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*Oct. 9, 10.

*Nov. 16.

THE CANADIAN FIRE INSURANCE COMPANY (DEFENDANT).. } APPELLANT;

AND

JAMES ROBINSON, *et al.* (PLAINTIFFS)..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF KING'S BENCH, PROVINCE OF QUEBEC, APPEAL SIDE.

Contract—Lex loci—Lex fori—Fire insurance—Principal and agent—Payment of premium—Interim receipt—Repudiation of acts of sub-agent.

The *lex fori* must be presumed to be the law governing a contract unless the *lex loci* be proved to be different.

The appointment of a local agent of a fire insurance company is one in the nature of *delectus personæ*, and he cannot delegate his authority or bind his principal through the medium of a sub-agent. *Summers* v. *The Commercial Union Assurance Company* (6 Can. S. C. R. 19), followed.

The local agent of a fire insurance company was authorised to effect interim insurances by issuing receipts countersigned by him on the payment of the premiums in cash. He employed a canvasser to solicit insurances, who pretended to effect an insurance on behalf of the company by issuing an interim receipt which he countersigned as agent for the company, taking a promissory note payable in three months to his own order for the amount of the premium.

Held, that the canvasser could not bind the company by a contract on the terms he assumed to make, as the agent himself had no such authority.

Held, further, that even if the agent might be said to have power to appoint a sub-agent for the purpose of soliciting insurances, the employment of the canvasser for that purpose did not confer authority to conclude contracts, to sign interim receipts, nor to receive premiums for insurance.

APPEAL from the judgment of the Court of King's Bench (appeal side), affirming the judgment of the

*PRESENT:—Sir Henry Strong C.J. and Taschereau, Gwynne, Sedgewick and Davies JJ.

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Superior Court, District of Ottawa, which maintained the plaintiffs' action with costs.

The plaintiffs' claimed $5,000 for insurance on a factory in the City of Hull, the property of two of the plaintiffs (D'Amour and Charlebois), which was destroyed in the great conflagration on 26th April, 1900. On 2nd May, 1900, D'Amour and Charlebois assigned their interest in the insurance to Robinson, the other plaintiff, to whom the insurance had been made payable as mortgagee. The application for insurance was made on 21st April, 1900, for twelve months, and, as plaintiffs alleged, an interim receipt was given by the company's agents on that date securing provisional insurance for thirty days from its date or until the issue of a policy or rejection of the risk. The plaintiffs further alleged that they gave a promissory note for the premium at the time of delivery of the interim receipt, payable in three months, which was accepted by the agents and afterwards duly paid.

The defendant denied that any authorised agent on its behalf had ever insured the property, or signed the interim receipt, and contended that no contract of insurance had been entered into. It also denied receiving any valid consideration or premium, or that any promissory note had been given to or accepted by or paid to any of its authorised agents, and alleged that the person named Healy who signed the interim receipt as its agent at Ottawa, had never been its agent nor held out by it as its agent, and had no authority to bind it in any manner. Defendant alleged that a number of blank receipts signed by the managing director in blank had been forwarded to one Smith, who was its agent at Ottawa, entrusted to him and were not to be issued by any other person nor without his signature as agent; that in Smith's absence and without his consent, Healy unlawfully obtained possession

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of the interim receipt produced by plaintiffs while it was still in the condition in which it left the head office; that the firm styled D'Amour and Charlebois, acting personally and through Healy, their agent, had prior to this unsuccessfully sought to effect an insurance upon the property in question; whereupon Healy, acting for them, and with their knowledge, on the receipt falsely stated a payment of $200 when both he and they knew no money had been paid, and signed the same as defendant's agent at Ottawa when both he and they knew he was not such agent; that upon the application for insurance reaching the head office at Toronto, where it was not known that Healy had signed the interim receipt, the manager there immediately telegraphed to Smith that the application was refused, and instructed him to take up the receipt, which he did; that the manager at Toronto had no means of knowing at the time that Healy had signed the receipt; that, had he known such fact, he would have repudiated the right of Healy to act as its agent or to countersign its blank receipts, and that he became aware of the fact of Healy's having signed the paper long after the fire; that when plaintiffs paid Healy the amount of the note given to him personally by them, both he and they knew that the company had repudiated the contract in question; and that, at the time of the fire, no premium had been paid and no consideration given to the company or to any one authorised to act for it.

The plaintiffs answered that the agents who effected the insurance were duly authorised for that purpose, and that the receipt was not only signed by Healy but also by Smith and by the general manager; that the company had frequently recognised the validity of similar receipts; that the application had been received and forwarded by Smith who confirmed the acts of

Healy; that the company knew that it had been customary for its agents to accept promissory notes in lieu of cash for the first premium; and that the note in question was received by the company's agents and paid to them; that Smith knew that the receipt had been issued, and had approved of it; that, at the time it left his possession to be given to plaintiffs, it bore his signature, and that Healy's name was simply written over his, which did not vitiate it, if such signature was at all necessary.

