WORLD MARINE & GENERAL INSURANCE COMPANY, LIMITED (DEFENDANT) ..... APPELLANT;

1951

*Oct. 19, 22
*Dec. 17

AND

YVON LEGER (PLAINTIFF) .....

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

*Insurance, Fire—Sub-agent with no evidence of authority—Power to bind Principal—Effect of receipt of premium with application by such sub-agent—Loss occurring before application received by General Agent.*

A sub-agent of a fire insurance company who has nothing from the company in the way of interim receipts or even official receipts with the name of the company on them and in fact nothing to indicate that he has any authority to enter into a binding contract of insurance on its behalf, is not an actual agent for the company so as to bind it to any insurance either in writing or orally. *Linford* v. *Provincial Horse & Cattle Insurance Co.*, 34 Beav. 291, followed. *Mackie* v. *European Assurance Society*, 21 L.T. (N.S.) 102; *Murfitt* v. *Royal Insurance*, 38 T.L.R. 334; *Kline Bros.* v. *Dominion Fire Insurance Co.*, 47 Can. S.C.R. 252 and *Grimmer* v. *Merchants' & Manufacturers' Fire Insurance Co.*, 4 M.P.R. 582, distinguished. *Potvin* v. *Glen Falls Insurance Co.*, [1931] 1 W.W.R. 380 at 390, approved.

Assuming that in the case at bar the sub-agent had authority to receive payment of the premium with the application, all that amounted to was, as pointed out in *Linford* v. *Provincial Horse & Cattle Insurance Co., supra,* at 293, that he had made "a proposal with a deposit which the company was entitled either to accept or reject, and the company never having accepted it, was not bound."

There is no authority binding upon this Court which lays down as a rule of presumption that one who testifies to an affirmative is to be credited in preference to one who testifies to a negative. Taschereau J. in *Lefeunteum* v. *Beaudoin* 28 Can. S.C.R. 89 at 93-94 was speaking only for himself and his statement, so far as it is inconsistent with this decision, cannot be supported.

Decision of the Supreme Court of New Brunswick, Appeal Division, 28 M.P.R. 59, reversed.

APPEAL from the judgment of the Supreme Court of New Brunswick (1) reversing the judgment of Anglin J. dismissing respondent's action against appellant.

*PRESENT: Rinfret C.J. and Kerwin, Rand, Kellock, Estey, Locke and Cartwright JJ.

(1) (1951) 28 M.P.R.; [1951] 3 D.L.R. 263.



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*J. L. O'Brien K.C.* for the appellant. The issues are limited to the question of whether Robidoux, if he told respondent that he was insured, bound appellant by so doing. The question of the liability of the other defendant Anderson is not in issue, as there has been no appeal from the judgment dismissing the action against Anderson. The questions in issue are essentially questions of fact to be decided on the evidence at trial, and the questions of fact to be decided are, 1. Whether Robidoux had ostensible authority to bind any one. 2. Whether, if he had such authority, it could be said to be authority to bind Anderson or to bind appellant.

In the judgment appealed from the question of whether Robidoux had authority to bind any one is dealt with very briefly with the following remarks:—"That is the usual custom among fire insurance agents. It would be detrimental to business if they did not have such authority." It is clear from the evidence that the custom of the insurance business in New Brunswick is such that power to bind on the part of an agent is the exception rather than the rule, only one of every twenty having such power, and that Robidoux did not have that power. In the light of the evidence it is difficult to understand how the Court of Appeal could have found as it did. Not only was the trial judge right in his finding that there was no evidence of Robidoux' power to bind, but that, on the contrary, the only evidence was to the effect that he had no such power and that it was not the usual custom for an agent to have such power. Hughes J. suggests that although Robidoux had only authority to canvass insurance, he could bind his principal if he exceeded that authority, quoting from *Mackie* v. *European Assurance Co.* (1). That case is not an authority for the finding that Robidoux with authority only to canvass for insurance could bind his principal if he exceeded this authority. Even if it could be said Robidoux had authority to bind, such authority was not on behalf of the appellant. There is no evidence that he had any authority to bind, but, if he had, it must have been on behalf of J. A. Anderson & Co. or other insurers with which that company placed risks. Not only is it clear from the record that the appellant never allowed Robidoux to hold

