1928
*Feb. 15, 16.
*Mar. 27.

RURAL MUNICIPALITY OF VICTORY No. 226 (PLAINTIFF) ..... } APPELLANT;

AND

SASKATCHEWAN GUARANTEE AND FIDELITY COMPANY, LIMITED (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL OF SASKATCHEWAN

Guarantee—Bond guaranteeing faithful discharge of duties by treasurer of municipality incorporated under Rural Municipality Act, Sask. (R.S.S. 1920, c. 89)—Default by treasurer—Liability of guarantor—Representations by municipality in certificates given to secure renewals of bond—Construction of certificates; contra proferentem rule—Certificate of auditor, whether representation of municipality—Alleged untruth of representations—Jury's findings—Jurisdiction of court of appeal to substitute its findings for those of jury.

Plaintiff was a rural municipality incorporated under *The Rural Municipality Act,* R.S.S. 1920, c. 89. Defendant executed a bond as security for the faithful discharge by P. of his duties as plaintiff's treasurer. The bond was renewed from year to year on a certificate, signed each year by plaintiff's reeve and auditor, in the form forwarded by the defendant, which contained representations, the truth of which, in certificates of March 1, 1922, and March 16, 1923, was challenged by defendant, to the effect that all moneys in P.'s control or custody had been accounted for, and that he had "performed his duties in an acceptable and satisfactory manner." P. being found short in his cash, plaintiff sued on the bond. The jury found that said representations were material and relied on by defendant, but that they were true, and judgment was given at trial against defendant. This was reversed by the Court of Appeal (21 Sask. L.R. 551) which held that the jury's finding that the representations were true was perverse.

Held (1): As the members of the Court of Appeal were of opinion that they had all the facts before them and that no further evidence could be produced which would alter the result, that court had jurisdiction to draw inferences of fact inconsistent with the jury's finding, and to give effect to the same (Sask. Court of Appeal Rule 44; *Calmenson* v. *Merchants' Warehousing Co. Ltd.,* 125 L.T. 129, at p. 131; *Skeate* v. *Slaters Ltd.,* [1914] 2 K.B. 429; *Everett* v. *Griffiths,* [1921] 1 A.C. 631).

(2): Even if, as *The Rural Municipality Act* now reads, the auditor of a municipality can properly be called an officer thereof, he is not an officer or agent to make any representations binding the municipality; nor did the fact that he signed the certificates constitute a holding out by plaintiff that he was authorized to make any representation on its behalf; the information required by defendant by the auditor's signature to the certificates was secured at defendant's own risk from the auditor as an individual and not as a representative of the municipality.

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

(3): Although the truth of the representations was not the subject of warranty (as in *Dom. of Canada Guaranty & Accident Co. Ltd.* v. *Halifax Housing Commission,* [1927] S.C.R. 492, and other cases referred to), yet, it being found that they were material and were relied upon, defendant was entitled to have the renewal of the bond set aside if it could successfully challenge their truth. (The certificate being framed by defendant, any ambiguity in its language should be construed in plaintiff's favour—*Ont. Metal Products Co.* v. *Mutual Life Ins. Co. of New York,* [1924] S.C.R. 35, at p. 41; *Condogianis* v. *Guardian Ass. Co.* [1921] 2 A.C. 125, at p. 130). As to the certificate of March 1, 1922, in view of the evidence, and having regard to the questions and answers in the application for the bond, from which the jury would be justified in concluding that defendant knew that plaintiff would depend on the auditor's statement, and as the reeve was not obliged to check the auditor's statement or P.'s books, the jury were entitled to affirm, as they did, the truth of the representations. But as to the certificate of March 16, 1923, the members of the council of plaintiff municipality knew at that time of a discrepancy between the surplus shown on the auditor's balance sheet and P.'s cash; the reeve should not have been satisfied with P.'s explanation of this, and should not have certified without notifying defendant of the discrepancy; the representation that all moneys in P.'s custody had been properly accounted for was not true, and, even if innocently made, it induced a renewal of the bond, which renewal defendant was entitled to have declared void. In the result, therefore, the plaintiff's appeal was allowed in part, the defendant being held liable only for the sum (with interest) in which the jury found that P. was in default when the bond was renewed in 1923.

