft? A. No, sir.

Mr. Hartpence: I move to strike out the answer.

The Court: I will let it stand.

Q. And you knew at the time, you were notified by this letter, that Mr. Sardo was claiming the insurance for the jewelry that was lost, didn't you?

Mr. Hartpence: Objected to as incompetent, irrelevant and immaterial.

The Court: The objection will be overruled.

A. I did not know what he was claiming.

Q. Did not the letter show you? A. He said he had had a loss; I did not know what he was claiming.

Q. You remember that letter, "Exhibit D-3"? A. Yes, sir.

Q. Now, didn't you, when you received that letter, make an investigation from your Newark office? A. No, sir.

Q. You knew Mr. Nordenchild? A. No, sir.

Q. Do you know Mr. E. Hoyt? A. No, sir.

Q. You don't know either one of those gentlemen? A. No, sir.

Q. What did you do with reference to this robbery when you got this letter? A. Sent it to the Claim Department.

Q. Where? A. New York.

Q. Did you ever follow it up after that at all? A. No, sir.

Redirect examination by Mr. Hartpence:

Q. When a claim loss is reported to your office, in like manner to this loss of Mr. Sardo, as shown in "Exhibit D-3," what then is the usual course pursued with regard to the investigation of it; who does that? A. The Claim Department.

Q. Do you have anything further to do with it in your office? A. No, sir.

Q. Whatever is done with the investigation of it after that, is done through an entirely different department? A. Entirely, yes, sir.

Q. And that Claim Department was located at the time of this loss, where? A. In New York.

By the Court:

Q. When the local agent notifies you, Mr. Brush,

that he has a risk, and wants it covered, do you go out yourself every time? A. No, sir, I might send somebody else out.

Further redirect:

Q. Are you familiar at all with what the Claim Department does as to listing the articles that are claimed to have been taken? A. Do you mean the procedure they follow out?

Q. Yes. A. As I understand it, they have an audit made of it.

By the Court:

Q. Don't you have blanks they fill in? A. They fill out proof of loss.

Q. Do you know whether a proof of loss has been filed in this case? A. I don't know.

Mr. Ward: Yes, sir.

Mr. McGinnis: Everything in the safe was taken.

REBUTTAL.

MELLOR NEWMAN, being recalled in rebuttal, testified as follows:

Direct examination by Mr. Ward:

Q. Did you receive this letter of June 23rd, 1922, from the Fidelity and Deposit Company? A. From Mr. Brush.

Q. And did you receive any stationery? A. Yes, sir.

Mr. Ward: I offer this in evidence.

Q. Did you receive any cards or stationery used in the business of the company? A. Yes, sir, cards, envelopes and stationery of all kinds.

Mr. Hartpence: Objected to as incompetent, irrelevant and immaterial.

The Court: Objection overruled.

Marked "Exhibit C-7½."

Q. I show you a card marked "Exhibit C-7," and ask you if that was a card received from the company? A. That is the card that the company paid for and gave to me; they paid for the printing; there was no charge to me.

Mr. Hartpence: I renew my motion to strike it out, as incompetent, irrelevant and immaterial.

The Court: Objection overruled.

Q. The card reads: "Telephone, Lambert 5813, Fidelity and Deposit Company of Maryland; Fidelity and Surety Bonds, Burglary Insurance, Mellor J. Newman, Agent, 126 Market Street, Paterson, New Jersey." Did you have that printed? A. The company sent that to me.

Q. I also show you a letterhead, or a paper, a letterhead of the Fidelity and Deposit Company of Maryland; did you receive that from them or not? A. Yes, sir.

Q. Who paid for it? A. The company sent it to me.

Mr. Ward: I offer this in evidence.

Mr. Hartpence: Let me see it, Mr. Ward. (Examines it.) Objected to as immaterial and irrelevant.

The Court: Objection overruled.

(Marked "Exhibit C-8.")

Q. I indicate to you on this letterhead of the Fidelity and Deposit Company of Maryland, Baltimore, "Meller J. Newman, 126 Market Street,

United States Trust Company Building, Paterson, New Jersey"; was this on there when you received this stationery from the company? A. That is the way the company sent it to me.

Q. I show you a book, and ask you if this is a book, an entry book of the insurance policy issued by you? A. Yes, sir.

Q. And I indicate the entrys, $611,251, what is that? A. That is the number of the policy, the burglary policy.

Q. Is that the policy, "Exhibit C-1"?

Mr. Hartpence: Objected to as incompetent, irrelevant and immaterial.

The Court: Objection overruled.

A. That is the number of the policy sent to Thomas Sardo, or to his broker.

Mr. Ward: I offer this in evidence.

Mr. Hartpence: Objected to as incompetent, irrelevant and immaterial.

The Court: Objection overruled.

(Marked "Exhibit C-9," two pages.)

Q. I indicate the entry referred to, which I will now ask leave to read to the Court, "611,251 F & D Co.," what does that mean? A. Fidelity and Deposit Company.

Q. "Thomas Sardo, 318 Market Street, $8,000 amount of policy; amount of premium, $40.00; term, one year, commencing June 13, 1923, expiration June 13, 1924; copy of policy form: burglary and hold-up insurance of jewelry store."

Mr. Hartpence: Objected to.

The Court: Objection overruled.

By the Court:

Q. Who made that entry in the book? A. I did.

Further direct:

Q. And Mr. Newman, did you at any time after you received this policy from the company, make that entry? A. Yes, sir.

The Court: He said he did; he entered it in the book himself, he said.

A. It is my own writing.

Q. You testified you received the check for $40.00? A. Yes, sir.

Cross examination by Mr. Hartpence:

Q. All the policies that you wrote for various companies were written in that book? A. Yes, sir.

Q. You represented how many companies? A. I represented one fire insurance company,—the National Ben Franklin Fire Insurance Company, I brokered business for them.

Q. And this was a register which you prepared for your own office, in which you kept the record of these policies? A. Yes, sir.

Q. You were not an officer of any of these companies that you did business for? A. No, sir.

Q. Nor a director? A. No, sir.

Q. Nor a stockholder? A. No, sir.

Q. You simply went out among people in Paterson and the vicinity and solicited business for your company, or if they came into your office seeking a policy, you wrote them? A. Yes, sir.

Q. When the policies were transmitted to you by the various companies you did this work for, you saw the policies were delivered to the applicant and countersigned where you were called upon to countersign? A. I was only called upon to countersign where I was the representative of the com-

pany; whenever I brokered business, I just stamped them.

Q. You delivered it to the party that applied for it, and charged them the commission? A. Yes, sir.

Q. You kept a record of all that, and in the course of time you rendered accounts to these various companies that you secured the policies from? A. Yes, sir.

Q. That was the extent to which your business went? A. Yes, sir, unless when Mr. Brush called on me every two weeks, he would ask me the different prospects around of bonds and different things, and I would take it up with him. If there was a new school going up, he would use every effort to help me to try and get it for our company.

Q. You received a commission if you secured it? A. Yes, sir.

Q. That is the extent to which your authorization went, isn't it?

Mr. Ward: Objected to.

The Court: He said he had a written authorization from the company which he says he is unable to put his hands upon.

A. It comes in a long order, and I signed one and sent it back to the company.

Q. Was it a paper similar to this one? A. No, sir, it was a long white sheet: "To Whom It May Concern."

Redirect examination by Mr. Ward:

Q. One thing I neglected to ask you in rebuttal. Did Mr. Brush ever come to you and tell you he would not insure this jewelry? A. He never told me anything like that; he never told me anything about not insuring jewelry; that is the only thing

I asked him to insure against hold-ups, and I never knew up to two weeks ago, but what he was covered for burglary insurance against jewelry.

THOMAS SARDO, recalled in rebuttal, testified as follows:

Direct examination by Mr. Ward:

Q. After this robbery at your place, and after you had reported it to the company, did anyone from the company ever come to see you? A. Yes, sir.

Q. What did they do? A. First, a man came in to take a statement; then somebody else came in to take also statements, an Italian man, the second one was—

Q. Did you give any list to these representatives of the company of what you had lost? A. Yes, sir. Then two other men came in and took stock of all the jewelry that was left in the store.

Mr. Hartpence: I object to this as incompetent.

Mr. Ward: We don't know who they were.

Q. From the time that you reported the loss of this jewelry by reason of this hold-up or this robbery, did anyone from the company ever state to you that your policy of insurance did not cover that loss?

Mr. Hartpence: Objected to as immaterial and irrelevant.

The Court: Objection overruled.

A. Nobody ever said that.

Q. Was there ever any statement made by any

representative of this company to you that this policy of insurance did not cover this loss until the answer was put in in the suit you filed against the company?

Mr. Hartpence: Same objection.

A. No, sir.

Cross examination by Mr. Hartpence:

Q. Is that one of your billheads? A. Yes, sir.

Q. Is that your signature down there? A. Yes, sir.

Q. You signed that? A. Yes, sir.

Q. Where did you sign it? A. In my store.

Q. When? May 24th, 1924, the date it bears? A. Get my copy there; I have an exact copy of it in my papers.

Mr. Hartpence: Will counsel please produce it?

Q. Was it, Mr. Sardo, just a short time after the robbery took place? A. Not very long, just a few days, that much.

Mr. Hartpence: We will offer it in evidence and ask that it be marked.

(Marked "Exhibit D-5.")

Mr. Ward: As I recall the chronological order of exents— (interrupted).

By the Court:

Q. What did you write that out for? A. Somebody from the company asked me to.

Q. Who brought that to you? A. One of the men that went over the jewelry stock.

Redirect examination by Mr. Ward:

Q. Mr. Sardo, this statement was made on May 24, 1924? A. I don't remember.

Q. The robbery occurred on May 20th? A. Yes, sir.

Q. Now, then, you had already notified the company on May 24th, or before that time, of the report, hadn't you? A. I notified Mr. Newman.

Q. And these men came up and you gave the statement on May 24th? A. Yes, sir.

Q. Now, then, even after that, when you made this claim against the company, you received the second policy of insurance, didn't you? A. Yes, sir.

Q. Was there anything ever said when you received this second policy of insurance, about the first policy not covering the loss?

Mr. Hartpence: Objected to as incompetent, irrelevant and immaterial.

The Court: Objection overruled.

A. Nothing at all; it was supposed to cover all jewelry.

Mr. Hartpence: I move to strike that answer out; it is mere supposition on his part as to what it was.

The Court: I will let it stand.

Mr. Ward: We rest.

SURREBUTTAL.

ARTHUR E. BENSON, sworn in surrebuttal, testified as follows:

Direct examination by Mr. Hartpence:

Q. Are you in any way connected with the

Fidelity and Deposit Company of Maryland? A. Yes, sir, I am an attorney representing the claim department.

Q. How long have you been connected with that company? A. With the claim department approximately six months.

Q. How long have you been connected with the company itself? A. I could not state.

Q. As far back as June, 1923? A. No, sir.

Q. As far back as May, 1924? A. Yes, sir.

Q. Where were you then? A. In the home office.

Q. That is located where? A. At Baltimore, Maryland.

Q. You are located at what office now? A. At the Newark branch office; I am in charge of all claims now in the State of New Jersey.

Q. And are you familiar with the records at the home office with regard to the branch offices? A. I am.

Q. And with regard to persons in the insurance business with whom the company does its business? A. I am familiar with the authority of the agents, yes, sir.

Q. And with the records that are kept of those authorities of the agents? A. I am, yes, sir.

Q. And are you familiar also with the method of adjustments of losses which are claimed by the assured? A. Yes, sir.

Q. And from your experience with these things, and your knowledge and observation of them, will you state whether or not you have recently made any effort to locate any written communication from Mr. Mellor Newman with respect to his representing the Fidelity and Deposit Com-

pany of Maryland? A. I made a special trip to Baltimore last Saturday, sir.

Q. What did you find? A. I found in the home office—

Mr. Ward: This is not the best evidence. The records themselves are the best evidence.

By the Court:

Q. Did you find any records at all? A. I found records, yes, sir.

Q. Indicating relationship with Newman? A. No, sir.

Mr. Hartpence: If it is not there, he cannot find it.

The Witness: I found in the home office merely the records showing—

Mr. Ward: I object—what the records show—

Q. What did you find? A. Records merely showing that business had been given to the company by Mr. Newman, Mr. Mellor J. Newman, showing the amount of commissions he received, and the amount of the business.

Mr. Ward: I now ask that that be stricken out, on the ground that the witness has testified that there is a record which is not produced here in court, and his evidence is not the best evidence.

The Court: I shall have to sustain the objection.

Q. Did you find any record at all appertaining to the appointment or designation of Mr. Newman as an agent to represent that company? A. No

records whatsoever, although I made a diligent search.

Further direct:

Q. Are you familiar with the forms which were in use in 1921, and from that time on, with regard to the appointment of the agents? A. I am, sir.

Q. I show you a paper, and ask you if you will state what that paper is in relation to the appointment of agents? A. This is the revised agreement, as of March, 1921, which is still in effect—the only form of agreement between an agent and a branch or home office.

Mr. Hartpence: I ask that it be marked for identification.

Marked "D-6 for identification."

Q. Would your experience with the company also in any way familiarize you with the method employed for the adjustment of a claim for loss? A. Yes, sir.

Q. What is the usual course?

Mr. Ward: Objected to.

The Court: Objection overruled.

A. The usual course is, if the claim, regardless of its nature, exceeds $500.00, as estimated by the assured when he makes notice of the claim, and if at any time the company feels that they cannot get up there themselves to make an inspection, we always turn the matter over to a local auditor, because it is necessary to know just what was in the store at the time after the robbery occurs to establish the question of co-insurance, if there is co-insurance.

Q. Do you know Mr. Nordenchild? A. No, sir.

Q. What is ordinarily and usually done with the list or inventory that is made of the merchandise or articles that are upon the assured premises in the way that you have referred to? A. They are generally checked up with police records first, to establish whether the assured is making a false claim, regardless of whether there was a coverage on it or not, as a matter of checking up on the assured, when he makes his claim; to be sure that we have no suspicions concerning him we always check that up with the police records; that is done regardless of the nature of the claim and regardless of the nature or extent of the policy; nine chances out of ten, when the first notice is given, we don't even know what the exact coverage of the policy is, because that is in one office and we are in another.

Cross examination by Mr. Ward:

Q. You were connected with this company in 1923? A. 1924.

Q. So at the time Mr. Newman states that he had his authority from this company, you were connected with them, were you? A. No, sir.

Q. You made a special trip to Baltimore to try and find this authorization? A. Not exactly to try to find it, but to try to find what would show his relationship with the company.

Q. You made a special trip to Mr. Newman, also? A. Yes, sir.

Q. You wanted him to tell a different story to what he had told on the witness stand? A. No, sir.

Q. Didn't you tell him he ought to stick by the company? A. No, sir.

Q. Didn't you tell him if he stated on the witness stand what he had told you, that the com-

pany might as well throw up its hands? A. I did not say that.

Q. But you did see him? A. Yes, sir.

Q. When? A. Last Thursday, I believe it was.

Redirect examination by Mr. Hartpence:

Q. In the month of May, 1924, at the home office in Baltimore, Maryland, did you have anything to do with the department of claims? A. Yes, sir.

Q. And what did you have to do with them? A. At that time I was in training more than anything else—there—

Q. If notices of losses were sent in to the home office for the assured, would they in any way come to your attention or jurisdiction? A. If they were very unusual, they would.

Q. Was there any claim received at the home office from Thomas Sardo in regard to this alleged loss of May 20, 1924? A. None that I can remember.

Q. When did you have your conversation with Mr. Newman about this case? A. I think it was last Thursday; I am not sure.

Q. What did he say to you about the occurrence? A. Mr. Newman's statements, as near as I can get it, were that he was under the impression that this policy was covering jewelry, and not only moneys and securities, but jewelry, and that he thought somebody from the company would have been to see him sometime before about it, but that nobody had been to see him; that he had talked to no one in the company concerning this case.

Q. That is all the conversation that took place between you and him? A. Absolutely all.

Recross examination by Mr. Ward:

Q. You did not inquire of him about what he

had asked for when this policy was granted by the company? A. I just told you exactly.

