

INDEX

	Page
Notice of Appeal from Court of Chancery . . .	1
Petition of Appeal	2
Bill of Complaint	3
Answer	7
Replication	10
Final Decree	11
Conclusions of Learning, V. C.	12

TESTIMONY

Plaintiff's:

Thomas C. Fleming,	
Direct	24
Cross	27
Charles J. Koch,	
Direct	32
Cross	39
Alpha Steinbach,	
Direct	52
Cross	54

Defendant's:

Harold M. Essig,	
Direct	58
Cross	63
Edward E. Ikier,	
Direct	75
Cross	79

New Jersey State Library

EXHIBITS

<i>Plaintiff's:</i>	Offered Page	Printed Page
Exhibit C-1—Insurance policy	30	87
Exhibit C-2—Proofs of loss	34	103
Exhibit C-3—Letter, dated February 7, 1916, from Edward E. Ikier to P. Curtis KoEune & Company	38	108
Exhibit C-4—Deed dated December 21, 1910	86	

New Jersey Court of Errors and Appeals

IN CHANCERY OF NEW JERSEY

Between
CHARLES J. KOCH,
Complainant,
And
COMMONWEALTH INSURANCE COM-
PANY OF NEW YORK,
Defendant.

20

Notice of Appeal

The complainant, Charles J. Koch, hereby ap-
peals from the decree heretofore made in this
cause dismissing the bill of complaint, filed in this
cause, and from the whole and every part thereof,
to the Court of Errors and Appeals in the last
resort in all causes. 30

Dated, March 23, 1917.

JOSEPH BECK TYLER,
Solicitor for Appellant.

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

JOSEPH BECK TYLER,
Of Counsel with Appellant. 40

Petition of Appeal

NEW JERSEY COURT OF ERRORS AND
APPEALS

Between 10 CHARLES J. KOCH, Complainant-Appellant, And COMMONWEALTH INSURANCE COM- PANY OF NEW YORK, Defendant-Respondent.	}	Appeal from Chancery.
--	---	--------------------------

The petition of Charles J. Koch, the appellant in the above-stated cause respectfully shows that
 20 your petitioner finds himself aggrieved by a final decree made in the Court of Chancery by His Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the ninth day of February, nineteen hundred and seventeen, in a cause wherein Charles J. Koch was complainant, and Commonwealth Insurance Company of New York, was defendant, in the following respects:

1. That the said decree adjudges that the bill
 30 of complaint should be dismissed, and that complainant is not entitled to the relief by the bill sought and prayed for, upon the ground that the decree is erroneous in that the Court of Chancery should have made a decree against the defendant for the relief prayed for in the bill of complaint.

2. That the Court refused to decree that the policy of insurance made by respondent with petitioner should be reformed, on the ground that, as matter of law, the policy could not be reformed, which finding is erroneous and contrary to law and
 40 the principles of equity.

Bill

3. That the Court refused to decree a reformation of the policy of insurance issued by respondent to petitioner on the ground that the knowledge and inspection of the insured premises by a solicitor, or sub-agent, of the duly authorized general agent, of respondent, who solicited the insurance, was not imputable to respondent, which finding is contrary to law and equity. 10

4. That the decree is contrary to law and the principles of equity.

JOSEPH BECK TYLER,
Solicitor and Counsel
for Appellant.

 Bill

20

(Filed, September 29, 1916)

IN CHANCERY OF NEW JERSEY

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

Your orator, Charles J. Koch, of the City and County of Camden and State of New Jersey, complaining, shows: 30

1. That he is the owner in fee of premises known as 328 Kaighn Avenue, Camden, New Jersey, and on the 22d day of December, 1915, the Commonwealth Insurance Company of New York, the defendant, issued to your orator its fire insurance policy contract insuring the building on said premises against loss by fire in the sum of Three thousand dollars (\$3,000.00), for a period of five years 40

Bill

from the date thereof. That a true and correct copy of said contract is hereto annexed and made a part hereof.

2. That said contract describes the property insured as a brick building; occupied as "Store and Dwelling," whereas the property is a brick building and occupied as a store and printing shop.

3. That on the 16th day of January, 1916, a fire occurred in said building and resulted in a loss or damage amounting to Seven hundred eighty-five dollars and seventy-seven cents (\$785.77). At time of said fire the aforesaid contract of insurance was in full force and effect and your orator had paid the premium of Thirty-six dollars (\$36.00), therein referred to. After the fire the defendant company notified your orator to file proof of loss, which proof of loss was duly made on the 2d day of February, 1916, in accordance with the terms of the policy.

4. About seven weeks thereafter, to wit: by letter dated the 20th day of March, 1916, the defendant company notified your orator "that its policy never was a valid contract of insurance, and therefore, that it never attached" for the reason that the building was "occupied for the purposes more hazardous than those permitted by the policy."

5. Your orator shows that there was no change of risk or increase of hazard from the date of said fire insurance policy, December 22d, 1915, to the date of loss by fire, January 16th, 1916. That the said building had been occupied as a store and printing shop for at least four years prior to date of said policy and was used for same purposes when the fire occurred as it was when the policy of insurance was written.

Bill

6. Your orator further shows that the use of said building was misdescribed in said policy but that such description was made and adopted by the defendant company without consultation with your orator and that your orator had no knowledge thereof until after the fire had occurred and the notice of March 20th, 1916, had been received from defendant. Your orator never had possession of nor had he seen said policy until after the fire occurred. 10

7. That said building for five years previous to issuance of present policy had been insured by the defendant company and the prior policy described the building and its use the same as in the present policy. When the old policy of insurance expired, the defendant company, through its duly authorized agents, solicited a renewal policy and were authorized to insure the building. Nothing was said and no questions were asked about the use or occupancy of the building. The defendant company described the property and its use as set forth in the policy and the policy was sent direct to the mortgagee, who held it continuously until after the fire occurred. Your orator has never furnished the defendant company or its agents with a description of the use of the building either for the present policy or the prior policy and had no knowledge of how the defendant company described the building in either the aforesaid present policy or the prior policy, until after the fire occurred. 20 30

8. That at the time the present policy was written the agent of the defendant company came to the building to solicit the insurance and saw and then knew how and for what purpose the building was being used. 40

Bill

9. Your orator has, since date of said fire, offered to join with the defendant and correct said mistake or misdescription and to pay the additional premium, if any, for use of said building as a printing shop, which reasonable request the defendant has declined and refused and also declined and refused to pay the said loss or any part thereof.

Your orator is without adequate remedy in the Courts of Law and therefore prays:

1. That the defendant, Commonwealth Insurance Company of New York, may answer this bill of complaint without oath and each statement therein made;

2. That the mistake or error in describing the use of said building in said insurance policy may be corrected and the said policy reformed so as to correctly describe the use of said building by striking out the words "store and dwelling" and inserting in place thereof "store and printing shop."

3. That the complainant may be allowed further or other relief in the premises as the nature of the case may require and as shall be agreeable to equity and good conscience;

4. That a writ of subpoena may issue commanding said defendant to answer this bill of complaint and to abide by such decree as this Court may make in the premises.

JOSEPH BECK TYLER,
Solicitor for and of
Counsel with Complainant.

Answer*(Filed, October 20, 1916)*

IN CHANCERY OF NEW JERSEY

Between CHARLES J. KOCH, And COMMONWEALTH INSURANCE COM- PANY OF NEW YORK, Defendant.	}	10 On Bill, etc.
--	---	---

The answer of the defendant, Commonwealth Insurance Company of New York, against the complainant, Charles J. Koch. 20

This defendant, Commonwealth Insurance Company of New York, answering the bill of complaint, says that:

1. This defendant has no knowledge or information sufficient to form a belief as to the statements in paragraph one.

2. Paragraph 2 is admitted.

3. Paragraph 3 is denied.

4. Paragraph 4 is admitted. 30

5. Paragraph 5 is denied.

6. Paragraph 6 is denied.

7. Paragraph 7 is denied.

8. Paragraph 8 is denied.

9. Paragraph 9 this defendant has no knowledge or information sufficient to form a belief as to the statements there made.

Answer

DEFENSE

1. This defendant alleges that the policy of insurance in question, under date of January 16, 1916, was a renewal of a policy originally written by the firm of Cheney & Company, of Camden, New Jersey, said policy having been issued for the term of five years, commencing December 22, 1910, and expiring December 22, 1915; that in the form of this policy the occupancy of the premises in question was described as a "store and dwelling."

2. That during the pendency of said policy the assured, the complainant, had changed the character of the hazard therein, by installing a "printing shop," and that said increase of hazard or the installation of said printing shop took place about a year after the issuance of the first policy above mentioned; that shortly before the expiration of the policy mentioned as the first policy a renewal thereof was secured by the assured's broker, Thomas C. Fleming, who ordered the policy renewed through the agency of D. A. Henderson & Company, Camden, New Jersey; that this defendant's agent, D. A. Henderson & Company, caused the same to be renewed for the assured's broker, Thomas C. Fleming, to whom said policy, or its renewal was surrendered.

3. That at the time of the renewal of said policy this company, the defendant herein, and its agent, D. A. Henderson & Company had no knowledge whatever of the increased hazard installed by the complainant as aforesaid, and that at no time during the continuance of the policy, up until a period subsequent to the fire and the resulted loss there-

Answer

under, was any information of that character communicated to either of them so that this defendant and its agent at no time during the existence of said policy had communicated to them the fact that an increased risk had been established in the property of the assured, the complainant in the above bill. 10

4. That the increased hazard installed by the complainant called for a much higher rate of premium; that the rate then in force for a store and dwelling was thirty cents per hundred as against the rate for a printing shop of one dollar and thirty-seven cents per hundred, so that the risk actually maintained by the complainant was almost five times in excess of that for which premiums were paid. 20

5. That the complainant and his broker, Thomas C. Fleming, knew or must have known that they were working a fraud upon the defendant company, and that they or both of them procured said contract of insurance by concealing from this defendant company, or its agents, the character of the risk assumed; that complainant, without the knowledge or consent of this defendant, not only increased the hazard by installing his printing shop during the continuance of the first policy above mentioned issued upon the store and dwelling, but at the time of the renewal thereof withheld from this defendant the true character of the business being therein conducted and misrepresented the occupancy, and that these were material facts concerning said contract of insurance which the assured should not have concealed or misrepresented, and by so doing has committed a fraud upon this defendant company. 30
40

Replication

4. This defendant further says that for the reasons above assigned that said policy has never attached, but was void initially and that this defendant has made a tender of the amount of the premiums actually paid, namely, the sum of thirty-six dollars, by handing the same to the complainant in legal tender.

7. That the policy above referred to was issued by this defendant with the following clause thereunder:

“This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof”;

* * * * *

“or if the hazard be increased by and means within the control or knowledge of the insured”;

Defendant therefore prays to be hence dismissed with its reasonable costs and charges.

HOWARD L. MILLER,
Solicitor for Defendant.

Replication

(Filed, October 23, 1916)

The complainant joins issue on the answer of the defendant.

JOSEPH BECK TYLER,
Solicitor for Camplainant.

Final Decree*(Filed, February 24, 1917)*

IN CHANCERY OF NEW JERSEY

Between CHARLES J. KOCH, And COMMONWEALTH INSURANCE COM- PANY OF NEW YORK, Defendant.	}	10 On Bill, etc.
--	---	---

This cause coming on to be heard by his Honor, Edmund B. Leaming, one of the Vice Chancellors of the Court of Chancery of New Jersey, at the Chancery Chambers, in the City of Camden, New Jersey, in the presence of Joseph B. Tyler, of counsel with the complainant, and Howard L. Miller, of counsel with the defendant, and the pleading and proofs having been duly heard and the arguments of counsel thereon duly considered, and it appearing to the Court that complainant is not entitled to the relief sought and prayed for by him in his bill of complaint; 20

It is, on this 9th day of February, A. D., 1917, by Edwin Robert Walker, Chancellor of the State of New Jersey, 30

ORDERED, ADJUDGED AND DECREED, that the complainant's bill be and the same is hereby dismissed, with costs.

And it is FURTHER ORDERED AND DECREED, that the complainant pay to the defendant the costs 40

Conclusions

of this suit to be taxed, and that execution issue therefor according to the practice of this Court.

E. R. WALKER,

Respectfully advised.

C.

E. B. Leaming, V. C.

10

A true copy.

Robert H. McAdams,
Clerk.

Conclusions
IN CHANCERY OF NEW JERSEY

20

Between

CHARLES J. KOCH,

Complainant,

And

COMMONWEALTH INSURANCE COM-
PANY OF NEW YORK,

Defendant.

} Final Hearing
on Bill to re-
form a policy
of fire insur-
ance.

30 Joseph B. Tyler, Esq., for complainant.
Howard L. Miller, Esq., for defendant.

LEAMING, V. C.:

The bill of complaint in this suit has been filed by complainant to reform a policy of fire insurance which was issued to him by defendant fire insurance company December 22, 1915, for a period of five years.

40 In the policy the insured building is accurately

Conclusions

described except in that the words "occupied as a store and dwelling" form a part of the description.

When the insurance was written the building was not in fact occupied as a store and dwelling but was occupied as a printing establishment. The bill seeks a reformation of the policy by causing it to set forth that the building was occupied as a printing establishment instead of as a store and dwelling. Complainant also tenders the additional amount of premium that would have been charged by defendant company had it been known by that company that the building was occupied as a printing office and not as a store and dwelling. The proofs adequately disclose that at the time the policy was issued no person in any way connected with or interested in the transaction knew that the building had been inaccurately described in the policy.

The circumstances which occasioned the error in description were as follows:

Five years prior to the issuance of the policy which it is now sought to reform a policy was issued by defendant company to complainant on the same building and for the same amount, which policy contained a description of the building identical with that contained in the present policy. At that time the insured property was occupied as a store and dwelling and the description contained in the policy was accordingly accurate. That policy, however, was issued to be used as collateral security for a building and loan association, as mortgagee, and was delivered to the mortgagee and was probably at no time in the possession of or read by complainant. Complain-

10

20

30

40

Conclusions

ant was accordingly unacquainted with the fact that the policy described the use to which the building was devoted.

10 About six months later complainant installed the printing plant in the building which is now the occasion of this litigation. Complainant was comparatively unfamiliar with insurance matters and apparently did not know that the installation of the printing plant in the building was operative to increase the hazard or to affect his then existing insurance in any way; accordingly no notice had been given by complainant to the insurance company of the change in the use of the insured building.

20 In the meantime and before the expiration of the old policy, the local agent of defendant company who had issued the old policy was succeeded in business by a new agent who took over the business of the old agent. A few days before the old policy expired the new agent of defendant company observed from the records which had been acquired from the prior agent that the policy was soon to expire, and determined that he would endeavor to secure in behalf of his company a new policy on the building when the old policy should
30 expire. Noting that the policy was held by a Building and Loan Association, as mortgagee, in which association a certain insurance broker of his acquaintance was an active member, the agent of defendant company telephoned to the insurance broker that the old policy on the building of complainant was about to expire and asked the broker to endeavor to secure a new policy for him. The insurance broker accordingly saw complainant—
40 the owner of the building—and explained to him

Conclusions

that his old policy was about expiring and asked him to take out a new policy in the same company at its expiration. Upon complainant's inquiring of the broker what it would cost, the broker telephoned to the agent of defendant company and inquired the amount of the premium and received a reply stating the amount the premium would be. That amount was the same amount that had been paid for the old policy, and it is obvious from the evidence that the amount was communicated by the insurance agent to the broker without any knowledge upon the part of the insurance agent that there had been any change in the use to which the building was devoted. The broker then apprised complainant of the amount of the premium and complainant authorized the issuance of the new policy at the expiration of the old one. The policy was accordingly issued by the agent of defendant company on the date above named and was obviously copied from the old policy.

The proofs adequately disclose that at the time this latter policy was issued and at the time the loss under it occurred neither complainant nor the Building and Loan Association who held the policy as collateral knew that the property was described in the policy as occupied as a store and dwelling. The new policy was sent by the agent to the broker and by him delivered to the mortgagee and was at no time in the possession of complainant or seen by him.

The evidence has also clearly established the fact that the existence of an error in description was unknown to any person who was in any way connected with or interested in the transaction and was wholly unintentional upon the part of all

Conclusions

parties concerned and that the error was not discovered by any one until after the loss had occurred by fire, and that this bill for reformation was then promptly filed by complainant.

10 The agent of defendant company who issued the policy here in question, and at whose request the insurance broker already referred to solicited the policy, was a general agent of defendant company in the sense of an agent who was clothed with power within a limited territory to assume risks and execute policies by his countersignature.

20 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 vs. Chase*, 57 N. J. Eq., 478.

30 In the present case it was the mutual intention and purpose of all parties connected with the transaction that any description of the insured property which might be contained in the policy of insurance should be accurate, and it was their mutual belief that the written policy, which was intended to faithfully express their mutual purpose, was in all things accurate.

40 It cannot be said that any specific formula of description entered the mind of complainant at any time, for he wholly relied upon those who

Conclusions

should prepare the policy to prepare it correctly in all respects; but his real contract, as intended by him, was not for that reason any less a contract for insurance on his printing establishment.

It is however, obvious, even in these circumstances that unless defendant company can be chargeable with knowledge of the fact that the insured property was used as a printing establishment no reformation can be decreed, because in such case the general intent on the part of the insurer that the property should be accurately described could not be properly said to include the specific intent to insure a printing establishment; but with knowledge of the use to which the insured property was devoted imputed to the insurer the authorities appear to be consistent with the view that the policy could be reformed and made to describe the insured property correctly.

This view appears to have been recognized in *Franklin Fire Ins. Co. vs. Martin*, 40 N. J. Law, 568. At page 574 of the report of that case it is said: "If the proposal for 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." The authorities there collected are to the effect stated (the citation of L. R. 19 Eq., should be at p. 485, and the citation of 45 Conn., should be 25 Conn.), and *Hill vs. Millville Ins. Co.*, 39 N. J., Eq., 66, decided in this Court, appears to be based on a similar view. See also *Dewes vs. Manhattan Ins. Co.*, 35 N. J. Law, 366, at page 371.

Conclusions

The agent of defendant company who issued the policy here involved did not have actual knowledge that the insured property was used as a printing office. But, as already stated, the insurance broker, who was procured by the agent of defendant company to secure this insurance for him, did in fact know that the lower floor of the insured building was used as a printing establishment. No written proposal or application for insurance was signed or made by complainant; he merely assented to the request of the broker for insurance and wholly relied upon the insurance company, or those representing it, in all things. He wanted his printing establishment insured and the broker knew that it was, in part at least, a printing establishment that was to be insured. If the knowledge of that broker is to be imputed to defendant company it would seem that reformation of the policy must be decreed, for in such case the mistake must be deemed a mistake of the insurer resulting in a written policy which expresses material matters which the insurer could not be said to have properly intended to express.

But I find myself unable to reach the conclusion that the knowledge of the broker that a printing plant was in the insured building can be imputed to defendant company in such manner as to afford a sound basis for a decree of reformation. It has already been suggested that if the general agent of the insurer, clothed by the insurer with powers to determine the terms of and to issue the policy for the insurer by his countersignature, had in fact known that the building was in use as a printing establishment, authorities appear to support the view that it could be appropriately said

Conclusions

that the minds of the necessary parties met on a contract to insure a printing establishment, and that the error of description in such case would be either a mistake or act of fraud on the part of the agent of the insurer while acting for the insurer in a matter within the scope of the agent's authority to act. But although the remedy of reformation appears to have been at times awarded in such circumstances, it must be conceded that some difficulty is encountered even in such cases in reaching a wholly satisfactory conclusion that the insurer can be said to have in fact made or to have intended to make a contract other or different from the one written, or that rescission rather than reformation may not in such circumstances be the appropriate and only remedy.

