CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

UNITED STATES FIDELITY AND GUARANTY CO (DEFENDANT) ..... } APPELLANT;

AND

THE FRUIT AUCTION OF MONTREAL (PLAINTIFF) ..... } RESPONDENT.

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*May 11, 14..
*June 12.

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

Insurance—Fidelity or guarantee bond—Employer's declaration—Warranty—Representation—Material concealment—Statements by employer not mentioned in the policy—Arts. 2468, 2485, 2487, 2489, 2490, 2491 C.C.—R.S.Q. 1909, ss. 7027, 7028.

The respondent's action was brought to recover $7,035.29 on two policies or fidelity guarantee bonds issued in 1922 and renewed in 1923, by each of which the appellant undertook to indemnify the respondent up to $10,000 for any loss sustained as the result of any act of fraud or dishonesty on the part of two of its employees, the cashier and his assistant. At the time of the issuance of the policies and of their renewals, the respondent, through its secretary, declared, in answer to written questions put by the appellant, that these employees were not then in default, that all moneys or property in their control or custody had been accounted for, and that the means of ascertaining the correctness of their accounts would be, in the case of the cashier, their checking by auditors every month and, in the case of the assistant cashier, a daily accounting by him to the cashier. It was agreed that "the above answers (were) to be taken as conditions precedent and as the basis of the bond applied for or any renewal or continuation of the same." But these statements were not mentioned or set out in the policies or in the renewal certificates. At the time of the application for the policies and of their renewals, the assistant cashier was already a defaulter, but not to the knowledge of the respondent.

Held, that, in cases under the law of Quebec, where the insurance company denies its responsibility on the ground that some answer or statement was untrue or that some term or condition was not re-

*PRESENT:—Anglin C.J.C. and Mignault, Rinfret, Lamont and Smith JJ.

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spected or observed by the insured, the first inquiry is whether such term, condition, answer or statement is set out in full on the face or back of the policy, and if it is, it must of course be given effect to; but if it is not, the term, condition, answer or statement cannot be regarded as a warranty or a condition precedent.

Held also, that the answers and statements of the respondent were not warranties or conditions precedent, but merely representations which fairly and reasonably interpreted according to the evidence, were substantially true and involved no material concealment. Moreover, these answers and statements, not being mentioned or even referred to in the policies, did not legally form part of the contract and could not affect or control the terms and conditions of the policies.

Judgment of the Court of King's Bench (Q.R. 45 K.B. 311) aff.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the Superior Court, Boyer J. and maintaining the respondent's action.

The material facts of the case and the questions at issue are stated in the above head-note and in the judgment now reported.

John Hackett K.C. for the appellant.

Eug. Lafleur K.C. and O. S. Tyndale K.C. for the respondent.

The judgment of the court was delivered by

RINFRET J.—The action is based on two policies or fidelity guarantee bonds by each of which the appellant undertook to indemnify the respondent up to the sum of $10,000.00, by one: for any loss which the latter might sustain as a result of any act of fraud or dishonesty by Thomas James Cambridge, employed by the respondent as bookkeeper and cashier; and by the other: for any such loss sustained through the fraud or dishonesty of J. A. L. Cadieux, employed by it as assistant-cashier.

The two policies were issued on or about the 19th June, 1922 but, by their terms, they applied to the period of one year beginning on the 12th June, 1922 and, in May, 1923, both were renewed for another year from the 12th June, 1923.

The policy relating to Cadieux was lost, but it was admitted that it contained the same terms and conditions as the other.

(1) (1928) Q.R. 45 K.B. 311.

The policy relating to Cambridge, after reciting his name, description and employment, reads as follows:

Whereas, said employee has been required to furnish this bond.

Now, therefore, in consideration of a premium paid for the period from June 12, 1922, to June 12, 1923, at 12 o'clock noon, it is hereby agreed, that, subject to the conditions set forth in this bond, the UNITED STATES FIDELITY AND GUARANTEE COMPANY, a body corporate, hereinafter called the "surety," shall, within three months next after proof of loss as hereinafter set forth, reimburse the employed to the extent of ten thousand 00/100 dollars, and no further for all pecuniary loss sustained by the employer of money, securities or other personal property in the possession of the employee, or for the possession of which he is responsible, by any act or acts of fraud or dishonesty committed by the employee in the performance of the duties of the office or position in the service of said employer as aforementioned, and occurring during the continuance of this bond and discovered and notified to the surety within six (6) months after the expiration or cancellation of this bond, within six (6) months after the death, resignation or removal of the employee prior to the expiration or cancellation of this bond.