Q. You said he was under the impression it covered jewelry? A. Yes, sir.

Q. Did you ask him what he had asked the company to grant? A. I did ask him what he understood the policy would cover.

Q. Don't you know that the answer that was filed in Sardo's case in the New Jersey Supreme Court to recover this money from your company, admits—have you read the answer in this case? A. Yes, sir.

Q. Do you know the answer admits that the company received the proof of loss? A. I know exactly what the answer says; the answer does not specify what kind of a proof of loss it admits receiving; it admits proof of claim.

SUR-REBBUTAL.

MELLOR NEWMAN, recalled.

Direct examination by Mr. Ward:

Q. You remember this gentleman, Mr. Benson, coming to see you? A. Yes, sir.

Q. Did he or not at that time tell you, that if you told on the witness stand the story that you had told him, that the company might as well throw up its hands—that it would lose the case? A. He did not use that expression; he came to my office after court; I asked him to come in the little room; he said, "I wanted to speak to you about the Sardo case"; and I said, "Yes, it is the first time I have seen anyone about it—two years have gone, and I thought somebody might have got in touch with me about it before this"; he said, "What are the particulars in the case?" and I told him that Sardo

was covered against a hold-up for burglary insurance on his jewelry.

Mr. Hartpence: Objected to.

The Court: The objection is overruled.

A. He said, "Well, has anyone spoken to you?" or words to that effect; I do not remember the exact conversation, and as I understand, I told him that either Mr. Sardo or somebody had asked me about the case; and I told him, "Of course, I have covered him on burglary insurance on his jewelry."

Mr. Hartpence: I move to have it stricken out.

The Court: You object to it as incompetent, irrelevant and immaterial; I shall allow it to stand.

A. I said, "That is my story"; and I said, "That is the truth of it, I covered him on jewelry insurance against burglary"; he turned to me and said, "Well, according to that kind of testimony we will settle out of court, I guess." That is all he said; and he said that somebody else would probably be up to see me.

Mr. Hartpence: I move to strike it out on the same grounds.

The Court: I will let it stand.

ARTHUR E. BENSON, being recalled, testified as follows:

Direct examination by Mr. Hartpence:

Q. At the time of the conversation referred to by you in your previous testimony, and just referred to by Mr. Newman, did you make a state-

ment to him that if what he said was so, you might just as well settle out of court? A. No, sir.

Q. What did you say to him with respect to what has just now been referred to? A. Nothing concerning that at all.

By the Court:

Q. What did you call on him for, anyhow? A. To ascertain what he thought the assured was covered for—making an investigation. I had no authority to settle out of court.

Both Sides Rest.

The Court: The Court will have to consider the matter, no doubt about that.

Mr. Hartpence: I desire to have the testimony written up before arguing the case, and I just received a telephone message that there are some cases coming on to-morrow morning in the United States Court that will take us a week to try, in Newark; they are jury cases, and what I would like to do would be to come back in two weeks, after I have had a chance to prepare a brief in the light of the evidence, and argue it orally, and submit a brief to cover the situation. It is a case of considerable importance to both parties, and at the same time I think it will turn on some very simple principles, and I would like to have a chance to collect the authorities.

The Court: Is it your idea that a policy issued in this way cannot be reformed?

Mr. Hartpence: Certainly.

The Court: You mean to say that, even though Newman made a mistake?

Mr. Hartpence: He did not make a mistake; he says he did not; the lines of the agency obligation

are very tightly drawn by the courts—the question of the mutuality of the mistake. There is no allegation of fraud, and mutual mistake must be shown. The question of agency is a very vital question in this case. I will come back any time your Honor desires within two weeks.

The Court: I will fix a date.

Mr. Ward: Mr. Sardo is in no position to have this testimony written up.

The Court: If ought to be done.

Mr. Hartpence: We will lend our copy to the other side.

The Court: All right; make a copy for me. I will fix a date as soon as Mr. Roberts notifies you that he has the testimony written out.

Exhibit C-1.

MESSENGER AND OFFICE ROBBERY POLICY

FIDELITY AND DEPOSIT COMPANY

OF MARYLAND

BALTIMORE

(Herein called the Company)

DOES HEREBY AGREE WITH THE ASSURED

Named and described as such in Item 1 of the Declarations forming part hereof, as respects Money and Securities, and such Merchandise as is described in the Declarations and stated therein to be insured hereunder.

(INDEMNITY AGREEMENTS)

Loss Outside Premises

I. To Indemnify the Assured FOR ALL LOSS BY ROBBERY committed during the hours speci-

fied in Section (a) of Item 4 of the Declarations, of such property, from a custodian outside the Assured's premises.

Loss Inside Premises

II. To Indemnify the Assured FOR ALL LOSS BY ROBBERY committed during the hours specified in Section (e) of Item 4 of the Declarations, of such property, from within the Assured's premises.

Limits of Indemnity

III. The Company's Liability is limited to the several specific amounts stated in Sections (b), (c), (d), (f) and (g) of Item 4 of the Declarations and subject to such limits as respects each Section, the total liability of the Company hereunder is limited to the amount stated in Item 6 of the Declarations.

Policy Period

IV. This Agreement shall apply only to a robbery committed as aforesaid, within the Policy Period defined in Item 3 of the Declarations or within any extension thereof under Renewal Certificate issued by the Company.

THIS AGREEMENT IS SUBJECT TO THE FOLLOWING CONDITIONS:

Definitions

A. "Robbery" as used in this Policy shall mean a felonious and forcible taking of property by violence inflicted upon a custodian; or by putting him in fear of violence; or by an overt felonious act committed in the presence of a custodian and of which he was actually cognizant; or a felonious and forcible taking of property from the per-

son or direct care and custody of a custodian, who, while having custody of property covered hereby, has been killed or rendered unconscious by injuries inflicted maliciously or sustained accidentally. "Money" as used in this Policy shall mean currency, coin, bank notes, bullion, uncanceled postage and revenue stamps in current use, United States War Savings Certificate stamps and Canada War Savings stamps not attached to registered certificates, and "Thrift" stamps. "Securities" as used in this Policy shall mean only such bonds, debentures, checks, coupons, demand and time drafts, promissory notes, bills of exchange, warehouse receipts, bills of lading, express and postal money orders, certificates of stock and deposit, and other instruments, as are negotiable and as respects which when negotiated, the Assured has no recourse against the innocent holder. "Custodian" as used in this Policy shall mean: (1) the assured, if an individual; (2) a member of the firm, if the Assured is a copartnership; (3) any executive officer of the Assured, if the Assured is a corporation; (4) any person not less than seventeen (17) nor more than sixty-five (65) years of age, who is in the regular employ of the Assured and duly authorized by him to act as his paymaster, messenger, collector, or cashier, and while so acting to have the care and custody of property covered hereby. "Guard" as used in this Policy shall mean any male person not less than seventeen (17) nor more than sixty-five (65) years of age who accompanies the custodian by the direction of the Assured, but who is not a driver of a public conveyance. "Premises" as used in this Policy shall mean the interior of that portion of the building designated in Item 2 of the

Declarations which is occupied solely by the Assured in conducting his business.

Exclusions

B. The Company shall not be liable for loss: (1) unless the robbery is established by reasonable evidence; (2) of any property unless it belongs to the Assured or is held by him in trust or as collateral for indebtedness to the Assured, or is held by the Assured in such capacity as would render him legally liable to the owner thereof for such loss of the property as is covered hereby; (3) of securities unless immediately after their loss, the Assured shall take all reasonable means to prevent their payment, negotiation or retirement; (4) if any one of the following persons is criminally implicated as principal or accessory in committing or attempting to commit the robbery; (a) the Assured; (b) any associate in interest; (c) a custodian or any other employee of the Assured directly in charge of property insured hereunder; (d) any guard accompanying a custodian; (5) unless the Assured has taken all reasonable precautions to safeguard the property against loss by robbery; (6) in excess of the actual cash value of the property at the date of the robbery; (7) unless books and accounts are kept by the Assured and the Company can accurately determine the amount of loss therefrom; (8) caused or contributed to directly by invasion, insurrection, war, riot, strike by the Assured's employees, fire in the premises, water or the action of the elements; (9) of any property contained in show windows of the premises due to breakage of show windows from the outside.

Change in Risk

C. If the Assured is unable, because of an unforeseen contingency beyond his control, to maintain any service or perform any act specified in the Declarations, thereby increasing the risk assumed hereunder, this insurance shall not be forfeited but the Company's liability in such an event shall be limited to the amount of insurance which the premium charged for this Policy would have purchased under the Company's manual of rates in force when this Policy was issued, for the actual risk under which the loss was sustained.

Notice of Loss

D. The Assured upon knowledge of any loss shall give immediate notice thereof by telegraph to the Company at its Home Office in Baltimore, Maryland, or to a duly authorized agent of the Company and shall also give immediate notice thereof to the public police or other peace authorities having jurisdiction.

Proof of Loss

E. Affirmative proof of loss under oath on forms provided by the Company must be furnished to the Company at its Home Office, in Baltimore, Maryland, with sixty days from the date of the discovery of such loss. Such proof of loss shall contain a complete inventory of all the property taken, stating the original cost, the actual cash value thereof at the time of the loss and the amount of loss thereon; a statement defining the interest of the Assured in the property for which indemnity is claimed; a statement containing reasonable evidence of the commission of a robbery as aforesaid, to which

the loss was due and of the time of its occurrence, and a statement in detail of other concurrent or similar insurance, if any. The Assured upon request of the Company shall render every assistance in his power to facilitate the investigation and adjustment of any claim, exhibiting for that purpose any and all books, papers and vouchers bearing in any way upon the claim made and submitting himself and his associates in interest and also, so far as he is able, his employees to examination and interrogation by any representative of the Company under oath if required.

Suspension Cancelation

F. Any representative of the Company may suspend this Policy by written notice to the Assured. This Policy may be canceled at any time by either of the parties upon written notice to the other party stating when thereafter cancelation shall be effective and the date of cancelation shall then be the end of the Policy Period. If such cancelation is at the Company's request the earned premium shall be computed pro rata; if at the Assured's request the earned premium shall be computed at short rates in accordance with the table printed hereon. Notice of cancelation or suspension mailed to the Assured at his business address or at the premises, or delivered to him at either place, shall be sufficient notice and the check of the Company similarly mailed or delivered a sufficient tender of any unearned premium. Reinstatement after suspension shall be granted by the Company in writing only, and the Assured shall be allowed unearned premium pro rata for the period of such suspension.

Payment of Loss
Reinstatement After Loss

G. Any payment to the Assured for loss hereunder shall constitute a payment in reduction of the amount of insurance applicable hereunder to such loss, but in any such case the insurance shall be immediately reinstated, as respects any subsequent loss, to apply in accordance with the Policy limits as before any loss occurred and the Assured shall pay the Company the additional premium on the amount of insurance so reinstated computed pro rata from the date of the occurrence of the loss to the date on which the Policy expires. Any property for which the Assured has been indemnified shall become the property of the Company. If recovered or returned, the Company may if it so elect, surrender such recovered or returned property to the Assured who shall thereupon repay to the Company the amount of indemnity received by him as payment for the loss of such property. The party to this contract recovering such property or receiving the return thereof shall immediately notify the other party in writing of such recovery or return.

Other Insurance

H. If the Assured carries other insurance covering such loss as is covered by this Policy, he shall not recover from the Company under this Policy a larger proportion of any such loss than the amount applicable thereto, as hereby insured, bears to the total amount of all valid and collectible insurance.

Limitations

I. No suit shall be brought under this Policy

until three months after proof of loss as required herein, has been furnished, nor at all unless commenced within two years from the date upon which the loss occurred. If any limitation of time for notice of loss or for any legal proceeding herein contained is at variance with any specific statutory provision in relation thereto, in force in the state in which the premises of the Assured as herein described are located, such specific statutory provision shall supersede any condition in this contract inconsistent therewith.

Prosecution

J. In the event of loss for which claim is made the Assured shall, at the request and expense of the Company, take legal action to secure the arrest and prosecution of the offenders.

Subrogation

K. The Company shall be subrogated in case of payment of any claim under this Policy, to the extent of such payment, to all of the Assured's rights of recovery therefor against persons, corporations or estates.

Assignment

L. No assignment of interest under this Policy shall bind the Company unless its written consent shall be endorsed hereon by one of its officers.

Changes

M. No condition or provision of this Policy shall be waived or altered except by written endorsement attached hereto, signed by the President, a Vice-President, or Secretary of the Company; nor shall notice to any agent, nor shall knowledge pos-

sessed by any agent or by any other person, be held to effect a waiver or change in any part of this contract; but nothing in this paragraph shall apply to changes in the written portion of Items 1, 2, 7, 8, 9, 11, 12, 13, 16, 17 and 18 of the Declarations forming part hereof when such charges are initialed by the Agent who countersigned this Policy. The personal pronoun herein used to refer to the Assured or a custodian shall apply regardless of number or gender.

Declarations

N. The statements in Items numbered 1 to 18 inclusive in the Declarations hereinafter contained are declared by the Assured to be true. This Policy is issued in consideration of such statements and the payment of the total premium in the Declarations expressed.

In Witness Whereof, The Fidelity and Deposit Company of Maryland has caused this Policy to be signed by its President and Secretary at Baltimore, Maryland, and countersigned by a duly authorized Agent of the Company.

ROBT. S. HART, Secretary — THOS. A. WHELAN, President

Countersigned by Mellor J. Newman

DECLARATIONS

Item 1.—Name of Assured is Thomas Sardo

Item 2.—Location of the building containing the premises is 318 Market Street, Paterson, New Jersey.

Item 3.—The Policy Period shall be from June

13th, 1923, to June 13th, 1924, at 12 o'clock noon, standard time at the location of the premises as to each of said dates.

Item 4. Section (a).—The insurance granted under Indemnity Paragraph I of this Policy shall apply specifically as provided in Sections (b), (c) and (d) of this Item, during the hours beginning at.....o'clock A. M. and ending at.....o'clock P. M. within the Policy Period.

	Insurance	Premium
Section (b).—On property specified in Item 7, while in the care and custody of a custodian accompanied or unaccompanied by a guard	$nil	$nil
Section (c).—On property specified in Item 7, while in the care and custody of a custodian accompanied by at least .....guard(s)	$nil	$nil
Section (d).—On property specified in Item 7, while in the care and custody of a custodian accompanied by at least.....guard(s), the property being otherwise safeguarded as follows	$nil	$nil

Section (e).—The insurance granted under Indemnity Paragraph II of this Policy shall apply specifically as provided in Sections (f) and (g) of this Item, during the hours beginning at 7 o'clock A. M. and ending at 12 (Midnight) within the Policy Period.

Section (f).—On property specified in Item 8, from within the premises, while at least one custodian is on duty therein part time there is two on duty, clerk & owner	$8000.	$40.00
Section (g).—On property specified in Item 8, from within the premises, while a custodian and at least one other employee of the Assured are on duty therein	nil	nil

The Total Premium for this Policy is $40.00

Item 5.—The premium is payable $40.00 in advance $..... on first anniversary, and $..... on second anniversary.

Item 6.—Subject to the limits specified in Item 4, Sections (b), (c), (d), (f) and (g) respectively, the Company's total liability under this Policy is limited to Eight-Thousand and 00/100 Dollars ($8000.).

Item 7.—The property insured under Indemnity Paragraph I is

Item 8.—The property insured under Indemnity Paragraph II is Money & Securities

Item 9.—The Assured's business is Jeweler

Item 10.—Not more than one custodian outside the premises will have custody of property covered hereby, at any one time, *except as herein stated*: No exceptions

Item 11.—All custodians and guards will be armed with loaded firearms, *except as herein stated*: One Revolver

Exhibits.

