ROBERT SUMMERS.....APPELLANT;

AND

THE COMMERCIAL UNION ASSURANCE COMPANY..... } RESPONDENT.

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*Mar. 9.

*April 11.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Insurance Co.—Interim receipt—Agents, powers of.

This was an action brought on an interim receipt, signed by one *S.*, an agent for the respondent company at *L.* One of the pleas was that *S.* was not respondent's duly authorized agent, as alleged. The general managers of the company for the province of *Ontario* had appointed, by a letter, signed by them both, one

*PRESENT—Ritchie, C. J., and Strong, Fournier, Henry and Gwynne, J.J.

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W., as general agent for the city of *L. S.*, the person by whom the interim receipt in the present case was signed, was employed by *W.* to solicit applications, but had no authority from, or correspondence with, the head office of the company.

In his evidence, *S.* said he was authorized by *W.* to sign interim receipts, and the jury found he was so authorized. He also stated that *W't.*, one of the joint general managers was informed that he (*S.*) issued interim receipts, and that the former said he was to be considered as *W.'s* agent. There was no evidence that the other general manager knew what capacity *S.* was acting in.

Held, affirming the judgment of the Court of Appeal for *Ontario*, that *W.* had no power to delegate his functions, and that *S.* had no authority to bind the respondent company.

Per *Strong*, J., That the general agents being joint agents could only bind the respondent company by their joint concurrent acts, the appointment of *S.* as agent by *W't.* without the concurrence of the other general manager would have been insufficient.

APPEAL from the decision of the Court of Appeal for *Ontario*, confirming the judgment of the Court of Common Pleas ordering a non-suit to be entered in an action in that court wherein the now appellant was plaintiff and the respondents were defendants.

The action was brought by the appellant to recover a sum of $1,200, under the terms of an interim receipt purporting to have been issued on behalf of the respondents, and signed by one *David Smith* as agent, and insuring for one year from 22nd June, 1878, unless notice were given that the proposal was declined, $500 on a building of a grist flouring mill, and $700 on fixed and movable machinery therein.

The declaration alleges that the appellant and *Skuse* and *Holmes* owned the mill in question, and that the two latter persons, after the insurance and before the fire, sold their interest to the appellant, and subsequently assigned to him all their rights under the insurance contract.

It also sets out the interim receipt verbatim, and alleges that *David Smith*, who signed it, was the duly

authorized agent of the respondents for that purpose, and that they became liable thereunder, and never declined the said proposal for insurance, and that the property insured was burnt on the 12th July, 1878.

The respondents pleaded seven pleas, but the principal defence rested on the second plea denying *Smith's* agency, and on the third plea, that the interim receipt and insurance contract were procured by the fraud of the appellant and others in collusion with him.

The case was tried before Mr. Justice *Morrison* and a jury at the *London* assizes, and upon the answers of the jury to certain questions submitted to them, a verdict was given for the appellant with $800 damages: leave being reserved to the respondents to move for a non-suit.

The evidence bearing on the subject of agency was as follows: There was a gentleman of the name of *Williams* resident in *London*, who was the general agent of defendants, appointed as such by the general agents of the company for the Province of *Ontario*, Messrs. *Westmacott* and *Wickens*, and *Williams* had authority to receive applications for insurance and to grant interim receipts. *Smith*, the person by whom the interim receipt in the present case was signed, was employed by *Williams* to solicit applications. *Smith* had no authority from, or correspondence with, the head office of the company. He says, in his evidence: "I got liberty from Mr. *Williams* to sign interim receipts. I always informed him I had issued them, and paid over the premiums to him monthly. Mr. *Williams* made reports to the head office; I made none; I was sub-agent for Mr. *Williams*. I could not say whether the head office knew who issued the interim receipts. I had no correspondence with the head office of the company. I told Mr. *Westmacott* (he was one of the head officers of the company in *Toronto*, and is since

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dead) that I was in the habit of issuing receipts. There was no one present when I told Mr. *Westmacott*; I never told Mr. *Wickens* (the other head officer); I never told Mr. *Williams* that I told Mr. *Westmacott* that I was issuing interim receipts. Mr. *Westmacott* seemed quite agreeable that I should do so, and all my applications could go through Mr. *Williams*. He said I was to be considered as Mr. *Williams*' agent."