This bond is issued subject to the following conditions:

1. The employer shall give notice by registered letter addressed to the president of the surety at its home office, Baltimore, Maryland, promptly after becoming aware of any act which may be made the basis of a claim hereunder.

2. The employer shall, within ninety (90) days after date of said notice, file with the surety an itemized claim hereunder, duly sworn to, and if required the employer shall produce for investigation by the surety at the office of the employer, all books, vouchers and evidence which may be required by the surety.

3. There shall be no liability on this bond for any act or acts of fraud or dishonesty committed by the employee after the employer has knowledge of any act which may be made the basis of a claim hereunder.

4. This bond may be cancelled at any time if the surety shall so elect, by giving thirty (30) days' notice in writing to the employer and refunding the unearned premium upon the surrender of the bond, the cancellation to take effect at the expiration of said thirty days.

5. If any act of the employee causing a loss to the surety shall constitute a crime, the employer shall, at the expense of the surety, lend every assistance to bring the employee to justice.

6. No action of any kind or description shall be brought to recover any claim on this bond unless the same shall be commenced within a period of twelve (12) months next after the employer shall have filed the notice as provided in the first condition.

7. If the employer be a corporation, the knowledge of an officer or director thereof shall be the knowledge of the employer capable of giving rise to a claim under this bond.

8. On application this suretyship may be increased or decreased by the surety, provided the surety's aggregate liability under all its suretyship on said employee shall not exceed the largest bond or engagement on the employee.

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9. This bond may be continued from year to year by the payment of the annual premium to the surety and issuance by the surety of its continuation certificate, provided that the liability of the surety shall not exceed the amount above written, whether the loss shall occur during the term above named, or during any continuation thereof, or partly during said term and partly during said continuation.

10. It is agreed, that none of the foregoing conditions shall be deemed to have been waived by the surety unless the waiver be in writing over the signature of an officer of the surety as its home office, and notice to any agent of the surety shall not be binding upon the surety nor affect a waiver or change in this contract or any part of it.

In witness whereof, the said employee has hereunto set his hand and seal, and the said surety has caused this bond to be sealed with its corporate seal, signed by its president and duly attested by its assistant secretary this 19th day of June, 1922.

Signed, sealed and delivered by the said employee in the presence of

R. G. Walker, T. J. Cambridge, (Seal)
Employee.

Attest:

United States Fidelity and Guarantee Company,

John R. Bland,
President.

F. D. Knowles, Attorney in Fact.
(Seal of surety)

The above policy and the similar one concerning Cadieux were issued upon an application made in each case by the employee, whereupon The United States Fidelity and Guaranty Company, the appellant, wrote to The Fruit Auction of Montreal Limited, the respondent:

An application has been made to this company to issue a bond of security for Mr. ———— as (stating the employment) in your service, at Montreal, to the amount of $10,000. The company desires to have answers to the following questions, and the answers will be taken as the basis of the bond if issued.

The respondent answered the questions in writing and signed them together with the following declaration:

It is agreed that the above answers are to be taken as conditions precedent and as the basis of the said bond applied for, or any renewal or continuation of the same, or any other bond substituted in place thereof, except as specifically changed, that may be issued by the United States Fidelity and Guaranty Company to the undersigned, upon the person above named.

In May, 1923, when the policies were renewed and continued for another year beginning the 12th June, 1923, the appellant had written to both Cambridge and Cadieux the following letter:

We hereby notify you that the current premium of $50 on the above numbered bond, issued by this company on your behalf, for $10,000 to The

Fruit Auction of Montreal Ltd., will be due on the 12th day of June next.

The premium must be paid on or before the date of expiration and a continuation certificate secured, otherwise the bond will lapse.

Kindly have the certificate below filled in and signed by your employer and forward with the premium to Mr. F. O. Knowles, Montreal, Que., when the renewal receipt will be sent you.