Item 12.—The property while in course of conveyance outside of the premises, will be conveyed in optional employed for the exclusive use of the custodian throughout his entire trip, *except as herein stated*:

Item 13.—There is in the premises a cashier's office or similar enclosure provided for the use of the custodian, *except as herein stated*: not warranted

Item 14.—A watchman or guard with no other duties is on duty in the premises or at the door of the premises during business hours, *except as herein stated*: No watchman

Item 15.—A foot or hand push button burglar alarm system connected with a central station or with a gong inside or outside the premises, is maintained during business hours, *except as herein stated*: Not warranted

Item 16.—The Assured has no other Burglary, Theft or Robbery insurance, *except as herein stateed*: no exceptions

Item 17.—The Assured has not sustained, or received indemnity for, a loss by burglary, theft or robbers within the last five years, *except as herein stated*: no exceptions

Item 18.—No burglary, Theft or Robbery insurance applied for or carried by the Assured has ever been declined or canceled, *except as herein stated*: FF. no exceptions

Exhibits.

Exhibit C-3.

LETTER FROM

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

773 Broad Street,

Newark, N. J.

Mar. 14, 1923

Mr. M. J. Newman,
126 Market St.,
Paterson, N. J.

Dear Sir:

With reference to coverage for the jewelry store you were inquiring about over the telephone today, I take pleasure in quoting the rates below.

To cover them against dishonesty on the part of employes working inside the store. Fidelity bonds can be issued at the rate of $7.50 per thousand with a minimum premium of $10.00.

For protection against hold-up while the store is open a hold-up policy can be written at a rate of $5.00 per thousand with a minimum premium of $12.50.

A Mercantile Open Stock Policy can be issued to cover them against burglary when the store is closed. Recovery is limited to $50.00 on each article unless additional premium is secured. The 80% co-insurance clause also applies with which I am sure you are familiar, that is, that recovery under the policy is limited to that portion of the loss incurred which eighty per cent of the cash value of the stock bears to the amount of insurance carried. The rate for this insurance is $30.00

per thousand for the first five thousand; $20.00 for the next five; $10.00 for the next five and $5.00 for each thousand thereafter.

Jewelry stores, as a class, are considered a very hazardous line, so that we would want to make an inspection of the premises before we issued any policies and to get a line on the concern before we issued any fidelity bonds.

If we can be of any assistance to you in lining this up, please let us know.

Yours very truly,

(signed) PAUL S. PARRIS,
Office Manager

Exhibit C-4.

LETTER FROM

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

773 Broad Street,

Newark, N. J.

June 14, 1923

Mr. Mellor J. Newman,
126 Market St.,
Paterson, N. J.

Dear Sir:

Re: #611250—*Thomas Sardo.*

I am enclosing herewith the above mentioned policy issued as of June 13th. Premium amounting to $40.00 will be charged to your account.

Kindly countersign this policy. Copy of same is enclosed for your files.

Thanking you for this business, I am

Very truly yours,

(signed) F. FITZGERALD,
Burglary Dept.

Exhibit C-5.

LETTER FROM

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

1-5 Clinton Street,

Newark, N. J.

June 19th, 1924.

Mr. Mellor J. Newman,
126 Market St.,
Paterson, N. J.

Dear Sir:

Re: Thomas Sardo—#611944.

I am enclosing herewith endorsement which I would thank you to kindly attach to the above mentioned policy. Copy of this endorsement is enclosed for your files.

Thanking you in advance, I am,

Very truly yours,

(signed) F. FITZGERALD,
Burglary Dept.

Exhibits.

Exhibit C-6.

LETTER FROM

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

773 Broad Street,

Newark, N. J.

May 18th, 1922.

Mr. Mellor J. Newman,
126 Market St.,
Paterson, N. J.

Dear Sir:

I have your favor of the 17th inst. sending us a list of prospects to which you have mailed the literature sent you for which please accept our thanks.

We regret that your name was spelled wrong on this printed matter which, evidently, was a typographical error and on future printed matter, we will see that this mistake is not made.

Very truly yours,

(signed) G. H. BRUSH

Exhibit C-7.

BUSINESS CARD

Telephone Lambert 5813

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND

Fidelity & Surety Bonds & Burglary Insurance

MELLOR J. NEWMAN
Agent

126 Market St.,
Paterson, N. J.

Exhibits.

Exhibit C-7½.

LETTER FROM

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

167 Market Street,

Newark, N. J.

June 23, 1922.

Mr. Mellor J. Newman,
126 Market St.,
Paterson, N. J.

Dear Mr. Newman:

We acknowledge receipt of your letter of June 22nd, and thank you for the interest you are taking. We will see that some stationery is sent to you direct from the Home Office. In going after contractors, do not make a promise that we will write their bid bonds until you receive an application and statement from them. We have to have time to check these up, and find out their financial standing.

There is a lot of work being done in your section at the present time, and I trust that you will be able to get your percentage of this.

Yours very truly,

(signed) GEORGE H. BRUSH

Exhibits.

Exhibit C-8.

LETTERHEAD

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND

Fidelity and Surety Bonds and Burglary Insurance

BALTIMORE.

MELLOR J. NEWMAN,
Agent

126 Market St., U. S. Trust Co. Bldg.
Paterson, N. J.

Exhibit D-1.

MESSENGER AND OFFICE ROBBERY POLICY

FIDELITY AND DEPOSIT COMPANY

OF MARYLAND

BALTIMORE
(Herein called the Company)

DOES HEREBY AGREE WITH THE ASSURED

Named and described as such in Item 1 of the Declarations forming part hereof, as respects Money and Securities, and such Merchandise as is described in the Declarations and stated therein to be insured hereunder.

(INDEMNITY AGREEMENTS)

Loss Outside Premises

I. To Indemnify the Assured FOR ALL LOSS BY ROBBERY committed during the hours specified in Section (a) of Item 4 of the Declarations, of such property, from a custodian outside the Assured's premises.

Loss Inside Premises

II. To Indemnify the Assured FOR ALL LOSS BY ROBBERY committed during the hours specified in Section (e) of Item 4 of the Declarations, of such property, from within the Assured's premises.

Limits of Indemnity

III. The Company's Liability is limited to the several specific amounts stated in Sections (b), (c), (d), (f) and (g) of Item 4 of the Declarations and subject to such limits as respects each Section, the total liability of the Company hereunder is limited to the amount stated in Item 6 of the Declarations.

Policy Period

IV. This Agreement shall apply only to a robbery committed as aforesaid, within the Policy Period defined in Item 3 of the Declarations or within any extension thereof under Renewal Certificate issued by the Company.

THIS AGREEMENT IS SUBJECT TO THE FOLLOWING CONDITIONS:

Definitions

A. "Robbery" as used in this Policy shall mean a felonious and forcible taking of property by violence inflicted upon a custodian; or by putting him in fear of violence; or by an overt felonious act committed in the presence of a custodian and of which he was actually cognizant; or a felonious and forcible taking of property from the person or direct care and custody of a custodian, who, while having custody of property covered hereby, has been killed or rendered unconscious by injuries inflicted maliciously or sustained accidentally.

"Money" as used in this Policy shall mean currency, coin, bank notes, bullion. uncanceled postage and revenue stamps in current use, United States War Savings Certificate stamps and Canada War Savings stamps not attached to registered certificates, and "Thrift" stamps. "Securities" as used in this Policy shall mean only such bonds, debentures, checks, coupons, demand and time drafts, promissory notes, bills of exchange, warehouse receipts, bills of lading, express and postal money orders, certificates of stock and deposit, and other instruments, as are negotiable and as respects which, when negotiated, the Assured has no recourse against the innocent holder. "Custodian" as used in this Policy shall mean: (1) the Assured, if an individual; (2) a member of the firm, if the Assured is a copartnership; (3) any executive officer of the Assured if the Assured is a corporation; (4) any person not less than seventeen (17) nor more than sixty-five (65) years of age, who is in the regular employ of the Assured and duly authorized by him to act as his paymaster, messenger, collector, or cashier, and while so acting to have the care and custody of property covered hereby. "Guard" as used in this Policy shall mean any male person not less than seventeen (17) nor more than sixty-five (65) years of age who accompanies the custodian by the direction of the Assured, but who is not a driver of a public conveyance. "Premises" as used in this Policy shall mean the interior of that portion of the building designated in Item 2 of the Declarations which is occupied solely by the Assured in conducting his business.

Exclusions

B. The Company shall not be liable for loss:

(1) unless the robbery is established by reasonable evidence; (2) of any property unless it belongs to the Assured or is held by him in trust or as collateral for indebtedness to the Assured, or is held by the Assured in such capacity as would render him legally liable to the owner thereof for such loss of the property as is covered hereby; (3) of securities unless immediately after their loss, the Assured shall take all reasonable means to prevent their payment, negotiation or retirement; (4) if any one of the following persons is criminally implicated as principal or accessory in committing or attempting to commit the robbery; (a) the Assured; (b) any associate in interest; (c) a custodian or any other employee of the Assured directly in charge of property insured hereunder; (d) any guard accompanying a custodian; (5) unless the Assured has taken all reasonable precautions to safeguard the property against loss by robbery; (6) in excess of the actual cash value of the property at the date of the robbery; (7) unless books and accounts are kept by the Assured and the Company can accurately determine the amount of loss therefrom; (8) caused or contributed to directly by invasion, insurrection, war, riot, strike by the Assured's employees, fire in the premises, water or the action of the elements; (9) of any property contained in show windows of the premises due to breakage of show windows from the outside.

Change in Risk

C. If the Assured is unable, because of an unforeseen contingency beyond his control, to maintain any service or perform any act specified in the Declarations, thereby increasing the risk assumed

hereunder, this insurance shall not be forfeited but the Company's liability in such an event shall be limited to the amount of insurance which the premium charged for this Policy would have purchased under the Company's manual of rates in force when this Policy was issued, for the actual risk under which the loss was sustained.

Notice of Loss

D. The Assured upon knowledge of any loss shall give immediate notice thereof by telegraph to the Company at its Home Office in Baltimore, Maryland, or to a duly authorized agent of the Company and shall also give immediate notice thereof to the public police or other peace authorities having jurisdiction.

Proof of Loss

E. Affirmative proof of loss under oath on forms provided by the Company must be furnished to the Company at its Home Office, in Baltimore, Maryland, within sixty days from the date of the discovery of such loss. Such proof of loss shall contain a complete inventory of all the property taken, stating the original cost, the actual cash value thereof at the time of the loss and the amount of loss thereon; a statement defining the interest of the Assured in the property for which indemnity is claimed; a statement containing reasonable evidence of the commission of a robbery as aforesaid, to which the loss was due and of the time of its occurrence, and a statement in detail of other concurrent or similar insurance, if any. The Assured upon request of the Company shall render every assistance in his power to facilitate the investigation and adjustment of any claim, ex-

hibiting for that purpose any and all books, papers and vouchers bearing in any way upon the claim made and submitting himself and his associates in interest and also, so far as he is able, his employees to examination and interrogation by any representative of the Company under oath if required.

Suspension Cancelation

F. Any representative of the Company may suspend this Policy by written notice to the Assured. This Policy may be canceled at any time by either of the parties upon written notice to the other party stating when thereafter cancelation shall be effective and the date of cancelation shall then be the end of the Policy Period. If such cancelation is at the Company's request the earned premium shall be computed pro rata; if at the Assured's request the earned premium shall be computed at short rates in accordance with the table printed hereon. Notice of cancelation or suspension mailed to the Assured at his business address or at the premises, or delivered to him at either place, shall be sufficient notice and the check of the Company similarly mailed or delivered a sufficient tender of any unearned premium. Reinstatement after suspension shall be granted by the Company in writing only, and the Assured shall be allowed unearned premium pro rata for the period of such suspension.

Payment of Loss

Reinstatement After Loss

G. Any payment to the Assured for loss hereunder shall constitute a payment in reduction of the amount of insurance applicable hereunder to

such loss, but in any such case the insurance shall be immediately reinstated, as respects any subsequent loss, to apply in accordance with the Policy limits as before any loss occurred and the Assured shall pay the Company the additional premium on the amount of insurance so reinstated computed pro rata from the date of the occurrence of the loss to the date on which the Policy expires. Any property for which the Assured has been indemnified shall become the property of the Company. If recovered or returned, the Company may if it so elect, surrender such recovered or returned property to the Assured who shall thereupon repay to the Company the amount of indemnity received by him as payment for the loss of such property. The party to this contract recovering such property or receiving the return thereof shall immediately notify the other party in writing of such recovery or return.

Other Insurance

H. If the Assured carries other insurance covering such loss as is covered by this Policy, he shall not recover from the Company under this Policy a larger proportion of any such loss than the amount applicable thereto, as hereby insured, bears to the total amount of all valid and collectible insurance.

Limitations

I. No suit shall be brought under this Policy until three months after proof of loss as required herein, has been furnished, nor at all unless commenced within two years from the date upon which the loss occurred. If any limitation of time for notice of loss or for any legal proceeding here-

in contained is at variance with any specific statutory provision in relation thereto, in force in the state in which the premises of the Assured as herein described are located, such specific statutory provision shall supersede any condition in this contract inconsistent therewith.

Prosecution

J. In the event of loss for which claim is made the Assured shall, at the request and expense of the Company, take legal action to secure the arrest and prosecution of the offenders.

Subrogation

K. The Company shall be subrogated in case of payment of any claim under this Policy, to the extent of such payment, to all of the Assured's rights of recovery therefor against persons, corporations or estates.

Assignment

L. No assignment of interest under this Policy shall bind the Company unless its written consent shall be endorsed hereon by one of its officers.

Changes

M. No condition or provision of this policy shall be waived or altered except by written endorsement attached hereto, signed by the President, a Vice-President, or Secretary of the Company; nor shall notice to any agent, nor shall knowledge possessed by any agent or by any other person, be held to effect a waiver or change in any part of this contract; but nothing in this paragraph shall apply to changes in the written portion of Items 1, 2, 7, 8, 9, 11, 12,

13, 16, 17 and 18 of the Declarations forming part hereof when such changes are initialed by the Agent who countersigned this Policy. The personal pronoun herein used to refer to the Assured or a custodian shall apply regardless of number or gender.

Declarations

N. The statements in Items numbered 1 to 18 inclusive in the Declarations hereinafter contained are declared by the Assured to be true. This Policy is issued in consideration of such statements and the payment of the total premium in the Declarations expressed.

IN WITNESS WHEREOF, THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND has caused this policy to be signed by its President and Secretary at Baltimore, Maryland, and countersigned by a duly authorized Agent of the Company.

ROBT. S. HART
Secretary

THOS. A. WHELAN
President

Countersigned by MELLOR J. NEWMAN

DECLARATIONS

Item 1.—Name of Assured is Thomas Sardo

Item 2.—Location of the building containing the premises is 318 Market St. Paterson N. J.

Item 3.—The Policy Period shall be from June 13th 1924, to June 13th 1925, at 12 o'clock noon, standard time at the location of the premises as to each of said dates.

Item 4. Section (a).—The insurance granted under Indemnity Paragraph I of this Policy shall

apply specifically as provided in Sections (b), (c) and (d) of this Item, during the hours beginning at ..... o'clock A. M. and ending at ..... o'clock P. M. within the Policy Period.

	Insurance	Premium
Section (b).—On property specified in Item 7, while in the care and custody of a custodian accompanied or unaccompanied by a guard	$nil	$nil
Section (c).—On property specified in Item 7, while in the care and custody of a custodian accompanied by at least ..... guard(s)	$nil	$nil
Section (d).—On property specified in Item 7, while in the care and custody of a custodian accompanied by at least ..... guard(s), the property being otherwise safeguarded as follows:	$nil	$nil
Section (e).—The insurance granted under Indemnity Paragraph II of this Policy shall apply specifically as provided in Sections (f) and (g) of this Item, during the hours beginning at 7 o'clock A. M. and ending at 12 (Midnight) within the Policy Period.		
Section (f).—On property specified in Item 8, from within the premises, while at least one custodian is on duty therein part time there is two on duty, clerk & owner	$8,000.	$40.00

Section (g).—On property specified in Item 8, from within the premises, while a custodian and at least one other employee of the Assured are on duty therein ..... $nil $nil

The Total Premium for this Policy is $40.00

Item 5.—The premium is payable $40.00 in advance, $..... on first anniversary, and $..... on second anniversary.