(1) 21 L.T. (N.S.) 102.

himself out as having authority, but that the respondent himself admits that he did not even know the name of the appellant until after the loss occurred. On the facts, this is not a case where the Appeal Court should have reversed the trial judge. *Roche* v. *Marston* (1) per Kerwin J. at 496. Hughes J., without expressly so stating, seems to imply from the authorities he quotes that in law an insurance agent when taking an application, is empowered to bind the insurer. In the present instance, if such were true, it would not be the appellant who would be bound. The case of *Kline Bros. & Co.* v. *Dominion Insurance Co.* (2) referred to, it is submitted, is of no authority in the present instance, nor *Grimmer* v. *Merchants & Manufacturers Insurance Co.* (3). In that case the sub-agent had the necessary powers or qualifications. The Court also held that the general agent had approved the sub-agent's binder.

The question of whether or not an insurance agent can bind the insurer is, in each case, a question to be decided on the particular facts of the case. Insurance agents, like other agents, may have very limited or very extensive powers. Welsford & Otter Barry's *Fire Insurance* 4th Ed. p. 84; Bowstead on *Agency* 4th Ed. 82-3, 273; *Potvin* v. *Glen Falls Insurance Co.* (4); *Newsholme* v. *Road Transport & General Insurance Co.* (5).

*E. G. Gowling K.C.* for the respondent. The respondent supports the judgment of the Court of Appeal. There was no restriction on Anderson's authority. If Anderson had dealt directly with the respondent and told him he was insured, the appellant would have been bound because Anderson was its general agent. That it was the only company for which both Robidoux and Anderson were acting in the transaction is conclusively proved by the fact that when Robidoux notified Anderson of the fire, the latter's immediate reaction was to telephone the appellant in Montreal and advise that the application had arrived, a fire had occurred, and he was disclaiming liability, to which the appellant agreed.

(1) [1951] S.C.R. 495.
(2) (1912) 47 Can. S.C.R. 252.
(3) [1932] 4 M.P.R. 582.
(4) [1931] 1 W.W.R. 380.
(5) [1929] 2 K.B. 356.

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*MacGillivray on Insurance Law*, 3rd Ed. at page 389 points out there is no absolute rule of law requiring a contract of fire insurance to be made out in any particular form; at 390, that there is nothing in law to prevent a valid contract of insurance being constituted by informal writing or even by mere oral communication; and at 391, if the contract may be fully performed with the year, the Statute of Frauds, does not apply.

Appellant's counsel submitted that the words in the application "All insurance subject to the approval of the company," placed the burden on the plaintiff to prove the approval. These words do not mean that the Head Office must approve. Such approval can be given by the general agent or the sub-agent if authorized to bind. If Head Office does not care for the risk it has the privilege of cancelling but until that is done the insurance is in force. One way of expressing approval is to tell the applicant he is covered, another is to accept the premium.

As to the sub-agent's authority. This is the issue in the case and is not to be decided by Anderson. His statement to the Court that Robidoux had no authority to bind was volunteered without his knowing any of the instructions given to the sub-agent. He left all the instructions to his office manager, who was not called; nor was any one from Head Office, which was notified of the appointment, called to state the nature of the authority. Anderson's statement that the sub-agent did not write policies is probably correct, but that the sub-agent did not have interim and renewal receipts may be questioned. Robidoux was a member of the Board of Fire Underwriters. Not only could he have got the application form but interim receipts from it as well. It is therefore quite conclusive that the sub-agent's authority did not depend on what forms were supplied him by his principal.

Anderson knew Robidoux was accepting premiums at the time of taking applications. If it is a fact that he told Robidoux to fill in the application and forward it to him and he would try and place it (which the respondent does not admit, but denies), he should have warned Robidoux then and there not to accept any premium or make any commitments until he had placed it.

It is open to this Court to find that the risk was approved then and there by Anderson. That in all probability he told Robidoux to cover and collect the premium. Welsford & Otter-Barry's Fire Insurance, 3rd Ed. p. 80 states: "The acceptance of the proposal by the insurers may be more or less conclusively shown in one or other of the following ways namely . . .