The certificate therein referred to was as follows:

To the United States Fidelity and Guaranty Company:

This is to certify, that the books and accounts of (here the name and employment of Cambridge or Cadieux) were examined by us from time to time in the regular course of business and we found them correct in every respect, all moneys or property in his control or custody being accounted for, with proper securities and funds on hand to balance his accounts, and he is not now in default.

He has performed his duties in an acceptable and satisfactory manner, and no change has occurred in the terms or conditions of his employment as specified by us when the bond was executed.

Exceptions: None.

Dated at Montreal, this 15th day of May, 1923.

The Fruit Auction of Montreal Limited

{Employer Corporate Body}

By Jas. R. Caldwell,
Secretary (Official capacity.)

(Seal)

If a corporation, affix corporate seal.

This notice must not be delivered as a continuation certificate.

This certificate was signed and returned by the respondent and the renewal receipts or continuation certificates were then issued by the company.

On the 16th January, 1924, certain entries in the respondent's bank books aroused the suspicions of the directors. The next day Cambridge and Cadieux admitted irregularities. A complete audit of the books was immediately started and, after many days of investigation, the loss sustained by the respondent was reported as $1,386.48 through the acts of Cambridge and $5,918.81 through the acts of Cadieux. The appellant would not admit its responsibility and consequently action was brought for the sum of $7,305.29, the total of the two amounts above mentioned.

The appellant was regularly notified in accordance with the policies. The respondent has proven a pecuniary loss of $7,305.29 through the acts of fraud or dishonesty committed by Cambridge and Cadieux in the performance of their duties during the currency of the policies. It is, there-

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fore, entitled to recover that sum from the appellant (save $892.87 abandoned at the trial), unless the appellant be right in its contentions now presently to be stated.

Among the questions asked from and answered by the respondent when the policies were issued were the following:

In the case of Cambridge:

11. To whom and how frequently will he account for his handling of funds and securities? To auditors monthly.

12. (*a*) What means will you use to ascertain whether his accounts are correct? Checking of all accounts by above.

(*b*) How frequently will they be examined? Monthly.

(*c*) If applicant is a salesman or collector, are statements rendered to customers in arrears, and at what periods?

(*d*) If applicant is an insurance agent, state period when reported settlements are required.

13. When were his accounts last examined? Month of May.

14. Were they at that time in every respect correct and proper securities and funds on hand to balance? Yes.

15. Is there now or has there been any shortage due you by applicant? No.

16. (*a*) Is he now in debt to you? No.

In the case of Cadieux:

11. To whom and how frequently will be account for his handling of funds and securities? Daily to cashier.

12. (*a*) What means will you use to ascertain whether his accounts are correct? Checking by cashier.

(*b*) How frequently will they be examined? Daily.

(*c*) If applicant is a salesman or collector, are statements rendered to customers in arrears, and at what periods?

(*d*) If applicant is an insurance agent, state period when reports and settlements are required.

13. When were his accounts last examined? June 10/22.

14. Were they at that time in every respect correct and proper securities and funds on hand to balance? Yes.

15. Is there now or has there been any shortage due you by applicant? No.

Statements to the same effect, it will be remembered, were also made in the certificates signed by the respondent when the policies were renewed.

The appellant now contends that these answers and statements were warranties and that in so far as they were affirmative as to facts they were untrue and misleading, in so far as they were promissory, they were not respected, observed or complied with by the respondent.

The Superior Court and the Court of King's Bench refused to regard these answers and statements as warranties

or conditions precedent. In their view, they were only representations. As they were held to have been made in good faith, as the facts were found to be substantially as represented and there was no material concealment, the action was accordingly maintained by both courts.

What we have now to consider is whether both courts have erred as to the nature and effect of the respondent's statements and certificates.

At the outset we think a clear distinction ought to be made—although not indicated in the judgments below—between the case of Cambridge and that of Cadieux.

The proofs of loss filed with the appellant in accordance with the policies were the result of the investigation made by the auditors immediately following the discovery of irregularities in the books of the two employees. These proofs contain itemized statements and form the basis of the claim against the appellant. The evidence at the trial was strictly confined to them and no evidence was offered of any other moneys misappropriated, stolen or embezzled. Their accuracy was conceded. They must, therefore, be taken to shew exactly the situation of Cambridge's and Cadieux' accounts as they stood when the respondent made its answers on the 12th day of June, 1922 or signed the certificates on the 15th day of May, 1923.