Item 6.—Subject to the limits specified in Item 4, Sections (b), (c), (d), (f) and (g) respectively, the Company's total liability under this Policy is limited to Eight-thousand and 00/100 Dollars ($8,000.).

Item 7.—The property insured under Indemnity Paragraph I is not covered.

Item 8.—The property insured under Indemnity Paragraph II is Money & Securities

Item 9.—The Assured's business is Jeweler

Item 10.—Not more than one custodian outside the premises will have custody of property covered hereby, at any one time, *except as herein stated*: no exceptions

Item 11.—All custodians and guards will be armed with loaded firearms, *except as herein stated*: not warranted

Item 12.—The property while in course of conveyance outside of the premises, will be conveyed in optional employed for the exclusive use of the custodian throughout his entire trip, *except as herein stated*:

Item 13.—There is in the premises a cashier's

office or similar enclosure provided for the use of the custodian, *except as herein stated*: not warranted

Item 14.—A watchman or guard with no other duties is on duty in the premises or at the door of the premises during business hours, *except as herein stated*: no watchman

Item 15.—A foot or hand push button burglar alarm system connected with a central station or with a gong inside or outside the premises is maintained during business hours, *except as herein stated*: not warranted

Item 16.—The Assured has no other Burglary, Theft or Robbery insurance, *except as herein stated*: no exceptions

Item 17.—The Assured has not sustained, or received indemnity for, a loss by burglary, theft or robbery within the last five years, *except as herein stated*: no exceptions

Item 18.—No Burglary, Theft or Robbery insurance applied for or carried by the Assured has ever been declined or canceled, *except as herein stated*: no exceptions

Exhibits.

Exhibit D-2.

Mercantile Safe Burglary Insurance Policy

Policy No. P. B. S. 1173

PHOENIX
INDEMNITY COMPANY
HOME OFFICE NEW YORK

(herein called the company)

In consideration OF THE PREMIUM HEREINAFTER SPECIFIED AND OF THE STATEMENTS OF THE ASSURED HEREINAFTER SET FORTH, WHICH ARE MADE A PART OF THIS POLICY BY THE ACCEPTANCE THEREOF,

HEREBY AGREES

TO INDEMNIFY THE ASSURED FOR DIRECT LOSS SUSTAINED DURING THE TERM OF THIS POLICY:

Insuring Clause

(a) BY BURGLARY of any of the property specified in agreement 17, occasioned by its felonious abstraction from within the safe or safes located in the premises and described in the schedule, after entry into such safe or safes has been effected by force and violence by the use of tools, explosives, electricity, gas or other chemicals directly upon the exterior thereof, of which force and violence there shall be visible marks thereon; and (b) BY DAMAGE to such safe or safes, the property contained therein, and the furniture, fixtures and premises, caused by such entry into the safe, or attempt thereat;

PROVIDED ALWAYS, that this policy shall be subject to the following agreements, together with such other agreements, if any, as may be endorsed hereon, and compliance with which shall be a condition precedent to the right of recovery hereunder.

AGREEMENTS

Definitions

1. The term "premises" as used in this policy, means that portion of the building specified in the schedule which is actually occupied by the assured and in which the safe or safes of the assured are located.

2. The term "securities" as used in this policy, means such evidences of debt or property as are negotiable by any holder thereof, and as respects which, when so negotiated, the assured has no recourse against an innocent holder.

Risks Not Covered

3. This policy does not cover any loss or damage if the assured, any associate in interest, any servant or employee of the assured or any person having lawful access to the premises, is implicated as principal or accessory in effecting or attempting to effect, the burglary; nor in the case of securities unless immediately after their loss the assured shall take all reasonable means to prevent their payment, negotiation or retirement; unless books and accounts are kept by the assured in such a manner that the exact amount of loss may be accurately determined therefrom by the company.

4. This policy does not cover any loss or damage if the premises are occupied for any purpose other than that described in the schedule; nor loss of or damage to property in excess of its actual cash value at the time of the loss or damage; nor to pledged goods in excess of the actual sum loaned on such goods, plus the legal interest accrued thereon; nor to postage and revenue stamps,

money orders, registered letters and packages or other property, belonging to the United States Government, or held by the assured as Postmaster of the United States Government; nor loss or damage to plate glass or ornamentation thereon nor damage to the premises, furniture or fixtures, or safes unless such property is owned by the assured, or the assured as tenant is legally liable for such damage; loss or damage resulting from or contributed to by invasion, insurrection, strike, riot or war, the act of any civil, military, or usurping power, the action of the elements, water or explosives (except explosives used by burglars); nor by fire, or occurring during a fire in the building in which the premises are located.

5. This policy does not cover any loss or damage attributable directly or indirectly to the undue exposure of any safe or safes during repairs thereto or the building in which they are contained; nor effected by opening any safe or chest by the use of any key or by the manipulation of any lock; nor loss unless the doors of all safes and chests covered hereby are equipped with combination or time locks and properly closed and locked at the time of the burglary or attempt thereat; nor loss of or damage to the property while contained within any safe enclosing a burglar-proof chest, unless such property shall have been abstracted from such chest after entry has been effected by force and violence, by the use of tools, explosives, electricity, gas or other chemicals directly upon the outer doors or walls of the safe and chest.

Assignment of Interest or Encumbrances

6. No assignment of interest under this policy nor any encumbrance placed on the property in-

sured by a chattel mortgage, bill of sale, or otherwise, shall bind the company unless consented to by endorsement signed by an executive officer of the company.

Fraud Voids Policy

7. This policy shall be void if there is any fraud or misrepresentation or concealment concerning this insurance or any claim hereunder.

Other Insurance

8. If other insurance is carried against loss or damage covered by this policy, the company shall not be liable for a larger proportion of the entire loss or damage than the amount insured hereunder bears to the total amount of all valid and collectible insurance covering such loss or damage.

Notice and Proof of Claim

9. Upon the happening of any event giving rise or likely to give rise to a claim under this policy, the assured shall (a) give immediate written notice thereof to the company at its home office in New York, N. Y., or to one of its duly authorized agents, and also give like notice to the public police authorities having jurisdiction and (b) within sixty days after the happening of the event, furnish to and file with the company, a detailed statement under oath on the forms supplied by the company, of the loss or damage sustained and (c) whenever requested by the company, produce all books, papers, records and vouchers bearing in any way upon the claim made, and submit himself, his associates in interest, the members of his household, his employees and servants to examination under oath by the company as often as may be required;

and the company shall not be held to have waived any agreement of this policy or any forfeiture thereof by any act taken, nor by any requirement made in connection with the investigation of any claim or with the examination herein provided for, or by the furnishing of the company's forms for proof of loss and (d) at the expense of the company, take such legal action as may be required by the company, for the arrest and prosecution of the offender or offenders, but the company, if it so elects, shall have the entire charge of such action and (e) give to the company all reasonable assistance (other than pecuniary) that may be required.

Replacement and Recovery

Diminution of Insurance

10. The company may, at its option, repair any damage to the premises or property, or replace any article lost or damaged by one of like quality and value, instead of paying the assured the amount of such loss or damage in money. When so replaced, or paid for, the damaged or stolen article shall belong to the company, but the assured shall be entitled to it upon payment to the company of the cost of its replacement or of the amount paid in money on account of its loss. If any article for which the assured has been indemnified, whether by payment in money or by replacement, is returned to or recovered by the assured, the assured shall immediately send written notice thereof to the company and either reimburse the company for the indemnity paid or the cost of replacement, or else forward the article forthwith to the home office of the company. All sums which may be paid or expended by way of indemnity to the as-

sured under this policy shall diminish the insurance hereunder in like amount.

Subrogation of Rights

11. The company shall be subrogated to all rights which the assured may have against any person or other entity in respect of any claim, payment or any other indemnity made under this policy, and the assured shall execute all papers necessary and convenient to secure to the company such rights.

Inspection and Suspension

12. A duly authorized agent of the company shall have the right at all reasonable times to inspect the premises, and the company may at any time, by written notice delivered or mailed to the assured at the address given in statement 2 of the schedule, suspend this policy until the premises shall have been made reasonably secure, as required in said notice. The assured upon demand shall be entitled to the unearned premium, computed pro rata, for the period during which the policy shall have been suspended.

Cancellation of Policy

13. This policy may be cancelled by the company at any time by giving five days written notice to the assured stating when the cancellation shall be effective. Such notice shall be sent by mail or delivered to the assured at the address given in statement 2 of the schedule. The check of the company or of its duly authorized agent for the unearned pro rata portion of the premium received shall accompany such notice. The assured may cancel this policy at any time by surrendering the policy or by written notice to the company or its

duly authorized agent and cancellation shall then be immediately effective. In such event the company will retain the earned portion of the premium computed by the short rate table printed hereon and will on demand return the balance of the premium to the assured.

Alterations in Policy

Definition of Representatives

14. No alteration in the terms of this policy or its agreements shall be valid unless the same be signed by an executive officer of the company; nor shall knowledge or information possessed by any agent or any other person, whether before or after the issuance of this policy, be held to effect an alteration in this policy or any part of it; and no person shall be deemed to be an agent of the company unless duly authorized in writing by an executive officer of the company.

Legal Proceedings

15. Legal proceedings for recovery hereunder may not be brought before the expiration of sixty days from the date of furnishing proof of loss as required herein, nor brought at all unless begun within two years after the occurrence of the loss.

Conflicting Statutory Provisions

16. If any agreement of this policy is at variance with any specific statutory provision relating to insurance policies, which provision would otherwise inure to the benefit of the assured, such specific statutory provision shall be substituted for such agreement.

Merchandise.

17. Subject to compliance by the assured with

the precautions specified in the schedule, the limit of the company's liability under this policy is as follows:

Item (*a*) On watches, jewelry, precious stones, articles made of gold, silver or platinum, and other merchandise owned by the assured or held by the assured in trust or on commission, or sold but not removed and for which the assured is legally liable to the owner thereof for such loss or damage as is covered hereby;

While contained in the safe specified as Safe No. 1 in the Schedule, up to the sum of $10000.00

While contained in the safe specified as Safe No. 2 in the Schedule, up to the sum of ..... $ Nil

While contained in the safe specified as Safe No. 3 in the Schedule, up to the sum of ..... $ Nil

Money and Securities

Item (*b*) On money, owned by the assured, securities owned by the assured or held in trust by the assured or held as collateral for indebtedness to the assured;

While contained in the safe specified as Safe No. 1 in the Schedule, up to the sum of ..... $ Nil

While contained in the safe specified as Safe No. 2 in the Schedule, up to the sum of ..... $ Nil

While contained in the safe specified as Safe No. 3 in the Schedule, up to the sum of ..... $ Nil

The total amount of insurance under this policy is

Ten thousand and 00/100.....Dollars ($10000.00)

Premium Term

18. The premium for this policy is Ninety two and 40/100 Dollars ($92.40)

19. The term of this policy is 12 months from the 19th day of November, 1923, at noon, to the 19th day of November, 1924, at noon, standard time, as to both dates, at the place where this policy has been countersigned.

SCHEDULE

The following statements, numbers 1 to 8 inclusive, are hereby made a part of this policy and are warranted by the assured to be true.

1. The name of the assured is Thomas Sardo

2. The building at which the risk is to be covered is located at 318 Market St., Paterson, New Jersey

3. That portion of the building actually occupied by the assured and in which the safe or safes are situated, is as follows: First Floor and is called "the premises"

4. The assured occupies the premises as Jewelry Merchant

5. The following precautions will always be taken by the assured to prevent loss:

(a) A burglar alarm system is not maintained,

and will be tested and left duly connected at the close of each business day while this policy is in force. Such alarm system protects;

(1) With traps, all inaccessible windows and with screens, all accessible windows (except stationary show windows), and all doors, transoms, skylights and other openings leading from the premises, and also protect all ceilings and floors not constructed of concrete, and all hall and partition walls, enclosing the premises. The name of such burglar alarm system is No and the system is connected with an outside central station.....

(2) All accessible windows (except stationary show windows) and all doors, transoms, skylights and other openings leading from the premises;

The name of such burglar alarm system is ..... and the system is connected with an outside central station, or with an alarm gong on the outside of the premises which is operated in conjunction with the watch service of a regularly incorporated company, ...

(b) A private watchman employed exclusively by the assured will be on duty within the premises at all times when the premises are not regularly open for business, while this policy is in force No

(c) The watchman described in paragraph (b) will make hourly rounds and record same on a watchman's clock, or will signal an outside central station at least hourly .....

6. The assured has never sustained any loss, nor received nor claimed indemnity for loss, by burglary or theft of any kind, nor had any burglary or theft insurance policy canceled by any company, nor been declined burglary or theft insurance, except as follows; No exceptions

7. The safes are described as follows:

"Fireproof" is constructed of iron or other metal filled with concrete; "Burglar-proof," with walls *at least* one inch thick, and doors *at least* one and one-half inches thick, constructed in each case of solid steel or steel plates.

Safe No. 1 (2 & 3).

Name of Maker—Herring-Hall-Marvin

Maker's Number on door handle—54351

The safe is so-called Burglarproof or Fireproof or both—F. P.

Thickness of outer door exclusive of bolt work is—½in.

Outer door is locked by combination or time lock—Comb.

There is in the safe a steel burglarproof chest—

Thickness of burglarproof chest door exclusive of bolt work is—

Chest is locked by combination or time lock—

Safe bought new or second-hand by Assured (also state year)—1922 2nd hand

Cost of safe to Assured was—135.00

8. The assured carries no other burglary insurance covering the property insured by this policy, except as follows: No exceptions

IN WITNESS WHEREOF, the PHOENIX INDEMNITY COMPANY has caused this policy to be signed by its president but the same shall not be binding unless countersigned by a duly authorized agent of the company.

(Signature of president.)

Countersigned at Paterson, N. J. this 19th day of November, 1923

H. H. MONDON

Authorized Agent.

Exhibits.

Exhibit D-3.

MELLOR J. NEWMAN

May 21, 1924.

Fidelity & Deposit Co., of Md.
1-5 Clinton St.,
Newark, N. J.
Gentlemen:—

#611250.

Kindly send me an application to be filled out on a Burglary Policy.

My client, Mr. Thomas Sardo, was robbed last night.

Kindly send said application at once, and oblige,

Respectfully yours,

MELLOR J. NEWMAN.

Exhibits.

Exhibit D-5.

Telephone Lambert 3107

Paterson, N. J., May 24 1924

M .....

.....

BOUGHT OF THOMAS SARDO

..JEWELER..

Terms: ..... 318 Market Street

A holdup occurred on May 20, 1924, Tuesday at about 9 P. M. Three men entered and asked for a ring. I got up and found revolvers pointing at me. A friend of mine James Caramanna was in the store at the time. They took us to the back room and tied us. I yelled for help and the tenant next door untied us. I immediately notified the police. I have two guns, one in my hip pocket and one behind the counter. I suffered a loss about a year ago but did not have any insurance and do not know if anything was lost. The amount of merchandise stolen due to this holdup is approximately $9000.—

THOMAS SARDO

No. 32, May Term, 1926.

Br.

New Jersey Court of Errors and Appeals

Between THOMAS SARDO, Complainant-Respondent, and FIDELITY AND DEPOSIT COMPANY OF MARYLAND, Defendant-Appellant.	On Bill to Reform Policy of Insurance. On Appeal from Chancery.

BRIEF OF DEFENDANT-APPELLANT.

I.

Statement of the Case.

On June 13, 1923, defendant, Fidelity and Deposit Company of Maryland, issued a policy of insurance to complainant, Thomas Sardo, for one year, designated as "Messenger and Office Robbery Policy," No. M-611250 (incorrectly stated in the pleadings as No. M-6111250), insuring him against loss of "money and securities". The policy was for $8,000. and the premium amounting to $40. was paid by the assured (State of Case, pp. 6, 10, 30, 32, 56, 80, 81, 107).