But in the present case the Court is asked to go further and charge the insurer with the knowledge of the insurance broker touching the use of the insured building and by reason of that undisclosed knowledge of the broker formulate a contract upon the part of the insured embodying matter that was within the knowledge of neither the insurer nor the general agent of the insurer, the latter of whom represented the insurer in all matters of contractual negotiation and engagement. I do not entertain the view that this broker can be said to have been, as insurance brokers sometimes are, the agent of complainant; the broker was selected and requested by the agent of the insurer to induce complainant to renew his insurance which was then about to expire; pursuant to that request the broker solicited the policy in behalf of the agent of the insurer and received from that agent for his service the customary proportion of

10

20

30

40

Conclusions

the agent's commissions. It thus appears that to whatever extent the broker was an agent of any one in this transaction he was the agent of the agent of the insurer, and as such it may be that he can be said to have been an agent of the insurer, although the evidence does not disclose whether the agent of the insurer was empowered to employ or engage the services of soliciting agents. But it is apparent that any agency of this broker was within extremely narrow lines and his participation in the transaction was in fact within equally narrow lines. He was merely asked by the insurer's agent to induce complainant to take out a new policy at the expiration of his old one; the broker did that, as requested, and nothing more. When he was asked by complainant the amount of the premium he telephoned to the insurer's agent in the presence of complainant and asked the amount and at once received a reply over the telephone and stated that amount to complainant. Complainant then consented to take a new policy and that consent was telephoned to the insurer's agent and the policy was then prepared by the insurer's agent and sent to the broker and by the broker delivered to complainant's mortgagee. The broker was neither expressly nor impliedly requested to make a survey or examination of the premises or in any way to supply information touching the property, or to utilize his own information touching the property, and he did not do so. He did exactly what he was asked to do and no more, and he was asked to do no more than secure complainant's consent to renew his insurance when the then current insurance expired. In this specific and limited

Conclusions

employment I find no justification for the conclusion that the broker became an agent of the insurer in such manner that knowledge which the broker may have fortuitously possessed concerning the use of the insured building and which was not acquired by him through, by reason of or under, his employment became the knowledge of the insurer or the knowledge of the agent of the insurer who issued the policy in behalf of the insurer. Whatever powers or duties were imposed upon this broker by the agent of the insurer would necessarily carry with them the implied power or duty to do whatever might be reasonably necessary to discharge those powers or duties; but no power or duty to obtain or utilize or supply information touching the insured property was either expressly or impliedly conferred by the broker's appointment for the purpose already stated. It appears to me that any conclusion to the contrary of that here stated would be utterly subversive of the established principles controlling agencies. 10 20

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 behalf of the insured and by mistake of the agent contains matter different 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; 30 40

Conclusions

and in *Mohr and Mohr Distilling Co vs. Ohio Insurance Co.*; 13 Fed. Rep., 74, it was said at *nisi prius* that an insurance company could be chargeable with knowledge of a broker who is acting at the instance of an agent of the company in soliciting insurance. These cases must be understood to refer to certain soliciting agents with broader powers and duties than those conferred upon the broker in the present case, for if relief is to extend beyond the field of rescission and recovery of the premium 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 Justice Hoke to that effect in *Floers vs. Aetna Life Insurance 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 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 de-

Testimony

fixed 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 which the insurer designed to assume and for that risk the insurer accepted the premium suitable for that risk, a premium in amount greatly less than the premium fixed for risks of the other nature. There was accordingly at no time a mutual intent of the contracting parties to insure a printing office. 10

I am obliged to advise a decree dismissing the bill.

Submitted: January 15, 1917.

Determined: January 26, 1917.

20

Testimony

IN CHANCERY OF NEW JERSEY

Between CHARLES J. KOCH, and COMMONWEALTH INSURANCE COMPANY, of New York, Complainant, Defendant.	}	On Bill, &c. Final Hearing.	30
---	---	--------------------------------	----

Before his Honor, E. B. LEAMING, Vice-Chancellor, at the Chancery Chambers, Camden, New Jersey, on Wednesday, January 10th, 1917. 40

Thomas C. Fleming—Direct

Appearances:

Joseph Beck Tyler, Esq., for complainant.

Howard L. Miller, Esq., and Lawrence B. READER, Esq., for defendant.

10 THOMAS C. FLEMING, a witness produced in behalf of the complainant, being duly sworn according to law, on his oath says:

By Mr. Tyler: Q. Mr. Fleming, where is your office? A. 309 Kaighn Avenue.

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

Q. How long have you been in that business, A. Twelve years this coming May.

20 Q. Do you recall December last having something to do with the placing of a policy on the property of Charles J. Koch, 328 Kaighn Avenue? A. I do; yes, sir.

30 Q. When and how did that matter first come to your attention? A. Through Mr. Henderson's office. Now, I couldn't tell you whether it was Mr. Henderson called up or who it was; it was somebody there, from their office, called up and said that Mr. Koch's insurance had expired or was expiring, he thought I could get that business if I would go after it. That is how I got in touch with it.

Q. Now, do you recall just about when that was, whether it was before or after the policy had expired, the old policy that was on the property? A. That I couldn't tell you. I am not in a position to tell you that.

40 Q. Was it within a few days of the time, one way or the other? A. Yes.

Thomas C. Fleming—Direct

Q. Now, after you had gotten that message from Mr. Henderson's office what did you do? A. Sent my bookkeeper over to see Mr. Koch—

Q. Was he there? A.—across the street. Sir?

Q. Was he there? A. No, sir, he wasn't there, but he came over—now I don't know whether he came that day or the next day, I couldn't say positively, it was shortly afterwards, I know. 10

By the Vice Chancellor: Q. Who came? A. Mr. Koch.

By Mr. Tyler: Q. Came where? A. To my office.

Q. Over to your office? A. Over to my office, yes, sir.

Q. Now, were you there when he came to your office at that time? A. Yes, sir. 20

Q. Just tell us what happened? A. Why, he asked me about the insurance. I told him the insurance had expired, I would like to place it for him if he would allow me to, and he said "What is the rate going to be?" I called up Henderson's he told us what the rate would be, Mr. Koch was still in the office, he said "Go ahead, put it on." I called up Henderson, told Henderson to go ahead, put it on and send the policy to me, he did and I delivered it to the building association. 30

Q. When the policy came you handed it over to the mortgagee? A. Yes, sir.

Q. That is what you mean by "the building association?" A. Yes, the treasurer of the building association.

Q. Now, did Mr. Koch make statements to you as to the use and occupancy of the building? A. None whatever.

Q. Did you ask him for any statement about use 40

Thomas C. Fleming—Direct

and occupancy? A. None whatever. That is all that transpired through me and Mr. Koch. He told me to go ahead and do the business. The policy came, at the end of the month I sent him a bill and he sent me a check for it. That is all I know about it.

10 Q. Now, Mr. Fleming, you had seen this building number 328 Kaighns Avenue, hadn't you? A. Yes, sir.

Q. And you had been in it? A. Oh, yes, sir.

Q. You knew how it was occupied, didn't you? A. Oh, yes. In fact, I sold the building before Mr. Koch came to it, but not to Mr. Koch but to another party ahead of Mr. Koch.

Q. At the time you placed the insurance did you know it was not occupied as a store and dwelling? 20 A. I didn't know anything about the policy.

Q. I am not asking you that, I am asking about the building at the time you placed the insurance last December. Did you know then that the building was not occupied as a store and dwelling? A. I know it was occupied as a store and dwelling.

Q. Beg pardon? A. Store and dwelling; yes, sir.

Q. Did you know that it was not occupied as a store and dwelling? A. No, I didn't know that, I 30 knew it was occupied as a store and dwelling, because there was a store front in it, a double bulk.

Q. I don't think you understand me. Did you know that it was occupied as a dwelling? A. No, I didn't know that.

Q. Didn't know that? A. I couldn't say positively.

Q. Did you know how it was occupied—what it 40 was being used for? A. Well, I know it was for

Thomas C. Fleming—Cross

printing, whether he used the whole building for printing or not I couldn't say, I don't know.

Q. Now, you had been in the building, you say, prior to that time? A. On the first floor, never was up on the second floor.

Q. And how was that used—the first floor? A. That was used for a printing office. 10

Q. Printing office? A. Yes, sir.

Q. Now, did you personally have any conversations with Mr. Henderson's office, or was that done through your clerk? A. Not until after the fire.

Q. Not until after the fire? A. No, sir.

Q. Was the policy ever turned over to Mr. Koch to your knowledge, after it came back to your office? A. No, not to my knowledge, went right direct to the association, the treasurer of the association. 20

By the Vice Chancellor: Q. That is the mortgagee? A. Yes, that is the building association, mortgagee.

Q. The policy was made payable, I assume, to the mortgagee? A. That is right; yes, sir. Dr. Haines, being treasurer, you know, we always deliver the policies over to him.

By Mr. Tyler: Q. You received, I suppose, a compensation for placing the insurance? A. Oh, yes; yes, sir. 30

Q. That was paid in the ordinary way, out of the premium? A. Oh, yes; yes, sir.

CROSS-EXAMINATION by Mr. Miller:

Q. Mr. Fleming, do I understand you to say that you knew the character of the business being conducted in Mr. Koch's place on Kaighn Avenue? 40

Thomas C. Fleming—Cross

A. Only the lower floor, Mr. Miller. Of course, I didn't know what was upstairs, I never was up there, I never went up there until after the fire; of course, after the fire I went up there to see what I could see, but previous to the fire I couldn't
 10 tell you what was upstairs, I don't know, I didn't know whether Koch lived there, it was a factory or anything else, but after the fire I did go upstairs and saw then the condition it was in.

Q. Well, you are an independent broker, are you not, Mr. Fleming? A. Yes, sir.

Q. And as such you procured this business from Mr. Koch? A. Yes, sir.

Mr. Tyler: I object to that as a conclusion. I think that the question as to the capacity in which he acted and the effect of
 20 having procured this insurance is a matter of law, and it is a conclusion that the witness should not undertake to state.

The Vice Chancellor: I will let the answer stand. His conclusion may not be binding, but it is his understanding of it, at any rate.

Q. You are licensed by the State as a private broker? A. Yes, sir.

30 Q. Independent broker? A. Yes, sir.

Q. And as such you do insurance business? A. Yes, sir.

Q. And this particular piece of insurance was placed through the agency of D. A. Henderson & Company? A. Yes, sir.

Q. Were they apprised at any time by you or any one else—A. No, sir.

40 Q.—what the character of the business was in this place? A. No, sir.

Thomas C. Fleming—Cross

Q. Are you familiar, Mr. Fleming, with the fact as to whether or not there was a previous policy of insurance upon this same property? A. I know there was, of course; I knew there had to be but I didn't have the business, I know, somebody else had it.

Q. I beg your pardon? A. I didn't have the business previous to that, somebody else had it. 10

By the Vice Chancellor: Q. You said "I knew there was, of course, but I didn't have the business," didn't you? A. Yes.

By Mr. Miller: Q. You are not familiar, then, with the previous five-year policy? A. Oh, no. It is like everybody else, if any business comes to me I go after it, to see if I can't get it.

Q. And Mr. Koch came to your office about this piece of insurance, did he not? A. He didn't come until we sent for him. 20

Q. But he finally arrived there? A. Yes, sir.

Q. Now, do I understand that you were present when he arrived or your bookkeeper? A. We both was there.

Q. You were both there? A. Yes, sir.

Q. And what did he ask about particularly? A. He wanted to know what the premium would be for a new policy. 30

Q. Yes. He was interested in knowing what the rate was, wasn't he? A. Yes; I should think he ought to be.

Q. Yes; and that was what interested him at that time? A. Yes.

By Mr. Tyler: Q. Now, you had no record of this policy expiring until you got it from Mr. Henderson, had you? A. None whatever; no, sir.

Q. And you went there at the suggestion of Mr. Henderson? A. Yes, sir. 40

Thomas C. Fleming—Cross

Q. And if it hadn't been for the suggestion by Mr. Henderson you wouldn't have gone at all? A. No, sir.

The Vice Chancellor: I object.

10 Mr. Tyler: All right. I suppose it is leading, may it please the court.

The Vice Chancellor: In the absence of Mr. Miller objecting I will. The reason I object is because answers of that kind only confuse me.

Mr. Tyler: I appreciate that, too.

The Vice Chancellor: I don't know what weight to give to them, and I am afraid I will give them improper weight.

20 Q. Did you take this matter up of your own initiative or at the initiative of some one else only? A. Will you just ask me that again, Mr. Tyler.

(Question repeated.)

A. Oh, Mr. Henderson only, or through the office of Mr. Henderson; I don't know whether Mr. Henderson was talking to me over the 'phone or somebody in the office but it came from Henderson's office.

Q. And what did he say to you or request of you in connection with the policy, new policy?

30 The Vice Chancellor: Didn't he already cover that ground?

Mr. Tyler: I think so. Will you admit this without formal proof?

Mr. Miller: Yes.

Mr. Tyler: I would like to have the insurance policy marked as an exhibit.

(Said paper marked Exhibit C-I.)

40 Q. Now, after this fire what did you do? A. Called up Mr. Henderson, that is, I called up the office, rather.

Thomas C. Fleming—Cross

Q. And what did you do then? A. I got an estimate on the repairs.

Q. At whose request? A. Yes, sir.

Q. At whose request? A. Well, at Henderson's office, they requested me to get an estimate on the repairs.

Q. And did you get some one to make an estimate? A. I sent Bareklow & Fulton there, carpenters and builders. 10

Q. In placing this policy was it your purpose to insure the property as it stood or to limit the insurance in any way? A. Oh, that was up to Mr. Koch, I thought. There was a three thousand dollar mortgage on it, the building association, and, of course, the insurance had to amount to that much, you know, and Mr. Koch didn't ask me to increase it or anything else. 20

Q. I don't think you answered my question, Mr. Fleming. Perhaps you misunderstood it. (To the stenographer) Will you please read the question.

Q. (Repeated) In placing this policy was it your purpose to insure the property as it stood or to limit the insurance in any way? A. Just as it stood.

By Mr. Miller: Q. Mr. Fleming, the securing of the bids for repairs was done after the execution of the non-waiver agreement, was it not? A. Yes, sir, it was done sometime afterwards, but I couldn't tell you who done it, I don't know; I know Bareklow & Fulton didn't do it. 30

Q. It was done sometime after the 15th day of February, wasn't it? A. Yes, I think it was about around that time; yes, sir; as near as I can tell you.

By Mr. Tyler: Q. How soon after the fire hap- 40

Charles J. Koch—Direct

pened was it that you called up Mr. Henderson's office? A. The next morning.

Q. And how soon after that was it that Mr. Henderson told you to get an estimate for repairs? A. I was talking to him over the 'phone the next morning—I landed in the office about nine o'clock
10 —and he said "Now, won't you go get an estimate for the repairs?" and I said "All right, sir." So I went to see Barcklow & Fulton.

Q. Now, the fire occurred on what day? Do you know? A. Really I couldn't tell you that, Mr. Tyler. It was sometime in December, I think, but whether it was December or January that I couldn't say.

Q. But it was prior to February 15th, wasn't it? A. Was it? I know it was in the evening
20 while I was away, because the next morning I came to the office and seen where the fire was across the way.

CHARLES J. KOCH, the complainant, being duly sworn according to law, on his oath says:

30 By Mr. Tyler: Q. You are the complainant in this matter, aren't you? A. Yes, sir.

Q. Where is your place of business? A. 328 Kaighn Avenue.

Q. You own that property, do you? A. Yes, sir.

Q. Now, do you recall placing an insurance policy upon the property in December last? A. Yes.

Q. Did you ever place a previous insurance policy
40 on the property? A. No.

Charles J. Koch—Direct

Q. That is, the previous policy was there at the time you bought the property? A. Yes.

Q. Did you ever see the previous insurance policy, to your knowledge? A. No.

Q. Did you ever see the present insurance policy? I show you Exhibit C-I; Was that ever handed to you? A. No. 10

Q. Did you ever see it until after the fire? A. Not until after the fire.

Q. Did you have any information of any kind as to how your building—as to how the use of your building had been described in this policy, C-I? A. No.

Q. When you were over to Mr. Fleming's office was anything said to you or did you say anything to Mr. Fleming, or his clerk, as to the use and description for the use of the building? A. No. 20

Q. Did they ask you anything about it? A. No.

Q. Did you make any statement about it at all? A. No.

By the Vice Chancellor: Q. Did you know how the building was described, as to its use, in the policy that had just then expired? A. No.

The Vice Chancellor: It had then just expired? 30

Mr. Tyler: Yes.

By Mr. Tyler: Q. Now, I wish you would tell us how you came to place this insurance policy, and I refer now to Exhibit C-1, that is the present policy; how you got notice of the expiration of the old one, and what was said and done for the purpose of placing new insurance. Tell us all that you know about that, please.

A. The message was sent over to my office from Mr. Fleming while I was out. 40

Charles J. Koch—Direct

Q. Now, what message? Do you recall? A. About placing the fire insurance, because the building and loan in which I am buying the property required that, as I understood it.

10 Q. What did you do then? A. Then I went over at the first opportunity to see Mr. Fleming, and I asked him how much it would be, so that I would know what to pay, and the girl called up Henderson's office and she got the premium, gave it to me, \$36; I said "All right, go ahead."

Q. Now, did she say anything to you to indicate what the premium of \$36 covered other than covering this building? A. No, only \$3,000 insurance, that is all I know.

20 Q. Did you hear her say anything to Henderson & Company as to how the building was occupied? A. No.

Q. Or what use it was put to? A. No.

Q. Did she say anything? A. No.

Q. Now, when did this fire occur? A. On the morning of January 16th.

Q. Did you receive a request to file a proof of loss? A. Yes, I think I did.

Q. And did you prepare and file a proof of loss with the company? A. Yes, I think I did.

30 Q. How much was your loss? Just wait a minute.

Mr. Tyler: Have you got the proof of loss Mr. Miller? If not, I will use a copy.

Mr. Miller: Yes, there it is (handing paper to counsel.)

Q. Is that the proof of loss which you signed and filed with the company (exhibiting paper to witness?) A. Yes.

Mr. Tyler: Now, I offer that in evidence. Said paper marked Exhibit C-2.

40

Charles J. Koch—Direct

Q. This proof of loss is dated February 9th, 1916, and states that the property is used by the assured as an electrical power printing office. Did you have any knowledge up to that time as to how this policy had described the property? A. No.

Q. When did you first get knowledge of a variance between the description of the property as set forth in the policy and the actual use of the property? A. After the fire. 10

Q. How long after the fire? After the proof of loss—A. Yes, I think so.

Mr. Tyler: Will counsel produce the copy of a letter written by them or their special agent on March 18th declining liability? It appears that the original of that letter was handed to Mr. Lang and he hasn't got the original here. I have a copy of it here, if the court please, and I would like to use it. You admit that letter was sent? 20

Mr. Miller: Yes, we will admit that.

Mr. Tyler: Counsel admits that the following letter was sent by Edward E. Ikier, Special Agent, to Charles J. Koch, dated March 18th, 1916.

The Vice Chancellor: Is that before or after the proof of loss was filed? 30

Mr. Tyler: After the proof of loss was filed.

The Vice Chancellor: Isn't that the letter that the answer admits?

Mr. Tyler: I guess that is true. That refers to the letter but the letter isn't set out in full in the bill.

The Vice Chancellor: The substance of it is, is it not? 40

Argument

Mr. Tyler: Yes, but I would like to spread it upon the record in full. This is the letter that I refer to in the bill.

10 The Vice Chancellor: Well, if it is not a full enough averment you may introduce the letter but I do not think you can broaden the bill.

Mr. Tyler: I only want it for the purpose of fixing dates.

The Vice Chancellor: Well, is the date erroneous in the bill?

Mr. Tyler: No, the date is referred to in the bill.

The Vice Chancellor: Introduce it if you think it is important, but I do not.

20 Mr. Tyler: I think it is better, it fixes other dates too. The letter that I referred to, admitted by counsel, is as follows: "In view of the fact that the building situate 328 Kaighn Avenue, Camden, N. J., was on December 22d, 1915, and at all times thereafter up to and including January 16th, 1916, the date of the fire by which the building and its contents were damaged by fire, occupied for purposes more hazardous than those permitted by policy number 1563613, issued to you by this company you are hereby notified that this company claims that it never assumed the risk to which the property was subjected, that its policy never was a valid contract, and, therefore, that it never attached. Very truly yours, Edward E. Ikier, Special Agent."