If we look at the proofs of loss in the case of Cambridge, we find that not only had he no shortage when the policy was issued in June, 1922, but he actually had an overage of $10.57. No cash was proven to have been received by Cambridge and not entered in the books, no moneys illegally withdrawn before the 15th June, 1923. A statement of I.O.U's of his for $526.30 is dated the 17th November, 1923. True it contains an enumeration of several I.O.U's, but for these no other date was proven. The date of the 17th November, 1923 was sufficient for the respondent's purpose to shew that the misappropriation occured during the continuance of the policy. If the appellant wished to connect the I.O.U's with the dates of the answers before the issue of the policy or of the certificate before the renewal, it was incumbent upon it to establish this connection. Not even an attempt was made to do so and the appellant was apparently content to accept the dates appearing in the proofs

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of loss and the exhibits thereto attached as accurate. Upon the evidence, Cambridge's accounts were correct both on the 12th of June, 1922 and on the 15th of May, 1923. There was then no shortage due by him and he was not indebted to the respondent on either of those dates. The result is that the appellant has utterly failed to make out a case against respondent, as regards Cambridge, on the ground of untruthfulness in the answers or in the statements of the certificate for renewal.

This does not however entirely dispose of Cambridge's case, because of the complaint that the so-called promissory warranties were not complied with. But it will be more convenient to discuss the nature and effect of these alleged warranties together with those invoked in Cadieux' case.

For that purpose, a few facts must be adverted to. In that respect, we adopt the findings of the trial judge, concurred in by the Court of King's Bench, and fully justified by the record.

At the time of the application for the policies as well as at the time of their renewal, Cadieux was already a defaulter. Before the application he had embezzled the sum of $892.87, and it was for that reason that at the trial the respondent agreed to reduce its claim by that amount. When the policy was renewed, Cadieux' shortage was considerably larger. The respondent, on the other hand, had no knowledge of this and only became aware of Cadieux' infidelity the day before the appellant was notified, while it realized the extent of such infidelity only after the investigation was completed.

Now the appellant points out that, in answer to its questions, the respondent, in June, 1922, had stated that, at that time, Cadieux' accounts were " in every respect correct and proper securities and funds on hand to balance," that there was not then nor had there been any shortage due by Cadieux and that he was not in debt to the respondent.

Likewise, in the certificates for renewal, it was stated that Cadieux' books were examined by the respondent in the regular course of business and were

found correct in every respect, all moneys or property in his control or custody being accounted for, with proper securities and funds on hand to balance his accounts and he is not now in default. He has performed his duties in an acceptable and satisfactory manner * * *.

The respondent further invoked the agreement

that the above answers (were) to be taken as conditions precedent and as the basis of the said bond applied for, or any renewal or continuation of the same,

and urged that notwithstanding the respondent's good faith, the falsity of its declarations had the effect of avoiding the contract.

According to the Civil Code of Quebec, the respondent was the insured under the policies now in question. Article 2468 C.C. reads as follows:

2468. Insurance is a contract whereby one party, called the insurer or underwriter, undertakes, for a valuable consideration, to indemnify the other, called the insured, or his representatives, against loss or liability from certain risks or perils to which the object of the insurance may be exposed, or from the happening of a certain event.

The employees, Cambridge and Cadieux, were the applicants. They are so referred to throughout the questions sent by the appellant to the respondent before the issue of the policies.

The respondent was

obliged to represent to the insurer fully and fairly every fact which shews the nature and extent of the risk, and which may prevent the undertaking of it, or affect the rate of a premium (Art. 2485 C.C.).

Misrepresentation or concealment either by error or design, of a fact of a nature to diminish the appreciation of the risk or change the object of it, is a cause of nullity. The contract may in such case be annulled although the loss has not in any degree arisen from the fact misrepresented or concealed (art. 2487 C.C.).

But

the obligation of the insured with respect to representation is satisfied when the fact is substantially as represented and there is no material concealment (Art. 2489 C.C.).