On May 20, 1924, and during the life of the policy, complainant alleges he was robbed of jewelry of the value of $9,000. which was taken from his store in Paterson, New Jersey, by armed robbers,

who tied up complainant and a companion who was there with him, and then decamped with the property (Case, pp. 37, 38, 135).

Defendant refused to pay the alleged loss. Complainant thereupon instituted a suit at law in the Supreme Court, Passaic Circuit, against defendant upon the policy, and defendant pleaded, among other things, that the policy did not cover the alleged loss of "jewelry" but in terms covered only "money and securities." (See Exhibit C-1, Case, p. 104, lines 28-29; and Exhibit D-1, Case, p. 121, lines 21-22).

The present bill was then filed to reform the policy, complainant alleging that the policy, through mistake or accident, was issued by defendant to cover "money and securities", whereas it was the intention of both parties that it should cover "money and jewelry". The bill is based solely upon the ground of mistake or accident. There is no allegation of fraud, and none was claimed (Case, p. 7, lines 1-10).

Complainant, in support of his bill, asserts that he had intended to insure against "holdups" of jewelry, and that he so stated to Lederer, the broker to whom he went first in search of his insurance. Lederer, who was complainants' representative, and in no way connected with defendant, took complainant to Newman, in Paterson, who maintained an insurance office there and who represented defendant and other companies in the solicitation of insurance in that vicinity (Case, pp. 33, 41, 45, 81).

Newman testified that he told complainant and Lederer that he had authority to write burglary insurance only (Case, pp. 46, 50, 51, 52, 56, 87, 88); that he would have to take up with the Company the question of the issuance of the policy complainant desired; that it would be some time before

the policy could be obtained; and that he could not bind them until they actually received the policy (Case, p. 46). Lederer also testified that when he and Sardo went to see Newman about obtaining the "hold-up" policy, Newman said to them that "I'll let you know; I'll have to take it up with the company" (Case, p. 41).

Brush, the manager of the defendant company at Newark, New Jersey, which was the issuing office (Case, pp. 57, 60, 73) for the field including Paterson, testified that the policy in question was issued from the Newark office, and that when Newman communicated with him about it he (Brush) told Newman that he would issue a policy covering *money and securities only* (Case, pp. 48, 62, 63, 67, 70, 73, 74). Prior to the issuance of the policy, Brush also visited complainant's place of business at Paterson (Case, pp. 35, 57-61) for the purpose of investigating the risk (which was the customary procedure), and that thereafter the defendant company specifically refused (Case, p. 73) to accept any risk covering anything but *money and securities.* (See, also, Exhibits C-3 and C-4, Case, pp. 106-108).

The policy was, therefore, issued in exactly and precisely the form in which the defendant intended and insisted it should be (Case, pp. 61, 74, 75).

On June 13, 1924 (nearly a month after the alleged robbery had taken place), complainant renewed the policy for another year in the same form as the original policy of June 13, 1923 (Case, pp. 85, 111, 119).

Lederer, complainant's broker, testified that he did not read or examine the original 1923 policy when he received it from Newman, and that he turned it over to Sardo without any explanation of its contents and assumed that it covered jewelry (Case, p. 44). Sardo testified that he did not

read or examine the policy when he received it from his broker, Lederer, and it was supposed to cover *jewelry* (Case, pp. 31, 33, 85). Newman testified that when he countersigned the policy he had examined it casually and apparently interpreted it in his own mind as covering *jewelry* (Case, pp. 83, 91), and that he said nothing to Lederer, when he delivered it to him about its covering in terms "money and securities" only (Case, pp. 48, 53, 54, 83). Neither did he in any way communicate that to the company (Case, pp. 55, 91). And ~~he~~ Sardo further testified that he did not read or examine the 1924 renewal policy, issued nearly a month after the alleged robbery had occurred (which was sent to him direct, Case, p. 54), and that it was not until after he had started the suit at law on the 1923 policy against the defendant company, and it had set up in the answer the defence above referred to, that he discovered (upon reading his policy then for the first time) that the policy in controversy as written covered "money and securities" and did not cover "jewelry" (Case, pp. 32, 33, 34). Nor did Sardo read his Phoenix Indemnity Policy, Exhibit D-2, Case, p. 123 (see Case, p. 36).

The Court below decreed a reformation of the 1923 policy, so as to make it read in terms and cover "money and jewelry" instead of "money and securities".

From the whole of that decree the present appeal is taken.

II.

Questions Involved.

1. Was there a mutual mistake in the terms of the policy M-611250?

2. Did the minds of the complainant and defendant ever meet on the terms of the policy as now reformed by the Court below?

3. Has not the Court below forced upon defendant a contract which not only did it not intend to make (and upon which the minds of the parties never met), but which it specifically refused to make?

4. Did defendant's representative Newman have the power and authority to make a "mutual mistake" for the defendant company with the complainant Sardo, especially in the face of its specific instructions to him to the contrary of his present assertion?

5. Does not the failure of the complainant Sardo to read and examine the policy in question, bar the equitable relief he now prays for in his bill?

6. Is complainant entitled to have the policy in controversy reformed?

III.

Argument.

The theory of mistake or accident upon which complainant appears to base his claim for equitable relief (and which, as above indicated, is the sole issue tendered by the bill), is that Newman was an agent of the defendant company with such general and complete authority, as to be clothed with the power to bind the company by his mistake in apparently interpreting the policy *in his own mind* to cover *jewelry* when he made his casual examination of it at the time he countersigned it, although the policy stated in terms that it covered *money and securities* only; and that such apparent mental interpretation by Newman, not disclosed to any one, was a mistake, attributable to and binding upon the defendant company, notwithstanding the fact that the company itself at its issuing office specifically refused to issue any policy except the one to cover *money and securities* only, and so notified Newman prior to the forwarding of the 1923 policy to him for countersignature and delivery.

Defendant, however, contends that it made no mistake. It never intended to issue any policy but the one it did issue, and never agreed to terms other than those it contains. It specifically refused to issue a policy covering *jewelry,* and it so informed Newman, who turned the business in to defendant for *his* "client" (Case, pp. 56, 134). There was no mistake on defendant's part with regard to either the form or terms of the policy it issued.

It was Sardo's duty to examine and read the policy when it was delivered to him, and if upon such

examination he found that it was not the policy he desired and had requested, he should have refused to receive it or should have returned it to the company issuing it. It was a document on which their minds had never met, and hence was no contract. He cannot now complain and ask that it be reformed so as to cover his alleged loss. He has had full protection on what the policy covered and for which the premium was charged.

Crescent Ring Co. v. *Traveler's Indemnity Co.*, N. J. Adv. Reps., Vol. IV, No. 6 (Feb. 6, 1926), p. 208.

Neither party could force upon the other a contract to which he had not assented, and the Court can no more force upon the one party than upon the other a contract on which the minds of both parties had never met. The most that complainant could ask is rescission, with the return of the premium; but he is not entitled to reformation.

Koch v. *Commonwealth Ins. Co.*, 87 N. J. Eq. 90; aff. 88 N. J. Eq. 344.

It is no more within the power of the Court to force upon the defendant company a new contract (for which it had not been paid (see Case, pp. 63, 106, 107), after the loss has occurred, than it would have been to force upon Sardo one to which he had not assented at the time of the delivery of the policy, had he read it then and refused to accept it because it was not in accordance with his application and desire.

It is significantly in favor of defendant's whole contention that the premium of $40 on the policy of $8,000. issued accords exactly with the rates for such a policy as testified to by Brush (case, p. 63), and as set forth in the very exhibits offered in evi-

dence by complainant (Exhibits C-3, C-4, Case, pp. 106-108); viz.: $8,000 @ $5. per $1,000 = $40. Had the additional protection been intended, the higher premium would have been charged (Case, pp. 56, 80).

If Newman (who conducted a general insurance office representing various companies, and who acted as the representative of the defendant company only for the purpose of soliciting business and countersigning and delivering the policies, after they were issued by the company, receiving a commision for his services which he retained from the premium paid by the assured and sharing it with the broker, Case, pp. 40, 41, 42, 44, 52, 53), saw fit *in his own mind* to misinterpret the effect of the policy after a casual examination of it and then deliver it to Sardo's broker or Sardo with no representation to them as to its form and terms, how can that, in this action, concern the defendant company or bind it as *its mistake* mutual with Sardo's, which is essential to warrant reformation?

Or, to state the proposition in another form, whatever the extent or scope of Newman's authority, may have been (and defendant asserts that it was simply the limited scope already indicated), can it be said that, by the application of any legal or equitable principle, he was an agent for the purpose of making a mutual mistake for the defendant, which is indispensable if reformation is to be decreed, especially in view of its open declaration to him that it would issue the policy only in the form and with the provisions which it contained when finally it was issued and delivered to Sardo?

That Newman cannot be held to have been an agent of defendant for the purpose of thus making a mutual mistake for it, seems to us to be a proposition that is so self-evident that its mere statement effects its complete demonstration.

Indeed, *Newman regarded himself as the principal or attorney of Sardo,* as well as his other patrons (Case, p. 56, lines 11-12, and p. 134). In his letter of May 21st, 1924, to the defendant (Exhibit D-3, Case, p. 134), he states solicitously for Sardo:

> "Kindly send me an application to be filled out on Burglary Policy. *My Client* Mr. Thomas Sardo, was robbed last night."

And at page 56 he states:

> "I have various other burglary insurance that I had at the time *for other clients.*"

It is also significant in this case, adverse to Sardo's present claim, that after the defendant company refused to issue a policy covering jewelry, he, in November, 1923 (Case, p. 133, lines 38-39; also pp. 35-37), prior to the alleged robbery, took out a burglary policy in the Phoenix Indemnity Company for $10,000., which specifically covered "jewelry" and not "money and securities" (Exhibit D-2, Case, pp. 130, 131), stating that he carried no other burglary insurance on the property covered by that policy (Case, p. 133, par. 8). This is clearly indicative of Sardo's knowledge that his *jewelry* was not covered by defendant's policy, and that he thus sought to cover it by the Phoenix policy. For some reason he was averse to disclosing whether he had been paid under that policy (Case, pp. 36, 37).

Summed up, the proposition involved in this suit for reformation, briefly stated, is—Shall Sardo, who received and accepted his policy without examining or reading it, and without his broker, Lederer, having read or examined it, and without Newman, who refers to him as "my client", having informed him of its terms, be permitted to stand by for more than eleven months and until after a robbery had occurred, without objecting to the

policy, and thereafter accept a renewal in the same form without examination or objection, and now come into a court of equity and ask that the policy be reformed so as to cover his alleged loss, by asserting that the policy in its existing form was so issued through mistake or accident—when the defendant company asserts that there was no mistake on its part in the issuing of the policy and that it was issued in precisely the form it intended it should be, having specifically refused to issue it otherwise;—merely because, in the final analysis, Sardo asserts that Newman, who received his application for a *money and jewelry* "hold-up" policy and transmitted it to the defendant company, now in effect says that *he interpreted in his own mind* that the policy as issued would cover the *jewelry* of which Sardo says he was robbed, as well as the *money and securities* specifically stated in the policy, and that his present assertion to that effect shall constitute a mistake on the part of defendant in the setting forth in the policy of the real terms of the contract between the parties, mutual with Sardo in the manner which is essential to warrant reformation?

Defendant respectfully submits that neither the evidence in the case nor the authorities thus warrant a reformation of the policy as prayed for in the bill of complaint.

As was stated by Vice Chancellor Leaming in *Koch* vs. *Commonwealth Ins. Co.*, 87 N. J. Eq. 90, at p. 93,—

> "There can be no doubt touching the fundamental doctrine that a reformation of a contract of insurance or other written contract can only be decreed, in the absence of fraud on the part of defendant, where the minds of the parties have met contractually and a mistake mutual to the contracting parties has been made in writing out the contract so as to make

the parties appear to have entered into a contract which they have not entered into; and the reformation must be such as to make the written contract correspond with that upon which the minds of the contracting parties have met. *Ordway* v. *Chase,* 57 N. J. Eq. 478."

And further at page 98, that:

"* * * If relief is to extend beyond the field of rescission and recovery of the premiums paid, the basis for relief must be the fact that the minds of the contracting parties met contractually on the specific matter touching which reformation is sought, and not, like rescission, in which the ground of relief may be that there was no meeting of minds. Many cases may be found in support of the view herein expressed. The reasoning of Mr. Justice Hoke to that effect, in *Floars* vs. *Aetna Life Ins. Co.,* 144 N. C. 232, appears to me to be unassailable.

"The primary cause for complainant's building being insured as a building occupied as a store and residence was the neglect of the complainant to notify the insurer of the installation of the printing plant in the building during the period of the life of the old policy; by reason of that neglect the present policy was issued at the expiration of the old policy to insure the same building, similarly used, against loss by fire. The policy which was issued was exactly as the insurer intended to issue it. On no sound theory can it be said that the defendant company ever contracted to insure complainant's building while in use as a printing establishment. There was not only the absence of an intent upon the part of the company to insure a printing office, but there was an honest and defined and fixed affirmative intent and purpose upon the part of that company to insure the building as a store and residence; that was the risk the insurer designed to assume, and for that risk the insurer accepted the premium fixed for risks of other nature. There was accordingly at no time a mutual in-

> tent of the contracting parties to insure a printing office.
>
> "I am obliged to advise a decree dismissing the bill."

This case was affirmed by the Court of Errors and Appeals in 88 N. J. Eq. at p. 344.

In *Dougherty* vs. *Ins. Co.*, 33 Atl. Rep. 295, under circumstances which were practically precisely the same as in the case at bar, reformation was refused.

In this case a policy of insurance had been issued on household goods "while contained in the two-story, frame * * * extension, occupied as store and dwelling, situate No. 212 Delaware Street." Thereafter the insured moved the goods, together with his grocery stock, to No. 211 Delaware Street, also a two-story, frame building, where insured carried on a grocery business, and an indorsement was then made on the policy as follows: "This insurance is transferred to cover similar property in the *frame dwelling house* No. 211 Delaware Street, Elizabeth, N. J. [Signed] Wm. Adams, Asst Secy."

After a loss of the property by fire, and the refusal of the company to pay the loss, the insured sought to have the policy reformed by inserting the words "store and" after the word "frame" in the indorsement of transfer, so as to cover the *frame store and dwelling house,* complainant alleging that the omission of the words "store and" *was due to the mistake of defendant's agent, which complainant did not notice until after the loss.* The defendant company denied that there was any mistake in writing the indorsement and asserted that it was written in exactly the form that it had been intended to write it. Vice Chancellor Emery, at page 297 of the report, said:

> "The fact clearly established by the evidence, on which the complainant relies for relief, viz., that by the transfer there was no increase, but rather a lessening of the hazard, cannot affect

> the decision of the only question on which I have the right to pass, which is whether the contract relating to the transfer should now be corrected or changed as claimed by complainant, because it was made in its present form through mistake. The law relating to the reformation of executed contracts is well settled, and it is only a question of the application of the law in each case. The rule in such cases is that proof must be made that there was a mutual mistake, in that the contract was not drawn as both parties intended it should be. Mistake on one side may be ground to rescind a contract; but an executed contract, such as a deed or policy of insurance, cannot be rectified, so as to be changed by a court of equity to another contract than that which the parties have signed, on the ground of mistake, unless it is shown to have been a mistake of both parties. *Doniol* v. *Insurance Co.* (1881; *Runyon, Ch.*), 34 N. J. Eq. 30; *Mortimer* v. *Shortall* (1842; *Lord Sugden*), 2 *Dru. & War.* 363; *Hearne* v. *Insurance Co.*, 20 Wall 488. Applying this rule to the facts of the present case the reformation of the policy must be refused, and bill must be dismissed."

The trial of the suit at law ultimately resulted in a non-suit, which was affirmed by this Court. (See *Dougherty* v. *Greenwich Ins. Co.*, 64 N. J. Law, 716, 721.)

In *Voorhis* vs. *Murphy*, 26 N. J. Eq. 434, it was held by Chancellor Runyon, where defendant sought to defeat foreclosure by alleging a mistake with regard to the payment of interest, that,—

> "Relief will not be afforded in equity on the ground of mistake, where the defendant's liability is the result of pure carelessness."