"(2) By accepting the premium. Where no policy has been issued to the proposers before the loss, the receipt of the premium and its retention by the insurers, though by no means conclusive may raise the presumption, in the absence of any circumstances leading to the contrary conclusion, that the insurers have definitely accepted his proposal. In such a case they are not entitled to refuse to issue a policy to him, and they are, therefore, liable to him in the event of a loss." at p. 191, "The insurers, by accepting the payment of the premium, may, even where no policy has been issued, be estopped from denying the existence of a contract of insurance between the assured and themselves."

*McElroy* v. *London Assurance Corp.* (1) per Lord Maclaren at 291.

Authority is a question of fact. *Murfitt* v. *Royal Insurance Co. Ltd.* (2). The receipt given comes within this category. Hals. 2nd Ed. 423. *Murfitt* v. *Royal Insurance Co. supra,* which it is stated was followed in *Parker & Co. (Southbank)* v. *Western Assurance* (3).

The judgment of the Court was delivered by:—

KERWIN J.:—This is an appeal by World Marine and General Insurance Company Limited (hereafter called the company), against a judgment of the Appeal Division of the Supreme Court of New Brunswick, allowing an appeal by the plaintiff, Yvon Leger, against the judgment at the trial which had dismissed his action. Suit was brought not only against the company but also against J. Arthur Anderson carrying on the business of an insurance agent at Saint John under the name of J. A. Anderson & Co. and the said J. A. Anderson & Co. As the trial judge's dismissal of the action against Anderson was affirmed by

(1) (1897) Ct. of Sess. 287. (2) (1922) 38 T.L.R. 334.
(3) (1925) W.C. & Ins. Rep. 82.

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the Appeal Division, and no appeal from that part of the latter's judgment has been taken by the plaintiff, we are not concerned with the claim against Anderson although it will be necessary to refer to his position in the events under review.

The claim before us is for the recovery of the sum of $7,000, for which amount the plaintiff claims the company insured him on May 30, 1947, against loss by fire of his portable sawmill near Shediac in New Brunswick. The mill was destroyed by fire the following day. No policy of insurance was issued but the plaintiff relies on an alleged verbal contract between himself and one Maurice Robidoux and claims that in making that contract Robidoux acted as the agent of the company so as to bind the latter. The company denies the contract and in any event, alleges that Robidoux had no authority either actual or implied to bind it. In order to determine these issues, it is necessary to examine the relevant facts in some detail.

At all material times the company was an insurer carrying on the business of fire insurance in New Brunswick. J. Arthur Anderson had an agency contract with the company by which he was appointed its general agent for the province in respect of all classes of fire insurance authorized by the company to be written in the province as it might from time to time determine. Clause 4 of this contract provides:

> The agent, in consideration of the remuneration hereinbefore specified, agrees faithfully to perform and observe the duties of a general agent. He may appoint sub-agents and accept applications for insurance in the classes which the company shall authorize the agent to undertake in the province of New Brunswick. He agrees to be governed by the judgment and opinion of the company as to lines and classes of hazards to be insured and to recognize at all times the authority of the company as to cancellation of certain lines or classes of hazards and to be governed by such rules and regulations as may from time to time be issued by the company.

Anderson had about 60 sub-agents, of whom 6 had specific power to bind on his behalf. In the entire province there are about 800 licensed insurance agents of whom only 41 have specific power to bind the insurance companies. Prior to January 1947, Maurice Robidoux had

been soliciting accident and sickness insurance for Anderson as a sub-agent. He never had a written contract with Anderson, nor did he ever have in his possession interim receipts or renewal applications. His powers as sub-agent were limited to taking applications. In connection with any business resulting in the issuing of a policy, he would be billed at the end of each month for the total of the premiums less his commissions. It was his responsibility to see that the premiums were collected and one feature greatly relied upon by the repondent is that, to Anderson's knowledge, Robidoux would, in many, if not all cases, receive the premium at the time the application was signed.

In January 1947, Robidoux commenced soliciting fire risks on behalf of Anderson and in April he submitted to Anderson an application for $4,000 fire insurance on a portable sawmill belonging to Thomas J. Kingston. On behalf of the company Anderson accepted this application and issued and delivered a policy. When the company learned of this it sent Anderson a letter on April 18th advising him that portable sawmills were in the category of risks upon which they looked with disfavour. This information was immediately conveyed to Robidoux in a letter from Anderson and finally, the Kingston matter was arranged by Anderson securing the cancellation of the policy and the issuance of a policy for $2,000 by the company and the issuance of policies by other insurers to cover the balance of the $4,000. Later Robidoux called Anderson and asked him if he could place insurance on a portable sawmill belonging to one Philias LeBlanc. This was arranged by $2,000 of the risk being placed with the company and the balance with other insurers.