Two more articles of the Quebec Civil Code should be cited:

2490. Warranties and conditions are a part of the contract and must be true if affirmative, and if promissory must be complied with; otherwise the contract may be annulled notwithstanding the good faith of the insured.

They are either express or implied.

2491. An express warranty is a stipulation or condition expressed in the policy, or so referred to in it as to make part of the policy.

Implied warranties will be designated in the following chapters relating to different kinds of insurance.

The "different kinds of insurance * * * designated in the following chapters" are marine insurance, fire insurance and life insurance, bottomry and respondentia. There are under the Code, no implied warranties in fidelity bonds or policies such as we have here.

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These articles of the Code should be read together with the following "general provisions applicable to all companies or associations" in the Revised Statutes of Quebec, 1909, in force when the appellant issued the policies:

7027. When the subject matter of any insurance contract is property or an insurable interest within the limits of the province, or is in connection with a person domiciled or resident therein, any policy, certificate, interim receipt, or writing evidencing the contract shall, if signed, countersigned, issued or delivered in the province, or committed to the post office or to any carrier, messenger or agent, to be delivered or handed over to the assured, his representative or agent in the province, be deemed to evidence a contract made in the province, and the contract shall be construed according to the law of the province, and all moneys payable under the contract shall be paid at the office of the chief officer or agent of the company or association affecting the insurance in the province. This article shall have effect notwithstanding any agreement, condition or stipulation to the contrary.

7028. 1. Where an insurance contract made by any company or association, is evidenced by a written instrument, the company or association shall set out all the terms or conditions of the contract in full on the face or back of the instrument forming or evidencing the contract, and, unless so set out, no term or condition, stipulation or proviso modifying or impairing the effect of any such contract made or renewed after the tenth day of February, 1909, shall be good and valid or admissible in evidence to the prejudice of the assured or beneficiary.

2. Nothing contained in this article shall exclude the proposal or application of the assured from being considered with the contract, and the court shall determine how far the insurer was induced to enter into the contract by any misrepresentation contained in the said application or proposal.

With Mr. Justice Greenshields in the Court of King's Bench, we apprehend that the solution of the present case must be found in the law above stated, however valuable and interesting may be the references made by counsel for both parties to the decided cases and the authorities in England or United States.

The policies now before us are contracts in favour and for the benefit of the Fruit Auction Company, although not signed by the latter.

Under the statute of Quebec, all terms and conditions had to be set out

in full on the face or back of the instrument forming or evidencing the contract, and, unless so set out, no term or condition * * * (was) good or valid or *admissible in evidence* to the prejudice of the assured or beneficiary.

(See *Kiernan* v. *Metropolitan Life* (1). The "instrument"

(1) [1925] S.C.R. 600.

evidencing the contract referred to in sect. 7028 of the statute is undoubtly the policy and the renewal receipt. This is made still clearer by the provision in subsection 2 of 7028 that the proposal or application may be " considered with the contract."

Warranties, by force of arts. 2490 and 2491 C.C., in order to be " a part of the contract " must be " expressed in the policy, or so referred to in it as to make part of the policy."

In this case, we find set out in the policies or the renewal receipts neither the documents of the 12th June, 1922 containing the questions and answers with the declaration at the foot signed by the respondent, nor the certificates for renewal sent by the respondent on the 15th May, 1923. These answers and statements, these declarations and certificates of the respondent are nowhere mentioned or even referred to in the policies or renewals, nor is it therein anywhere expressed that they are to be taken as conditions precedent or warranties. They do not therefore legally form part of the contract and they do not affect or control the terms and conditions of the policy. In fact, " not having been set out in the policies," they are expressly declared by the statute not to be " good and valid " terms and conditions of the contracts and they were not even " admissible in evidence " against the respondent beneficiary.

The policy is above recited in full. In terms, it is declared subject to ten enumerated conditions, none of which is alleged to have been infringed. On the other hand, condition no. 3 specifically stipulates that

> there shall be no liability on this bond for any act or acts of fraud or dishonesty committed by the employee after the employer had knowledge of any act which may be made the basis of a claim hereunder.

The implication is that until knowledge is brought home to the employer, the liability of the insurance company remains unaffected.

As a result, the statements made by the respondent in its answers and certificates were neither warranties nor conditions precedent and they were no part of the terms and conditions of the contracts.