The trial judge after hearing the witnesses in court decided in favour of the plaintiff, and on appeal, the Court of King's Bench affirmed this judgment, Hall and Bossé JJ. dissenting

Foran K.C. and *Lafleur K.C.* for the appellant. The agent, Smith, had no power to delegate his functions; Boudousquié "Assurance contre l'Incendie," no. 84; Grenoble, 24 Mars, 1838; Gouget & Merger, Dict. de Dr. Comm. *vo* "Assurance Terrestres" 81, 466; Ponget, Dict. des Assurances Terrestres, *vo.* "Agents," nos. 5, 6; 5 Pothier, "Mandat" (ed. Bug.) p. 211; Troplong, "Mandat" nos. 446, 448; 12 Huc (Art. 1998) no. 86; Arts. 1142, 1144, 1711 C. C.; *Summers* v. *Commercial Union Assurance Co.* (1); In the *Summers Case* (1) the jury had found as a fact that the broker was employed by the local agent, and had been authorised by him to sign interim receipts. In this case Healy never was in Smith's employ and had never been authorised to sign anything. In the *Summers Case* (1) the jury found that the general agents of the company had knowledge that the broker was acting as agent. Here the existence of Healy was not brought to the general agent's knowledge until after the action had been instituted. The company never held out Healy as its agent; it could not do so; it did not know him. D'Amour

(1) 6 Can. S. C. R. 19.

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knew from Healy's actions that Smith was the real agent, and that recourse was to be had to him when the question of accepting a note for the premium was mooted. D'Amour saw Smith's name on the receipt, consented to it being erased by Healy, and accepted the receipt without Smith's signature. D'Amour gave Healy a note for the premium payable not to the order of the company, nor Smith, but to the order of Healy. Healy never indorsed the note but kept it. Smith told him he would not accept the note and never saw it. See Art. 2500 C. C. The agent cannot accept anything but money in payment of a premium. Ostrander, (2 ed.) p. 295, sec. 94; *Canadian Fire Ins. Co.* v. *Keroack* (1); *Montreal Assurance Co.* v. *McGillivray* (2); *Walker* v. *Provincial Ins. Co.* (3); *Frazer* v. *Gore District Mutual Fire Ins. Co.* (4); *Western Ins. Co.* v. *Provincial Ins. Co.* (5); *Citizens Ins. Co.* v. *Bourguignon* (6).

Aylen K.C. for the respondent. The company ratified the acts of Smith and Healy by accepting the money for the note; Joyce on Insurance, nos. 73, 455, 456, 457, 458; Ostrander on Fire Insurance, pp. 35, 37, 152, 207, 272, 276, 277, 302; *The Manufacturers' Accident Insurance Co.* v. *Pudsey* (7); *Basch* v. *Humboldt Mutual Fire & Marine Ins. Co.* (8). See also Dalloz. *vo.* "Assurance Terrestres," nos. 26, 27, 152, 172, 177, 182; Dalloz. Supp. *vo*, "Assurance Terrestres," nos. 105, 128; *Rossiter* v. *Trafalgar Life Ins. Assoc.* (9); *Compagnie d'Assurance des Cultivateurs* v. *Grammon* (10), Art. 2481 C. C.

THE CHIEF JUSTICE.—There are, in my opinion, four distinct grounds for allowing this appeal.

(1) 2 Legal News 272.
(2) 13 Moo. P. C. 87.
(3) 8 Gr. 217.
(4) 2 O. R. 416.
(5) 5 Ont. App. R. 190.
(6) M. L. R. 2 Q. B. 22.
(7) 27 Can. S. C. R. 374.
(8) 5 Bennett's Fire Ins. Cases, p. 421.
(9) 27 Beav. 377.
(10) 3 Legal News 19; 24 L. C. Jur. 82.

First: Smith, if he did in fact delegate his authority as an agent for the appellants for the purpose of effecting policies of assurance to Healy, had no legal authority to do so.

At the opening of the appeal there was some discussion as to whether the authority of Smith to appoint a sub-agent depended upon the law of Ontario or Manitoba, (the legal domicile of the company), or on that of Quebec, and my brother Taschereau remarked that the law governing the contract must be presumed to be that of the *lex fori*, unless the *lex loci* was proved to be different. I agree in this and consider that the appeal must be determined by the law of the Province of Quebec.

Article 1711 of the Civil Code is as follows:

1711. The mandatary is answerable for the person whom he substitutes in the execution of the mandate, when he is not empowered to do so; and, if the mandator be injured by reason of the substitution, he may repudiate the acts of the substitute.

This article 1711 deals only with the question of responsibility and it does not define the cases in which the mandatary may appoint a sub-agent The corresponding article of the French Code is 1994. The provision appears to apply in cases where the mandatary is neither empowered nor prohibited by the contract of mandate to appoint a sub-agent.