We now come to the specific circumstances giving rise to the claim advanced by the respondent. In January 1947 Robidoux saw the respondent in connection with sickness and accident insurance and truck insurance and as he understood the respondent was going to purchase a portable sawmill, suggested that the respondent take out fire insurance on it. The respondent said that he would see

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Robidoux when he had purchased the mill. Either at this or a subsequent interview Robidoux handed the respondent a business card reading as follows:

cCc MAURICE ROBIDOUX
J. A. Anderson & Co.
86 Prince William St. Saint John, N.B.

(It was explained that "cCc" are the initials of another company, not a fire insurance company).

Soon after the purchase of the mill and between May 1st and May 20, 1947, the respondent saw Robidoux on the street at Shediac and asked him what the insurance would cost. Robidoux said that he would call Anderson on the telephone. This he did when Anderson told him to fill in the application and forward it "and I will try to place it." Anderson also told him that the premium for $7,000 coverage would be $315. According to the evidence of Robidoux at the trial he told the respondent not only the amount of the premium but also that Anderson had said that he would try to place the insurance, or as he put it in another way, "I told him they (fire insurance risks on portable sawmills) were very hard to place and would have to be brokered out." Not having the money, the respondent told Robidoux that he would see him later.

The next meeting occurred on the night of Friday, May 30th, at Robidoux's house. The respondent paid the money and received a receipt on an ordinary receipt form which merely states that Robidoux had received from the respondent $315 "for fire insurance on mill." At the same time the respondent signed an "Application for Farm Risks and Country Dwellings", not addressed to any particular insurance company but "To the . . . . Insurance Company Limited." At the foot of the first sheet of this application immediately above the date and the respondent's signature appears in heavy type "All Insurances Subject to the Approval of the Company." The respondent's testimony that on this occasion Robidoux told him that "starting from that time I was insured," was denied by Robidoux.

It should here be explained that in his reasons for judgment the trial judge first came to the conclusion that the action against the company must be dismissed on the ground that there was no evidence of the authority of

anyone, and in particular of Robidoux, to effect the alleged insurance by the company. Undoubtedly, as the trial judge held, Robidoux's examination for discovery, part of which had been put in at the trial, was not evidence against the company and on the argument before this Court we announced our agreement with the trial judge that the order for the examination of J. Arthur Anderson "and Maurice Robidoux, agent of the above named defendant, J. A. Anderson & Co., for discovery," refers only to the defendants, J. Arthur Anderson and J. A. Anderson & Co.

After disposing of the claim against the company, the trial judge proceeded to discuss the claim against Anderson. It was in that connection that he decided that Robidoux had told the respondent on May 30th that the latter was insured. He did this on the basis that, being unable to say whether the story of Robidoux or the respondent was correct, one who testifies to an affirmative is to be credited in preference to one who testifies to a negative, referring to the remarks of Taschereau J. in *Lefeunteum* v. *Beaudoin* (1). In considering whether, at the meeting in Shediac between May 1st and 20th, Robidoux had told the respondent that Anderson would try to place the insurance, or whether, as the respondent testified no such statement was made, the trial judge also, as to the claim against Anderson, on the same basis decided that Robidoux had told the respondent that the insurance had to be "brokered out."

The remarks of Taschereau J. in the case referred to have been adopted and followed by trial judges in several decisions in Canada and it is therefore advisable to point out that Mr. Justice Taschereau was speaking only for himself. However, he referred to an extract from the judgment of the Master of the Rolls in *Lane* v. *Jackson* (1), and to what was said by Baron Parke speaking for the Judicial Committee in *Chowdry Deby Persad* v. *Chowdry Dowlut Sing* (2). I doubt that the Master of the Rolls or Baron Parke or Mr. Justice Taschereau were dealing with the matter otherwise than as set forth in 6 Law Magazine (1831) 348 at 370, referred to with approval in chapter 8 on Presumptions in Prof. Thayer's Preliminary Treatise on Evidence in a foot-note at page 313, i.e., that

(1) (1897) 28 Can. S.C.R. 89 at 93-94. (1) (1855) 20 Beav. 535 at 539-40.
(2) (1844) 3 Moo. Ind. App. 347 at 357.