That is the fundamental distinction between this case and other cases where the answers and statements of the in-

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sured were incorporated in the policies or bonds, such as *The Harbour Commissioners of Montreal* v. *The Guarantee Company of North America* (1). In that case, the circumstances were so vastly different as to render the decision quite inapplicable to the present one. There was however this main distinction that the promises and conditions there held to have been disregarded by the insured, and for the non-fulfilment of which he was declared not entitled to recover, were stipulated in the policies themselves as express conditions upon which they were granted.

It is hardly necessary to point out that the judgment of this court in *The Dominion of Canada Guarantee and Accident Company, Limited* v. *The Housing Commission of the City of Halifax* (2), can have no bearing upon the present decision, based entirely upon the special statute and the Civil Code of Quebec. Perhaps it should be noted, however, that, in that case,

> it was recited in the policy that the Commission had made certain statements in writing to the company in (its) application

and these statements were expressed to be "material" and conditions precedent to the right of the employer to recover under the policy.

In cases under the law of Quebec, where the insurance company denies its responsibility on the ground that some answer or statement was untrue or that some term or condition was not respected or observed by the insured, the first inquiry is whether such term, condition, answer or statement is set out in full on the face or back of the policy and if it is, it must of course be given effect to; but if it is not, the term, condition, answer or statement cannot be regarded as a warranty or a condition precedent. All that remains for the Court, if such term, condition, answer or statement is contained in the proposal or application of the assured, is to determine how far it constituted a misrepresentation which induced the insurer to enter into the contract. The difference is that while the warranty of the existence of a fact must be literally true and it is no answer to say that (the) declaration was made in good faith and in ignorance of its untruth, while promissory warranties must be strictly

(1) (1893) 22 Can. S.C.R. 542. (2) [1927] S.C.R. 492.

complied with (C.C. 2490); with respect to representation, it is sufficient if the fact represented be substantially true and there be no material concealment.

These are matters for the court to determine, as the statute expressly states, and in each case therefore it becomes largely a question of ascertaining the true meaning and intent of the answers and statements made by the assured, in the light of the special circumstances and context.

We should now consider some judgments of this court such as: *Arnprior* v. *United States Fidelity* (1); *Railway Passengers Assurance Company* v. *Standard Life* (2), *London Guarantee & Accident Company* v. *City of Halifax* (3) and *Rural Municipality of Victory* v. *Saskatchewan Guarantee & Fidelity Company* (4) to which we have been referred by counsel. Each of these cases turned mainly upon the determination of the scope of the answers or statements of the assured and of their materiality in the assumption of the risks by the assurers.

The Corporation of the Town of Arnprior v. *The United States Fidelity and Guaranty* (1) was from the province of Ontario. This court had under consideration section 144 of the Ontario *Insurance Act* (R.S.O. 1897, c. 203) which was almost verbatim the same as s. 7028 R.S.Q. 1909. The principal point involved appears to have been whether the rule of law contained in the statute was inoperative unless it was itself " embodied by an express stipulation in the insurance policy." It was held that the Act did not

require the policy to state that any particular representation was material to the contract, its effect being only that no misrepresentation shall avoid the policy unless it is material.

There, by the terms of the bond itself, reference was made to the fact of the insured having delivered to the insurance company

a statement in writing setting forth the nature and character of the office or position to which the employee has been elected or appointed, the nature and character of his duties and responsibilities and the safeguards and checks to be used upon the employee in the discharge of the duties of said office or position, and other matters, which statement is made a part thereof.

(1) (1914) 51 Can. S.C.R. 94.
(2) (1921) 63 Can. S.C.R. 79.
(3) [1927] S.C.R. 165.
(4) [1928] S.C.R. 264.

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The assured was asked what means were used and would be used to ascertain whether the accounts of a tax collector were correct, the answer was: the "auditors examine the rolls and his vouchers from treasurer yearly." The auditors never had in fact examined a single collector's roll and never, in any succeeding year, was such examination made. Upon the evidence and the context of the questions, the majority of the court held that this was a material misrepresentation avoiding the policy.