And in *Crescent Ring Co.* vs. *Travelers' Indemnity Co.*, N. J. Adv. Rep., Vol. IV., No. 6, (Feb. 6, 1926), at page 208, it was held by this court that,—

> "Where an insurance agent represents that a policy to be issued will contain certain stipulations (which are not unlawful), the policy must contain them or the assured will not be bound to accept it; in such case it is the duty of the insured, when the policy is received, to promptly examine it; and if it does not contain the stipulations agreed upon to at once notify the company of such fact and of refusal to accept the policy."

And at page 215 of the report, Chancellor Walker, speaking for the court and quoting *Metzger* vs. *Aetna Ins. Co.*, 227 N. Y. 411, said:

> " 'If the insured obtained or held a mistaken view or belief concerning the agreements of the policy, the fraud or negligence of its president and representative was the cause. A mere reading of the policy would have made him and the plaintiff know the agreements the plaintiff was accepting and entering into. To hold that a contracting party who, through no deceit or overbearing inducement of the other party, fails to read the contract, may establish and enforce the contract supposed by him, would introduce into the law a dangerous doctrine. Of course, the doctrine does not exist.' "

And further, at page 215 of the report, Chancellor Walker said:

> "Now even if it were to be held that the declarations of Nearing were 'deceit and overbearing inducement,' that would not have excused the officers of the Ring Company from reading the contract of insurance, because, as was proved in this case, the fraud, such as it was, was not perpetrated by the Indemnity Company—the other party; nor was it authorized by it, *nor did it afterwards, with knowledge, ratify it.* In this case the Ring Company, before accepting the policy, was perfectly at liberty to examine it and to call in a lawyer or an insurance expert to advise them

as to the meaning of its terms and the extent of the Indemnity Company's liability. This they did not do.

"While one sued for fraud cannot set up as a defense that if the plaintiff had exercised reasonable care, he would not have been defrauded; yet, where no active wrong-doing is attributed to the principal defendant, and reliance is placed upon the fraud of an agent, who was not instructed, or actually or impliedly authorized, to commit it, there can be no recovery by a plaintiff who could have protected himself by examining into the character of the transaction and the truthfulness of the representations made, *unless the defendant with knowledge, ratifies it.* And this the Indemnity Company did not do. * * *

"On the case made at the trial, which resulted in a verdict and judgment for the plaintiff, the non suit moved for should have been granted, and, failing that, the trial court should have directed a verdict in favor of the defendant, as no evidence adduced by the Indemnity Company made a case for the Ring Company entitling it to go to the jury. These views lead to a reversal and the award of a *venire de novo.*"

In *Henderson* vs. *Stokes,* 42 N. J. Eq. 586, it was held that,—

"To reform a written instrument, which is the foundation of a bill for specific performance, on the ground of mistake, the proof must be so full and clear as to leave no room for controversy."

Vice Chancellor Bird, at pages 588 and 589 of the report, said:

"Does enough appear to warrant the court to decree that the defendant shall convey the additional land? The court never interferes unless it is incontrovertibly proved that there was a mistake. The rule is thus inexorable to save the court from the danger of making contracts for parties. I submit a few of the cases in our

> own reports. (Cases cited.) These cases also show that it must appear that the mistake must be *mutual;* that, is at the time of the execution of the writing some term was left out which both parties had consented to, and which both intended to have in the agreement. (Cases cited.)"

And further at page 589 quoting from *2 Lead. Cas Eq.,* the Vice Chancellor said:

> "The learned American editor of that work says the rule is accurately given in *Tesson* vs. *Atlantic Ins. Co.,* 40 Mo. 33, 36: 'A court of equity has jurisdiction to reform a policy of insurance or other written contract upon parol evidence, when the agreement really made by both parties has not been correctly incorporated into the instrument through accident or mistake in the framing of it, but both the agreement and the mistake must be made out by the clearest evidence, according to the understanding of both parties as to what the contract was intended to be, and upon testimony entirely exact and satisfactory, and it must appear that the mistake consisted in not drawing the instrument according to the agreement that was made.'"

In *Herron* vs. *Mullen,* 56 N. J. Eq. 839, it was held that:

> "Courts of equity have power to reform deeds for the correction of mistakes, but to warrant reformation there must be a mutual mistake—that is, a mistake shared in by both parties."

Vice Chancellor Stevens, whose opinion was adopted by this court, said, at pages 839, 840:

> "There is not the least evidence that the mistake was mutual, consequently there can be no reformation. The weight of the evidence is that even if Herron did not know that the deed contained the clause of assumption when he accepted it (and it is not clear on the evidence

> that he did not), he knew of it before he conveyed to Phillips. He is not entitled to the remedy of rescission because he has incapacitated himself from returning the property."

In *Sloss-Sheffield Steel Co.* vs. *Aetna Life Insurance Co.*, 75 N. J. Eq. 545, Mr. Justice Swayze, speaking for this Court, at page 548 of the report, said:

> "In other words, the contract was a contract for insurance at regular rates with a special agreement of the agents to accept a smaller sum in payment; but there is no evidence in the case to indicate that that agreement to accept a smaller sum in payment of a larger sum was the agreement of the defendant company. Quite the contrary; the amount paid the company was the exact amount which it was entitled to receive at the policy rates. There is some evidence that the agents informed the company of their action and begged for some concession that would add to their compensation, but this the company refused to grant. It never assented to receive less than the full rates and never held the agents out as authorized to make a contract different from that contained in the policies. * * *
>
> "What has happened is that the complainant has been disappointed in its expectation that it could settle at a price less than it had agreed by the acceptance of the policies to pay. It may have been justified in entertaining this expectation, but to entitle it to relief it was necessary that it should be at least be a term of the parol contract."

In *Birch* vs. *Baker*, 81 N. J. Eq. 264, Vice Chancellor Emery, at page 269 of the report, said:

> "On the second issue, the alleged omission of the agreement from the written contract by mistake, which is the equitable ground of relief relied on for protection against the Statute, I conclude on the proofs that the evidence shows that the agreement in its present form was the

> agreement intended to be signed by the complainant, as well as by the other parties of the first part and the defendant, Sims, and that if there was any misapprehension or mistake on the part of the complainant in reference to the agreement with the other parties as to the compensation for his lands, it was not a mistake as to the promise for payment being either intended to be or actually being in the agreement at the time it was signed. The mistake which is equitable ground for reformation of a written contract must be clearly shown to have been a mutual mistake, and the mistake must be established by such force of proof as leaves no rational doubt of the fact of a mistake. *Green* vs. *Stone* (Court of Errors and Appeals, 1896), 54 N. J. Eq. (9 Dick.) 387, 399, 400. The evidence offered by complainant upon this issue of mistake falls far short of this requirement. * * * Upon the question of reformation of written contract for mutual mistake, due weight must always be given to the sworn statement of defendants as to their intentions in reference to the form of the contract. The reason is, that otherwise, under the form of reformation or correction, a new contract may be in fact made by the court. And where the entire preliminaries to the signed contract are oral and there is no writing of any kind to appeal to for the purpose of correction, the court must require proofs that will be sufficient to overcome the effect of the defendants' oaths."

In *Greene* vs. *Stone*, 54 N. J. Eq. 387, referred to by Vice Chancellor Emery, *supra*, Mr. Justice Depue, speaking for the Court of Errors and Appeals, at page 395 of the report, said:

> "Nor is there such proof in the case as would justify the reformation of the deed on the ground of mistake. Courts of equity may grant relief on the ground of mistake, by rescinding the entire contract or reforming it, but such relief will not be granted in case of a deed, unless upon proof that is entirely satisfactory and

convincing. In granting relief on the ground of mistake, there is a distinction between the rescission and the reformation of a written instrument. A court of equity may rescind a contract for a mistake which is unilateral—that is, a mistake on the part of one of the parties only. In such a case, the whole contract is set aside, and the parties restored to their original position. But in the case of the reformation of a contract or deed by altering or expunging some of the terms contained in it on the ground of mistake, the part improperly introduced into it will be altered or expunged, and the instrument will stand as reformed. To warrant reformation there must be a mutual mistake—that is, a mistake shared in by both parties. *Paget* v. *Marshall,* 28 Ch. Div. 255; 2 Pom. Eq. Sec. 870. Consequently no relief can be granted for a mistake which is unilateral after the position of the parties has been changed so that the former state of things cannot be restored. *Pollock Cont.* 541. The deed was delivered and accepted, and possession taken and held under it until the entire estate was divested by a sale in the foreclosure suit. The defendant, in his answer, admits that he became aware of this covenant shortly after process was served upon him in the foreclosure proceeding. No efforts were made to rescind the conveyance by restoring the title to Beckett, and, at this time, restoration of Beckett to his original position has become impossible, and relief by the way of rescission could not be granted even if the proof of unilateral mistake were entirely satisfactory and convincing."

And further, in considering the equitable relief by way of reformation, Mr. Justice Depue said, at page 397:

"The doctrine that a contract or deed will not be reformed for mistake, in the absence of fraud or imposition, unless the mistake was mutual, that is, reciprocal and common to both parties, where each alike was under the same miscon-

ception as to the terms of the written instrument, is the settled doctrine of the courts of equity. This doctrine is accurately stated by Mr. Kerr in this language:

'There can be no rectification if the mistake be not mutual or common to all parties to the instrument, or if one of the parties knew of the mistake at the time he executed the deed. Where one party only has been under a mistake while the other, without fraud, knew what the character of the deed was, and intended that it should be, the court cannot interfere, for otherwise it would be forcing on the latter a contract he never entered into, or depriving him of a benefit he had *bona fide* acquired by an executed deed. Rectification can only be had where both parties have executed an instrument under a common mistake and have done what neither of them intended. A mistake on one side may be a ground for rescinding but not for correcting or rectifying an agreement.' *Kerr Fr.* (2 Ed.) 498."

And, continuing, he said:

"The doctrine is stated by Chief Justice Spencer in this language: 'It is not enough in cases of this kind to show the sense and intention of one of the parties to the contract; it must be shown, incontrovertibly, that the sense and intention of the other party concurred in it; in other words, it must be proved that they both understood the contract, as it is alleged it ought to have been, and as in fact it was, but for the mistake. It would be the height of injustice to alter a contract on the ground of mistake, where the mistake arises from misconception by one of the parties in consequence of his imperfect explanation of his intentions. To make a contract, it is requisite that the minds of the contracting parties agree on the act to be done; if one party agrees to a contract under particular modifications, and the other party agrees to it under different modifications, it is evident there is no contract between them. If it be clearly shown that the intention of one

of the parties is mistaken and misrepresented by the written contract, that cannot avail unless it further be shown that the other party agreed to it in the same way, and that the intention of both of them was, by mistake, misrepresented by the written contract.' *Lyman* vs. *United Ins. Co.*, 17 Johns. 377."

"Equally explicit is the language of Chief Justice Ames, in *Dinman* vs. *Providence R. R. Co.*, 5 R. I. 130, 135, where he said: 'If the court were to reform the writing to make it accord with the intent of one party only to the agreement, who avers and proves that he signed it as it was written by mistake, when it accurately expressed the agreement as understood by the other party, the writing, when so altered, would be just as far from expressing the agreement as it was before, and the court would be engaged in the singular office of doing right to one party at the cost of a precisely equal wrong to the other.'

"* * * To justify the reformation of a deed executed, delivered, accepted and acted upon, on the ground that it did not correctly express the agreement made by the parties, the proof must be clear and convincing, and upon testimony that is unexceptionable, both with regard to the agreement actually made by the parties and the mutuality of the mistake through which a different agreement was put in the deed. In *Rowley* vs. *Flannelly*, 3 Stew Eq. 612, 614, Vice Chancellor Van Fleet says: 'When the evidence, in demonstration of mistake, is doubtful or equivocal, or strongly contradicted, so that it is impossible for the mind to reach a strong conviction as to the truth, the court will not change what is written, * * * Until a mistake has been established by such force of proof as leaves no rational doubt of the fact, no change in the writing sought to be reformed is entitled to be called a correction.' "

In *Mullen* vs. *Cronan*, 90 N. J. Eq. 392, Vice Chancellor Lewis (who advised the decree in the case at bar) himself states the rule, at pages 393, 395, as follows:

"This evidence is inconclusive and somewhat feeble to effect a reformation and moreover, the mistakes which equity will reform are common and ordinary ones and which are not the result of negligence. * * *

"In view of these facts and circumstances, which I am constrained to view as correct, I think reformation of the instrument should be denied. It is well settled that equity will not decree a reformation when the result would be inequitable, and aside from this the testimony offered by the complainant, and the burden of proof is with him (*Flaacke* vs. *Jersey City,* 28 N. J. Eq. 110; affirmed, 30 N. J. Eq. 733), does not disclose any mutual mistake, and there is no authority for the doctrine that a unilateral mistake is ground for reformation in the absence of fraud. *Green* vs. *Stone,* 53 N. J. Eq. 387; *Herron* vs. *Mullen,* 56 N. J. Eq. 839; *Doniol* vs. *Commercial Fire Ins. Co.,* 34 N. J. Eq. 30, and other cases."

In the case last cited by Vice Chancellor Lewis (*Doniol* vs. *Commercial Fire Ins. Co.*) it was held by Chancellor Runyon that:

"A policy of insurance was issued to and in the name of the complainant's wife on his property, upon her application. Complainant alleged that the policy was taken out by her in her own name instead of his, by mistake on her part. Reformation after loss refused on the ground that there was no proof of mutual mistake nor fraud on the part of the Company."

And in *Giammares* vs. *Allemannia Fire Insurance Company,* 91 N. J. Eq. 114, Mr. Justice Bergen, speaking for this Court, at page 116 of the report, said:

"But the real question presented is whether the proof justifies a reformation of this written agreement upon the ground of mutual mistake. There is no proof in this case of any fraud

which would be a basis for equitable interference, unless a disagreement of the parties as to the proposed contract is such a basis without convincing proof that the bargain was not correctly and truly expresesd, which it is not. The right to have reformation prayed for depends upon an agreement, part of which it is alleged was omitted when reduced to writing, because of a mutual mistake, which both admit, or the evidence shows they ought to admit, and it rests, in the last analysis, upon what the agreement was, and if it be claimed to be different from the writing, the proof ought to be clear and convincing that it was as claimed, but erroneously expressed in the written agreement, through some mutual misunderstanding, or mistake in neglecting to use proper words to express the contract really made. * * * With all these well settled principles to apply to the case under review, all that remains for us to decide is whether the complainants have shown by their proofs such a situation as justifies the reformation which the vice chancellor advised. * * * There does not seem to be any proof, of the character required, of any agreement except that expressed in the notation signed by the agent and attached to the policy. There was proof by the complainants that their broker asked for more, but none that it was agreed to, and certainly a court of equity will not make a contract for parties by inserting in a written agreement, terms of which there is no proof that the contracting parties agreed to. The notation attached to the policy was brief and explicit, *it was taken by complainants and held until after the destruction of the property by fire without protest,* and they knew the policy was void unless the changed condition of the property was noted on the policy. *The notation attached could be read at a glance and plainly disclosed that it did not contain what is now urged was omitted by a mutual mistake. A perusal of the short rider attached to the policy would have disclosed the alleged error.* In dis-

posing of this case we have assumed the authority of the stenographer to bind the company and its agent, but that is not taken as a determination of that question for that we do not decide. *Here we have a written contract which we are asked to reform according to the understanding of one party, against the evidence of the other that no such agreement as the complainant avers was ever made. In other words, we are to make a contract for the parties without convincing proof of an agreement made but omitted from the writing by mutual mistake.* We do not think that the evidence in this record shows a mutual reciprocal mistake 'common to both parties, when each alike was under the same misconception as to the terms of the written instrument,' according to the rule in *Green* vs. *Stone, supra. 'Courts of equity do not grant the high remedy of reformation upon a probability; nor even upon the mere preponderance of evidence, but only upon a certainty or error.'* Pom. Eq. Jur. Sec. 859, cited in *Hupsch* vs. *Resch,* 45 N. J. Eq. 657; affirmed, 46 N. J. Eq. 609, on the opinion of Vice Chancellor Pitney in which he said—'that he who asks to have a written instrument reformed must make out a perfectly clear case, free from doubt.' The complainants, having failed to make out a perfectly clear case, free from doubt, the decree in their favor will be reversed and the bill of complaint dismissed."