On 19th November, 1879, a rule was granted by the Court of Common Pleas to enter a non-suit or for a new trial, and this rule was subsequently made absolute to enter a non-suit.

From this judgment the appellant appealed to the Court of Appeal for *Ontario*, and that court, on 20th September, 1880, dismissed the appeal with costs.

Mr. *H. Cameron*, Q.C., and Mr. *Bartram*, for appellant:

The principal question seems to turn upon the evidence rather than upon the legal principles applicable to the case: whether the evidence shows *David Smith* to have been an authorized agent of the company to issue interim receipts. The forms of application and interim receipts were supplied to *David Smith* by defendants' agent, and such forms gave notice to the plaintiff that he was their agent. There is no notice on said forms qualifying his authority.

The evidence of *Williams*, the general agent of the company for *London* and the county of *Middlesex*, proves that *Smith* was a canvassing agent, or broker, of the defendants, working under said *Williams*, with the knowledge and concurrence of the general agents at *Toronto;* and the defendants are therefore bound by Statutory Condition 21 (1), because *David Smith* was thereby an agent of the defendants. *Leake* Cont. (2).

The jury have found expressly, on a correct charge from the judge, fairly leaving the question to them,

(1) Cap. 153, R. S. Ont. (2) Pp. 517, 524 and 525.

that *David Smith* was duly authorized by the local agent at *London*, with the knowledge of the general agents of the defendants for *Ontario*, to grant interim receipts. *Robertson* v. *Pro. M. & F. Ins. Co.* (1).

The jury saw the witnesses, the way in which they gave their evidence, and we submit that taking *Smith's* evidence by itself, if it is sufficient to sustain the verdict, it ought not to have been disturbed.

The only doubt in the case was whether the agent *Williams* had authority to delegate his authority. But in this case there can be no doubt the general agents at *Toronto* knew that *Smith* was acting as sub-agent, and in this very case he applied for 12 p. c. commission in order that he might get 2 p. c. as sub-agent. Moreover, from the evidence of *David Smith* and *Byron Williams*, *Williams* necessarily carried on his general agency for *London* and the county of *Middlesex*, with the assistance of sub-agents, *David Smith*, *G. G. German* and others, for it would have been impossible for him to conduct his business except by means of sub-agents. *Story* Agen., sec. 14, cited by Mr. Justice *Galt*, and secs. 28, 29, 31 and 58; *Leake* Con., 483; *Campbell* v. *National Ins. Co.* (2); *Clarke* on Ins. (3).

Mr. *Robinson*, Q. C., and Mr. *W. N. Miller*, for respondents:

There can be no doubt *Smith* was never directly appointed by the head office, and that the general agents at *Toronto* never knew that *Smith* had issued interim receipts, unless through what *Smith* told Mr. *Westmacott*. It is equally true that the moment *Williams* knew *Smith* had issued an interim receipt, he ordered the money to be returned. Now it seems to us the question is simply this: had *Smith* authority to sign? It must be by direct

(1) 8 New Brunswick Reports, 379. (2) 24 U. C. C. P. 133.
(3) P. 50.

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authority from the head office, or by the company not repudiating *Smith's* act. It is beyond all dispute that the company never knew that an interim receipt had been issued.

The business entrusted to *Williams* was of a strictly personal character, requiring the exercise of his own judgment and skill, and could not be delegated. *Evans* Pr. Agent (1); *Story* Agen. (2).

But it is contended *Williams* had authority to appoint sub-agents. Even if the business entrusted to *Williams* was of such a character that it could be delegated in case of necessity, there was no evidence to shew that it was necessary for *Williams* to appoint agents to enable him to transact it.

The appointment of general manager of the respondents was vested in two persons, *Westmacott* and *Wickens*. A letter signed by the two was used in the appointment of *Williams*, and a joint appointment by *Westmacott* and *Wickens*, it is submitted, would be necessary to constitute *Smith* the agent of the respondents (3).

There is no custom that agents appointed by the general agents have authority to appoint sub-agents that bind the company. The learned counsel then argued in reference to the misrepresentations made in the application for insurance, upon which point the court did not express any opinion.