30

The Vice Chancellor: The answer sets up that defense specifically.

40

Mr. Tyler: Yes, I think so.

Charles J. Koch—Direct

The Vice Chancellor: And admits your averment in the bill to that effect, so I do not see that this letter can add very much.

Mr. Tyler: The letter sets out dates and fixes the date of the fire.

Mr. Miller: I may add that our letter is under date of March 17th the letter you just read. 10

Mr. Tyler: I will accept the correction. The date I have is March 18th.

By Mr. Tyler: Q. Did you receive that letter, Mr. Koch, that I referred to? A. There was a letter came about that time, which I think is the one.

Q. And prior to the receipt of that letter had you any knowledge that there had been a mis-description of the property in this policy? A. Prior to receiving that letter? 20

Q. Yes, at any time prior to the receipt of that letter had you knowledge that there had been a mis-description of this property in the fire insurance policy? A. Yes.

Q. When did you first get that knowledge, if it was prior to this letter? This letter is dated March 17th. When did you first get knowledge? A. When Mr. Ikier called. 30

Q. About when was that? A. I can't recall the date.

Q. Do you know whether it was prior to the time that you filed the proof of loss or not? A. I believe it was after.

Q. After you had filed the proof of loss? A. Yes.

Mr. Tyler: Now, will counsel produce a letter asking the complainant to file a proof of loss, dated February 7th? 40

Charles J. Koch—Direct

Mr. Miller: Yes (handing paper to counsel).

10 Q. I show you a letter dated February 7th, addressed to Ko Eune Company, in reference to filing proof of loss, and ask you if you have ever seen that letter before? A. I believe I saw that in Ko Eune's office.

Mr. Tyler: Will you admit that letter was sent?

Mr. Miller: Yes.

Mr. Tyler: I will offer that in evidence. Said letter marked Exhibit C-3.

20 Mr. Tyler: That letter provides. "With reference to notice of loss described in this company's policy number 1563613, Charles J. Koch, if it is your intention to make a claim for same this company desires that you make proof of such loss, in accordance with the requirements of said policy, no condition of which is waived by this notice. This notice is being given you as required by Chapter 340 of the insurance laws enacted by the legislature of 1911 of the State of New Jersey. Truly yours, Edward E. Ikier, Special Agent."

30 By Mr. Tyler: Now, do you know whether up to that time, the date this letter was written or you saw the letter, that you had been informed or received information that there had been a misdescription in the policy? A. I believe it was after that.

Q. Had you made any inquiry of other insurance offices or agents as to placing insurance on this property and the premium to be paid? A. No.

40 Q. Had you any information or knowledge as

Charles J. Koch—Cross

to the rates of insurance that were charged for different descriptions? A. No.

Q. Of use of property? A. No.

Q. Mr. Fleming is the only person that you applied to? A. The only one.

By the Vice Chancellor: Q. Did you know that there was a higher rate of insurance for a building that was used for the purposes for which you were using that building than for one used as a dwelling and store? A. No, I did not. 10

By Mr. Tyler: Q. Have you ever had a fire loss before this one? A. No.

By the Vice Chancellor: Q. Have you ever had insurance before this? A. On the building?

Q. Yes. A. No.

CROSS-EXAMINATION by Mr. Miller: 20

Q. Well, did you ever have any other kind of insurance except the building? A. On the plant.

By the Vice Chancellor: Q. Have you ever had you mean, in the building? A. Yes.

By Mr. Miller: Q. Where did you place that insurance? A. In other companies. I divided it amongst customers.

Q. Through whom did you place that insurance? A. Do you mean through what agent? 30

Q. Yes. A. Do you want the names?

Q. Yes. A. Richard O'Neil; John Spuhler, deceased now, and Robert D. Clow.

Q. O'Neil placed most of this insurance, didn't he for you? A. Well, I just can't say. I believe I had it divided equally, to the best of my knowledge.

Q. O'Neil and you are friendly? A. We are acquaintances. 40

Charles J. Koch—Cross

Q. Now, when you secured the insurance on the machinery you talked insurance a little bit then with O'Neil, didn't you? A. I don't know what you mean.

10 Q. You discussed rates for insurance with O'Neil, didn't you? A. No, I didn't.

Q. Just gave him what he asked you? A. I asked him to place it, if it was five hundred, if it was a thousand, I asked him to place it.

Q. And how did you work with Spuhler—the same way? A. The same way.

Q. And the same way with Clow? A. Yes.

Q. Now, were there different rates for insurance? A. I don't know; I hardly think so.

20 Q. In other words, you may have been paying different rates for insurance but you don't know whether you did or not—that is true, is it? A. Yes.

Q. Why were you dividing up this business among these three gentlemen? A. As a matter of business consideration.

Q. And was that the reason that you gave Mr. Fleming some? A. Yes.

30 Q. Then why did you give Fleming all of the real estate? A. Because of the building and loan, they had the mortgage.

Q. You don't remember talking the rate over with O'Neil, do you, for your real estate? A. No.

Q. Never discussed that with him—is that true? A. I was talking to him after the fire.

Q. No. Did you ever discuss the insurance rate with O'Neil before you placed it with Fleming? A. No.

40 Q. Isn't it true that you took this insurance from Fleming because you knew you were getting

Charles J. Koch—Cross

a pretty cheap rate of insurance? A. I did not, no.

Q. What were you paying on your machinery?

A. I can't recall that now.

Q. Well, what do you pay on it? A. I think that it is specifically rated now. 10

Q. Well, one year, or five years, or how? A. One year.

Q. How much do you pay now? A. I think the rate is eighty some odd cents.

Q. A year? A. Per hundred, yes.

Q. So that you are paying more a year for your machinery than you are for five years for your property—is that true? A. Yes, I believe that is so.

Q. You are now paying almost three times as much a year for your machinery as you are for your property for five years—isn't that true? A. Yes. 20

Q. And yet you never discussed this with O'Neil? A. No.

Q. He is a friend of yours, isn't he? A. An acquaintance.

Q. He is a friend of yours, isn't he? A. An acquaintance.

Q. Well, he is one you talked the thing over with after the fire, isn't he? A. Yes. 30

Q. So that he is a little more friendly to you than the others? A. Because he came down there oftener with orders.

Q. How often did he come down there with orders? A. Well, now, I can't answer that. The best way that I can answer that was whenever he needed it.

Q. Well, you said oftener. What did you mean 40

Charles J. Koch—Cross

by that? What did you have in your mind? A. Well, if he needed any stationery.

Q. Well, about how often would he need stationery? A. That all depends how often he used it, or how often he used it up.

10 Q. Well, assuming that to be true, how often?
A. Well, he might come down one week and in two or three weeks he may need something else, and I may not have heard from him for a few months.

Q. And he was coming down there during the continuance of your first policy on this property?
A. Yes.

Q. And you were carrying insurance on the machinery during the continuance of the first policy?
A. Yes.

20 Q. When did you purchase this property? What year?
A. I suppose it was 1911, I am not sure.

Q. About a year after this first policy was placed on it? A. That I don't know.

Q. Well, you know the first policy was issued in 1910, don't you? A. That was on the property.

Q. Well, you know that, don't you? A. I think it was on.

30 Q. Well, haven't you found that out yet? A. I did all the transaction through the building and loan, Mr. Haines.

Q. And in that transaction you took over an existing insurance policy? A. I believe so.

Q. And that policy was placed on the store and dwelling, wasn't it? A. I don't know.

Q. You never saw your title policy, did you?

Mr. Tyler: Title policy or insurance policy?

40 Q. Or insurance policy? A. No.

Charles J. Koch—Cross

Q. Did you ever see your title policy? A. The deed?

Q. Yes. A. Oh, yes.

Q. Did you ever see your title policy, your search, &c? A. No.

Q. Now, you changed the character of the business in this place at what time? A. During my occupancy. 10

Q. Yes? A. —it was always the same.

Q. When did you move in? A. I believe it was five years ago last July.

Q. You don't know much about insurance, do you? A. I don't know anything about it.

Q. You used a term a few minutes ago, specific rating. Where did you get that from? A. That was quoted to me by Mr. O'Neil sometime ago, a few months ago, when I placed more insurance. 20

Q. Well, what did it convey to your mind? A. Well, as I understand it it means that it is a specifically rated.

Q. Yes, it is essentially an insurance term, isn't it? A. I believe so.

Q. Now, when you moved into this building it was a store and dwelling, was it not? A. When I moved into it? 30

Q. Yes. A. As far as the structure was concerned—

Q. Yes. A. Just the same as it is today.

Q. It had been a hat store, hadn't it? A. It wasn't a hat store, he renovated and cleaned hats.

Q. Well, then, it wasn't the same?

Mr. Tyler: He said as far as the structure was concerned, he did not refer to the use of the building. 40

Charles J. Koch—Cross

By the Vice Chancellor: Q. You set up the printing business in there after you bought it? A. Yes, when I moved in.

Q. And there had been no printing business there until you established it? A. Not until I
10 went in there.

Q. And before you bought it you understand it to have been a store and dwelling? A. It was used as—to clean hats and renovate them, &c., by this party that had it previously.

Q. And also for dwelling purposes, do you think? A. I believe he did use it.

Q. Have you been using it in part for dwelling purposes? A. No.

Q. All for printing business? A. Yes.

20 By Mr. Miller: Q. So that the portion of the building not used as a hat renovating department was a dwelling, wasn't it, previous to your moving in there? A. I think so.

Q. You don't know that either. Now, what proportion of that insurance policy were you taxed at the settlement? That is, of the first insurance policy. A. I don't know.

Q. You didn't look into that? A. No.

Q. You are a business man? A. Yes.

30 Q. Been in business how long? A. About ten years.

Q. Now, you carried this first policy for three or four years, did you not? A. I think so.

Q. You made no inquiry of any one as to the increase of the risk which you had made possible by bringing this printing shop to this house, did you? A. Did I make inquiry?

Q. Yes. A. I made no inquiry.

40 Q. You never discussed that with anybody? A. No.

Charles J. Koch—Cross

Q. And yet these insurance men were coming down there quite frequently to see you—A. Yes.

Q. Were they not? A. Yes.

Q. And yet they never asked you for a renewal of your store and dwelling policy, did they? A. No.

Q. You never discussed it with them? A. Not that I know of. 10

Q. Not until after the fire—then you discussed it? A. Yes.

Q. And in the meantime you had three insurance men calling on you and getting your business? A. Yes.

Q. And among them you divided up only your personal property? A. Yes.

Q. Why didn't you give some of those agents a chance at your real estate? A. Because I didn't feel any necessity for it the building and loan was satisfied. 20

Q. I see; and they never asked you for the business did they? A. I don't know if they did.

Q. Well, if they had do you think you would remember it? A. I believe Mr. Clow asked for the business.

Q. Who? A. Mr. Clow.

Q. Did he give you a rate? A. No; I don't believe I even asked the rate off of him. 30

Q. Well, did he give you a rate without asking? A. Not until I saw the policy.

By the Vice Chancellor: Q. Not until what? A. Not until I got the policy.

Mr. Tyler: Is this in reference to personal property?

Mr. Miller: Well, now, I will find out what he is referring to. 40

(Charles J. Koch—Cross

The Witness: Personal property, the plant, on the equipment.

Q. I think Mr. Miller is referring to the building, whether he asked you for the business of insuring the building. Isn't that what you asked, Mr. Miller?

110 Mr. Miller: Yes.

A. Well, I don't know if I was ever asked about that.

By Mr. Miller: Q. Well, can you say that you were never asked about it? A. I don't know.

Q. Well, if you were about to insure your premises for five years and had these friends or agents coming to your house, wouldn't it seem reasonable that you would discuss with them the rates? A. Well, that may be true.

20 Q. Yes. Well, now, as a matter of fact, can you recall discussing the rates with these other insurance men? A. No.

Q. You placed this insurance on the building as soon as you heard the rate, didn't you? A. Yes, I told them to go ahead and place it.

Q. You never attempted to get any other bids for this business? A. No.

Q. Did you know whether or not this property had a specific rate? A. No, I did not.

30 Q. Why didn't you inquire about that? A. Well, I don't know anything about it.

Q. You don't know, then, now, what specific rating means? A. Only as I have stated before.

Q. But you did not inquire in this case whether your property was thus rated? A. No, I didn't inquire at all.

Q. You were satisfied with this premium? A. 40 Oh, yes.

Charles J. Koch—Cross

Q. And you knew that you were getting a pretty low rate of insurance? A. No, I didn't know.

Q. Did you ever say to O'Neil that you were delighted with the fact that this broker was able to get such a low rate by just making the form read store and dwelling? A. No.

Q. Did you ever discuss that at all with Mr. O'Neil? A. What you asked me? 10

Q. Yes. A. No.

Q. Or anything else similar to that? A. No, not that I remember.

Q. Now; at no time did you communicate to the D. A. Henderson Company the character of the use of this building, did you? A. No.

Q. And their renewal was a renewal of the policy previously issued and under a similar form? 20

Mr. Tyler: I object to that. It is not cross-examination, and the witness is not qualified, I think, to testify as to what the previous policy was, he said he did not know.

The Vice Chancellor: Well, he can say that he doesn't know if he does not. I think he has already said he never has seen the policy, or this one either.

(Question repeated).

A. I don't know. 30

By Mr. Tyler: Q. These several insurance men that were coming to your place—you spoke of Mr. O'Neil, Mr. Clow, and one other—did they ever inform you as to any change of risk or increased hazard? A. No.

Q. They came there from time to time, didn't they? A. Yes.

Q. And they were about the plant and in the 40

Charles J. Koch—Cross

plant and knew what it was being used for? A. Yes, I believe they had knowledge of what it was.

Q. And never said anything to you about it? A. No.

By the Vice Chancellor: Q. Mr. Koch, when
 10 Mr. Fleming told you the rate that would be
 charged for the renewal of this insurance on the
 building, did you know or have in your mind any
 idea that the rate which he named might have
 been based upon his understanding, or, rather, up-
 on Henderson's understanding that this property
 was not used for a printing office but was in fact
 used for a dwelling and store? Did you have any
 such thought or idea in your mind when that rate
 was told to you by Henderson? A. No, I did
 20 not.

Q. When that rate was told to you by Henderson
 did you know that it was a low rate for the in-
 surance on the building used for the purposes
 which you were using that building for? A. No, I
 didn't know it.

Q. Did you know at that time that if you had
 told Fleming or Henderson that this building was
 used for a printing office that the rate would have
 been higher than the rate given to you? A. No.

30 Q. Then your testimony is that at the time this
 rate was given to you and you ordered the insur-
 ance placed that you did not know and had no
 thought that there was any misapprehension
 touching the use of the building? A. No, I did
 not.

Q. Didn't it occur to you that the rate was much
 less than the rate you were paying for the insur-
 ance on your personal property? A. It never
 40 occurred to me.

Charles J. Koch—Cross

By Mr. Miller: Q. Didn't you discuss with Mr. Richard O'Neil—that is the agent, isn't it? A. Yes.

Q. Richard O'Neil? A. Yes.

Q. The premium that you had paid on that building and show him your policy? A. No. 10

Q. And didn't he then tell you, after inspecting your policy, that you were not properly covered?

Mr. Tyler: May I have the time fixed of the conversation? I think it is only fair to the witness.

The Vice Chancellor: Yes, fix the time, Mr. Miller.

Q. Shortly after the second policy was issued to you, or the first policy that you purchased. A. That I discussed that policy with him? 20

Q. Yes.

The Vice Chancellor: Before the fire?

Q. Oh, yes, before the fire, shortly after you secured this policy from Fleming? A. I don't remember any discussion with him on that.

Q. Will you say that you did not have that conversation with him? A. I can't recall that.

The Vice Chancellor: Well, give him the time, place and circumstances, Mr. Miller, and refresh his memory, if it can be refreshed. 30

Q. Shortly after you purchased this policy from Fleming, at your place of business on Kaighn Avenue, did you have that conversation? A. I don't recall any conversation.

Q. Did you have that conversation with him anywhere else? A. No, I don't remember any.

Q. You don't remember? A. I don't remember any conversation. 40

Charles J. Koch—Cross

The Vice Chancellor: What did you say the conversation was, Mr. Miller, that you claim was had?

10 Mr. Miller: A discussion relative to this policy in which O'Neil was asked to quote his rates on this policy, and O'Neil quoted other rates whereupon the assured told him he was getting it for less and showed the policy.

Q. Did O'Neil quote other rates to you?

The Vice Chancellor: Less than what?

Q. Didn't O'Neil quote rates to you on this building in excess of what you had paid? A. Before the fire?

Q. Yes. A. No.

20 Q. Did he afterwards? A. I think afterwards we got talking about it.

Q. Did he tell you before the fire that you were not properly covered? A. I don't remember that, no, I don't think he did.

Q. Did he tell you after the fire that you were not properly covered? A. I don't remember that he made that statement, not properly covered.

30 Q. What statement did he make—do you remember? A. I believe that after the fire—it was after the fire that I was talking to him and he did say that it was a low rate, I says I didn't know anything about that.

Q. How long after the fire was it? A. About three weeks.

Q. Before you put in your proof of loss? A. I don't know.

Q. At that time did he say what the rate should have been? A. I can't recall that.

40 Q. Did he fix any figures? A. I can't recall it.

Charles J. Koch—Cross

By Mr. Tyler: Q. Now, Mr. Koch, do you recall when you had this conversation with Mr. O'Neil, this alleged conversation, whether you had the policy or not with you at that time? A. No, I didn't have the policy at that time.

Q. Didn't have the policy? A. No.

Q. Did you ever get the policy until after the fire? A. I don't remember ever getting it, no. 10

Q. When did you first get hold of this policy? A. I can't recall the date.

Q. Well, tell us the circumstances, how you got it and when you got it, as near as you can? A. Mr. Lang called at the office and asked for the policy.

Q. Yes. Now, how long after the fire was that? A. I don't know. 20

By the Vice Chancellor: Q. Mr. who? A. Mr. Lang.

Q. Who is he? What connection had he with the matter? A. He represented the Ko Eune Company.

By Mr. Tyler: Q. Insurance adjusters of Philadelphia? A. Yes. And I told him that I didn't have the policy, I didn't know anything about it, that it was in the possession of the building and loan, and I took him to Mr. Fleming's office and I believe that we couldn't get it then, because the treasurer had it, but he would see the treasurer and get it. I think a day or two afterward the policy was received. 30

By the Vice Chancellor: Q. This insurance on the personal property, on the plant itself: Do you recall about when that had been placed? How long before this present policy was placed on the building was the insurance placed on the personal 40

Alpha Steinbach—Direct

property? A. Well, there were different dates for these various policies.

Q. Did you place insurance on the plant at the time you bought the property or put in the plant, in July, 1911? A. Not until fall.

10 Q. Not until the fall of that year? A. Yes.

Q. You did place insurance then on the plant? A. Yes; on the plant, yes.

Q. And who was it placed with in the first instance—do you recall? A. I think Mr. Spuhler.

ALPHA STEINBACH, a witness produced in behalf of the complainant, being duly sworn, according to law, on her oath says:

20

By Mr. Tyler: Q. What is your name? A. Alpha Steinbach.

Q. Steinbach? A. Yes, sir.

Q. Miss Steinbach, you are employed by Thomas C. Fleming? A. Yes, sir.

Q. At his office at 309 Kaighn Avenue? A. Yes, sir.

Q. And were you in his employ last December? A. Yes, sir.

30

Q. Do you recall receiving a message from any one as to the expiration of an insurance policy on Mr. Koch's property, 328 Kaighn Avenue? A. Yes, sir.

Q. From whom did you get that message? A. D. A. Henderson & Company.

Q. How did you get the message? A. By telephone.

Q. What was the message? A. That the policy

40

Alpha Steinbach—Direct

covering property 328 Kaighn Avenue, in the name of Koch, would expire on the 22d.