APPEAL by the plaintiff from the judgment of the Court of Appeal of Saskatchewan (1) which reversed the judgment of Embury J. who, after certain findings of fact by the jury, gave judgment for the plaintiff against the present respondent (defendant) for the sum of $10,000 on a claim made by the plaintiff under a bond entered into by the present respondent as security for the faithful discharge by one Paisley of his duties as treasurer of the plaintiff, a rural municipality incorporated under the *Rural Municipality Act* of Saskatchewan. The Court of Appeal set aside the judgment of Embury J. and ordered that the plaintiff's action against the present respondent be dismissed with costs. By the judgment now reported the plaintiff's appeal was allowed in part, with costs in this Court, and judgment directed to be entered for the plaintiff for $3,600 with the costs of the action, the costs in the Court of Appeal to go to the appellant in that court (the

(1) 21 Sask. L.R. 551; [1927] 2 W.W.R. 577.

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present respondent). The material facts of the case are sufficiently stated in the judgment now reported.

G. H. Yule K.C. for the appellant.

E. B. Jonah K.C. for the respondent.

The judgment of the court was delivered by

LAMONT J.—This is an appeal from the decision of the Court of Appeal of Saskatchewan (1), reversing the judgment in favour of the appellant municipality entered by the trial judge upon the findings of the jury. The action was brought by the municipality against J. R. Paisley, its former secretary-treasurer, for moneys misappropriated by him, and against the respondents (hereinafter called the company) on its bond as surety for Paisley's fidelity.

The material facts briefly are: In January, 1920, the municipality was established under the provisions of *The Rural Municipality Act*. J. B. Fitzmaurice was its first reeve, and J. R. Paisley its first secretary-treasurer. Under the Act the secretary-treasurer was required to furnish to the municipality a bond for the faithful discharge by him of his duties as treasurer, and Paisley furnished the bond sued on herein, which was for $10,000.

On December 18, 1920, the respondents sent to Paisley the following communication:

Renewal No..... Regina, Sask., Dec. 18, 1920.

To. JARED R. PAISLEY,
Ardkenneth, Sask.

Dear Sir:

We beg to notify you that Bond No. 8132 for $10,000 issued by this Company on your behalf to Rural Municipality of Victory No. 226 will expire on the 1st day of January next. Issued the 1st day of January, 1920.

The premium $40 should be paid on or before the date of expiration and a RENEWAL CERTIFICATE secured, otherwise the bond will lapse.

Kindly have the certificate below filled in and signed by your employer and forwarded with remittance for premium to McCallum, Hill & Co., Regina, Sask., when the renewal receipt will be sent you.

Yours respectfully,

E. A. McCALLUM,
President.

(1) 21 Sask. L.R. 551; [1927] 2 W.W.R. 577.

To THE SASKATCHEWAN GUARANTEE & FIDELITY COMPANY, LIMITED,

This is to certify, that the books and accounts of Mr. Jared R. Paisley, Secy.-Treas., 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.

Dated at.....this.....day of.....

Signature of Employer,

.....

Official Capacity,

.....Auditor.

On February 5, 1921, Fitzmaurice, as reeve, signed the said certificate and returned it to the company. On March 1st, 1922, he signed a similar certificate. On March 16, 1923, W. J. Swan, who was then reeve, signed a further certificate, couched in the same language. The certificates were also signed by Wm. C. Inkster, who had been appointed auditor. In the fall of 1923 the council appointed Ronald Griggs & Co., chartered accountants, to make an audit of the accounts of the municipality. Their report shewed that Paisley was short in his cash some $15,000. Hence this action. The main defence of the company was that the allegations of fact contained in the certificates of the reeve, of March 1, 1922, and March 16, 1923, were not true, and that, by reason of the representations contained therein, the company had been induced to continue the bond in force from year to year.

The action was tried before Mr. Justice Embury with a jury.

The questions submitted to the jury were as follows:—

1. Did the defendant Paisley misappropriate moneys of the plaintiff municipality? Answer: Yes.

2. If so, to what amount? Answer: $11,518.69.

3. Did plaintiff municipality on March 1, 1922, represent to the company:

(*a*) That books and accounts of defendant Paisley had been examined by the municipality and its officials from time to time and in the regular course of business and found correct in all respects? Answer: Yes.

(*b*) That all moneys in his control and custody were properly accounted for? Answer: Yes.

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(c) That the said Paisley had performed his duties in an acceptable and satisfactory manner? Answer: Yes.

4. Were the said representations true? Answer: Yes.

5. If not, were they made falsely or recklessly? Answer: No answer.

6. Was each of the said representations material? Answer: Yes.

7. Did defendant the Saskatchewan Guarantee and Fidelity Company rely upon the said representations in agreeing to a renewal of the existing bond? Answer: Yes.

* * * * *

Questions and answers 8 to 12, inclusive, were exactly the same as questions and answers 3 to 7, inclusive, except that they referred to the representations made on March 16, 1923, instead of those made March 1, 1922, the answer to question 9 being the same as to question 4.