It should be borne in mind in the case at bar that Newman, the soliciting agent at Paterson, made no statement nor representation whatever, either to Sardo, the complainant, or to his broker, Lederer, when he delivered the policy, or at any other time, regarding the terms of the policy or its legal effect, as he apparently interpreted it, in covering "jewelry"; and it should also be noted that there is absolutely no evidence in the case to show

that Newman ever communicated that apparent interpretation to the defendant company, or any one representing it. And this is true as to both the 1923 policy, which is the subject matter of this suit, and the renewal policy of 1924.

It should further be noted, just as stated by Mr. Justice Bergen in *Giammares* vs. *Allemannia Fire Insurance Company,* 91 N. J. Eq., at page 119, *supra,* that the provisions of the policies with regard to the property covered—

> "could be read at a glance and plainly disclosed that it did not contain what is now urged was omitted by a mutual mistake,"

and that a perusal of the particular parts of the policies setting forth the property insured (which in the original policies were plainly inserted in typewriting in the declarations, and not included in the usual fine print portions thereof), "would have disclosed the alleged error." (See Case, p. 104, 11, 28, 29, Item 8; and Case, p. 121, 11, 21, 22, Item 8.)

It is difficult therefore to see how the Vice Chancellor could reach the conclusion of a ratification of Newman's alleged mental processes as indicated in his memorandum opinion. (Case, pages 21 and 22.)

The authorities are uniform that if a principal is to be charged with ratification of his agent's acts and thereafter estopped from disaffirming them, it must be shown unequivocally that the affirmatory acts claimed were done with full knowledge by the principal of the agent's specific act and the acceptance thereafter of the benefits flowing from it.

But, as Chancellor Walker pointed out in *Crescent Ring Co.* vs. *Travelers' Indemnity Co.,* N. J. Adv. Rep., Vol. IV, No. 6 (Feb. 6, 1926), *supra,* at

page 212 of the report, in discussing the general rule with regard to the answerability of the master for the wrong of a servant or agent committed for the *master's benefit* (see also quotations *ante,* pp. 14, 15):

> "We do not perceive how this case can help the Ring Company because the alleged false representations in this case (which lead to the issuing of the policy) were not made for the benefit but to the detriment of the principal."

And further, at page 214, that:

> "The Indemnity Company ratified the agency of Nearing in negotiating the very policy it issued to the Ring Company, because of such issuance and receipt of the premium therefor, but there is no evidence that it authorized him to negotiate a jewelers' block policy, *and his statement that the Indemnity Company's policy had as broad a coverage was a misrepresentation detrimental to his principal and a moral fraud that was not authorized by it, and, consequently, not binding on the Indemnity Company.*"

In *Standard Oil Co.* vs. *Linol Company,* 75 N. J. *Law,* 294, Mr. Justice Garrison, speaking for the Supreme Court, said:

> "Agency cannot be proved by the declarations of one assuming to act in that capacity. Until a declarant is shown to be the agent of a party to the suit his declarations (including his declaration that he is such agent) are inadmissible. *Brounfield* vs. *Denton,* 43 Vroom 235.
>
> "* * * From the brief of counsel for the defendant, rather than from the state of the case, it is to be gathered that what the defendant wanted to prove was a series of statements made by persons not authorized to bind their employer by volunteer declarations or narra-

> tives touching the master's affairs. It cannot be too often pointed out that the mere fact that one employs others to work for him does not make him chargeable with what they may say about him or his affairs while in his employ; if he employs them to talk for him a different case may be presented. *King* v. *Atlantic City Gas Co.*, 41 Vroom 679."

In *King* vs. *Atlantic City Gas Co., supra,* Mr. Justice Garrison, speaking for the Court of Errors and Appeals, at p. 681, said:

> "Where a person authorizes another to speak for him he may be confronted by testimony as to what was said by his representative within the scope of his authority; but where the employment is purely mechanical the master is not chargeable with what his employe may choose to say while at work for him.
>
> "In the present case an employe was sent either to repair the heater or to ascertain its condition and report it to his employer; neither of these employments charged the servant with any duty or omission that involved the making of declarations of any sort or of the expression of his views to any person other than his employer. Hence, within the rule illustrated by the decision above cited, it was error to admit the testimony."

As previously discussed, the authority of Newman was limited to the solicitation of insurance, writing of burglary insurance, the countersigning of the policy when delivered to the insurer, and the collection of the premium therefor. He had previously stated to Sardo and his broker that he had no authority to issue the hold-up policy they desired; that he would have to take it up with the company and that he could not bind them. Brush, the Manager of the defendant company, testified that

the policy was issued as soon as it left the Newark office, and it is clear that Newman's function of countersigning it was a purely perfunctory one,—as a matter of office record and identification and for collection and renewal purposes (Case, pp. 74, 75).

In *Hall* vs. *Passaic Water Co.*, 83 N. J. L. 771, Judge Treacy, speaking for the Court of Errors and Appeals, said, at page 775:

> "Not only does the burden of proof as to the fact of agency rest with one who seeks to charge another as principal with the acts of an alleged agent, but the burden also rests with him to prove the extent of the agency; in other words, the burden is upon him to show that the act or acts of the agent were within the scope of his authority."

In *Kelly Construction Co.* vs. *Hackensack Brick Co.*, 91 N. J. L. 585, Mr. Justice Trenchard, speaking for this Court, at page 587 of the report, said that:

> "The defendant, however, claimed that after the original contract was made it was modified by a supplemental parol agreement by the terms of which payments were to be made not later than the tenth of the following month, and in default of any such payment the contract was terminated.
>
> "But a sufficient answer to that claim is that there was no evidence to support it. The evidence of O'Keefe by which the defendant hoped to show such a modification of the original contract was properly overruled. O'Keefe was merely a foreman in charge of mechanics and laborers on the job, and the fact that he was accustomed to buy trivial things needed in an emergency did not show that he had authority to modify a contract for upwards of $5,000

> worth of brick already entered into by the duly authorized officials of the company by which he was employed."

The Vice Chancellor in his memorandum opinion (Case, p. 20) also observes that the "ordinary layman is not a trained lawyer nor an insurance expert," and cites the case of *Radawansky* vs. *Scottish Union Ins. Co.*, 126 Atl. Rep. 657.

But whatever application that case may have had to the situation involved, it seems to us that it has been entirely displaced by the decision of this Court in the *Crescent Ring Company* vs. *Travelers' Indemnity Company* case, *supra,* where Chancellor Walker, at page 216 of the Advance Report cited, said:

> "In this case, the Ring Company, before accepting the policy, was perfectly at liberty to examine it and to call in a lawyer or an insurance expert to advise them as to the meaning of its terms and the extent of the Indemnity Company's liability. This they did not do."

And because they did not thus inform themselves as to the terms and effect of the policy, this Court held that they could not complain because the policy failed to cover them as they desired.

The *Crescent Ring Company* case also, we think, entirely disposes of the Vice Chancellor's observation with regard to the effect that the doctrine of *caveat emptor* does not apply to insurance. (Case, page 20); and the case cited there (105 Atl. 611), was reversed on appeal by this Court (*Giammares* v. *Ins. Co.*, 91 N. J. Eq. at 119, *supra.*) Reference to the case of *Commercial Insurance Company* vs. *New Jersey Rubber Co.*, 61 N. J. Eq. 446, cited by the Vice Chancellor in his memo-

randum opinion (Case, p. 21) will show that it has no application to the case at bar. There, the Insurance Company had cancelled its policy after the loss and returned to the insured the *pro rata* unearned premium on the full amount of the policy, retaining the proportionate amount of the premium for the period covered prior to the loss, and the Court held that the Insurance Company could not

> "assert a right to the premium for valid insurance, and at the same time insist that the insurance had never been effected. By claiming and maintaining such a right (of retention) with *full knowledge of all material circumstances,* it unequivocally affirmed the validity of the insurance for the period covered by the premium and definitely waived every objection on which its validity could be denied."

In the case at bar, however, there has been no effort on the part of the defendant to avoid its liability upon the policy *as written,* and had there been a loss of *money or securities* during the life of the policy, Sardo would have been fully protected by the policy. Again, it is difficult to follow the Vice Chancellor's application of the case last cited to the circumstances of the case at bar, for the relief sought here is not rescission, but reformation.

And finally, with regard to the Vice Chancellor's reference to the rule that where one of two innocent parties must suffer from fraud of a third person, the loss ordinarily falls upon the one whose acts enable such frauds to be committed (Case, p. 22),—

It seems to us that that has no application to the present case, where fraud is neither alleged, claimed nor proved, and where it must be perfectly plain that if the loss of which Sardo now complains was

due to the dereliction of either party it was *his* dereliction in failing to read his policy and to inform himself of its contents and legal effect promptly upon receiving the same from the defendant company.

The opinion of Vice Chancellor Lewis beginning on page 17 of the state of the case and running down to page 19, line 26, contains a succinct and substantially accurate statement of the situation involved, except that the strict theory of the complainant's bill bases the prayer for relief upon the ground of "mistake or accident" (Case, page 7, lines 3, 4; page 8, lines 24, 27), rather than upon the ground of "mutual mistake" as stated by the Vice Chancellor (Case, p. 19, lines 1, 27, 29).

Indeed nowhere in the bill of complaint is it unequivocally alleged that it was previously agreed and understood by both complainant and defendant that defendant was to issue a policy covering "money and jewelry" and that the written policy fails to set forth the terms and provisions of such oral agreement on which the minds of the parties have met, but which the written instrument fails to accurately set forth.

The Vice Chancellor, however, thereupon proceeds to consider and discuss the situation involved from the point of view of "mutual mistake," which is not the issue involved, and we have herein discussed it upon the like theory, for it seems to be clear that it is upon this theory only that complainant can hope to sustain his prayer for *reformation* which is the ultimate relief which he seeks in his bill—not *rescission.* And from that point on (Case p. 19, line 27) to the conclusion of his opinion (Case, p. 23) it is respectfully submitted that the Vice Chancellor's opinion is erroneous in its as-

sumption of the theory presented by the bill, the facts, and the law, and that the conclusion reached by him is the exact opposite to that which his clear and concise previous statement of the facts would warrant, and to which that statement would logically lead; and it follows that the decree based upon that conclusion is equally erroneous.

It is respectfully submitted, therefore, that the decree appealed from should be reversed, and that the prayer for the reformation of the policy should be denied and the bill of complaint dismissed, and the prayer of defendant's Counterclaim granted.

WALL, HAIGHT, CAREY & HARTPENCE,
Solicitors for and of Counsel
with Defendant-Appellant.

New Jersey Court of Errors and Appeals

THOMAS SARDO, Complainant-Respondent, AND FIDELITY & DEPOSIT COMPANY OF MARYLAND, Defendant-Appellant.	On Appeal From Chancery.

BRIEF ON BEHALF OF RESPONDENT.

Statement of Facts.

The complainant, Thomas Sardo, who is engaged solely in the jewelry business in the City of Paterson, desiring to be protected from robbery of his store applied to the defendant Company for a policy of insurance. He applied for what was referred to in the case as a "hold up policy," and with the sole purpose of being indemnified for any loss which he would sustain by reason of being robbed of money of his stock of jewelry.

He applied to his broker, who in turn brought him to an agent of the Company, viz., Mellor Newman, and the policy of insurance was issued

to him on June 13th, 1923. Newman was undoubtedly conceded the agent. The policy was countersigned by Newman as agent. Correspondence which passed between Newman and the defendant and which was produced in evidence showed that he was treated as agent and referred to as agent. It also appeared that Newman on letterheads, cards, advertisements and other printed matter was referred to as the agent of the defendant, and that all of this printed matter was furnished to Newman by the defendant.

It also appeared without contradiction, that the complainant did apply for a policy to indemnify him for loss for robbery of *money and jewelry;* that Newman so understood the application, and that the policy of insurance which he handed to the complainant was a policy which he Newman, the agent, supposed was a policy for loss of *money and jewelry.*

It also appeared in the evidence that the general manager of the Company, a man named Brush, after the application for the insurance policy had been made, called on the complainant at his place of business for the purpose of inspecting same, and there ascertained that the sole business of the complainant was that of a jewelry store keeper.

On the 20th of May, 1924, complainant was held up by masked men and robbed of a large part of his jewelry. Not being indemnified by the defendant, he brought action in the Passaic Circuit Court and there for the first time through the question being raised in the pleadings, he learned that the policy of insurance which had been issued to him was a policy which indemnified him for loss of *money and securities.* It ap-

peared equally strong in the case, that complainant had never carried any securities and had no intention of insuring against loss of securities. Thereupon complainant brought suit in the Court of Chancery to reform the policy of insurance, claiming that the same was a mistake; and that such mistake was a mutual one, and that in any event the Company was put on notice after the inspection by its general manager, Mr. Brush, that the policy issued could not have been intended to be the policy desired by the complainant.

The Court after a thorough hearing on the subject found as it appears by the opinion (P. 23), that there was a mistake in fact, and decreed the reformation of the policy by substituting for the words, "moneys and securities," the words, "moneys and jewelry."

It is from this decree that the defendant appeals, and charges a number of grounds, none of which, it is contended, are of sufficient force to justify a reversal.

POINT I.

Newman, the man with whom complainant contracted was the undoubted agent of the Company.

The policy of insurance, Exhibit C 1. (P. 102, Ls. 20-30), closes as follows:

> "In Witness Whereof, The Fidelity and Deposit Company of Maryland had caused this Policy to be signed by its President and Secretary at Baltimore, Maryland, *and*

countersigned by a duly authorized Agent of the Company.''

Under the names of the Secretary and President of the Company, appears the words:

''Countersigned by Mellor J. Newman.'' (P. 119).

Exhibit C-4 (P. 107) is a letter from defendant in reference to this policy under discussion, and it is addressed to Mellor J. Newman, and closes as follows:

''Kindly countersign this policy. Copy of same is enclosed for your files'' (P. 108 L. 1).

Exhibit C-5 (P. 108, Ls. 25-30), is a letter with reference to the same policy and is addressed to Mellor J. Newman and directs him to attach a certain rider to the policy.

Exhibit C-6 is a letter from the defendant Company addressed to Mellor J. Newman, which amongst other things they express regret that they spelled his name wrong on the printed matter which they had furnished him (P. 109, Ls. 20-25).

Exhibit C-7 is a business card which reads as follows:

''Fidelity and Deposit Company of Maryland.

Fidelity & Surety Bonds & Burglary Insurance.

Mellor J. Newman
Agent.

126 Market St.,
Paterson, N. J.''

(P. 109 at bottom).

Exhibit C-7-1/2 is a letter from defendant Company to Newman in which amongst other things is stated:

> "We will see that some stationery is sent to you direct from the Home Office."

This letter is countersigned by George H. Brush, who was the man that afterwards inspected the premises of complainant.

Exhibit C-8 is a letter head of the Company, viz:

> "Fidelity and Deposit Company
> of Maryland
>
> Fidelity and Surety Bonds and Burglary Insurance, Baltimore.
>
> Mellor J. Newman,
> *Agent.*
> 126 Market St., U. S. Trust Co., Bldg.,
> Paterson, N. J." (P. 111, Ls. 1-20).

The importance of this is that it appears in connection with the testimony of Mellor J. Newman, whose testimony begins at page 45, who testified to his signature at bottom of policy (P. 45, L. 40). He testified that he had authorization to act for the defendant Company (P. 45, L. 40); that he had the authority to write burglary insurance (P. 50, Ls. 1-10), and that this authorization was in writing.

Again at page 51, line 1, this original authorization, however, he was unable to find; that the various other exhibits which we have quoted above viz., letters and business cards, upon which appears the name of defendant Company and also the name of witness, Mellor J. Newman, as agent; that all of this stationery was printed and furnished to him by the defendant

Company. This appears fully on his rebuttal testimony beginning at page 78, L. 30 and continues down to the end of page 80.