Q. 22d of what? A. December, that was 1915.

Q. Now about when did you get the message?

A. I couldn't tell you. It was a few days before. I couldn't just say what day.

Q. Did they make any suggestion or request of you with regard to the policy? A. Yes; they said that it had been formerly put on by Davis & Wotjkowiak, who were formerly in business next door, and he said that, being as they were out of business, probably we could get it, being a neighbor there; so I said I didn't know but I would try.

Q. Now, what did you do in pursuance of that?

A. Mr. Fleming was out at the time; when he came in I told him, he said he would go over and see Mr. Koch, he went to the 'phone, Mr. Koch at the time being out he left word with the young lady in the office, and sometime later that morning Mr. Koch came over in reference to the insurance.

Q. What happened when Mr. Koch came over?

A. Well, he said that he had received the message and for to go ahead and put the insurance on. He said "What will it cost?" And Mr. Fleming was there at the time, he said "I don't know, call up Henderson and see." I called up Henderson and they said \$36.

Q. For how long a period was that? A. Five years.

Q. Did Henderson & Company, or whoever was talking on the 'phone, make any statement to you as to what use of the property that covered? A. No, sir.

Q. Did they ask what use of the property was covered by that request for information? A. No, sir.

Alpha Steinbach—Cross

Q. Did you ask Mr. Koch to make any statement of the use of the property? A. No, sir.

Q. Did he make any statement to you of the use of the property? A. No, sir.

10 Q. Now, did Mr. Koch make any comment or statement as to the rate or the premium that was being charged? A. No, sir.

Q. And having obtained that rate, or that premium, statement of premium, what did you do? A. I told Henderson to go ahead and renew it.

Q. And then the policy was subsequently received at your office? A. Yes.

Q. And what was done with it? A. A record was taken and Mr. Fleming delivered the policy.

20 Q. Delivered the policy to whom? A. I couldn't say; I don't know.

CROSS-EXAMINATION by Mr. Miller:

Q. Then you really placed this insurance for your office? A. Yes, sir.

Q. Now after Mr. Koch called did he inform you that he had changed the use of his building? A. No, sir.

Q. And that he was now running a printing shop there? A. No, sir.

30 Q. You didn't know that yourself? A. That he was running a printing shop?

Q. Yes, you didn't know to what use he was putting the building? A. No, I didn't know to what use.

Q. And in that connection you didn't communicate to Henderson & Company—A. No, sir.

Q.—anything other than the order for a renewal of the old policy? A. That is it.

40 Q. Upon the same terms as the expiring policy? A. Yes, sir.

Alpha Steinbach—Cross

Q. And the price they quoted you was based upon that information—isn't that true? A. Yes, sir.

Q. Now, Koch didn't discuss with you the amount of the premium he had been charged, did he? A. No, sir.

Q. He seemed to be satisfied with the amount, did he? A. Yes, sir. 10

By Mr. Tyler: Q. Did you request of Henderson that they place this policy in any particular company? A. No, sir.

Q. Did you know what company the old policy was in? A. No, sir. Well, I don't remember whether Henderson told me at the time he called up, I couldn't say that.

Q. But did you know how the old policy was made out? A. No, sir. 20

Q. Had you any knowledge as to how the property was described in the old policy? A. No, sir.

Q. Did Henderson state to you how it was described? A. No, sir.

Q. You knew that Mr. Koch had a printing shop across the street, didn't you? A. Well, I knew that he had, yes.

Q. In fact, he had done printing for you people, hadn't he? A. Yes. 30

Q. And you knew that that printing was being done in his building across the street, didn't you? A. Yes.

Q. Did you have any knowledge that it was not being used for a dwelling? Did you know that no one was living in the building? A. I can't say that I knew that at the time.

Q. Now, in the insurance business a five year policy takes a cheaper rate than a one-year policy, doesn't it? A. Yes, sir. 40

Alpha Steinbach—Cross

Q. As a matter of fact, it is just four times the rate for one year instead of five times, isn't it?

A. Yes, sir.

Q. Now, did you ask for this insurance of your own initiative or at the request of some one else?

10 A. At the request of some one else.

Q. And who was that? A. Henderson.

By the Vice Chancellor: Q. It was more of a favor than a request, wasn't it?

(Witness did not answer).

By Mr. Miller: Q. The information that you obtained over the 'phone was—

Mr. Tyler: Let us have an answer to that question.

By the Vice Chancellor: Q. Did you get my
20 question? I said, the communication from Mr. Henderson to you, or to your office, was more in the nature of a favor to your office than a request, wasn't it? A. Yes, sir.

By Mr. Tyler: Q. Well, what did they say about getting the policy? A. About getting the policy?

Q. Yes. A. Well, I just don't know what you mean.

Q. What did Henderson ask you to do about it?

30 A. He just asked—he said that it had been formerly put on by these people that were out of business at the time, and did I think I could get it, he would like to—let me see. Did I think I could get it for them.

Q. And you said what? A. I said I would try. "I don't know but I will try.

By Mr. Miller: Q. As a matter of fact, wasn't it a piece of information sent to your office?

40 The Vice Chancellor: I gathered from

Alpha Steinbach—Cross

the testimony of Mr. Fleming that it was simply a favor extended to them from Henderson's office, to give them a change to get the insurance.

Mr. Tyler: I think the testimony will have to be based upon the exact words. 10
They asked him to get the policy, he said he didn't know but they would try to get it.

By the Vice Chancellor: Q. I do not know whether it is material or not if I have got a misapprehension of the testimony of Mr. Fleming, but I will ask you to testify again, if you please, exactly what was said to you by the person, whoever it was, that called you from Mr. Henderson's office. Now, be very careful in repeating this to repeat it as accurately as you can from memory. 20
A. Well, I just can't remember the exact words.

Q. Well, state the substance of what that person said, as nearly as you can, and who the person was, if you know. A. I don't know who the person was. He said—

Q. Now, state what he said? A. Well, he said that the policy would expire and he thought that probably we might get it for him, and I said I would try, I didn't know but I would try. I can't 30
tell you—just tell you the exact words.

By Mr. Miller: Q. Then you are not certain at this time just what that telephone message was?
A. Well, I can't give you the exact words but I can give you the main subject in it, asking for the policy, asking for the renewal.

Q. Now, didn't you at the time take it that this was a little friendly tip to your office that there was some loose business down there that you 40

Harold M. Essig—Direct

might get if you went after it? A. Well, I couldn't say that, I don't know.

Q. Well, when you got this information you went after the business? A. Yes.

Q. You are not agents for the Commonwealth Fire Insurance Company? A. For the what?

10 Q. For the Commonwealth Fire Insurance Company? A. For the Commonwealth?

Q. Yes. A. No, sir.

Q. Nor for D. A. Henderson & Company? You are independent brokers? A. Yes, sir.

Q. Place your insurance where you want to? A. Yes, sir.

By Mr. Tyler: Q. You did place this business with Henderson & Company? A. Yes, sir.

20 Q. Why was that? A. Well, because they asked for it.

Complainant rests.

Case for defendant.

30 HAROLD M. ESSIG, a witness produced in behalf of the defendant, being duly sworn according to law, on his oath says:

By Mr. Miller: Q. Your name is what? A. Harold M. Essig.

Q. You are connected with the D. A. Henderson Company? A. Yes, sir.

Q. In what capacity, Mr. Essig? A. Well, I might say manager, chief clerk.

40 Q. And were you serving in that capacity in December of 1915? A. I was.

Harold M. Essig—Direct

Q. Are you familiar with how this insurance was placed so far as your office is concerned? A. As to how we secured it?

Q. Yes. A. Yes.

Q. Or as to how it was secured? A. At the time this policy was expiring, or the previous policy, rather, which was one that had been written by or placed, rather, brokered by Davis & Wotjkowiak with John W. Cheney & Company, whom we succeeded in July of 1913—in going over our expirations some few days or a week, or possibly ten days—I could not just say the time—before that policy expired I noticed the expiration and seeing that it was a policy on 328 Kaighn Avenue, on a brick store and dwelling, as described in that policy, to which was attached a mortgagee clause, payable to the West Jersey Mutual Building & Loan Association, and having an idea that Mr. Fleming was connected with that association in some way, I called his office and solicited a renewal of that policy, meaning that it was a tip to them to get the insurance.

Q. Is Mr. Fleming an independent broker? A. He is.

Q. And is licensed under our State laws? A. Yes, sir, I presume so.

Q. Well, you know that he is an independent broker? A. Oh, yes, I know he is an independent broker.

Q. At the time of the issuance of the original policy, the one dated December 22d, 1910, running until December 22d, 1915, I understand that was secured by Davis & Wotjkowiak? A. That was a policy that, according to the memorandum of John W. Cheney & Company—and I do not see

Harold M. Essig—Direct

any reason why it should be an error in that respect—was one that was written in the name of Charles J. Koch, it was written December 22d—
 10 jr dated December 22d, 1910, for five years, and there was no endorsement made on that policy afterwards, up to the time it expired it was in that way.

Q. So that, so far as your records show, the policy was issued to Koch? A. It was, so far as the records indicate it was written in Mr. Koch's name, yes.

Q. And there has been no memoranda or change indicated in the policy? A. None.

20 The Vice Chancellor: I do not know what to think about that. This is not the best evidence. It is evidence competent for present purposes, to show the notion that was in the witness' mind at the time of the telephoning, but it is not the evidence of the contents of that policy, nor is the testimony of Mr. Koch the best evidence. In the absence of the policy I am a little in doubt to know what the fact may be.

30 Mr. Tyler: We can clear up the question of when he bought the property by the records downstairs.

The Vice Chancellor: That may not be conclusive. He might have taken out the policy later.

40 By the Vice Chancellor: Q. What does the record show the date of that policy to be? A. As far as this memorandum is concerned there cannot be any question as to the date of that expiration, or the date of that commencement, I should not hesitate to say that, nor can there be any question as to the copy of this form.

Harold M. Essig—Direct

Q. Won't you please answer my question instead of giving me a lecture: (Repeated) What does your record show the date of that policy to be? A. December 22d, 1910, to December 22d, 1915.

By Mr. Miller: Q. This policy was originally issued upon what? A. Do you mean what class of property? 10

Q. Yes. A. It was issued on a brick store and dwelling, 328 Kaighn Avenue, Camden, N. J.

Q. Now, during the continuance of that first policy was a change in the use of the premises ever indicated? A. No. I have already answered your question. There was no change made on it at all.

Mr. Tyler: I object to that unless the witness will qualify— 20

The Vice Chancellor: I cannot accept the testimony touching the contents of this policy from any one in the absence of the policy or some effort to procure its presence here. It is purely secondary evidence, and it is incompetent clearly and I cannot accept it. I will not strike out the testimony that has been given but so far as it is intended for the purpose of showing the contents of the prior policy it is clearly incompetent. Mr. Cheney's records are presumably accurate but not necessarily so; they are entitled to every respect but they are not legal evidence. 30

Q. Did it ever come to the notice of your office, Mr. Essig, that a printing shop had been established here? A. Not to my knowledge.

Q. Are you familiar with the rates, insurance 40

Harold M. Essig—Direct

rates? A. More or less, principally more; we are associating with that, and I am personally constantly.

10 Q. Well, what would be the difference between the rates on this particular property at that time, December 22d, 1915, between a store and dwelling and a printing shop? A. Well, the store and dwelling have no specific rate, it would be at what we term a minimum rate, in accordance with the existing—

20 Q. Well, was this particular property specifically rated? A. Not at that time, therefore the minimum rate would have applied, and had we had knowledge that it was a printing office a printer's minimum would have been applied, in which case we would have had to have made inquiry as to whether it was a hand power printer, as to whether it was a power printer, and also whether there was a dwelling in the same building.

The Vice Chancellor: Which was it? Is there any dispute about what it was? Was it a power printer?

30 Mr. Tyler: No, I think it was an electric power printer. The plant was run by electricity no other power in the building except electric current.

The Vice Chancellor: Well, was there any change in the power? At the time the policy was issued was it a gas power plant?

Mr. Tyler: Gas.

40 By Mr. Miller: Q. At the time this policy was issued this was a gas power printing shop? A. Well, under that condition, with a dwelling in there—

Harold M. Essig—Cross

Q. No dwelling. A. No dwelling. Printing of-
fices other than hand power, the rate on the build-
ing would have been \$1.47 annually, and four
times that for five years.

Q. That would have made the premium what
on that policy? A. That would have made a pre-
mium of about \$176.40. 10

CROSS-EXAMINATION by Mr. Tyler:

Q. For five years? A. For five years, yes.

Q. Now, since then the building has been speci-
fically rated, hasn't it? A. The building was spe-
cifically rated under date of June 28th, 1916.

Q. At what rate? A. The building rate flat is
84 cents.

Q. For use for what purpose? A. Well, the card
that I have here, published by the State, Atlee 20
Brown's Rate Bureau, says "328 Kaighn Avenue,
Koch Printing Company, 6/28/16, No. 229, brick
and frame, 3m., slag, 84 cents. Koch Printing
House, job printers."

Q. And what would be the rate, then, for five
years? A. That rate would be \$3.34 per hundred.
Now, I haven't given the premium, I have just
given the rate.

Q. In the previous case you gave the premium. 30
Won't you please state what the premium would
have been on this policy? A. On this contract,
\$100.20.

Q. So that the difference between this contract
as written and the contract as re-rated would be
\$73.80, wouldn't it? A. No, that would be \$76.20,
Mr. Tyler.

Q. You said the first was \$100.20? A. I said
under the latter conditions, \$100.20, and previous-
ly I said \$176.40. 40

Harold M. Essig—Cross

Q. Yes, and the policy was written for \$36, wasn't it? A. Oh, yes.

Q. It was written for \$36 under the store and dwelling minimum, and the difference between the policy as written and a policy on the building as now rated would be \$73.80, wouldn't it? A. Oh, I get your point.

The Vice Chancellor: But that rating was since the fire.

Mr. Tyler: I appreciate that.

The Vice Chancellor: Since the policy was written. The difference which it seems to me is material is the difference between what he did pay and what he would have paid at that time for a five year policy under the rate then existing.

Mr. Tyler: We had those figures; I thought that was a matter of argument. I will ask the question so as to bring it all out.

Q. And the difference between the premium paid on this policy and the premium paid on the printing shop at the time the policy was written would have been \$140.40, is that right? A. At the time the policy was written the premium—

Q. Now, just answer my question. A. Read the question, please.

(Former question repeated).

A. I didn't get that premium at all.

Q. Well, you stated that the premium for five years at the rate of \$1.47, for \$3,000, would have been \$176.40? A. Correct.

Q. Is that correct? A. \$176.40.

Q. And the amount of the premium on the policy as written was \$36; is that correct? A. Yes;

Harold M. Essig—Cross

the amount of the premium on the policy in dispute is \$36.

Q. And the difference between those two is \$140.40? A. That is right.

Q. Now, you have a plat or map of the buildings in the city of Camden in your office, don't you? A. We have a map of the city of Camden in two volumes, yes, sir. 10

Q. And that shows the construction of all the buildings, doesn't it? A. It shows each building, yes, but it is subject to correction, and we can't tell accurately or decidedly—absolutely that the building as shown on that map is correct.

Q. Well, whose map is it? A. Sanborn Map Company, New York.

Q. Now, those maps are obtained by you when? A. How? 20

Q. When are those maps obtained by you? A. Well, I couldn't answer that question offhandedly, I don't know.

Q. Well, you undertake to keep those maps up to date, don't you? A. We don't keep them up to date ourselves, no. The Sanborn Map Company have corrections made at various times and their people do the work.

Q. And you get copies of these corrections? A. Yes, sir. 30

Q. And attach them to your map in your office? A. They attach them.

Q. And those corrections are in what nature? A. In the nature of pasters.

Q. Covering particular properties—isn't that true? A. Yes.

Q. Now, you use that map both in quoting rates and in writing policies, don't you? A. Not always. 40

Harold M. Essig—Cross

Q. But you do, don't you? A. At times, yes.

Q. And that map shows you how a building is constructed, doesn't it? A. It shows us how a building is constructed, yes.

10 Q. And how it is occupied too, doesn't it? A. That at times does show the minimum of that but that is subject—

Q. Wait a minute; answer the question. And especially so as to business properties—isn't that true? A. As a rule.

Q. As a rule? A. Yes.

Q. Now, you can go to that map usually in writing a policy or quoting a rate and quote a rate on that map without asking questions, can't you? A. Well, I wouldn't say—no, I wouldn't say that.

20 Q. Don't you often quote your rates on that map unless special information is given to you? A. As a rule, on a risk in a section, for instance, Broadway, or a business street, which we know is correctly rated, we simply look in the rate drawer to see if a specific rate were placed on that building.

Q. And you have a different rate for frame buildings and a different rate for brick buildings, don't you? A. We do.

30 Q. And don't you go to your map to see what information that will give you as to the building? A. Not always.

Q. But you do that? A. Where we have—

Q. Wait a minute. You do that occasionally? A. Sometimes, yes.

Q. And that information is available to you in every instance? A. It is.

40 Q. And was available to you in this instance? A. Yes; the risk is on the map undoubtedly.

Harold M. Essig—Cross

Q. Now, when you asked for this insurance you asked for it for yourselves, didn't you, not for another agency? A. No.

Q. Didn't you ask for it for yourselves? A. Not necessarily.

Q. Well, you didn't ask for it for Freeman Brothers or anybody of that kind, did you? A. No; we gave the benefit of the business to Mr. Fleming's office, as I have already explained. 10

Q. Yes, I understand that. You called them up and solicited the business, didn't you? A. No, I shouldn't say solicited business, in that case we would have solicited directly from the assured.

Q. No, but you didn't do that? A. No.

Q. Because you had had no business relations with the insured at all, had you? A. Not to my knowledge. 20

Q. So you thought the best way to get the business was to get it through a local agent who was perhaps acquainted with the insured? A. Yes.

Q. Isn't that true? A. Half a loaf is better than none.

Q. And you thought that Fleming was on the ground and in a better position to get that policy than you were to get it yourself, didn't you? A. I thought— 30

Q. Wait. Please answer that. A. I thought Mr. Fleming—

Q. That isn't the question. A. I am going to answer your question.

Q. Can't you answer it yes or no? A. No, I can't.

Q. Well, then answer it in your own way. A. I called Mr. Fleming and took the subject up with him because I thought that in his position and as 40

Harold M. Essig—Cross

being interested in the West Jersey Mutual Building Association that he would be able to control it or land it.

Q. For you? A. No, for himself.

Q. And for you too? A. Well, if you put it that way, for himself and us, yes.

Q. And your object in calling up Mr. Fleming wasn't entirely charitable, was it? It was with the idea of getting a piece of business out of which you would receive a part—the commission at least—isn't that true? A. That is true, yes.

Q. Now, at the time you wrote this policy you believed you were writing it correctly, didn't you? A. We did, as far as we know; we had no other information.

20 By the Vice Chancellor: Does your firm procure business direct from patrons without the intervention of brokers? A. Oh, yes, yes.

Q. In doing that do you get a broker's commission or are you simply dealing as agents of the company? A. If we were dealing directly with the assured we would make an agency commission, and if we are dealing through a broker we have to pay a brokerage commission. In other words, the broker's commission comes first, we do not

30 deal with the assured at all.

Q. When you deal directly with the assured you get the broker's commission and an agent's commission too? A. No, theirs—the broker's then is eliminated entirely, we simply make the regular agency commission, it is what we term direct business.

Q. You get then—A. The full commission.

Q. What the broker would have gotten? A. Yes, 40 sir, exactly.

Harold M. Essig—Cross

By Mr. Tyler: Q. And on business which you get through the broker you get the agency commission less the broker's commission, don't you?

A. We pay the broker commission and we get a certain commission from the company.

Q. Yes. A. And then out of that commission we pay the broker his commission, brokerage. 10

By the Vice Chancellor: Q. I don't get it clear yet. When you deal directly with the assured you get an agency allowance, I understand you to say?

A. Yes, sir.

Q. But I don't understand just what your relations with the different companies where you place the policies may be, and I don't know whether it may not be essential element of the proofs in this case that it be ascertained. I do not know whether an insurance agency is a general agent of the company or whether such agencies from the company's standpoint are mere brokers. I do not know how to ascertain unless you get proofs of that fact. 20

Mr. Tyler: The policy designates in this case.