So, in *Railway Passengers Assurance* v. *Standard Life* (1), the assured's answers were held to have been evasive, misleading and so framed as to give the impression that the employee's accounts were audited monthly, which they were not, and thus they did not "represent to the insurer fully and fairly every fact which shows the nature and extent of the risk" within the terms of art. 2485 C.C. The policy itself contained an agreement by the insured whereby the truth of its answers to the questions of the insurer was made the basis of the contract.

London Guarantee & Accident Co. v. *City of Halifax* (2) was another case of a tax collector. Several points were raised for consideration by the court, but one of them was the complaint of the insurance company respecting certain answers by the city to questions submitted with regard to the proposed guaranty, which answers, along with others, were to be taken as the basis of the contract. Newcombe J., writing for the majority of the court, reviewed the evidence at considerable length and with the greatest care, as a result of which he came to the conclusion that under all the circumstances, the answers complained of, when given a reasonable interpretation, could not be relied on to prevent recovery under the bond.

In *Municipality of Victory* v. *Saskatchewan Guarantee Fidelity Company*, (3) there was a jury trial. The jury found that the representations made by the assured were true. And, of course, the main inquiry was whether there was evidence on which the jury were entitled to find as they did. The conclusion, unanimously arrived at by the court, was that the verdict on that ground was justified, but this

(1) 63 Can. S.C.R. 79. (2) [1927] S.C.R. 165.
(3) [1928] S.C.R. 264.

conclusion was reached after full consideration of all the particular circumstances and after viewing the questions and answers as a whole, in the light of their fair and reasonable interpretation.

It should be added that, of the four judgments just referred to, only one, *Railway Passengers* v. *Standard Life* (1) came under the Quebec Code. When comparing them with the present case, due allowance must be made for the fact that the relevant law was different and that considerations which must bear upon our judgment here could not be made to apply there. In fact these previous decisions are now discussed only because counsel laid stress on their possible bearing in the present case.

The *Arnprior Case* (2) and the *Railway Passengers Case* (1) were decided against the assured. The *City of Halifax Case* (3) and the *Municipality of Victory Case* (4), on the contrary, were decided against the insurance company. This seems to indicate that, strictly speaking, no precedent can be found in any of them for the propositions propounded by the appellant. The question whether there was material misrepresentation is obviously one of fact, which the court must determine according to the peculiar features of each case.

Let us therefore examine the facts and circumstances with which we are confronted. The answers and statements which are made the basis of the appellant's complaint have already been recited. They are not in the application and the respondent was not the applicant. In the *Arnprior Case* (2), this fact was observed and two at least of the learned judges of this court held that this would preclude the case from being "brought within the literal terms" of the Ontario statute (which was the same as section 7028 R.S.Q.). We shall assume nevertheless that the document signed by the present respondent could properly be described as part of the "proposal" of the assured within the meaning of the statute.

The proof shews that the respondent had retained the services of a chartered accountant of many years' experi-

(1) 63 Can. S.C.R. 79.
(2) 51 Can. S.C.R. 94.
(3) [1927] S.C.R. 165.
(4) [1928] S.C.R. 264.

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ence. The books of Cambridge and Cadieux were audited by him monthly. His monthly reports were sent to the board of directors of the respondent in the following form:

> I have audited the books and accounts of your company including the cash vouchers for the operations of the month of * * * and I have found the whole correct. I herewith enclose you the following statements:
>
> 1. Trial balance.
> 2. Accounts receivable.
> 3. Accounts payable.
>
> Respectfully submitted,
>
> Yours truly,
>
> (Signed).

Then followed the monthly trial balance subscribed with the words: "Audited and verified" and signed by the accountant; and then the list of accounts receivable and payable initialed by him. By every one of these monthly reports the accounts were stated to be correct in every respect, except in a few minor points, which were immediately taken up by the directors and for which satisfactory explanations were promptly given. Not one of the reports gave the slightest indication of any ground for suspicion. In fact, the auditor himself suspected nothing until the discovery made by the directors at their meeting of the 16th January, 1924. As appeared at the trial, the auditing was not all it should have been. In fact, the auditor counted the cash on hand only about once a year. The appellant strongly relies on this and claims that accordingly the undertaking of the company to have Cambridge account monthly for the funds and securities he had on hand was not fulfilled.

