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Agent's Liability to Third Person, Liability of Agent Who Acts for Undetermined Principal

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COMMENT ON RECENT CASES

AGENCY—AGENT BOUND HIMSELF ON CONTRACT WHERE NO PRINCIPAL.—[New York] A recent decision of the New York Court of Appeals deserves attention.[1] The receiver of a corporation (plaintiff) applied to a broker for burglary insurance. Through an intermediary the defendant agreed to provide the insurance. He was the agent in New York of "London Lloyds." An application was handed to the defendant. It was headed "Underwriters and Brokers' Emergency Agreement" and the form was stated to be "provisional." Following other provisions was the word "Binding" and the signature: "Marsh—for Company." No formal policy was issued. Loss occurred.

London Lloyds do not issue insurance. A broker for one wishing insurance posts the particulars. Underwriting members may then subscribe the shares which they wish to take. When the total is reached a policy is issued which binds only those who underwrite. Accordingly the defendant had no principal so far as the particular paper was concerned. Nevertheless, the "binder" was held to be a present contract of insurance.

The plaintiff was one party to that contract. Who was the other party? The New York court held that Marsh (defendant) was the other party. Is this result satisfactory? It seems to be despite the manner in which Marsh signed. Let it be conceded that this probably violates the purpose which Marsh had in mind. But if he did not intend to contract for himself temporarily, with perhaps an informal novation later on, what was his purpose? Probably he did not think out his problem. The result is then to hold Marsh rather than turn away the plaintiff without redress.

The facts do not seem to be controlled by *Lyon* v. *Williams*.[2] There the agent signed "for the corporations" and there were corporations for which he was authorized to make the particular contract. For the same reason dicta in certain English cases such as *Pike* v. *Ongley*[3] seem ineffective.[4]

The New York court did not advert to the rule of implied warranty of authority as a basis upon which the plaintiff might have recovered. The appellate division thought that the action was brought improperly on the contract of insurance; that it should have been instituted "for breach of contract to insure" or "for fraud or for falsely representing that he was agent for an insurance company."[5] There seems to be no reason why the doctrine of implied warranty

1. *Ell Dee Clothing Co.* v. *Marsh* (1928) 247 N. Y. 392, 160 N. E. 651.
2. (1856) 5 Gray (71 Mass.) 557.
3. (1887) 18 Q. B. Div. 708.
4. 1 *Mechem* "Agency" secs. 1174, 1175; see also 33 Harv. Law Rev. 591.
5. (1927) 220 App. Div. 701.

of authority would not suffice.[6] There are no facts to show that the plaintiff or its receiver had knowledge that Marsh had no principal at the time the binder was signed.

There is a statement in the opinion of Andrews, J., which should be challenged.

"The general rule may be stated that, where one party to a written contract is known to the other to be in fact acting as agent for some known principal, he does not become personally liable whether he signs individually or as agent. *Johnson* v. *Cate* 77 Vt. 218, 59 Atl. 830."

This seems to state a point of view inconsistent with one of the landmarks of the law of agency, *Higgins* v. *Senior*.[7] Furthermore, the declaration is not supported by the Vermont case. It does not appear to be a case of a written contract but an oral contract of sale. The written receipted bill which is therein mentioned appears to have been made some five years after the sale.

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CONSTITUTIONAL LAW—FOURTH AMENDMENT—TELEPHONE WIRE-TAPPING AS A VIOLATION.—[United States] In *Olmstead* v. *United States*[1] the charge was a conspiracy to violate the federal Prohibition Act, and the evidence showed a huge enterprise doing a business of $2,000,000 a year, and involving more than 100 persons, with headquarters in Seattle. Part of the evidence consisted in conversations held by the conspirators over telephone wires running from their offices and houses; the federal officers having attached intercepting wires in the basement of the office building and in the street near the homes.

Was this evidence obtained in violation of the Fourth Amendment? If yes, it was plainly inadmissible under *Weeks* v. *United States*[2] and later rulings. No, answered five judges; Yes, answered four.

The Chief Justice's opinion, for the majority, divides the problem under four heads. First, this overhearing of telephone-talk was not a "search or seizure" under the terms of the amendment. Secondly, it did not become inadmissible on common law grounds merely because illegal (if it were), because illegally obtained evidence is admissible, except when the illegality consists in the violation of a constitutional provision. Thirdly, the illegality of the act under a Washington state statute forbidding wire-tapping did not affect the federal law of evidence. And, fourthly, unethical methods of obtaining evidence do not afford ground for excluding it.

6. *Mechem* "Agency" secs. 1373-1385 incl.; *Tiffany* "Agency" (2nd ed.) pp. 344-349.

7. (1841) 8 M. & W. 834, followed in *Gordon Malting Co.* v. *Bartels Malting Co.* (1912) 206 N. Y. 528.

1. 48 Sup. Ct. Rep. ——, June 4, 1928.

2. 232 U. S. 383, 34 Sup. Ct. Rep. 341.