By Mr. Tyler: Q. Mr. Essig, I show you Exhibit C-1, which is the policy issued December 22d, 1915: That policy and the riders are signed by D. A. Henderson & Company as agents and in that instance you were agents to solicit the insurance and write the policies, weren't you? A. Yes, we were the agents of that company. 30

Q. And your agency covered the matter of soliciting the insurance and issuing the policy when obtained, didn't it? A. Soliciting, yes, you might say for soliciting it, but through whoever might be interested in it. 40

Harold M. Essig—Cross

Q. Yes, being agent for the company you could solicit it through any one you choose, couldn't you, either Mr. Fleming or you would call some one further up the street or you could have called me up and asked me to try to get it? A. Surely.

10 Q. And that is what you did in this case, wasn't it? A. We called him up.

Q. Now, please answer the question. A. Yes, we called Mr. Fleming in that way.

Q. As a matter of fact, the company issues to you a written authorization to execute these policies, doesn't it? A. Yes, sir.

Q. And you have that authorization in this case? A. Yes, sir.

20 Q. Now, at the time you wrote this policy, at this time upon Mr. Tyler to produce the record that this property was occupied as a store and dwelling, didn't you? A. We had no knowledge other than in that contract, in our record of that contract.

Q. In what? A. I say, we had no knowledge of the risk other than our office record showed it.

Mr. Miller: I would make a demand at this time upon Mr. Tyler to produce the original policy of insurance.

30 The Vice Chancellor: The demand is a proper one.

Mr. Tyler: Yes and I will be very glad to do it. I cannot do it now because it is not in court and I have no knowledge where it is, but I shall certainly make inquiry of the building and loan association and see if I can produce it. We have had no notice to produce it at all, if we had we would have made our inquiry before coming into court,

40

Harold M. Essig—Cross

but in the interest of getting all the facts I will endeavor to get the policy.

The Vice Chancellor: I apprehend Mr. Henderson's office may have a copy.

By the Vice Chancellor: Q. You said that is all the information you had there. A. 10
This is an office copy of the policy.

Mr. Miller: Then I would ask that we be permitted to use our files and such copies as we may have to prove the material variations.

The Vice Chancellor: Well, if both sides will agree to adopt this as a correct exemplification of what the other policy contained I will accept it as such.

Mr. Tyler: Well, I cannot do that now. 20
There is a material difference here as to whose name this policy was originally written, and I want to go into that—I anticipate I will have an opportunity to do it on the noon hour—and this other question at the same time.

By Mr. Tyler: Q. At the time you wrote the policy you believed that the policy correctly described the property 328 Kaighn Avenue, both as to the building and as to the use to which it was 30
being put, did you not? A. I can't answer that question that way.

Q. Well, now, you can say whether or not you intended to write a policy to cover something else besides what Mr. Koch had? A. Yes, I could answer that.

Q. Well, please answer that. A. As the policy was expiring we renewed it.

Q. And you intended to issue a policy that cov- 40

Harold M. Essig—Cross

ered the property 328 Kaighn Avenue, didn't you?
A. As a store and dwelling.

Q. And you believed that it was occupied as a store and dwelling, didn't you? A. Naturally, because our record did not indicate otherwise.

10 Q. And if you had had knowledge that it had been occupied otherwise you would have communicated with the assured, wouldn't you? A. Not with the assured, no, sir.

Q. Well, through Mr. Fleming? A. We would have communicated with Mr. Fleming, advised him and asked him how to write it.

Q. You had no purpose or idea in writing a policy which did not cover the premises described in it, did you? A. No.

20 Q. It was your purpose and belief that the policy insured Mr. Koch—is that true? A. I have already answered that.

Q. Well, isn't that true? A. Yes.

Q. And you believed that Mr. Koch, from all the information and knowledge that you had in your possession, for his premium was obtaining fire insurance, insurance against loss by fire, didn't you? A. Naturally, through his representative.

30 Q. And the company, acting through you as its agent, believed that that policy was correctly written at the time it was written, didn't it? A. Well, I don't think I can answer for the company.

Q. You, you are the company, aren't you? A. Oh, no, we are the agents for it.

Q. Well, then, you believed so, didn't you? A. As far as we know.

40 Q. Did you ever make any inquiry or investigation on the property as to how it was occupied?
A. We had no reason to.

Harold M. Essig—Cross

Q. No, no; now, we will get along better if you will answer my question: Did you do that? (Repeated) Did you ever make any inquiry or investigation on the property as to how it was occupied? A. No.

Q. You have a city directory, don't you, in your office? A. Yes, sir; we do. 10

Q. And that directory gives the names and occupation of various residents of this city, doesn't it? A. Yes, I should say so.

Q. And Mr. Koch's name, Charles J. Koch, the complainant, is shown in there as being a printer? A. Probably, I don't know.

Q. Well, that information you had at your hand, in your office, didn't you, when you issued this policy? A. We had the directory, certainly, but we would have no reason for looking at it. 20

By the Vice Chancellor: Q. Do you know whether the maps in your office at that time disclosed this property as a printing establishment? A. I believe that the map shows the property as a printing establishment, but I won't say definitely, I think it does.

By Mr. Tyler: Q. Now, you didn't examine the directory to see what business was carried on in this place, did you? A. That would be an unusual proceeding. We did not. 30

Q. No, never mind your explanation. You did not? A. No.

By Mr. Miller: Q. Mr. Essig, the policy issued in 1910 was a standard policy of insurance? A. Undoubtedly.

Q. And did it have the usual conditions contained in the standard policy of insurance? A. If it was a policy of that particular company, issued 40

Harold M. Essig—Cross

in the State of New Jersey, it would be a standard policy.

10 Q. Then did it contain the 7th, 8th and 9th paragraphs of the standard policy? Reading from the standard policy: "This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact of circumstance concerning this insurance or the subject thereof."

The Vice Chancellor: Are you reading now from the policy that is before us?

Mr. Tyler: No, he is reading from a form which he believes to be the usual form used in 1910 by this company.

20 The Vice Chancellor: But you are interested, are you not, in the provisions of the policy that is in question here?

Mr. Miller: Yes. Well, I have asked him if that was a copy of the standard policy.

The Vice Chancellor: I do not understand what the purpose of this is, Mr. Miller. The provisions which you are quoting are in the policy Exhibit C-1?

30 Mr. Miller: Precisely. I am now speaking as to the original policy which is not here.

The Vice Chancellor: I do not think he can testify to that until you get it.

Mr. Miller: Well, I assumed that we might show that the policy issued was an exact copy of the standard policy of insurance, a copy of which I have in my hand, and that I might prove that through this witness.

40 The Vice Chancellor: I will let you go

Edward E. Ikier—Direct

into that if you fail to get hold of the original after proper effort.

Mr. Miller: Well, then, I will withdraw that question for the present.

Q. I ask you to refer to the policy under date of December 22d, 1915, Mr. Essig, and ask you if the 7th and 8th paragraphs— 10

The Vice Chancellor: Well, they show for themselves, don't they, Mr. Miller? There is no dispute about that.

Q. Very good. That is all. A. Thank you.

EDWARD E. IKIER, a witness produced in behalf of the defendant, being duly sworn according to law, on his oath says: 20

By Mr. Miller: Q. What is your name? A. Edward E. Ikier.

Q. And you are connected with the Commonwealth Fire Insurance Company? A. I am.

Q. Your capacity is what? A. Special agent of the company.

Q. Was Thomas Fleming an agent of your company in December of 1915? A. He was not. 30

Mr. Tyler: Objected to. I move to have the answer stricken out. I think it is not the proper way to prove agency. He is the special agent and has not shown the scope of his authority, and it is not the proper way to prove agency.

The Vice Chancellor: I think we have got to assume that Thomas Fleming was not an agent of the insurance company. He 40

Edward E. Ikier—Direct

10 does not claim to have been anything but a broker, an insurance broker. The only question is, whether or not he became an agent of Henderson & Company in such manner as to bind the insurance company. I think his own testimony excludes the idea that he was an agent of the Commonwealth Insurance Company as such. It may be an important question, although I do not think it is the primary question in the case; it may be an important question how far Henderson & Company may have been authorized or empowered to bind the Commonwealth Company by the engagement of a broker to procure insurance for that company or for one of the companies represented by them.

20

Mr. Tyler: Yes, I feel it is a very important factor.

The Vice Chancellor: But it is conceded that Fleming was not an agent of this company by virtue of any employment by this company.

30

Mr. Miller: I will re-frame the question. I want to get another element of the situation in it. I will withdraw that question for the present.

40 Q. In our state, Mr. Ikier, how is an agent of an insurance company appointed? A. An agent is appointed on the recommendation of a special agent of the company who recommends to the home office which, in turn, advises the Insurance Commissioner of their recommendation of the appointment of that man as an agent of the company, and they issue an authorization over the

Edward E. Ikier—Direct

signature of the manager of the company, in conjunction with a certificate of appointment issued by the Insurance Commissioner of the State of New Jersey.

Q. And in this case no such certificate has been issued to Fleming? A. It has not.

Q. By the Commonwealth Insurance Company? A. It has not. 10

Q. Are you familiar with the rates? A. I am.

Q. Can you tell us the difference between the rates for this Kaighn Avenue property as a store and dwelling and as a printing office run by gas power, December 22d, 1915? A. Well, the minimum rate on a store and dwelling is 30 cents per annum, per hundred; the minimum rate on a printer is \$1.47, that is, the power printer; and the rates are all based on the hazard of the risk, a store and dwelling hazard is considered as an individual hazard, and the printing shops are classed in one or two classes, or two or three classes, and pays according to the hazard of the printer. 20

Q. And what was the character of this particular hazard? A. The character of this hazard was a printer, a power printer, gas power printer.

Q. Without any dwelling? A. Without any dwelling. 30

Q. Did it come to the attention of your company at any time that this hazard existed on this insurance? A. It had not.

Q. Would your company have insured that particular property in the manner that it was insured—

Mr. Tyler: I object to that.

Q. —had it received that knowledge? 40

Edward E. Ikier—Direct

The Vice Chancellor: I think the objection is well taken. I do not believe this witness can properly testify to that as a fact.

10 Mr. Miller: Aside from the rate, your Honor, I might say that I wish to show that the Commonwealth would not have assumed the burden of this risk had they known the risk but would have divided the insurance among other companies.

The Vice Chancellor: I think that may very well be assumed, but I do not believe this witness can testify to what his company would do. I take it for granted that that is so, but I do not believe this agent
20 knows any more about that than I do.

A. It is permissible, your Honor, for me to ask a question.

The Vice Chancellor: No; answer questions that are asked.

Q. Are you familiar with what your company does with that line of hazards? A. All lines are referred to me and I know exactly what the company should write and should not write.

30 Q. And in this particular hazard are you qualified to say what the company would have done at that time? A. I am.

Mr. Miller: I will renew my question, your Honor.

Mr. Tyler: I object to it. I do not think anybody can say.

The Vice Chancellor: I do not think it is competent.

40 Q. Was this particular property specially rated in December, 1915? A. It was not.

Edward E. Ikier—Cross

CROSS-EXAMINATION by Mr. Tyler:

Q. As a matter of fact, the minimum rate in existence in December, 1915, was much higher than the property was afterwards specially rated for, wasn't it? A. I don't know what the rate was afterwards. I haven't looked it up since the fire. I assume it is, because I think you had— 10

Q. It has been testified that it was specifically rated at 84 cents. A. Conditions are different today than they were at the time of the fire.

Q. As a matter of fact, the property was specially rated at 84 cents? A. I believe so.

Q. And in order to obtain a special rate the property is examined by a competent person to determine the risk, isn't it? A. It is.

Q. Now, if this property was examined by a competent person to determine the risk it was then determined that the risk was not as great as would be indicated by the minimum rate in existence prior to that time—isn't that true? A. Under the conditions at the time that new rate was made, no. 20

Q. Now, wouldn't the rate of 84 cents specially placed on the property indicate to your mind that the hazard was not as great as the rate of \$1.47 called for prior to that time? A. That is quite true. 30

Q. And the property had not been specially rated up to the time of this fire, had it? A. No, it had not.

Q. And you did not have any knowledge of this particular risk prior to the time of the fire, did you? A. No, I did not.

The Vice Chancellor: I think you may show by this witness, Mr. Miller, if you care to, that, so far as his knowledge extends of 40

Edward E. Ikier—Cross

10 the conduct of the business of this company, the company has never at any time issued a policy on a property such as this for the lower rate for residence purposes. I think that is as far as this witness can properly go in his testimony—that it is a uniform course of dealing of the company to execute policies on the property according to the rating of the property.

Mr. Miller: I wanted to even go further and show that they would not insure even on the assumption of a higher rate.

20 The Vice Chancellor: I do not think you can show that any insurance company or any corporation in the world will not do something because they have not done it, but you can show that they have not done it, if you choose. I do not see anything that would prevent them from doing it if they made up their minds to do it.

By Mr. Miller: Q. Has your company at any time within your knowledge of its history issued a policy of insurance upon the character of a hazard as in this case for the premium that has been testified, \$36? A. Well, the Commonwealth Insurance Company—

30 Mr. Tyler :You can answer that yes or no.

The Vice Chancellor: Can you answer it?

(Question repeated.) A. No, sir.

By the Vice Chancellor: Q. For five years, of course, that is? A. Yes.

40 The Vice Chancellor: Now, it seems to me that is as far as the witness can go. How could your able assistant sitting beside you testify what you would not do or

Argument

what you would have done under given circumstances?

Mr. Miller: I would call upon Mr. Tyler for the production of his title deed in this case.

Mr. Tyler: I have had no notice to produce it, but that will follow the same course in regard to the policy. I will try to procure them during recess. 10

At this point a recess was taken until one o'clock, p. m.

Hearing of the cause resumed after recess, in the presence of the respective counsel heretofore noted. 20

Mr. Tyler: I asked Mr. Koch who lives at 328 Kaighn Avenue, to see the treasurer of the building and loan association, Dr. Haines, whose office is at 3d and Kaighn Avenue, right near him, and have him bring the policy or some explanation of it, and at the same time to bring his own deed. He did not leave here until twenty-five minutes past twelve, it is now five minutes past one, he has not gotten back yet but he ought to be here very shortly. He certainly ought to be able to produce the deed. I understand he has that in his own possession. If the complainant rests and the defendant rests I doubt whether we will be able to get that policy. I do not know a thing about it, but if it is material for any purpose I am willing to make any admis- 40

Argument

sions that are material that will be of assistance, so that we can proceed with the argument, if necessary. I think he may be here any minute.

10 The Vice Chancellor: I would like to ascertain, if it is possible, whether or not this property was originally insured by the complainant under the policy which has expired, and if so, an inquiry ought to be made directed to how it happened that the use of the property was incorrectly stated in the policy. It is quite possible that this policy was placed by the building and loan association and the error may have occurred in that way. The policy seems to have
20 been drawn, by the memorandum in the hands of Henderson's manager, payable to the mortgagee.

 Mr. Tyler: Yes.

 The Vice Chancellor: And that may have
30 been done without any active participation on the part of complainant in the preparation of the policy. The complainant thinks the property was insured when he bought it. Such information as we have about the policy indicates that that could not have
 been done.

 Mr. Miller: I might suggest, if your Honor will permit me, that the records of the Register of Deeds' office show that Mr. Koch took title on the 21st day of December, 1910, one day before this policy was issued.

40 Mr. Tyler: And that the deed was recorded on the 22d, the same date the policy was issued.

Argument

The Vice Chancellor: It is a possibility, which looks more or less in my mind like a probability, that the placing of this policy was a part of the work of the building association who advanced the money for the purchase; as the policy was made payable to them, as mortgagee, it is likely that the whole thing was handled in that form. As to who participated in any matters of description we cannot know without some further investigation. The principal inquiry however, and the only purpose of the inquiry, so far as I can see, is to ascertain whether or not this complainant intentionally deceived in the execution of the original policy, or whether the incorrect statements got in the policy through inadvertence or mistake. When he had testified that he bought the property already insured, and when later it looked as though that could not have been so, the suggestion naturally arose that he might have been responsible for this original error in the policy. 10 20

Mr. Tyler: I will have to get him to explain that. I will be very glad to do it. 30

The Vice Chancellor: At this time it is his notion that he bought the property subject to the insurance and the policy was merely assigned to him. I think you will probably find, when we get down to the bottom of it, that the property was insured when he bought it and that instead of having an assignment of the policy the building association had a new policy taken out 40

Argument

payable to them as mortgagee. That is only conjecture on my part, but that is the most probable solution.

10 Mr. Tyler: It is very likely that whoever made settlement instead of making an assignment said "I will have a new policy put on," something of that kind.

20 The Vice Chancellor: If the settlement certificate could be found, which is improbable, it is not unlikely that you will find a credit for the return premium on the old policy and a charge for the excess on the new in the settlement certificate. That also is conjecture, but I know those things are done that way very often when there is an advance of purchase price by a building association or by any other person.

Mr. Miller: I omitted to prove it, and I don't know that it has any force, but I will ask Mr. Tyler if he will admit that on the 8th of March 1916, notice of rescission under this policy was served upon Mr. Koch and that a tender was made of the amount of premium?

Mr. Tyler: Yes.

30 Mr. Miller: There is no doubt about that. We can prove it, if necessary.

40 Mr. Tyler: I understand they offered to return the premium to Mr. Koch sometime after the fire, and this letter is a certification of that fact, by somebody who made the tender. The deed, as stated by Mr. Miller, shows the date of the transfer and the record of the deed. Now, if it is simply a question of showing that this policy was

Argument

in the ordinary customary form, so far as this case is concerned, I am willing to admit that. I think all policies are in that form.

The Vice Chancellor: I think Mr. Koch testified that he did not set up the printing business in this place until some months after he purchased the property. 10

Mr. Tyler: Yes, he fixed it as July, 1911.

The Vice Chancellor: So that I do not see that it makes very much difference.

Mr. Tyler: Along that line it seems to me to be true that it doesn't make very much difference about explaining the policy, because in December, 1910, when it was written, the property was still intact. 20

The Vice Chancellor: I do not see that it makes very much difference whether this was a policy taken out at the time of the purchase or prior to that time, as it is conceded as a fact that on the date that this old policy apparently bears date, and at the time of the purchase of the property, the property was not used as a printing house, and that long after the time the policy was obviously written he established in the premises the printing business which is now the cause of the trouble. I do not see that it matters much what the facts are with reference to when the policy was written, providing it is conceded that it was written prior to the time that he established the printing business in the property. 30

Mr. Tyler: I haven't the slightest doubt that the policy was written on December 40

Argument

10 22d, 1910, and that is indicated by the renewal of the policy on the exact date five years hence, and the testimony already shows that the property was occupied by the previous owner as a store and dwelling, I believe—I do not think it appears in the testimony just how he occupied it but it was a store, at least, and I think a dwelling.

Mr. Koch says sometime in the following year, 1911, shortly after he bought the property, he occupied it as a printing shop and continued to occupy it in that way down to the time of the fire.

20 The Vice Chancellor: Well, supposing I hear the arguments while we are waiting for the witness. It probably will not affect the arguments much whatever the testimony may be.

(Arguments made by counsel).

30 Mr. Tyler: (During the course of argument) Mr. Koch has returned and says that during the noon hour he interviewed Dr. Haines, who is the treasurer of the building and loan association, and that Dr. Haines went all through his policies to see if he could find the old policy but was unsuccessful, and he informed Mr. Koch that his recollection was that when he got the new policy the old one was destroyed. Mr. Koch does produce a deed dated December 21st, 1910, recorded in the office of the Register of Deeds December 22d, 1910, book 352 of deeds, page 583, etc., which describes the premises 328 Kaighn Avenue, Camden,
40 New Jersey, and refers to the premises by

Exhibit C-1

street number. That I will offer in evidence.

Said paper marked Exhibit C-4.

Both sides rest.