There can be little doubt, although there is no express article to that effect, that the mandator may prohibit the delegation of his mandate by the mandatary to a third person, provided the prohibition is express. Then, surely there is nothing requiring that the prohibition to delegate should be express in its terms; it may well be left to inference when the mandate necessarily implies trust and confidence in the person on whom it is conferred.

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Then, in a case in this court, *Summers* v. *The Commercial Union Insurance Co.* (1), an appeal from Ontario, it was held that an agent of an insurance company, such as Smith was in this case, could not act through the medium of a sub-agent since the authority of the original agent involved trust and confidence and was in the nature of *delectus personæ*. It is therefore a case where the mandatary cannot legally discharge his duties by handing them over to another not selected by the mandator.

There is an *arrêt* of a Belgian Court of Appeal to this effect. Gand, 26th, May, 1851; Pasicrisie, 1851, 2, 318.

For this reason I conclude that Smith had no legal power to substitute Healy for himself in making the contract of insurance with d'Amour and Charlebois.

Secondly: Even if Smith had legal authority to substitute Healy, he, in point of fact, as appears from the depositions, never did so. Healy had apparently authority to get proposals for Smith, but Smith never empowered him to conclude contracts, to sign interim receipts or to receive premiums. It was incumbent on the plaintiff to establish this in proof by clear testimony, but he has failed to do so. It does not appear that Healy was authorized to conclude a contract and to sign an interim receipt with d'Amour and Charlebois or with anyone else. This appears to have been his own view for he erased Smith's countersignature from the interim receipt, thus indicating that he had not authority from the latter. The very way the interim receipt he used came into the hands of Healy, militates against the pretention that he had, in fact, actual authority from Smith for Healy appears to have abstracted the receipt from a parcel containing blanks sent by the company's agent at Toronto, addressed to Smith and without having authority to do so from the

(1) 6 Can. S. C. R. 19.

latter. On the whole, it is not proved that Healy had *de facto* the authority he professed to exercise. This is further confirmed by the fact that he gave the interim receipt without receiving payment of the premium, taking for it a promissory note at three months payable, not to Smith, but to himself, which note he did not hand over to Smith at once, although after some time, he offered to deliver it to the latter, who refused to accept it. There certainly never was, in fact, any authority conferred by Smith to enter into a contract of insurance to be binding on the appellant on the terms and to be carried out in the manner this assumed contract was.

Thirdly: Even if it were granted that Smith could, in law, substitute a sub-agent and had, in fact, done so, there is a clause in article 1711 C. C., (not to be found in the French Code), which is conclusive as to the right of the appellant to disavow Healey's acts. The words of this clause are:

> If the mandator be injured by reason of the substitution, he may repudiate the acts of the substitute.

If there could be a case in which a principal would be entitled to say he was injured by the acts of one who had assumed to act as the sub-agent of his mandatary, it is the present. Here we find this pretended sub-agent entering into a most improvident contract of insurance as regards the risk taken, not complying with the terms of the mandate as regards the interim receipt, and taking payment of the premium in a manner not warranted by anything the appellant had authorized, by a deferred promissory note payable, not to the appellant, or its agent, but to the sub-agent himself. It is impossible to say, if this could be in law and was in fact a substitution, that the appellant was not grievously injured by the way in which the substitute executed the mandate. This therefore gives the company the right to repudiate the pretended contract.

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Lastly: The powers of the sub-agent cannot exceed those of the principal agent. Smith, himself, had no power to enter into a contract in the terms of that which Healy pretended to make as his sub-agent with d'Amour and Charlebois. He could only effect an interim insurance binding on the company by an interim receipt countersigned by himself and on receiving himself the premium in cash. *London and Lancashire Life Assurance Co.* v. *Fleming* (1); *Acey* v. *Fernie* (2). These terms were not complied with and, therefore, on this last distinct ground, that on which Mr. Justice Hall's dissenting judgment proceeds, the respondent must fail.

The appeal is allowed and the action dismissed. The appellants must have their costs here and in both courts below.

TASCHEREAU J. concurred in the judgment allowing the appeal with costs and dismissing the plaintiff's action with costs.

GWYNNE J.—The appeal in this case must, in my opinion, be allowed with costs.

The case in the Privy Council of *The London and Lancashire Insurance Co.* v. *Fleming* (1) is, in effect, an overruling of the judgment of this court in the case of *The Manufacturers Accident Insurance Co.* v. *Pudsey* (3), reported in the twenty-seventh volume of the Supreme Court reports.

SEDGEWICK and DAVIES JJ. also concurred in the judgment allowing the appeal and dismissing the action with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Foran & Champagne.*

Solicitors for the respondent: *Aylen & Duclos.*

(1) [1897] A. C. 499. (2) 7 M. & W. 151.
(3) 27 Can. S. C. R. 374.