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*Nov. 14.
*Dec. 20.

KLINE BROTHERS AND COMPANY (PLAINTIFFS) ..... } APPELLANTS;

AND

THE DOMINION FIRE INSURANCE COMPANY (DEFENDANTS) } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Fire insurance—Removal of goods—Consent—Binder—Authority of agent.

K. Bros. & Co., through the agents in New York of the respondent company obtained insurance on a stock of tobacco in a certain building in Quincy, Flo., and afterwards obtained the consent of the company to its removal to another building. Later, again, they wished to return it to the original location and an insurance firm in New York was instructed to procure the necessary consent. This firm, on January 14th, 1909, prepared a "binder," a temporary document intended to license the removal until formally authorized by the company, and took it to the firm which had been agents of respondents when the policy issued, but had then ceased to be such where it was initialed by one of their clerks on his own responsibility entirely. On March 19th, 1909, the stock was destroyed by fire in the original location and shortly after a formal consent to its removal back was indorsed on the policy, the respondents then not knowing of the loss. In an action to recover the insurance:—

Held, affirming the judgment of the Court of Appeal (25 Ont. L.R. 534) that the "binder" was issued without authority; that even if the insurance firm by whose clerk it was initialed had been respondents' agents at the time they had, under the terms of the policy, no authority to execute it and authority would not be presumed in favour of the insured as it might be in case of an original application for a policy; and that it was not ratified by the indorsement on the policy as the company could not ratify after the loss.

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Brodeur JJ.

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APPEAL from a decision of the Court of Appeal for Ontario (1), affirming the judgment at the trial in favour of the defendants.

The defendants pleaded several defences to the action on the policy insuring plaintiffs' tobacco in Quincy, Flo., but the only one dealt with on the appeal was that at the time of the loss the policy only covered goods in another building. The circumstances are sufficiently stated in the head-note.

D. L. McCarthy K.C. for the appellants. The defendants are estopped from denying that the New York firm were their agents. *Montreal Assurance Co.* v. *McGillivray* (2), at p. 121. Being agents they had authority to issue the binder. *Eastern Counties Railway Co.* v. *Broom* (3).

The issue of the binder was ratified. *Lewis* v. *Read* (4); *Williams* v. *North China Ins. Co.* (5).

Even if the New York firm were agents of respondents they could not license a removal of the stock insured without express authority in writing. The policy so provides, and see *Western Assurance Co.* v. *Doull* (6).

The indorsement on the policy after the loss would not have ratified if the respondents had knowledge of the fire: *Grover* v. *Mathews* (7).

Hamilton Cassels K.C. for respondents.

THE CHIEF JUSTICE.—I would dismiss this appeal with costs.

The action is brought on a policy of fire insurance

(1) 25 Ont. L.R. 534.
(2) 13 Moo. P.C. 87.
(3) 6 Ex. 314.
(4) 13 M. & W. 834.
(5) 1 C.P.D. 757.
(6) 12 Can. S.C.R. 446.
(7) [1910] 2 K.B. 401.

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issued by the respondents through their agents in New York, to cover a stock of tobacco in a warehouse described as situated on the southeast corner of Love and Washington streets in the town of Quincy. The policy is dated 3rd September, 1908, and the fire occurred on the night of the 18th March, 1909; the amount claimed is $2,000. There are several defences, the substantial one being, that, by reason of changes in the contract of insurance previously made at the request of the insured, the goods were not, at the time of the fire, within the protection of the policy.

In December, 1908, it was found necessary by the insured to transfer the tobacco from the warehouse, at the corner of Love and Washington streets, to the Owl warehouse in the suburbs of Quincy, and this was done with the consent of the company, evidenced by the memorandum attached to the policy and dated 14th October, 1909. So that at the moment of the fire the subject of insurance was tobacco stored in the Owl warehouse, whereas the goods actually destroyed and for the value of which this claim was made had been removed from that location several weeks before. There can be no doubt as to the fate of this claim if there was nothing else on this record. And I must confess my inability to understand how the liability of the respondents has been affected by the subsequent happenings upon which the appellants rely. It is useless to insist upon the many reasons which may be urged to support the company's contention, that the location of the goods insured materially affect the risk; they are so obvious as not to require mention. For the better understanding of the appellants' case I will briefly state all the facts.