But, what was the representation made by the respondent? What could the appellant fairly and reasonably understand by the answers the respondent made to its questions, if not that the respondent had engaged the services of a reputable accountant, that this accountant would audit the books of Cambridge and Cadieux monthly, and that, in the course of doing so, he would check the accounts and would be expected to perform all the ordinary duties of an auditor? The appellant was thus informed that the respondent would trust to its auditor for these purposes, and its answers implied nothing more. The appellant did not expect that the directors or the officers of the respondent

would check the work of their auditor and would review it to find out whether it had been properly carried out. They had the right to believe that it would be, and to assume that it was. Moreover, as stated by one of the expert accountants heard in this case, a review of the auditor's work was quite out of the question. It would not be apparent to anybody who looked at the books that they were not correct. This

would not appear unless one actually set himself down for an absolute investigation.

The insurance company never expected that such investigation would be made. It knew that the respondent, by its answer, meant nothing more than that it undertook to have an auditor, reputed to be competent, and to see that this auditor should make a monthly audit. This representation was fulfilled, and the respondent did its whole duty under its undertaking. The evidence of the experts is that the monthly reports which the directors got from the auditor

would imply that the cash had been examined and counted and (that) the cash stated to be found (was) on hand.

The words "audited and verified" would be understood to mean that the auditor had checked the cash and

it would be reasonable, on receiving this report, to think the cash had been checked.

The respondent did not undertake to go beyond that; its answers did not mean that it would; nor could the appellant reasonably interpret them as so meaning.

Likewise, when the respondent represented that Cadieux would account "daily to the cashier" and that "checking by the cashier" would be the means of ascertaining whether his accounts were correct, the fair meaning of this representation was that they would have a cashier under whom Cadieux would work and whose duty it would be to check up Cadieux. And so they had. Cambridge, the cashier, had been in their employ and they had known him for quite a while. He was a trusted employee. They had absolute confidence in him and up to that time had had no reason to doubt his fidelity. It would be the ordinary duty of any cashier to check the cash daily. The directors would naturally assume that he was doing his duty and they were entitled to rely upon that. The appellant could not reasonably understand that the answer now being considered meant anything else. The respondent did not guarantee

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the competency of the auditor nor the fidelity of the cashier. If the insurance company wished to secure such a warranty, under the law of Quebec it was incumbent upon it to have it expressed in the policy. But it may be that, in such a case, it would have found it difficult to get the risks.

These considerations apply to the other answers of the respondent and to the certificates for renewals. They do not go further than the information and honest belief of the officer who signed them. It had been indicated to the insurance company that the means to be adopted by the respondent to ascertain whether the accounts were correct would be the examination by the auditor and the checking by the cashier. The auditor was there and never reported anything incorrect; the cashier was there and never reported any irregularity. It was intended that, in its answers and in its statements in the certificates, the respondent should give to the appellant the information which it had from its auditor and from its cashier. Condition no. 7 of the policies stipulated that "the knowledge of the employer" was that of a director or an officer. The auditor, in this case, did not know any more than what he reported. If Cambridge knew more, he never disclosed it to an officer or a director of the respondent. He was not himself such an officer or director.

The insurance company knew that the answers and statements must be based on the information obtained from the auditor and the cashier. They were the only persons who could properly give such information and who were competent to give it. Information from any other employee or officer would not, under ordinary circumstances, be so dependable. In fact, the insurance company really agreed that the information should be obtained from these two men, and it might have had a ground of complaint if the information on which the answers and statements were based had been procured from any other source less likely to be reliable.

On the whole, the answers and statements of the respondent, under the relevant law and statute, were not warranties or conditions precedent, but merely representations. These representations, in the light of their fair and reasonable meaning, were substantially true and involved no

concealment. The source from which the information conveyed, and which served as a basis for the documents signed by the respondent, would be procured was, or should have been, fully understood by the appellant company, and it must be held to have entered into the contracts and renewals with a complete appreciation of the scope and purport of the answers given and of the statements made by the respondent.

We would confirm the judgment of the trial judge unanimously upheld by the Court of King's Bench of Quebec. The appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Foster, Place, Hackett, Mulvena, Hackett and Foster.*

Solicitors for the respondent: *Brown, Montgomery and McMichael.*