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what was involved was a mere natural presumption which, according to Mr. Starkie as set forth in 6 Law Magazine, is derived wholly by means of the common experience of mankind, from the course of nature and the ordinary habits of society. The word "presumption" used by Mr. Starkie is unfortunate and liable to misconstruction and it is putting it too high to say, as Mr. Justice Taschereau is reported to have said, that it is a "rule of presumption." There is no decision binding upon this Court which lays down any such mechanical formula. It is in every case the duty of the tribunal of fact to ascertain the facts in the light of all the circumstances present in the particular case. It would appear perhaps more logical where the Court finds itself faced with a choice between two witneses testifying to the affirmative and negative, respectively, of a particular proposition, if it finds itself unable to choose, after taking into consideration all the circumstances, that the decision should be that the burden of proof has not been met, than that the finding should be for the affirmative. It may be that in all the circumstances of a given case the Court could come to the conclusion that the affirmative should be accepted, but it should not do so on the basis of the application of any rule of thumb.

In the present case we are willing to assume that Robidoux told the respondent on May 30 that the latter was insured but on a reading of the record we are satisfied that at the earlier interview Robidoux told the respondent that Anderson had said he would "try" to place the insurance, thus indicating to the respondent that the proposal had not been finally accepted.

On Saturday, May 31, the mill was destroyed by fire but the application had already been sent through the post office by Robidoux to Anderson and it was with the incoming mail on Anderson's desk in Saint John on the following Monday morning when Robidoux telephoned Anderson and advised him of the fire. A few days later Robidoux saw the respondent who asked him the name of the company he (Robidoux) was acting for, whereupon Robidoux handed him the heading of a printed copy of agents' returns showing the name of the appellant company. Undoubtedly, until that time the respondent did not know the name of the company but this fact is of no importance to the legal

problem involved. Robidoux sent a cheque for the amount of the premium to the respondent who, however, declined to accept it as that would prejudice his claim.

In these circumstances there can be no doubt that Robidoux was not an actual agent for the company so as to bind it to any insurance either in writing or orally but it is argued that he falls within that class of agent for whose contract with a proposed insured an insurer should be held liable. It is of the utmost importance that Robidoux had nothing from the company in the way of interim receipts or even official receipts with the name of the company on them and in fact nothing to indicate that he had any authority to enter into a binding contract of insurance on its behalf. Furthermore, the application form signed by the respondent clearly states "All Insurances Subject to the Approval of the Company," and as stated above the proper conclusion on the evidence is that Robidoux told the respondent that Anderson would "try" to place the proposed insurance or that it would be "brokered out." All cases such as this must be determined upon their own circumstances and the facts that on May 30th Robidoux received payment of the $315 and told the respondent he was insured do not separately or in conjunction add anything, no matter what effect they might have under other conditions. Estoppel was not pleaded but even if it were there is nothing to show that anything that happened in connection wtih the Kingston and LeBlanc applications ever came to the knowledge of the respondent and therefore he did not act upon any holding out that could possibly have been otherwise urged.

Hughes J. speaking for the Appeal Division referred to the decision of Vice Chancellor Malins in *Mackie* v. *The European Assurance Society* (1). There, however, as pointed out by McCardie J. in *Murfitt* v. *The Royal Insurance Company Limited* (2), the agent had been supplied with a book of printed forms and it was held that he was authorized to make contracts on behalf of The European Assurance Society in accordance with the terms in the forms. In *Linford* v. *The Provincial Horse & Cattle Insurance Company* (3), the Master of the Rolls held that it was not the ordinary duty of an agent of a company to

(1) (1869) 21 L.T. (N.S.) 102.
(2) (1922) 38 T.L.R. 334 at 336.
(3) (1864) 34 Beav. 291; 55 E.R. 647.