RITCHIE, C. J.:—

This is an action brought on what the plaintiffs claim was an insurance interim receipt issued by *David Smith*, agent of the Commercial Union Insurance Co. The respondent denied *Smith's* agency, and also denied

(1) P. 38, and cases cited.
(2) Sec. 14.
(3) Lewin Trusts, 7th ed., 236; *Lee* v. *Sankey*, L. R. 15 Eq. 204; *Broom* v. *Andrew*, 18 Law J. Q. B. 153.

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that the answers given in the application for insurance to certain questions which the agent *Smith* took from the insured were such as, under the circumstances, the plaintiff was bound to give. I have carefully read the evidence in this case, and I entirely agree with the judgments delivered by Mr. Justice *Galt* in the Court of Common Pleas, and by the judges of the Court of Appeals; and I am of opinion that *Smith*, who was nothing more than a broker, was taking risks for the agent of the company. I have failed to find out any authority whatever from the company to him to authorize him to act as their agent and complete a contract of insurance with any party whatever; and I have failed to find any evidence of any such recognition of his agency or his acts in that character as would clothe him with implied authority from them to take risks.

The appeal should be dismissed.

STRONG, J. :—

I am of opinion that the decision of the Court of Common Pleas, in making absolute the rule to enter a nonsuit, was right, and ought to be affirmed. The execution of the agency entrusted to *Williams* involved the exercise of judgment and discretion in the important matters of accepting or rejecting the risks which were offered to the company, and it is a first principle of the law of agency that, when personal confidence is thus reposed in the agent, he cannot delegate his authority. The interim receipt upon which the action was brought, having been signed by *David Smith*, who alleges he was authorized by *Williams* to take risks and grant receipts, is therefore not binding upon the defendants, unless some prior authority, or subsequent ratification by the company, or their general agent at *Toronto*, is shown. There is no proof of ratification by a subse-

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quent recognition of the acts of *David Smith*, but his evidence is relied on to show that he had express authority to act as agent, and in that capacity to sign interim receipts for premiums. This evidence is said to be found in the direct examination of *David Smith*, who was a witness manifestly favorable to the plaintiff, and in what was elicited by the defendants' counsel on cross-examination. It refers to a conversation between the witness and Mr. *Westmacott*, one of the joint agents of the company at *Toronto*, which took place on the occasion of a visit which Mr. *Westmacott* had paid to the office of *Williams*, the company's agent at *London*, when *Smith* was driving *Westmacott* to the railway station, no one else being present. What passed is thus stated by *Smith* :—

> I told *Westmacott* that I was in the habit of issuing receipts; I told him during our drive from *Williams'* office; it was in 1878 sometime; it was before the fire; *Williams* asked me to drive him down; previous to that he had spoken to me; there was no one present when I told *Westmacott;* I had never told it to *Wickens;* I had never told *Williams* that I had told *Westmacott* I was issuing interim receipts; *Westmacott* seemed quite agreeable that I should do so, and all my applications could go through *Williams* he said; I was to be considered as *Williams'* agent. It was then that I spoke about the commission, he said he couldn't come to any understanding about that, he would consult the head office in *Toronto*. I wanted him to appoint me an agent direct, and I said whatever arrangements he could make with *Williams* would be satisfactory to him.

There is nothing in this statement which amounted to evidence of authority to sign receipts proper to be left to the jury.

It is, of course, to be conceded, that if there had been any evidence amounting to even a mere "scintilla," as it has been termed, that should have been left for the consideration of the jury, and the nonsuit would in that case be wrong. But assuming that *Westmacott* had power to confer authority on *Smith* to act directly as agent of the company, there is an en-

tire absence of any proof of his having exercised such a power. *Smith* does not say he told *Westmacott* he was in the habit of signing receipts or accepting risks, but merely that he issued receipts. It is true that in his evidence in chief he said he had told Mr. *Westmacott* he was signing interim receipts, but the cross-examination must be regarded as a correction or qualification of that statement, and the whole evidence being read together, it comes to no more than this, that the witness told *Westmacott* he issued receipts, which, taken in connection with his request to *Westmacott* to be appointed as an independent agent and *Westmacott's* refusal, implied in his answer that he was to be considered *William's* agent, shows that all that was intended to be sanctioned by *Westmacott* was that *Smith* should continue to act as the sub-agent of *Williams*; in other words, that his acts should be subject to the approval and control of *Williams*. This being the fair construction of the evidence, there was nothing to leave to the jury, and the appellant was properly non-suited.