10

Exhibit C-1

4F. 1868 \$3000.00
No. 1563613

THE COMMONWEALTH INSURANCE COMPANY OF NEW YORK

Amount \$3000.00. Rate 1.20 Premium \$36.00

20

IN CONSIDERATION OF THE STIPULATIONS HEREIN NAMED AND OF thirty six & 00/100 DOLLARS PREMIUM Does Insure Charles J. Koch for the term of Five Years from the twenty-second day of December 1915, at noon, to the twenty-second day of December 1920, at noon, against all direct loss or damage by fire, except as hereinafter provided,

To an amount not exceeding three thousand & 00/100 Dollars, to the following described property while located and contained as described herein and not elsewhere, to wit: 30

P. D \$3000 On Brick building and additions, foundations, plumbing, steam, gas and water pipes, heating and lighting apparatus, and all permanent fixtures, plate and ornamental glass and fresco work, wall decorations, also storm doors and windows, screen, screen doors, awnings, whe- 40

Exhibit C-1

ther in position or stored in said building, or stored in out buildings on premises described below; also sidewalks, flag poles, toilets, fences on premises; occupied as a Store and Dwelling to cover also materials and supplies in, on or
 10 around the premises, situate No. 328 Kaighn Avenue, Camden, New Jersey, West Jersey Mutual Building and Loan Association, Mortgagee.

Non-Contribution clause attached.

Privilege to use kerosene oil stoves; to make additions, alterations and repairs, same to be covered by this policy; to effect other insurance without notice until required; to use the electric current; to keep on hand not exceeding one quart of gasoline, benzine, or naphtha for household use,
 20 to remain vacant not exceeding six consecutive months at any one time in any one year or unoccupied.

It is understood and agreed this insurance shall not be invalidated by any act or neglect of any agent, tenant or servant of the assured, provided such act or neglect shall occur without the knowledge or control of the assured.

This insurance is held binding as a special agreement, anything contained in this policy regarding ownership of ground or mortgage or
 30 trust deed to the contrary notwithstanding.

LIGHTNING CLAUSE

This Policy shall cover any direct loss or damage caused by Lightning (meaning thereby the commonly accepted use of the term Lightning, and in no case to include loss or damage by cyclone,
 40 tornado or windstorm), not exceeding the sum in-

Exhibit C-1

sured, nor the interest of the insured in the property, and subject in all other respects to the terms and conditions of this policy. *Provided*, however, if there shall be any other insurance on said property, this company shall be liable only *pro rata* with such other insurance for any direct loss by Lightning, whether such other insurance be 10
against direct loss by Lightning or not.

Attached to and made part of Policy No.
of the Insurance Company.

Agents.

FROM
D. A. HENDERSON & CO.
305 INSURANCE MARKET STREET
CAMDEN, N. J.
6-15

20

N. Y., Penna. and New Jersey Standard

Mortgage Clause

Loss or damage, if any, under this policy, shall be payable to West Jersey Mutual Building and Loan Association, as mortgagee [or trustee], as 30
interest may appear, and this insurance, as to the interest of the mortgagee [or trustee] only therein, shall not be invalidated by any act or neglect of the mortgagor, or owner of the within described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are per- 40

Exhibit C-1

mitted by this policy; PROVIDED, that in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee [or trustee] shall, on demand, pay the same.

PROVIDED, also, that the mortgagee [or trustee] shall notify this company of any change of ownership or occupancy or increase of hazard which shall come to the knowledge of said mortgagee [or trustee] and, unless permitted by this policy, it shall be noted thereon, and the mortgagee [or trustee] shall, on demand, pay the premium for such increased hazard for the term of the use thereof; otherwise this policy shall be null and void.

This company reserves the right to cancel this policy at any time as provided by its terms, but in such case this policy shall continue in force for the benefit only of the mortgagee [or trustee] for ten days after notice to the mortgagee [or trustee] of such cancellation and shall then cease, and this company shall have the right, on like notice, to cancel this agreement.

Whenever this company shall pay the mortgagee [or trustee] any sum for loss or damage under this policy and shall claim that, as to the mortgagor or owner, no liability therefor existed, this company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payment shall be made, under all securities held as collateral to the mortgage debt, or may at its option, pay to the mortgagee [or trustee] the whole principal due or to grow due on the mortgage with interest and shall thereupon receive a full assignment and transfer of the mortgage and of all such other securities;

Exhibit C-1

but no subrogation shall impair the right of the mortgagee [or trustee] to recover the full amount of its claim

Dated December 3rd 1915.

To be Attached to and forming part of Policy No. 1563613 of Commonwealth Insurance Company 10

D. A. HENDERSON & CO
Agents.

FROM
D. A. HENDERSON & CO.,
INSURANCE
305 MARKET STREET,
CAMDEN, N. J.
11-14

THIS POLICY IS MADE AND ACCEPTED SUBJECT TO THE STIPULATIONS AND CONDITIONS, printed on back hereof, which are hereby specially referred to and made a part of this policy, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto; and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be subject of agreement 20
indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached. "Provisions required by law to 30
40

Exhibit C-1

be stated in this policy."—This policy is a Stock Corporation.

IN WITNESS WHEREOF, this company, has executed and attested these presents. But this policy shall not be valid unless countersigned by the
 10 duly authorized agent of the company at Camden, N. J.

E. G. RICHARDS,
 President.

Countersigned at Camden, N. J. this
 day of Dec. 3—1915

D. A. Henderson & Co.

Agent.

Robert Newbould,
 Secretary.

20

This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall

40

be optional, however, with this company to take

Exhibit C-1

all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this company of the property described. 10

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss. 20

This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured, or if mechanics be employed in building, altering, or repairing the within described premises for more than fifteen days at any one time; or if the interest of the insured be other than unconditional and sole ownership; or, if the subject of insurance be a building on ground not owned by the insured in 30 40

Exhibit C-1

fee-simple; or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss; or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for lights and kept for sale according to law but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light); or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days.

This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurp-

Exhibit C-1

ed power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon. 10

If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

This company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes, or securities; nor unless liability is specifically assumed hereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools, or property held on storage or for repairs; nor, beyond the actual value destroyed by fire for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise; nor for any greater proportion of the value of plate glass, frescoes, and decorations than that which this policy shall bear to the whole insurance on the building described. 20 30

If an application, survey, plan, or description of property be referred to in this policy it shall be a part of this contract and a warranty by the insured.

In any matter relating to this insurance, no per- 40

Exhibit C-1

son, unless duly authorized in writing, shall be deemed the agent of this company.

10 This policy may by a renewal be continued under the original stipulations, in consideration of premium for the renewed term, provided that any increase of hazard must be made known to this company at the time of renewal or this policy shall be void.

20 This policy shall be canceled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is canceled by this company by giving notice it shall retain only the *pro rata* premium.

30 If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto.

40 If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, that part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location, shall, for the ensuing five days only, cov-

Exhibit C-1

er the property so removed in the new location; if removed to more than one location, such excess of this policy shall cover therein for such five days in the proportion that the value in any one such new location bears to the value in all such new locations; but this company shall not, in any case of removal, whether to one or more locations, be liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time of fire, whether the same cover in new location or not. 10

If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; 20
30
40

Exhibit C-1

and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify

10 The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made.

In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respec-

Exhibit C-1

tively selected by them and shall bear equally the expenses of the appraisal and umpire.

This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to an examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required. 10

This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto. Liability for re-insurance shall be as specifically agreed hereon. 20

If this company shall complain that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment. 30

No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of 40

Exhibit C-1

law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.

10 Wherever in this policy the word "insured" occurs, it shall be held to include the legal representative of the insured, and wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage."

If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies or contracts of insurance, such regulations shall apply to and form a part of this policy as the same may be written or printed upon, attached
20 or appended hereto.

PROVISIONS REQUIRED BY LAW TO BE STATED IN THIS
POLICY

APPOINTMENT OF UMPIRE BY THE COURT.—When, in the event of any loss or damage to property in this state described in any policy of fire insurance and covered thereby, the ascertainment of the amount of any such loss or damage is, as provided
30 in the policy, to be determined by appraisers, one selected by the company, the other by the insured, and the two so chosen shall have failed or neglected, for a space of ten days after both have been chosen, to agree upon and select an umpire, it shall be lawful for either the insured or the company to apply to any Court of record in the county in which the property is or was located, on five days' notice in writing, to the other party of
40 his or its intention so to do, to appoint a compe-

Exhibit C-1

tent and disinterested umpire. Any such notice in writing, when served by the insured, may be served upon any local agent of the company; and the said Court shall, on proof by affidavit of the failure or neglect of the said appraisers to agree upon and select an umpire within the time aforesaid, and of the service of notice aforesaid, forthwith appoint a competent and disinterested person to act as umpire in the ascertainment of the amount of said loss or damage; and the acts of the umpire so appointed shall be binding upon the insured and the company to the same extent as if such umpire had been selected in the manner provided for in said policy of insurance. 10

ASSIGNMENT OF INTEREST BY INSURED 20

The interest of _____ as owner of property covered by this Policy is hereby assigned to _____ subject to the consent of THE COMMONWEALTH INSURANCE COMPANY OF NEW YORK.

Signature of the Insured.

Dated

Note To secure Mortgagees, if desired, the Policy should be made payable on its face to such Mortgagee, as follows: Loss, if any, payable to JOHN DOE, Mortgagee, subject to the conditions of this Policy. 30

CONSENT BY COMPANY TO ASSIGNMENT OF INTEREST

THE COMMONWEALTH INSURANCE COMPANY OF NEW YORK hereby consents that the interest of 40

Exhibit C-1

as owner of the property
covered by this Policy be assigned to

Signature for Company.

10

FORM FOR REMOVAL

Permission is hereby granted to remove the
property insured by this Policy to the
situate

and this Policy is hereby made to cover the same
property in new locality all liability in former lo-
cality to cease from this date.

Rate increased to % Additional Premium \$
20 Rate Reduced to % Return Premium \$

Agent.

Dated

Sheet

Block

No.

Agent.

If this Policy is cancelled the following receipt
is to be filled up and signed by the insured.

19

IN CONSIDERATION of Dollars
30 Return Premium, the Receipt of which is hereby
acknowledged, this Policy is cancelled and surren-
dered to THE COMMONWEALTH INSURANCE COM-
PANY OF NEW YORK.

Assured.

Exhibit C-2

To the COMMONWEALTH INSURANCE COMPANY,
OF NEW YORK CITY.

BY YOUR POLICY OF INSURANCE,

No. 1563613

Renewal No.

10

Commencing Dec. 22nd 1915

Continued to Dec. 22nd 1920,

Issued at your office in Camden, N. J.

YOU INSURED CHARLES J. KOCH against loss or damage by fire, according to the terms and conditions printed on said Policy, and under the following form, to amount of \$3,000.00

\$3000.—On brick building and additions, including foundations, plumbing, steam, gas and water pipes; lighting and heating apparatus and all permanent fixtures; plate and ornamental glass and fresco work; wall decoration, also storm doors and windows, screens, screen doors, awnings, whether in position or stored in said building, or stored in outbuildings on premises described below; also sidewalks, flag poles, toilets, fences on premises; occupied as Store and dwelling situate on #328 Kaighn Avenue, Camden, New Jersey. West Jersey Mutual Building and Loan Association, Mortgagee 20 30

Non-Contribution Clause attached.

Privilege to use kerosene oil stoves; to make additions, alterations and repairs, same to be covered by this policy; to use the electric current; to keep on hand not exceeding one quart of gasoline, benzine or naphtha for household use, to effect other insurance without notice until required, and to remain vacant not exceeding six consecutive 40

Exhibit C-2

months at any one time in any one year or unoccupied.

10 It is understood and agreed this insurance shall not be invalidated by any act or neglect of any agent, tenant or servant of the assured, provided such act or neglect shall occur without the knowledge or control of the assured.

This insurance is held binding as a special agreement, anything contained in this policy regarding ownership of ground or mortgage or trust deed to the contrary notwithstanding.

Lightning Clause attached.

New York, Pennsylvania and New Jersey, Standard Mortgagee Clause.

20 Loss or damage, if any, under this policy, shall be payable to West Jersey Mutual Building & Loan Assn as mortgagee, [or trustee] as interest may appear, and this insurance, as to the interest of the mortgagee [or trustee] only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by
 30 any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy; PROVIDED, that in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee [or trustee] shall, on demand, pay the same.

40 PROVIDED also, that the mortgagee [or trustee] shall notify this company of any change of ownership or occupancy or increase of hazard which

Exhibit C-2

shall come to the knowledge of said mortgagee [or trustee] and, unless permitted by this policy, it shall be noted thereon and the mortgagee [or trustee] shall, on demand, pay the premium for such increased hazard for the term of the use thereof; otherwise this policy shall be null and void. 10

This company reserves the right to cancel this policy at any time as provided by its terms, but in such case this policy shall continue in force for the benefit only of the mortgagee [or trustee] for ten days after notice to the mortgagee [or trustee] of such cancellation and shall then cease, and this company shall have the right, on like notice, to cancel this agreement.

Whenever this company shall pay the mortgagee [or trustee] any sum for loss or damage under this policy and shall claim that as to the mortgagor or owner, no liability therefor existed, this company shall, to the extent of such payment, be thereupon legally subrogated to all rights of the party to whom such payment shall be made, under all securities held as collateral to the mortgage debt, or may at its option, pay to the mortgagee [or trustee] the whole principal due or to grow due on the mortgage with interest, and shall thereupon receive a full assignment and transfer of the mortgage and of all such other securities, but no subrogation shall impair the right of the mortgagee [or trustee] to recover the full amount of its claim. 20 30

Dated December 3rd/15

Attached to and forming part of Policy No. 1563613 of Commonwealth Ins. Co. of N. Y.

(signed) D. A. HENDERSON & CO
[Signature for the Company] 40

Exhibit C-2.

The property thus insured belonged to the said Charles J. Koch (hereinafter referred to as "the assured") and no other person or party had any interest therein except West Jersey Mutual Building & Loan Association, Mortgagee.

- 10 The whole amount of insurance upon the above-described property, including the Policy above referred to, at the date of the fire hereinafter mentioned, was \$3,000.00 and no more.

For names of companies and apportionment, see Schedule annexed hereto.

- The building insured, or containing the property insured, destroyed or damaged, was occupied in its several parts by the parties hereinafter named, and for the following purposes, to wit:—
- 20 by the assured as a electric power printing establishment.

A fire occurred on the 16th day of Jan. 1916, about 3:40 o'clock A. M., by which loss and damage was sustained to the property described in said Policy, as set forth in Statement hereto attached and which is made part hereof; amounting to \$785.77, and the assured claims of said Company, by reason of said Policy, Fire and Loss, the sum of \$785.77.

- 30 The fire originated in rear of first floor from cause or causes unknown to assured.

- The said fire and the consequent loss or damage was occasioned without fraud or evil practice on part of the assured; nor has any act been done, or caused to be done, by the assured, in violation of the provisions of the said Policy, whereby it would become void; and, if required, will produce books of account and other proper vouchers, and
- 40 make replies to interrogatories that may be pro-

Exhibit C-2

pounded by authority of the said Company, relating to said loss.

Witness my hand at Camden, N. J. this 2nd day of Feb. A. D. 1916.

State of New Jersey }
 County of Camden } ss. 10

Camden, N. J., Feb. 2nd 1916.

Personally appeared Charles J. Koch
 Signer of the foregoing Statement, who made solemn oath to the truth of same.

BEFORE ME:

FRANCIS RAWLE, JR.
 Notary Public.

My commission expires March 25, 1917.
 (Notarial seal.) 20

JOBGING

FRANK TURNER
 CONTRACTOR AND BUILDER

Office: 828 Broadway
 Camden, N. J.

Jany. 22nd, 1916.

Mess. P. Curtis KoEune Company, 30
 Philadelphia, Pa.

Gentlemen:—

I will agree to repair fire damages to property #328 Kaighn Ave., Camden, N. J. as follows: Repair and replace ceiling joist, rafters, studding and weatherboarding, also window frames, sash and shutters, door frames and doors, washboard and mouldings also stairway. Repair the plaster and electric wiring. All new interior and exter- 40

Exhibit C-3

ior woodwork to receive two coats of paint and
balance of exterior on rear ine coat; interior on
first and second floors one coat. Replace broken
glass including the plate and florentine in the
bulks. Rooms where damaged to be papered, for
10 the sum of Seven Hundred Eighty-five 77/100
Dollars (\$785.77).

(Signed) Yours truly,
FRANK TURNER.

FT/FT.

Exhibit C-3

20 February 7, 1916.

Messrs. P. Curtis KoEune & Co.,
Philadelphia, Pa.

Gentlemen:

With reference to notice of loss of property de-
scribed in this Company's policy #1563613,
Charles J. Koch, if it is your intention to make a
claim for same, this Company desires that you
make proof of such loss in accordance with the
requirements of said policy, no condition of which
30 is waived by this notice.

This notice is being given you as required by
Chapter #340 of the Insurance Laws enacted by
the Legislature of 1911 of the State of New Jer-
sey.

Truly yours,
EDWARD E. IKIER,
Special Agent.

New Jersey Court of Errors and Appeals

BETWEEN CHARLES J. KOCH, Complainant-Appellant, and COMMONWEALTH INSURANCE COMPANY OF NEW YORK, Defendant-Respondent.	}	Appeal from Chancery.
---	---	--------------------------

BRIEF FOR APPELLANT

Facts

Appellant appeals from a decree of the Court of Chancery, dismissing the bill of complaint.

The cause was heard by Vice-Chancellor Leaming, who found the facts, briefly, as follows:

1. Bill to reform fire insurance policy which described the insured premises as follows: "Occupied as a store and dwelling" (p. 13 S. C.).
2. Premises not used as a store and dwelling when insurance was written, but was used, in part, as a printing shop (p. 18).
3. That D. A. Henderson & Co., were the general agents of defendant company, clothed with power within a limited territory to assume risks

and execute policies by their counter-signature (p. 16).

4. That the premises insured were within the territory of said agents (p. 16).

5. That shortly before the expiration of an old policy upon said premises (which policy described the building as a store and dwelling) said *agents* requested another broker to go to the complainant to solicit a renewal of the policy (p. 14).

6. That, as requested by said agent, said broker went to see complainant in reference to a renewal of said policy (p. 14).

7. That the broker obtained complainant's consent to renew said policy and so informed the general agent, who afterwards wrote and counter-signed the same (p. 15).

8. That complainant was never aware of the mis-description in said policy until after a loss had occurred, when he promptly filed his bill for reformation (p. 15).

9. That the policy was never in the possession of complainant, having been delivered to a mortgagee by the broker procuring the insurance (p. 15).

10. That "it was the mutual intention and purpose of all parties connected with the transaction that any description of the insured property which might be contained in the policy of insurance should be accurate, and it was their mutual belief that the written policy, which was intended to faithfully express their mutual purpose, was in all things accurate" (p. 16).

11. That complainant "merely assented to the

request of the broker for insurance and wholly relied upon the insurance company, or those representing it, in all things." (p. 18).

12. That the broker "was merely asked by the insurer's agents to induce complainant to take out a new policy at the expiration of his old one; the broker did that, as requested, and nothing more" (p. 20).

13. That "the insurance broker who was procured by the agent of defendant company to secure this insurance for him did, in fact, know that the lower floor of the insured building was used as a printing establishment" (p. 18).

14. That the insured was not acquainted with insurance matters (p. 14).

15. That the broker procuring the insurance was the agent of the company, not the agent of the insured (p. 19).

16. No fraud or collusion (pp. 15. 16).

Argument

Appellant contends that the decree is erroneous for the following reasons:

FIRST: That there was error in the findings of the learned Vice-Chancellor that the policy of insurance could not be reformed because the minds of the contracting parties had never met to insure the premises as a printing establishment.

SECOND: That it was error for the learned Vice-Chancellor to hold that the knowledge obtained by the broker of the insurer touching the uses of the building could not be imputable to the insurer.

Upon the first point the learned Vice-Chancellor refused to reform the policy of insurance, relying, mainly, on the authority of *Floars v. Aetna Life Ins. Co.*, 144 N. C., 236; 56 S. E. Rep., 915, for the reason set forth in that opinion, namely that the minds of the insured and the company had never met upon the subject sought to be reformed, and that, therefore, there was no mutual mistake, but if a mistake at all, it was a one-party mistake, which could not be reformed.