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grant or contract to grant policies of assurance. In that case the plaintiff had paid the agent 10s on account but it was held all the plaintiff had done was to make a proposal with a deposit, which the company was entitled either to accept or reject. In the *Murfitt* case McCardie J. stated the *Linford* decision to be good law but he then referred to the *Mackie* decision. McCardie J. pointed out that in the case before him the agent occupied a position in which he might well have been authorized to give oral cover and that he had been habitually giving it for 2 years before, to the knowledge of his superiors and with their consent. It was on that ground and on the special facts of the case that judgment was directed to be entered for Murfitt. The decisions in Murfitt and Mackie depend upon their own particular facts.

Hughes J. also referred to *Kline Bros. & Co.* v. *Dominion Fire Insurance Company* (1), and the remarks of Chief Justice Fitzpatrick at page 255. The quotation from that page must be read in connection with the preceding sentence and a perusal of all the reasons makes it clear that the Court was there dealing with the question of an agent admittedly qualified to bind the company at the inception of a risk. The only other decision referred to by Hughes J. is *Grimmer* v. *Merchants' and Manufacturers' Fire Insurance Company* (2). There, the sub-agent had been supplied with interim receipts and had power to issue them, but as he had none with him at the time he accepted the application for insurance, he gave a verbal binder and it was held that the insurer was liable as if the interim receipt had been issued. These circumstances show that the decision is quite distinguishable.

On behalf of the respondent we were referred to two extracts from Welford & Otter-Barry on Fire Insurance, which in the 4th Ed. appear at pages 80, 81 and 198, and read as follows:

p. 80:

> The acceptance of the proposal by the insurers may be more or less conclusively shown in one or other of the following ways, namely:

p. 81:

> (2) By accepting the premium. Where no policy has been issued to the proposer before the loss, the receipt of the premium and its retention by the insurers, though by no means conclusive, may raise the

(1) (1913) 47 Can. S.C.R. 252. (2) (1932) 4 M.P.R. 582.

presumption, in the absence of any circumstances leading to the contrary conclusion, that the insurers have definitely accepted his proposal. In such a case they are not entitled to refuse to issue a policy to him, and they are, therefore, liable to him in the event of a loss.

p. 198:

The insurers, by accepting the payment of the premium, may, even where no policy has been issued, be estopped from denying the existence of a contract of insurance between the assured and themselves.

There, however, the authors are discussing the effect of the acceptance of a premium by the insurers, that is, where no question arose as to the money having been received by the insurers or someone on their behalf. "Accepting" payment of the premium is, as explained in the text, "receipt and retention." At p. 193 the authors deal with payment of premiums to an agent who has no authority to accept applications, and at p. 85, where the application is not accepted, the applicant is entitled to a return of the premium as is stated. Even assuming in the present case that Robidoux had authority to receive payment of the premium with the application, all that this amounts to from the standpoint of the respondent is, as pointed out by Sir John Romilly M.R. in *Linford* v. *Provincial Horse and Cattle Insurance Company* (*supra*), that he had made "a proposal with a deposit which the company was entitled either to accept or reject, and the company never having accepted it, was not bound."

More to the point are the remarks of Ford J. in a case referred to by Counsel for the appellant, *Potvin* v. *Glen Falls Insurance Co.* (1). We agree with Mr. Justice Ford's statement therein that in all cases where it was held that an agent of an insurance company had implied authority to bind the company, the agent either had in his posession some *indicia* of authority, some forms to implement his promise of an interim covering, or the course of dealing between the agent and his principal showed that, with the knowledge and consent of his superiors, he had been habitually exercising the authority he assumed. The same principle may, we think, be deduced from the statement in MacGillivray on Insurance Law, 3rd Ed. page 381. These remarks appear in an earlier edition of the textbook referred to by Ford J. except for a few additions, one of which is

(1) [1931] 1 W.W.R. 380 at 390

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that acceptance of a premium by an agent who has no actual or apparent authority to contract, does not bind the company.

In the reasons for judgment in the Appeal Division, after referring to the fact that Robidoux was paid the premium and thereupon informed the plaintiff that he was insured it is stated "That is a usual custom among fire insurance agents." We are unable to find any evidence in the record to support that statement.

The appeal should be allowed, the judgment of the Appeal Division set aside and that of the trial judge restored. The appellant is entitled to its costs in this Court and the Appeal Division.

*Appeal allowed with costs.*

Solicitors for the appellants: *Ritchie, McKelvey & Mackay.*

Solicitors for the respondent. *Inches & Hazen.*