Had *Smith*, however, gone much further, and proved authority derived from *Westmacott* to act as agent independently of *Williams* and to sign and issue receipts binding the company, an authority conferring on him powers co-ordinate with those delegated to *Williams* by the letter of the joint agents, which is in evidence, I should still have been of opinion that the non-suit ought not to be disturbed. The general agents of the company at *Toronto* are Messrs. *Westmacott* and *Wickens*. It does not appear that they were members of a mercantile firm, or in any way associated as partners in any business other than that of the general agency of the respondent's company. It may well be implied that the general agents in this province of an English insurance company have, as part of their general authority, power to appoint local agents with authority to sign interim receipts in

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accordance with the usual course of insurance business as carried on in this country. We have, however, no evidence of the actual authority given by the company to Messrs. *Westmacott* and *Wickens*, and with the facts before us that they were joint agents, and in the appointment of *Williams* had acted jointly, one of them, as it appears, having considered on that occasion that he had no authority to act independently of his colleague, we cannot possibly presume that they had a several as well as a joint authority. The irresistible conclusion is therefore that, as in all cases of joint agency, they could only bind their principals by their joint and concurrent acts. Then, it is not even pretended that Mr. *Wickens* concurred in authorising *Smith* to act as an agent, or in recognising his acts as binding on the company; so that even on the assumption that *Westmacott* had conferred such authority, it would be wholly insufficient, for the reason that Mr. *Wickens's* concurrence was wanting. This last ground alone is an incontrovertible reason for sustaining the non-suit.

The learned counsel for the appellant urged that the evidence of a conversation which the witness *William Smith* states he had with *Westmacott* at *Toronto* afforded matter for the consideration of the jury. I am of opinion that this testimony was of no importance, and contained nothing which could properly have been left to the jury, and that for the same reasons already given with reference to the alleged conversation between *Westmacott* and *David Smith*. It contains nothing to show any recognition by *Westmacolt* of *David Smith* in any other character than in that of a sub-agent to *Williams*, and even if it had it could not bind the company, who had entrusted their general business, not to the sole agency of *Westmacott*, but to the conjoint management of *Westmacott* and his colleague *Wickens*.

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Taking the view of the case which I have thus briefly stated, I do not feel called upon to enter into a detailed consideration of the other defence—that of misrepresentation—but I think it right to state that on this branch of the case I entirely concur with the Chief Justice of the Court of Appeals, who came to the conclusion that there was a gross misrepresentation, and that in consequence the plaintiff was disentitled to recover. For that reason, had the non-suit on the point of agency not been proper, it would have been incumbent on us to have granted a new trial.

I am of opinion that the appeal must be dismissed with costs.

FOURNIER, J. :—

For the reasons given in the judgment of the Court of Appeal, I am of opinion that this appeal should be dismissed.

HENRY, J. :—

I concur in the judgments that have been given. I think *Smith* had neither direct authority, nor was his action in signing these receipts sufficiently ratified by the general agents of this company. Without one or other of these two, he could not bind the company. I think, therefore, the receipts given by him, although they were furnished by the local agent to him, did not bind the company. He was virtually soliciting business under the local agent and for him. The parties ran the risk, and they must take the consequences of dealing with a person who is not authorized to bind the company in which they are insured. There is no doubt a great injury is done where parties are induced to take policies in such a way, but as the law is, you cannot bind a company that does not bind itself. They have the right to give certain powers to their

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agents, and in the appointment of local agents there is no implied authority to them to authorize any other parties to act for them. I think the non-suit is right, and a case is not made out to bind the company; and therefore the judgment of the court below should be affirmed.

GWYNNE, J., concurred.

Appeal dismissed with costs.

Attorney for appellant: *W. H Bartram.*

Attorneys for respondents: *Beatty, Miller, Biggar & Blackstock.*