It is difficult to perceive how the principle laid down in the cited case can apply to the case at bar, for two reasons:

1. The cited case relates to a life, or accident, insurance policy issued in North Carolina, where, apparently, there is no statute similar to our New Jersey statute, which expressly provides that a solicitor of a life insurance company shall be deemed to be the agent of the company, whereas, in the cited case it was distinctly held that the solicitor was not such agent. Also, the Vice Chancellor found as a fact that the broker was the agent of the Insurance company in the case at bar.

2. That in the cited case it was held that the mistake was not mutual, whereas, in the case at bar the Vice-Chancellor found as a fact that the mistake was mutual. He said:

“In the present case it was the mutual intention and purpose of all parties connected with the transaction that any description of the insured property which might be contained in the policy of insurance should be accurate, and it was their mutual belief that the written policy, which was intended to faithfully express their mutual purpose, was in all things accurate” (p. 16).

The facts of the *North Carolina* case, were, briefly, these:

Floars, plaintiff, signed an application for an accident insurance policy, at the instance of one Bridgers, a soliciting agent of the Company, on the representation of the agent that for the premium agreed upon plaintiff would receive in case of total loss of one eye, one third of the face of the policy, which would be \$333.33. Subsequently, a policy was issued by the company which did not so provide, but allowed only a current indemnity for time lost, amounting to \$15.00.

Bridgers, the soliciting agent, was merely a canvasser, with no power other than finding applicants for insurance, who when found, dealt directly with the company, with whom the contract was made. In that case the Court said that any parol statement made by the solicitor, differing from the written contract, would not bind the company. But, that case differs from the case at bar in two respects: (a) The cited case was one in which the insured dealt directly with the insurance company, whereas, in the case at bar, the insured dealt with an agent of the company. (b) In the cited case it was sought to vary the written contract by parol statements of an unauthorized soliciting agent, whereas, here, it is sought to impute knowledge or notice to the principal through its agent, and not to vary the contract because of any unauthorized parol statement of an agent.

Moreover, the cited case could have no application in a suit on a life insurance policy in this State, because our statute (Sec. 127, p. 2879, 2 Comp. Stat.), expressly provides:

“Whoever solicits, procures, or receives in or transmits from this state any application other than his own, for membership

or insurance in any corporation or association embraced by section three shall be deemed and held to be an agent of such corporation or association within the meaning of this act. * * *”

The cited case, as above stated, was for the enforcement of a life insurance policy. The case at bar, as above noted, is upon a fire insurance policy. The decisions in fire insurance cases are decidedly against the cited case, as will appear by an examination of the following cases:

In *Mohr v. Hohr Dist. Co. v. Ohio Ins. Co.*, 13 Fed. Rep., 74 (1882), it was held:

“If plaintiffs (the insured), employed an insurance broker to place insurance for them, he was their agent, and not that of the insurance company. But if, *acting on behalf of an agent* of the Company, the broker solicited insurance from the plaintiff, he was the agent of the insurance company, and it is legally chargeable with his knowledge.”

The learned Vice-Chancellor referring to that case said it must be understood to refer to certain soliciting agents with broader powers and duties than those conferred upon the broker in the present case, but, in a very recent case in which the facts were about the same as they are here, the Supreme Court of Kansas, in *Cue vs. Fire Ins. Co.*, 130 Pac. Rep., 664, expressly held:

“A solicitor in the employ of the local agents of the insurance company took the written application for the policy, and the appellee’s evidence tended to show that the solicitor had inspected the property and had knowledge of the fact that gasoline was used on the premises, and that the building had no chimney or flue for a stove; further,

that the solicitor told the assured that it would be all right to use gasoline. The agents issued the policy after approving the application. The appellant contends that, under these circumstances, a mere solicitor, who is not directly in the employ of the insurance company, cannot by parol waive a written condition of the policy. That the agent himself may do so is well settled. And the same principle applies to the situation here presented. Where an insurance company approves an application taken by one who is not at the time its agent or in its employ and issues the policy, it will not be heard to deny the fact of his agency. It cannot, accept the benefits of the transaction and refuse to assume the burdens and liabilities thereof. So, where an agent of an insurance company employs a solicitor to inspect risks and to take applications for insurance and issues a policy upon the written application so obtained, the company is bound by the knowledge of the solicitor and his representative made in securing the application to the same extent as though the agent himself had made the inspection and taken the application. *Insurance Co. v. Davis*, 59 Kan. 521t, 53 Pac., 856; *Pfiester v. Ins. Co.*, 85 Kan., 97, 116 Pac. Rep., 245, and cases cited in the opinion. In *Gurnett v. Ins. Co.*, 124 Iowa, 547, 549, 100 N. W., 542, 543, it was held that the matter of imputing the agent's knowledge to the insurer no distinction should be made between a recording and a soliciting agent."

In *Mullin v. Vt. Fire Ins. Co.* (Sup. Ct. Vt.), 58 Vt., 113; 4 Atl., 817, it was held:

"Where an application for insurance against loss by fire was obtained by one not an agent of the defendant, but a broker doing the business under an arrangement with defendant's duly-authorized agent, by whom it was sent to defendant; and that the de-

fendant returned it for additional information as to the ownership and occupation of the property to be insured; and the agent gave the application to the broker, with instructions to obtain the answers from the applicant; and the broker took the application away, and returned it with the answers written in his own handwriting, and not in accordance with the facts although the broker at the time had full information as to the facts; held, that the act of the broker, under these circumstances, was the act of the agent, and the knowledge of the broker, no matter when obtained, if before the answers were given, was the knowledge of the defendant, and it was estopped from setting up such false answers in defense."

In *Coles v. Jefferson Ins. Co.* (Sup. Ct. App. W. Va.), 23 S. E. Rep., 732, 733, held:

"The insurance agent, within the general scope of the business he transacts is *pro hac vice* the insurance company. What he knows, they know, what he does, they do. He has power to bind and to lose, and no limitation on his power unknown to strangers will bind them. *Insurance Co. v. Wilkinson*, 13 Wall., 222; *Muhleman v. Insurance Co.*, 6 W. Va., 508. See *2 Beach Ins.*, sec. 1064, *et seq.* If, however, the insured employs an insurance broker to place insurance for him, he is the agent of the insured, and not the agent of the insurer. But if, acting on behalf of the Company, or of an agent of the company, the broker solicits the insurance, he is the agent of the company."

Also in *19 Cyc.*, 812:

"If the agent be of the type that his knowledge is to be imputed to the insurer, the knowledge of his clerk or sub-agent acquired in his employment during or subse-

quently to the issuance of the policy is likewise attributable to the insurer.”

Citing the following cases:

Bennett v. Council Bluffs Ins. Co., 70 Iowa, 600; 31 N. W., 948.

Steele vs. German Ins. Co., 93 Mich., 81, 53 N. W., 514.

Carpenter vs. German-Amer. Ins. Co., 135 N. Y., 298; 31 N. E. Rep., 1015.

Arff v. Star F. Ins. Co., 125 N. Y., 57; 25 N. E., 1073.

Bergeron v. Pamlico Ins. Co., 111 N. C., 45; 15 S. E., 883.

Phoenix Ins. Co. v. Ward, 7 Tex. Civ. App., 13; 26 S. W., 763.

Mullin v. Vermont Mut. F. Ins. Co., 58 Vt., 113; 4 Atl., 817.

Wilson v. Comm. Un. Ass. Co., 96 Atl., 540 (Sup. Ct. Vt.).

In the last cited case, which appears to be the last in point of time (1916) the facts were:

“Mrs. Sheldon, wife of H. K. Sheldon, was agent of defendant company. Her husband solicited insurance in her behalf, and worked with her in her office. He wrote insurance on property owned by joint tenants in the name of one of the joint tenants only, and running to a mortgagee. He viewed the premises with a view to writing the insurance. That the insured had informed Mr. Sheldon of the true state of the title before the policy was written. That Mrs. Sheldon nor the insurance company knew the facts regarding these matters. After loss, company sought to avoid liability on the ground that the insured was not the holder of the title of the premises insured.”

In deciding this feature of the case, Powers, J., said:

“The first question presented, then is as to the effect of this knowledge on the part of Mr. Sheldon. The defendant insists that evidence thereof was improperly admitted, because Mr. Sheldon was not the defendant’s agent; and therefore his knowledge of the facts was immaterial. But, under our holdings in *Mullin v. Vt. Mut. Fire Ins. Co.*, 58 Vt., 113; 4 Atl., 817, the knowledge acquired by Sheldon was, in legal effect, acquired by Mrs. Sheldon, the company’s agent. In that case one Butler acted for Manley, the agent, in much the same way that Sheldon acted for Mrs. Sheldon; and it was held that his knowledge was the knowledge of Manley, and bound the company. * * *

“(5) There is a decided and growing tendency on the part of Courts to treat insurance contracts as standing in a class by themselves. However, illogical this tendency may be said to be, its existence will not be questioned. Courts and among the number our own, have taken occasion to refer to some of the peculiar features of and attending these contracts; that the policy contains so many and such intricate conditions and stipulations that an ordinary mind cannot grasp their significance; that the opportunity for negotiation and discussion of terms, usual in the case of ordinary contracts, is denied an applicant for insurance, inasmuch as the terms of the policy are prepared and fixed in advance, and there is little for the property owner to do but to take the policy offered him or go without protection, that it is the general practice with the insuring public to leave it all to the agent, who is usually a competent and reliable adviser. From these and perhaps some other considerations growing out of the advantage which the company has over the applicant, the Courts have very generally leaned strongly against forfeitures invoked in defense of honest claims.”

In May on Insurance, Sec. 154, p. 303 (4th ed.), it is stated that:

“A mere stranger from whom the regular agent receives the premium, and to whom they deliver a policy which he counter-signs and delivers to the assured, will bind the company. He is a sort of sub-agent.”

In New Jersey, as early as 1884 in *Hill vs. Millville Insurance Co.*, 39 N. J. Eq. (12 Stew.), 66, 74, Chancellor Runyon laid down the rule, much the same as expressed by Judge Powers in the late Vermont case. He said (p. 74):

“* * * Baker * * * was the agent of the company. * * * Being the Company's agent, his mistake in the application in question was the mistake of the company as much as it would have been if the application had been made in the company's office and taken down by its secretary, and the blunder had been made by the latter. * * * In 2 *Am. Lead Cas.* (5th ed.), 919, note, it is said that whatever the rule may be, under ordinary circumstances, it would seem clear that when the duty of preparing the policy, is, as generally happens, assumed by the assurers they cannot take advantage of the failure of the instrument to express any fact or circumstance that has been duly communicated by the insured and omitted, through negligence or design, by their officers or agents, and that the principle is the same where the error or misdescription occurs in an application or survey, which, though nominally proceeding from the insured, is in fact prepared or dictated by an agent of the company. * * *”

Misdescription of Premises Insured

In *Dewees v. Manhattan Ins. Co.*, 35 N. J. L. (VI Vr.), 366, 371, the facts found by Beasley, C. J., were these:

“The description in the policy was: ‘To the amount of \$2,875, viz: \$750 on his undivided interest in the frame building occupied by the assured for country store, situate, etc., \$2,000 on his stock of merchandise, consisting of the usual variety of a country store, contained therein; and \$75.00 on his store furniture and fixtures contained therein.’

“At the time the policy was taken out, and from thence to the time of the fire, the building insured was used in part as a stable. That the agent of the company obtained the policy, and that at the time of doing so he was fully acquainted with the premises insured, and of the uses to which they were put.”

On page 371, the learned Chief Justice said:

“There is no pretence of any fraud in the procurement of this policy. The only ground that can be taken is, that the agent knowing that the premises were to be, in part, used as a stable, should have so described the use in the policy. The assumption is, and must be, that the warranty, in its present form, was a mistake in the agent, * * * no one can doubt that, in a proper case of this kind an equitable remedy exists. * * *”

In *Franklin Fire Ins. Co. v. Martin* (Ct. of Err. & App.), 40 N. J. L. (XI Vr.), 568, 569, Mr. Justice Depue found the facts as follows:

“Premises insured were ‘his two-story and attic frame shingle-roof building, occupied as a dwelling and boarding house, situate on the West side of Bergen Point plank road, in Bayonne, Hudson County, New Jersey.’ Above building known as the ‘Mansion House’ (p. 569).

“In fact, it was at the time occupied as a dwelling and boarding house, and also as

a country tavern, and in a room back of the bar-room there was kept for use a billiard table. The property continued to be so used until the fire occurred" (p. 572).

"Drinking houses and taverns classified as extra hazardous.

"Insurance obtained by agent of the company, who viewed the premises before issuing the policy" (p. 573).

Held (p. 574) :

"If the proposal for insurance be prepared by the agent of the company, and he misdescribes the premises, with full knowledge of their actual condition, 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 condition of the premises as they were known to the agent." Citing many cases.

The learned Vice-Chancellor who heard and decided the case at bar found that there was no fraud or collusion in the procurement of the policy. He refused reformation of the policy on the ground that, although :

"The agents of defendant company who issued the policy here involved did not have actual knowledge that the insured property was used as a printing office. But, as already stated, the insurance broker, who was procured by the agent of defendant to secure this insurance for him, did in fact know that the lower floor of the insured building was used as a printing establishment. No written proposal or application for insurance was signed or made by complainant; he merely assented to the request of the broker for insurance and wholly relied upon the insurance company, or those representing it in all things * * *" (p. 18) :

Yet,

“if relief is to extend beyond the field of rescission and recovery of the premium 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” (p. 19).

A careful analysis of the opinion of Mr. Justice Depue in *Franklin Fire Insurance Company vs. Martin*, above quoted, shows that the learned Vice-Chancellor in the case at bar was clearly in error in holding that there could be no reformation of the policy in question.

In the *Franklin Fire Insurance Company* case, (*supra*), the error in the description of the property was made by an agent of the company, and the policy was reformed.

In the case at bar the error in description was made by the soliciting agent of the company, and the Vice-Chancellor refused to reform it.

The Vice-Chancellor found as a fact that the agent procuring the insurance was the agent of the general agent of the insurance company. He said:

“The agent of defendant company who issued the policy here involved did not have actual knowledge that the insured property was used as a printing office. But, as already stated, the insurance broker, who was procured by the agent of defendant company to secure this insurance for him, did in fact know that the lower floor of the insured building was used as a printing establishment. No written proposal or application for insurance was signed or made by complainant; he merely assented to the request

of the broker for insurance and wholly relied upon the insurance company, or those representing it, in all things. He wanted his printing establishment insured and the broker knew that it was, in part at least, a printing establishment that was to be insured. If the knowledge of that broker is to be imputed to defendant company *it would seem that reformation of the policy must be decreed, for in such case the mistake must be deemed a mistake of the insurer* resulting in a written policy which expresses material matters which the insurer could not be said to have properly intended to express.”

of Mr. Koch. * * *” (p. 26).

“Q. Now, Mr. Fleming, you had seen this building, number 328 Kaighn Avenue, hadn't you? A. Yes, sir.

“Q. And you had been in it? A. Oh, yes, sir.

“Q. You kenw how is was occupied, didn't you? A. Oh, yes, in fact, I sold the building before Mr. Koch came to it, but not to Mr. Koch, but to another party ahead of Mr. Koch. * * *” (p.).

“Q. Do you know how it was occupied, what was it being used for? A. Well, I know it was for printing, whether he used the whole building for printing or not I couldn't say, I don't know.

“Q. Now, you had been in the building you say, prior to that time? A. On the first floor, never was up on the second floor.

“Q. And how was that used—the first floor? A. That was used for a printing office.”

The learned Vice-Chancellor held that if the knowledge which the broker obtained concerning the use of the building was merely fortuitous it was not imputable to the company.

It is respectfully submitted that the knowledge of the broker was not merely fortuitous in the sense employed by the Vice-Chancellor, but, on the contrary, that it was knowledge which he acquired in carrying out the instructions of his principal. It seems to be the settled law of this State that the principal is liable for the acts of his agent in matters within the scope of his authority, so that if the agent in the case at bar were acting within the scope of his authority it would necessarily follow that the principal is bound.

Implied Power

The learned Vice-Chancellor found that the agent in the case at bar had implied power to do whatever might be reasonably necessary to discharge his duty. He said:

“Whatever powers or duties were imposed upon this broker by the agent of the insurer would necessarily carry with them the implied power or duty to do whatever might be reasonably necessary to discharge those powers or duties; but no power or duty to obtain or utilize or supply information touching the insured property was either expressly or impliedly conferred by the broker’s appointment for the purpose already stated * * *” (p. 21).

We agree with the learned Vice-Chancellor in the first sentence of this paragraph, but we think his conclusion is inconsistent with his premise. What is “reasonably necessary” is the true question. Was it or was it not “reasonably necessary” for the agent to describe the premises as he saw them? We think it was.

It would seem, therefore, that if the broker was directed by the general agent to go to appellant’s

place of business to obtain the insurance upon his premises that the information which he there obtained was certainly within the "implied power" or duty to do whatever might be "*reasonably necessary*" to carry out his principal's instructions. If the broker saw that the place he was about to insure was a printing shop, and described it as a "store and dwelling" it was his mistake, not the insured's.

Meeting of Minds

As to the meeting of minds, it should not be overlooked that the minds met to insure premises known as No. 328 Kaighn Avenue, Camden, N. J. (pp. 24, 33, 59). The Vice-Chancellor said:

"He [the insured] wanted his printing establishment insured, and the broker knew that it was, in part, at least, a printing establishment that was to be insured * * *" (p. 18).

So that it is not so much a question whether the minds met as it is whether the subject upon which the minds did meet was properly set down in writing. *It is not disputed that the minds met to insure 328 Kaighn Avenue.* The agent procuring the insurance testified that he was requested by the general agents of the company to obtain the insurance on 328 Kaighn Avenue (p. 24). The general agent testified that he requested a renewal of the insurance on premises 328 Kaighn Avenue (p. 59), and the Vice-Chancellor finds, as a fact, that all of the parties agreed to a renewal of the same (p. 18). It is clear that the minds met to insure premises No. 328 Kaighn Avenue; that the agent knew how the building was used, but failed to properly describe it; that the

insured "wanted his printing establishment insured" and did not know that it was not so insured until after the loss had occurred.

The learned Vice-Chancellor finds, as a fact, that the mistake was mutual. He said:

"The proofs adequately disclose that at the time the policy was issued no person in any way connected with or interested in the transaction knew that the building had been inaccurately described in the policy" (p. 13).

And, on page , he further said:

"In the present case it was the mutual intention and purpose of all parties connected with the transaction that any description of the insured property which might be contained in the policy of insurance should be accurate, and it was their mutual belief that the written policy which was intended to faithfully express their mutual purpose, was in all things accurate" (p. 16).

Notwithstanding these findings of fact the Vice-Chancellor said:

"It is, however obvious, even in these circumstances, that unless defendant company can be said to be chargeable with knowledge of the fact that the insured property was used as a printing establishment no reformation can be decreed."

The puzzled question, therefore, seems to be whether the mistake was mutual, as found by the Vice-Chancellor, or whether the company had no knowledge that the premises were used as a printing plant, as found by the Vice-Chancellor.

What, therefore, is essential to charge the company with such knowledge?

The Vice-Chancellor, as above noted, found as a fact that D. A. Henderson & Co., were the general agents of the insurer clothed with power to execute policies by their counter-signature within this jurisdiction. He also said (p. 19):

“The broker was selected and requested by the agent of the insurer to induce complainant to renew his insurance which was then about to expire; pursuant to that request the broker solicited the policy in behalf of the agent of the insurer and received from that agent for his services the customary proportion of the agent’s commissions. It thus appears that to whatever extent the broker was an agent of anyone in this transaction he was the agent of the agent of the insurer, and as such it may be that he can be said to have been an agent of the insurer.”

Imputable knowledge has been the subject of several decisions in this State.

Vulcan Detinning Co. v. American Can. Co. (Court of Errors and Appeals) 67 Atl. Rep., 339.