It will be noted that upon examining this stationery that the term "Agent" is without qualification. Mr. Newman further testified that he explained to the complainant and his broker that he would take the matter up with his Company before he issued the policy; that when he told him he owned a jewelry store, he then took it up with Mr. Brush; that complainant told him "He wanted his jewelry covered against hold-ups; that it affected his credits in New York; that salesmen would ask him if he was covered with insurance" (P. 46, Ls. 25-30); that he took this matter up with Mr. Brush, the manager of the Newark Office (P. 46, L. 35); that he took it up through the medium of letters and telephone calls (P. 46 at bottom P. 47 at top); that a representative came from Newark to see him in reference to same and asked him questions regarding the assured (P. 47, Ls. 26-28). All of this was in June, 1923, and thereupon a policy was issued.

It is important to note that before this policy was issued that they had full knowledge of the fact that the complainant was a jeweler, as their letter Exhibit C-3 (P. 106), addressed to Mr. Newman sets forth:

> "With reference to coverage for the jewelry store you were inquiring about over the telephone today," etc.,

and closes with:

> "Jewelry stores, as a class, are considered a very hazardous line, so that we would want to make an inspection of the premises before we issued any policies and to get a

line on the concern before we issued any fidelity bonds'' (P. 107, Ls. 4-12).

This inspection referred to in the letter was later made by Mr. Brush, the Manager of the Company of New Jersey, as appears from his testimony at page 27, Ls. 1-10 and again at page 57, Ls. 30-35.

Under examination of the Court at the bottom of page 58, Mr. Brush, manager of the Company, testified as to why he had inspected the premises, and at page 59, Ls. 10-20, he said he saw no moneys or credits, but he did see jewelry, and made a report in writing, which he did not, however, produce (P. 59, Ls. 30-40).

It will thus be seen that the evidence was overwhelmingly to the point that Newman was an agent; that Mr. Brush, the manager of the Company inspected the premises and thereafter caused a policy to be issued.

POINT II.

There was a mutual mistake between complainant and defendant as to the terms of the policy which is the subject of this suit.

We have shown that Newman was the defendant's agent and clothed with authority to make applications for and write burglary insurance for the defendant company (P. 50, Ls. 5-10); (P. 51, Ls. 12-20); (P. 52, Ls. 5-10), for whose benefit he collected premiums. The complainant, Thomas Sardo, asked Newman, the defendant's agent for a holdup policy covering ''money and jewelry'' and Newman, said he

would have to take it up with his company (P. 46, Ls. 20-30). Newman thereafter did take it up with his company and as a result thereof, a policy covering "money and securities" was sent by the defendant company to their agent Newman, who said when he countersigned the policy, he had examined it casually and interpreted it in his own mind as a policy covering "money and jewelry" (P. 18, Ls. 20-25) (P. 30, Ls. 25-30).

Complainant says that since he asked the defendant's agent, Newman, for a holdup policy covering money and jewelry and defendant's agent, Newman, at a subsequent period handed the complainant a policy which he (Newman) interpreted in his own mind as covering "money and jewelry," but which in fact was a policy on "money and securities," then there was a mutual mistake of fact in the terms of the policy M-611250 (P. 30, Ls. 25-30) (P. 31, Ls. 5-10).

Any transactions or dealings which the complainant had with the defendant company was through their agent Newman, and since complainant asked Newman for a "holdup policy" covering "money and jewelry" and Newman had replied that he would have to take it up with his company and since Newman did take it up with his company, it may be presumed that the defendant company was told by their agent, Newman, that the complainant desired a "holdup policy" covering "money and jewelry" and since at a subsequent period after communicating with his company, Newman handed the complainant a policy, which he received from his company (P. 74, Ls. 30-40) without explaining to the complainant what kind of a policy it was, it may be presumed that both complainant and New-

man, believed that the complainant received the kind of a policy he asked for.

Since the testimony shows that the complainant did not get the kind of policy he asked for, to wit: (a holdup policy covering money and jewelry) but got a policy covering money and securities (P. 31, Ls. 5-10) it is obvious that there was a mutual mistake between complainant and the defendant company, either through the fault and carelessness of Newman, the agent of the defendant company or Mr. Brush, the manager of the defendant company at Newark, New Jersey, who inspected complainant's store.

The mind of the complainant and the defendant, acting through its duly authorized agent therefore met on the contract as to the terms of the policy, viz., that it should be a policy to indemnify the complainant from loss of money and jewelry. Since the policy issued was for "money and securities," but did not express the terms of the policy mutually agreed upon under the contract made between the parties, hence it was a proper case for reformation, and the decree of the Court of Chancery in inserting the word "Jewelry" in place of "Securities," so that the policy read "'Money and Jewelry," expressed the proper terms of the contract.

We assume that it is needless to cite authorities to the fact that the principal of course is bound by the acts of the agent, within the scope of his authority, and within the scope of his apparent authority. It is well settled that if through mistake of the agent of the Company, both the complainant and defendant must suffer, that the penalty should fall upon the Company as being the innocent cause, rather than upon the complainant.

In the case of *Crescent Ring Co., Inc.* v. *Travelers Indemnity Co.*, 132 Atl. Rep., P. 106, in discussing the question of principals bound by the acts of its agent, the Court said:

> "And the limit of his power to bind the indemnity company was the apparent authority which it permitted him to assume, or which it held him out to the public as possessing" (2nd Col., P. 108).

POINT III.

The defendant argues, "did defendant's representative, Newman, have the power and authority to make a mutual mistake for the defendant Company with the complainant, Sardo?"

Newman solicited business for the defendant Company, he made application for policies, he had authority to write burglary insurance and countersigned and delivered the policies after they were issued by the defendant. If Newman's authority was limited and he was not a general but a special agent, then it became incumbent upon, and it was the duty of the defendant Company to put the complainant on guard and to notify him that Newman's authority was limited.

Newman notified the defendant Company of the character of insurance the complainant desired (P. 46, Ls. 30-40; P. 82, Ls. 35-40; P. 83, Ls. 1-10), and when the defendant Company sent Newman a policy of insurance, he (Newman) as the defendant's agent had the right to assume that his Company sent him the character of insurance he told them that complainant desired in the absence of any explanation, instructions or

directions coming with the policy, the defendant Company sent Newman their agent. When the defendant Company sent Newman a policy of insurance other than what he told them the complainant desired, it became the defendant Company's duty to see, inquire and investigate whether its agent, Newman, merely handed the complainant the policy or explained to complainant that it was a policy other than he desired, for as a matter of law the defendant Company knew they would be liable if its agent Newman, merely handed the complainant the policy without making an explanation to the complainant to the effect that the policy was of a different character than that which the complainant, Sardo, ordered from the defendant Company agent, Newman.

It was within the knowledge of the defendant Company as to the character of insurance the complainant desired (P. 46, Ls. 30-40; P. 55, Ls. 25-30), and they knew as a matter of law that the complainant had the right to assume he would get the character of insurance he asked for in the absence of an explanation made to him by Newman when Newman handed him the policy of insurance.

If Newman, the defendant's agent had the power and right to make application for insurance, solicit insurance business, write burglary insurance and countersign policies and receive premiums for the benefit of the defendant Company, logically a mistake in his duties would bind the defendant Company (P. 79, Ls. 18-25).

The power of Newman to act as its agent was unquestioned and we again refer the Court to his entire testimony on rebuttal beginning at page 78 and continuing to page 80.

A mistake is not a matter of law which is questioned to be within the scope of an agent's authority; it is only a positive act, an act of commission which is questioned to be within the scope of an agent's authority.

POINT IV.

The failure of the complainant Sardo to read and examine the policy in question does not bar the equitable relief he now prays for.

It seems to be contended in defendant's brief, that in the case of *Giammares* v. *Caffaro,* 89 Eq. P. 460, the Court held:

> "Failure of the insured to read the policy and thus discover the omissions is not such negligence as will bar relief."

Vice Chancellor Lane in his opinion said:

> "The defendant insists, fourth, that because of the failure of the insured, or his broker to read the policy, there can be no relief. Here again there is a wide divergence of opinion in foreign jurisdictions. Some have followed the rule adopted by the Wisconson Supreme Court in *Bostwice* v. *Mutual L. Ins. Co.,* 116 Wis. 392; 67 L. R. A., 705, which is to the effect that the principles of *caveat emptor* apply to the sale of an insurance policy with as much rigidity as in the case of a sale of merchandise. Others have adopted a contrary rule. 67 L. R. A. 727 *et seq.;* see, note to *Dolvin* v. *American Harrow Co.,* 28 L. R. (N. S.) 882 *et seq.*"
>
> "I think the rule to be applied in this State is to be gathered from a consideration of the following cases: *Loyd* v. *Hulick,* 69 N. J. Eq., 786, in which the Chief Justice

> said: 'Its (that is, the deed) delivery by the defendants to the complainants without a disclosure of the fact that it contained these covenants was equivalent, it seems to me, to a declaration on their part that the deed was drawn in conformity to the provisions of the contract. It is true that the complainants might readily have discovered by an examination of the deed before accepting it, that it was not what they had bargained for, and it may be conceded that prudence upon their part required a scrutiny of the deed before its acceptance by them. But I am not able to perceive that their failure to discover the fraud disentitles them to relief. In the transaction of business men ordinarily deal with one another in the belief that each is honest'."

The case of *Crescent Ring Co.* v. *Travelers Co.*, 132 At. Rep., P. 106, does not hold to the contrary the rule above enumerated. That case, however, was not a suit for a reformation of a contract on the ground of mistake, but an action at law for fraud. There was urged before the Court of Errors, by the appellant a reason for granting motion for non-suit, which was overruled, the reason being that the Ring Co. had an opportunity to ascertain the extent of the terms of the policy, the truth of the agency, etc., and that they failed to exercise that right.

Vice Chancellor in his opinion said:

> "In support of this several cases are cited in the United States Supreme Court and in New York and some other States, but none in New Jersey" (P. 109—2nd Col.).

Had the complainant in the case at bar proceeded with his action at law, and the judge had permitted the parties to testify pro and con as

to what was contracted for, a situation somewhat similar to the Crescent Ring Co. would have been presented. In the *Ring Co.* case too, the Court urges as a reason for holding the complainant responsible for his failure to read, was upon a principal laid down in the case of *Metsger* v. *Aetna Ins. Co.*, 227 N. Y. 411, viz.:

> "That ignorance through negligence or inexcusable truthfulness, will not relieve a party from his contract obligations", etc.

There was no ignorance or inexcusable ignorance in the case at bar. Why should the Court assume that if the complainant had read the policy and had seen the word "Securities" there instead of "jewelry", that as a matter of law he would have been bound to know that such a term did not embrace jewelry? Indeed, so broad is the term "Security," that it was thoroughly argued and necessitated an opinion of the Court of Chancery, in the case of *Pratt* v. *Worrell,* 66 N. J. Eq., P. 194. In that case it was held that the word "securities" did not embrace land.

In 35 *Cyc.,* P. 1283, appears a variety of definitions of the word "securities," and amongst one of the cases cited, it was held that stock certificates were not securities (*Howard Savings Inst.* v. *Newark,* 63 N. J. L. 547. In another case, it was held that real estate and mortgages were not securities (*People* v. *Mercantile Credit Guaranty Co.,* 35 Misc. (N. Y.), 755).

How then can it be said that this man upon reading the word "securities," would be bound to know its exact definition to the extent of being put on notice, that it did not include jewelry.

While in the case of *Howard Savings Inst.* v. *City of Newark,* first argued in the Supreme

Court (63 N. J. L., P. 65), and where the decision there handed down was reversed by the Court of Errors and Appeals in 63 N. J. L., P. 547, gold and silver certificates of the United States were held to be, by the Court of Errors and Appeals, "securities."

Yet a person of ordinary intelligence would speak of these certificates as money.

POINT V.

Defendant's contention that it had refused to issue a policy such as complainant desired is without a shred of evidence to support it.

Counsel for the defendant-appellant cites cases in his brief only two of which may have any bearing on the case *sub judice,* to-wit:

1. *Crescent Ring Co.* v. *Travelers Indemnity Co.,* reported in N. J. Adv. Rep., Vol. 4, No. 6 (Feb. 6, 1926).

2. *Koch* v. *Commonwealth Ins. Co. of N. Y.,* reported in 87 Eq., at page 90, and affirmed in 88 Eq., at page 344.

The case of *Crescent Ring Co.* v. *Travelers Ind. Co.,* may be distinguished from the case *sub judice.* That was a case, where a purchaser commenced an action at law against an innocent vendor, alleging fraud of defendant's agent in procuring the sale of insurance.

This case is on bill to reform a policy of insurance and there is no allegation of fraud in the bill, but complainant's position is, that he is entitled to a reformation of his insurance policy

where defendant's agent (Newman) who countersigned the policy and complainant made mutual mistakes and the mistake of the defendant's agent (Newman) who countersigned the policy was either due to his own carelessness and neglect or due to the carelessness and neglect of some other agent or servant of the defendant Company.

The case of *Koch* v. *Commonwealth Ins. Co. of N. Y.*, reported in 87 N. J. Eq., page 90, and affirmed in 88 N. J. Eq. at page 344, is directly in point with complainant's case and is an authority for complainant's position.

The only reason reformation was not decreed in the *Koch* case was because, the Vice Chancellor found "the evidence in the case did not disclose whether the agent of the insurer was empowered to employ or engage the services of soliciting agents (P. 96 in the middle of the page) and any knowledge which the soliciting agent of the agent of the defendant had and which was material to the risk was not acquired by him by reason of his employment and he was not employer for that purpose and therefore under the circumstances could not bind the defendant" (P. 96 in the middle of the page).

But the court cites with approval the case of *Franklin Fire Ins. Co.* v. *Martin,* reported in 40 N. J. Law at page 568, and at page 574 of the report of that case it is said: "If the proposal of insurance be prepared by the agent of the company, and he misdescribes the premises, with full knowledge of their actual condition, and there be no fraud or collusion between the agent and the insured, the contract of insurance may be reformed in equity, and made to conform to the condition of the premises as they were known to

the agent.'' This case is directly in point with the complainant's contention.

In the case *sub judice* the proposal of insurance was prepared by Newman, the agent of the defendant Company (P. 45, Ls. 30-40) and apparently defendant's agent, Brush, their manager at the Newark office misdescribed the ''coverage'' of the policy (P. 74, Ls. 30-40) and made it read ''money and securities'' instead of ''money and jewelry'', for Newman, who was defendant's agent told Brush, the defendant's manager at the Newark office, the character of policy, the complainant desired (P. 46, Ls. 20-40) (P. 82, Ls. 35-40) (P. 83, Ls. 5-10).

Now, if Newman, the defendant's agent, prepared the proposal of insurance and communicated with Brush, the defendant's manager at Newark and told him what kind of a policy, the complainant desired and he (Brush) with full knowledge of the character of insurance policy, the complainant desired, misdescribes the coverage of the policy and makes it read ''money and securities'' instead of ''money and jewelry'' and there is no fraud or collusion between the agent and the insured, the contract of insurance may be reformed in equity and made to conform to the terms of the coverage of the policy as they were known to both Newman and Brush, the agents of the defendant.

On page 97 of the *Koch* case, 87 Eq., second paragraph, the court said: ''There are authorities to be found in which it is held that when a soliciting agent has been appointed by an insurance company and supplied by the company with blank applications for insurance, and such an application for insurance has been filled in by the soliciting agent at the request of and in be-

half of the insured, and by mistake of the agent contains matter from that which the insured has correctly stated to the agent, the insurer will be charged with knowledge of the matter actually supplied by the insured to the soliciting agent, and that the policy, issued in conformity to such written application may be reformed at the instance of the insured." This language is very appropriate to the complainant's case.

The Vice Chancellor found as a matter of fact that the defendant intended to issue a policy covering "money and jewelry" and that the defendant's theory of the case was incredible.

Respectfully submitted,

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PETER J. MCGINNIS,
Of Counsel.