As I said before the policy was issued by the com-

pany's agents in New York, and the indorsement consenting to the change in the location was given through the same agency. When, however, the appellants were prepared to transfer the tobacco to the corner of Love and Washington Streets the New York agency was closed, a fact which came to the knowledge of the appellants' insurance broker either at the time, or immediately after the application for the consent of the company to the change was made at the office in New York occupied by their former agents. In my view, however, the broker's knowledge of the closing of the agency is not of major importance because of the other facts of this case. Whatever may be the truth as to this, the brokers, when they applied for the consent of the company to the re-transfer, were content to accept from a clerk in the office of the company's former agents, instead of the document which they had prepared, a document known amongst insurance brokers as a "binder," and which it is alleged operates according to the custom of insurance brokers in New York, to bind the company until such time as a more formal agreement is issued. Whatever may be in some circumstances the effect of a "binder" issued by a qualified agent, when the policy is first applied for, I entertain no doubt that it was of no value in the circumstances of this case. Excluding from consideration those cases where the agent is clothed with all the powers of the company itself, and has authority to issue and cancel policies of insurance generally without reference to the head office, I agree fully with the respondents' counsel who, in his very able factum, makes the distinction between the powers to be implied in the case of insurance agents when taking new risks, and their powers when assuming

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to deal with risks already in existence. In the former case a person dealing with the agent is entitled to assume that he has the general powers of an insurance agent, and within the scope of his ostensible authority, has power to bind the company to the extent of the risk accepted by the agent, even though, as a matter of fact, in accepting such risk, the agent is exceeding his authority. But where, after a risk has been accepted, and the terms of the contract are embodied in a policy, the agent is applied to for permission to change the location of the goods insured, or any of the conditions of that policy, the applicant deals with that agent at his peril, and if in fact the agent has no authority, the assent given by him is of no avail, even although the person obtaining the assent has no knowledge of the lack of authority. Here, of course, it cannot be successfully pretended that the agent had any authority to issue the "binder" in view of this condition of the policy which the insured or their agents had at the time in their possession:—

> In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of the company,

and admittedly there was no such writing. It is also provided that the entire policy shall be void if the hazard be increased by any means within the control or knowledge of the insured, or if any change takes place in the subject of insurance, unless otherwise provided by agreement indorsed on the policy or added thereto, and there is no such agreement here. As I have already said a change of location in the subject of insurance would, as materially affecting the risk, come within that provision. It may almost be accepted as an axiom in insurance law "that the locality and surroundings of insured property are always con-

sidered material by insurers in accepting and rejecting applications for insurance, is a matter of common information to which the courts cannot be indifferent in the decision of questions of this character." Beach on Insurance, Vol. 2, sec. 623.

But it is said that on application to the company at its head office in Toronto the action of the clerk who issued the "binder" was ratified, and the consent of the company then given operated retroactively to validate the action of the clerk (14 January, 1909). It is impossible to accept this contention. At the time the assent of the company was given, March 26th, 1909, the fire had actually occurred and the subject-matter of the insurance had been destroyed. The company could not insure with the knowledge of the loss, and, of course, there can be no ratification if the principal could not make the contract at the time he is asked to ratify it. Here we have this additional fact which certainly does not help the appellant. At the time the assent of the company was given the insureds' agents knew that the goods were destroyed and, notwithstanding, they carefully kept that fact concealed from the company. It is unnecessary to comment on such lack of candour. The assent could not in any case be referred back to the date of the binder, because it was given without any reference to it; the company appears to have been kept in ignorance of the fact that such a document ever existed. I also agree with Mr. Justice Garrow when he says that in any event the application to the company for its consent to a retransfer of the goods should not have been delayed from the 14th January to the 26th March. For the neglect which caused the loss the appellant must now bear the consequences; the respondent company is not in any way responsible.

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DAVIES J. concurred with the Chief Justice.

IDINGTON J.—I think this appeal must be dismissed with costs.

DUFF J.—I concur in dismissing this appeal with costs.

BRODEUR J.—I concur with the Chief Justice.

Appeal dismissed with costs.

Solicitors for the appellants: *McCarthy, Osler, Hoskin & Harcourt.*

Solicitors for the respondents: *Cassels, Brock, Kelly & Falconbridge.*