Harford vs. Duchastel (Court of Errors and Appeals), 93 Atl. Rep., 587.

In the latter case the Court of Errors and Appeals held:

“In order that the principal may be affected with a constructive notice of matters known to the agent the information constituting the notice must be obtained by or imparted to the agent while he is actually engaged in doing his principal’s business, in pursuance of his authority, and in his character as agent.”

Does that principle of law stop with the general agent of the insurer, or does it go on to the person selected by the general agent to perform a specific duty?

That depends, of course, whether the duty to be performed is judicial or ministerial. If it is ministerial the principal will be bound

In *Calhoon v. Buhre* (Supt. Ct.), 67 Atl., 1068, 1069, it was held:

“The rule that an agent cannot delegate his powers unless the sub-agency be directly authorized or ratified by his principal, with full knowledge of the facts, has no application to acts purely ministerial. In such cases if he directs the act, or being aware of the circumstances afterwards adopts it as his own, that is sufficient.”

In *Ryer v. Turkel* (Court of Err. & App.), 70 Atl., 68, 71, it was held:

“It may, indeed, be true that under the maxim, ‘*delegata potestas non potest delegari.*’ an agent or broker whose employment involves any exercise of judgment or discretion may not transfer to another the right and power to discharge his own duty. *Clark & Skyles on Agency*, Sec. 342; *Dwelling House Ins. Co. v. Snyder* (1896), 59 N. J. L., 18, 20; nevertheless, when an act to be done is ministerial or mechanical only, the agent may employ another to do it; and in such case the act is as well performed by the sub-agent as by the agent. *Clark v. Skyles Agency*, Sec. 345; *Titus, et al., v. Cairo & Fulton R. R. Co.* (1884), 46 N. J. L., 393, 418.”

Delegation of Authority

The duty delegated to the broker in the case at bar was purely ministerial, or, rather, a sort of quasi co-partnership affair, for, as Mr. Essig, the general agent's manager, testified (p. 67) “Half a loaf is better than none,” explaining that there

was a sharing of profits between the general agent and Mr. Fleming, the broker:

On page 67 the testimony is:

“Q So you thought the best way to get the business was to get it through a local agent who was perhaps acquainted with the insured? A. Yes.

“Q. Isn't that true? A. Half a loaf is better than none.

“Q. And you thought that Fleming was on the ground and in a better position to get that policy than you were to get it yourself, didn't you? A. I called Mr. Fleming and took the subject up with him because I thought that in his position and as being interested in the West Jersey Mutual Building Association that he would be able to control it or land it.

“Q. For you? A. No, for himself.

“Q. And for you too? A. Well, if you put it that way, for himself and us, yes.

“Q. And your object in calling up Mr. Fleming was not entirely charitable, was it? It was with the idea of getting a piece of business out of which you would receive a part of the commission at least—isn't that true? A. That is true, yes.

“Q. And on business which you get through the broker you get the agent's commission, don't you? A. We pay the broker a commission and we get a certain commission from the company” (p. 69).

“Q. Mr. Essig, I show you Exhibit C-1 which is the policy issued December 22d, 1915; that policy and the riders are signed by D. A. Henderson & Company as agents, and in that instance you were agents to solicit the insurance and write the policies, weren't you? A. Yes, we were the agents of that company.

“Q. And your agency covered the matter of soliciting the insurance and issuing the policy when obtained, didn't it? A. Solicit-

ing, yes, you might say for soliciting it, but through whoever might be interested in it.
 “Q. Yes, being agent for the company you could solicit it through any one you chose, couldn’t you, either Mr. Fleming or you could call some one further up the street or you could have called me up and asked me to try to get it? A. Surely.

“Q. And that is what you did in this case, wasn’t it? A. We called him up.

“Q. Now, please answer the question. A. Yes, we called Mr. Fleming in that way.

“Q. As a matter of fact the company issues to you a written authorization to execute these policies, doesn’t it? A. Yes, sir.

“Q. And you have that authorization in this case? A. Yes, sir.

“Q. Now, at the time you wrote this policy, at the time it was written in your office, you believed that this property was occupied as a store and dwelling, didn’t you? A. We had no knowledge other than that contract.

“Q. In what? A. I say, we had no knowledge of the risk other than our office records showed it” (p. 70).

“By the Vice-Chancellor: Q. Do you know whether the maps in your office at that time disclosed this property as a printing establishment? A. I believe that the map shows the property as a printing establishment, but I won’t say definitely, I think it does.” (p. 73).

It is perfectly manifest that the purpose of the general agent was to “land” the insurance on appellant’s property and in consummating that purpose, procured the services of a third party, with whom they shared their commission. Therefore, in view of the findings of the learned Vice-Chancellor that Mr. Fleming was selected by the agents of the insurer “to induce complainant [appellant] to renew his insurance which was then about to

expire," and "pursuant to that request the broker solicited the policy in behalf of the agent of the insurer and received from that agent for his service the customary proportion of the agent's commission"; that "the broker was the agent of the agent of the insurer, and as such can be said to have been the agent of the insurer"; that appellant was unfamiliar with the subject of insurance; that the error in describing the premises as a "store and dwelling" was a mutual mistake, free from fraud or collusion; that the broker procuring the insurance "knew that it was, in part, at least, a printing establishment that was to be insured"; that appellant "wanted his printing establishment insured," and did not know that it had not been so insured until after a loss had occurred. Those findings coupled with the testimony that the records in the general agent's office discloses the fact that the premises were used as a printing shop, lead to the conclusion that the learned Vice-Chancellor fell into error in dismissing the bill of complaint on the ground that the general agent had no knowledge or notice that the property was used as a printing shop.

It is respectfully submitted that the decree of the Court of Chancery dismissing the bill of complaint should be reversed, and a decree entered in favor of appellant reforming the description of the use of the premises so as to read "store and printing establishment" instead of "store and dwelling."

Respectfully submitted,

JOSEPH BECK TYLER,
Counsel for Appellant.

June Term, 1917.

THE ARTHUR H. CRIST Co., Cooperstown, N. Y.
New York Office, 220 Broadway

NEW JERSEY COURT OF ERRORS AND
APPEALS

CHARLES KOCH,
Complainant-Appellant,

VS.

COMMONWEALTH INSUR-
ANCE COMPANY OF NEW
YORK,
Defendant-Respondent.

ON APPEAL, &c.

BRIEF OF RESPONDENT

FACTS.

The learned Vice-Chancellor has so carefully reviewed the testimony that his opinion needs no further collaboration as it is at once a complete and analytical statement of the entire circumstances.

It is obvious that the reformation sought would attack and destroy the fundamental rule that the Court cannot create a new contract for the parties.

AUTHORITIES.

“A contract is born of a meeting of minds upon the subject-matter thereof. If the minds of the parties never met, if the defendant intended to insure one interest, and the plaintiff another, there has been no contract to which the policies can be

reformed, and equity cannot make a contract for the parties to help the plaintiff in his dilemma. It was incumbent on the plaintiff to prove an actual binding agreement which should be adopted as a standard to which the policy may be reformed. Nothing less than a binding agreement can suffice as this standard, and if a mutual mistake of both parties intervenes between the creation of such an agreement and the drafting of the policy endorsement, then and then only can reformation be decreed. Reformation then, as distinguished from the antithetical remedy of rescission, would leave the contract as actually made unchanged, and would merely affect the written evidence thereof."

23d *Harvard Law Rev.*, 608.

"The mistake must be mutual and common to both parties to the instrument. It must appear that both have done what neither intended. A mistake on one side may be a ground for rescinding, but not for reforming a contract. Where the minds of the parties have not met, there is no contract, and hence none to be rectified."

Citing *Hearne vs. Marine Ins. Co.*, 20 Wall. 488.

"Courts of Equity do not rectify contracts; they may and do rectify instruments purporting to have been made in pursuance of the terms of a contract. But it is always necessary for a plaintiff to show that there was an actual concluded contract antecedent to the instrument which is sought to be rectified; and that such contract is inaccurately represented in the instrument."

Citing *Mackenzie vs. Coulson*, L. R. No. 8 Equity Cases, 368.

“It is now firmly settled that to enable the plaintiff to invoke the reformatory power of the Court, his proof must amount to more than a mere preponderance of the evidence; that a Court of Equity exacts a high degree of satisfactory proof as to the existence of the alleged mistake, and as to the true agreement of the parties.”

Southard vs. Curley, 134 N. Y. 148;

Burt vs. Quackenbush, 72 App. Div. 547;
175 N. Y. 490.

“The applicant for insurance possesses the knowledge of title and of the other facts, essential to give validity to the contracts of insurance, and the responsibility of imparting that information to the other party to the contract is primarily with him.”

Lakeview Brewing Co. vs. Commerce Ins. Co., 143 App. Div. 656; affirmed 207 N. Y. 746.

“An insurance contract is no different from any other, when the rules of law governing in the reformation of written agreements are to be applied to it. The rule is elementary that before the Court will reform a written contract, the proof must convincingly establish that there has been a mutual mistake, or a mistake by one party, and fraud or deception by the other party.”

Lakeview Brewing Co. vs. Commerce Ins. Co., *supra*.

“The power of Courts of Equity to reform written instruments is one in the exercise of which great caution should be observed. To justify the Court in changing the language of the instrument sought to be reformed (except in case of fraud) it

must be established that both parties agreed to do something different from what is expressed in the writing, and the proof upon this point should be so clear and convincing as to leave no room for doubt. Losing sight of these cardinal principles, in the administration of this peculiar remedy would lead to the assumption of a power which no Court possesses of making an agreement between parties to which they have not both assented."

Meade vs. Westchester Fire Ins. Co., 64 N. Y. 453.

"We cannot make a contract for the defendant which it did not, in fact, make, even though the failure to make the insurance which the plaintiff desired was owing to the defendant's misapprehension of the application."

Meade vs. W. C. Fire Ins. Co., *supra*.

"To allow this contract of insurance to be reformed, and then enforced, would be to do just what the Court there refused to do; for here, as there, the defendant did not understand the terms of the instrument, as they are claimed by the plaintiff to have been, and to impose it upon them in those terms would be to make a contract for them which they did not intend to enter into. The policy of insurance is then to be taken as the contract of the parties."

Meade vs. W. C. Fire Ins. Co., *supra*.

"An action to reform a written agreement rests upon the theory that the parties came to an understanding, but in reducing it to writing, through mutual mistakes, or through mistake on one side and fraud on the other, omitted some provision

agreed upon or inserted one not agreed upon. The object of such an action is to so change the instrument as written as to conform it to the agreement as made, by inserting the provision omitted, or striking out the one omitted by mutual mistake. In the absence of fraud, nothing can be put in or taken out by the Court, unless it was the intention of both parties that it should go in or be left out when the agreement was written. The sole office of such an action is to correct mistakes by writing out the contract according to the actual agreement."

Curtis vs. Albee, 167 N. Y. 360.

"The plaintiffs have failed to show a mistake on the part of the defendant. It issued just the policy it intended to issue. The Court may only reform a contract so as to make it conform to the intention of both parties."

Dougherty vs. Lion Fire Ins. Co., 41 Misc. 285; affirmed 95 App. Div. 618.

"To grant the relief sought in this case would not be to conform the contract to the intention of both parties to it, but would be to create a new contract, which the defendant did not intend to make."

Dougherty vs. Lion Fire Ins. Co., *supra*.

"The mistake must be one made by both parties to the agreement, so that the intentions of neither are expressed in it. That is, to apply the rule to the present case, the parties must have come to a full agreement between themselves to insure the plaintiff's equitable interest; and by mistake the policy must have failed to express that agreement."

Miaghan vs. Hartford Fire Ins. Co., 12 Hun. 321.

“In the present case, the plaintiff’s evidence utterly fails to reach that high degree. His case rests solely on his own testimony and he is an interested witness. He is contradicted on the material point by the testimony of the defendant’s agent, who has no pecuniary interest, although, doubtless, he sympathizes with the defendant. We might further say that there is plainly no evidence of mutual mistake, because it is not pretended that Stowell drew the policy differently from what he intended.”

Bartholomew vs. Mercantile Ins. Co., 34th Hun. 263; affirmed 107 N. Y. 623.

“If it were such a contract as one of the parties intended to make, and the one it understood the others also intended to make, the Court has no power to reform it, as under such circumstances it would be making a new contract for the parties, and unjust to the ones who made no mistake.”

Christopher St. R. Co. vs. 23d St. R. Co., 149 N. Y. 51.

“To entitle the plaintiff to a reformation of the contract, he must prove that it was the intention of both parties to make a contract such as he sought to have established, and that this intention was frustrated either from some fraud, accident, or the mutual mistake of the parties. It was not enough for him to show his own intention. He must further show that the sense and intention of the defendant concurred therein. He must prove that both parties understood the contract as he alleges it ought to have been, and, in fact, would have been but for the fraud or mistake.”

Jackson vs. Anderson, 59 N. Y. 244.

“The Court can only act in reformation upon the most substantial and convincing proof that it was the intention of both parties to make the agreement as reformation would have it, and that this intention was frustrated by fraud, accident or mutual mistake. It was not enough to show the intention of one party. The Court will not reform if the negligence of the party asking relief was the cause of the mistake.”

Raby vs. Greater N. Y. Dev. Co., 151 App. Div. 72.

“A policy cannot be reformed upon proof of claimant’s mistake alone; it is an agent’s duty to assume rights of applicants for insurance to be just as stated, and when he draws a policy accordingly, there is no ground of reformation.”

Clement on Fire Ins., page 602.

“A mistake by one party, coupled with ignorance thereof by the other party, does not constitute a mutual mistake. Thus, if the minds of the parties meet on the subject-matter of a bargain, but one party enters into a bargain under a mistake, and the other party enters into a bargain in ignorance of the mistake, or in the belief that no mistake has been made, there is no mutual error.”

23 *Harvard Law Review*, page 611.

“Plaintiff’s sole claim is predicated upon a mutual mistake, and the proof which he offered at the trial utterly failed to establish it. The defendant endorsed upon a policy precisely what the plaintiff’s agent requested it to, and what it actually intended to endorse thereon. Parties, not Courts, make con-

tracts. To reform the policy as asked by plaintiff, is to have a Court make a contract for the parties, which they did not and never intended to make.”

Welles vs. Yates, 44 N. Y. 525.

“The description in a policy of the property insured as a building, ‘occupied as a dwelling and boarding house,’ defines the character of the risk assumed, and is a warranty that the property, at the time of the insurance was occupied for that purpose. Where the conditions of insurance provide that if the assured shall cause the building, goods or other property insured, to be described in a policy otherwise than as they really are, so that they be charged at a lower premium than is therein proposed, the policy shall be of no force. The policy is not avoided simply by a misdescription of the property. To effect an avoidance of a policy, the misrepresentation must have been operative to cause the insurance to be effected at a lower rate than it otherwise would be subject.”

Franklin Fire Ins. Co. vs. Martin, 40 N. J. Law, page 568.

OTHER NEW JERSEY CASES.

Deweese vs. Manhattan Ins. Co., 6 Vroom, 366;

Dougherty vs. Greenwich Ins. Co., 35 Vroom, 716;

Scott vs. Hall, 58 E. 42;

Dodd vs. Paul, 43 E. 302.

Green vs. Stone, 54 E. 387;

Morris vs. Penrose, 38 E. 629;

Haggerty vs. McKenna, 25 E. 48;
Dillett vs. Kimball, 25 E. 66;
Ordway vs. Chase, 57 N. J. E. 478.

POINTS NOT DECIDED BELOW.

- 1.—The broker alone is liable.
 - 2.—Failure of appellant to inform the company of the increased hazard.
 - 3.—Elements of fraud.
 - 4.—Action at law.
-

BROKER ALONE IS LIABLE.

It will be observed that in our state that a broker has come to possess an independent station, that he is apart from the insurance company and is the agent of the assured.

“Q. In our state, Mr. Ikier, how is an agent of an insurance company appointed?

A. An agent is appointed on the recommendation of a special agent of the company who recommends to the home office which, in turn, advises the insurance commissioner of their recommendation of the appointment of that man as an agent of the company, and they issue an authorization over the signature of the manager of the company, with a certificate of appointment issued by the insurance commis-

sioner of the state of New Jersey.

Q. And in this case no such certificate has been issued to Fleming?

A. It has not." (P. 76, l. 30.)

It would be anomalous to assume that Fleming was the agent both of the assured and the company.

Moreover our courts have decided the status of the broker together with his consequent responsibility to the assured for his failure to exercise his skill.

"A fire insurance broker is a specialist in the business of fire insurance, and holds himself out to the world as possessing sufficient skill requisite to his calling.

"Neglect to exercise his skill is actionable if it proximately results in loss to the insured by whom he is retained.

"*Milligan vs. Woodward*, 64 N. J. L. 444."

Upon the view expressed, we are at a loss to reconcile the theory of some of our sister states, with the above maxim.

FAILURE OF APPELLANT TO INFORM THE COMPANY OF THE INCREASED HAZARD.

Under the policy or agreement of insurance appellant had solemnly stipulated neither to misrepresent or conceal, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; nor increase the hazard by any means within his control or knowledge upon forfeiture of the policy (p. 10, l. 20).

Yet the appellant after the purchase of the prem-

ises in question and during the continuance of the first policy issued by the same company increased the hazard by installing mechanical and other devices that increased the hazard five times in excess of the original rate (p. 77, l. 20).

This fact he concealed and at no time revealed to the company. It was his duty to at once inform the company of the change brought about by himself.

This change occupied four years of the first policy and the balance of the second policy up until the fire.

It seems plain to us that this was a deliberate and purposeful effort to conceal a very material circumstance affecting an increased hazard.

ELEMENTS OF FRAUD.

While concealing this knowledge from the company appellant was entertaining various insurance men, most of whom were his friends and among whom he distributed all his insurance for personal property located in the same house (p. 39, l. 20).

To these same friends he was paying more one year for machinery insurance than he was for five years' insurance on the building (p. 41, l. 20). And these same insurance friends were coming down to appellant's place of business several times a week, long before the renewal of the building insurance, and yet he never asked them the rate for the particular hazard he maintained, they never solicited the business and he finally gave it to an apparent stranger (pp. 41, 42).

To eliminate the notion of fraud it is necessary to assume that the above is true. But it must be borne in mind that he procured an insurance rate

five times less than any of his insurance friends could have obtained for him and from strangers.

It is our firm belief that he knew he was getting a low rate of insurance by concealing from the company the fact that he had changed the character of the use of the premises and had installed machinery that increased the risk five times beyond the amount paid.

“It has already been stated that fraud may consist in silence, as well as in actual outspoken misrepresentation.

“The suppression of the truth, whenever it becomes the means of deceit, is regarded with disfavor in equity, no less than the suggestion of falsity. Nor can a man remain silent if it is his duty to speak. Suppression of the truth in such a case is fraud. Familiar instances of this principle are found in the contracts of insurance and suretyship, where, from the situation of the parties, the duty of disclosure is greater than in ordinary cases.”

Bisphams' Equity, page 319, S. 213.

ACTION AT LAW.

An action at law is now pending in our Supreme Court brought to recover under the same policy of insurance here sought to be reformed. This suit is subsequent to the hearing on the bill and antecedes the opinion of the Vice-Chancellor.

In the light of this new offense it occurs to us that we should further raise the question, has complainant exhausted his remedy at common law? Our thought is controlled by the decisions of this state

which seem to permit the entire question be left to the jury, especially whether the increase of hazard defeats plaintiff's claim to recover.

Moreover, it is obvious, that if reformation is granted, defendant has no defense to the common law suit; whereas, if denied, plaintiff may still proceed with his suit at law. This would seem to place complainant where he has two remedies for the same cause of action, a position greatly intolerant to our jurisprudence.

We may have gone afield to discuss the classified points undecided but are influenced by the thought that our angle of discussion may more clearly clarify the basic adjudication that there was no mutual mistake and that the company issued the only policy the terms of which were communicated or revealed or which it had in mind.

Respectfully submitted,
HOWARD L. MILLER,
LAWRENCE B. READER,
Counsel of Respondent.