Questions 13 and 14 were as follows:

13. Was the defendant, Paisley, in default to the plaintiff municipality on March 1, 1922, and if so, what amount? Answer: No.

14. Was the defendant, Paisley, in default to plaintiff municipality on March 16, 1923, and if so what amount? Answer: Yes. $3,600.

The jury having found that the representations made were true, the trial judge entered judgment for the municipality against the company for $10,000, and against Paisley for $11,518.69.

The company appealed, with the result that this judgment was set aside and judgment entered for the company.

The reasons given by the Court of Appeal for setting aside the judgment were:

That the answers of the jury to questions 4 and 9 were perverse and unreasonable and contrary to the evidence; that Paisley's books and accounts had not been kept in any proper or satisfactory manner; that this was known to Inkster and his knowledge should be imputed to the council, and also that Inkster's representation in the certificates that the books and accounts had been correct in every respect, constituted a representation by the municipality. From that judgment the municipality now appeals to this court and asks that the judgment of the trial judge be restored for the following reasons:

1. That the Court of Appeal had no jurisdiction to substitute its own finding of fact for that of the jury.

2. That the auditor, Inkster, was neither an officer nor an agent of the municipality to make any representations

on its behalf, and his signature to the certificate in no way bound the municipality.

3. That there was evidence on which the jury were entitled to find that the representations made in the said certificates were true.

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1. The jurisdiction of the Court of Appeal to set aside the finding of the jury and to substitute therefor its own finding of fact, has its foundation in Rule 44, which declares that " the court shall have power to draw inferences of fact, and to give any judgment and make any order which ought to have been made, and to make such *further* or *other order* as the case may require * * *." These words are identical with the language of Order 58, R. 4 of the English Rules, which has been under review in a number of cases, and, although there has been some difference of judicial opinion, the weight of authority is in favour of the view expressed by Lord Atkinson in *Calmenson* v. *Merchants' Warehousing Company Limited* (1), in the following words:

> The principle which should guide the Courts of Review in setting aside, as against the weight of evidence, a verdict found by a jury on issues of fact is shortly and neatly laid down by Lord Herschell in *Metropolitan Railway Company* v. *Wright* (2), in these words: " The case was one within the province of a jury, and in my opinion the verdict ought not to be disturbed unless it was one which a jury, viewing the whole evidence reasonably, could not properly find."
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> Order LVIII, r. 4, enables a Court of Review to give to the defendant in such an action certain relief in addition to, and going much beyond, that of setting aside the verdict of the jury. It enables the court in certain cases to enter judgment for the defendant. But, according to the authorities, this extra relief should only be granted where the members of the court are of opinion (1) That they have all the facts before them; and (2) that, if a new trial were granted, no further evidence could be given which would alter the result (see *Banbury* v. *Bank of Montreal* (3). See also *Skeate* v. *Slaters, Limited* (4); *Everett* v. *Griffiths* (5).

As the members of the Court of Appeal were of opinion that the answers of the jury to questions 4 and 9 were perverse and that they had all the facts before them and that

(1) (1921) 125 L.T. 129, at p. 131.
(2) (1886) 54 L.T.R. 658; 11 App. Cas. 152, at p. 154.
(3) 119 L.T.R. 446; (1918) A.C. 626.
(4) [1914] 2 K.B. 429.
(5) [1921] 1 A.C. 631.

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no further evidence could be produced which would alter the result, the court, in my opinion, had jurisdiction to draw inferences of fact inconsistent with the finding of the jury, and to give effect to the same.

2. As *The Rural Municipality Act* now reads, I am very doubtful if the auditor of a municipality can properly be called an officer of the corporation but, even if he can, he is an officer only to " audit and report upon all books and accounts affecting the municipality " and certify to the same, and to " notify the minister, the reeve and all the councillors of any negligence, irregularity or discrepancy which he finds in the books or accounts." In no other capacity can he be employed by the municipality. S. 156. He is, therefore, not an officer or agent to make any representation on behalf of the municipality so as to bind it thereby. Nor, in my opinion, does the fact that he signed the certificates constitute a holding out by the municipality that he was authorized to make any representation on its behalf. The company requested Inkster's signature to the certificates because *prima facie* he was the person who had the most accurate knowledge of the state of the books and accounts. The obtaining of his certificate would ordinarily afford the company the most reliable information obtainable as to the performance by Paisley of his duties. That information, however, the company, in my opinion, secures at its own risk from the auditor as an individual and not as a representative of the municipality.

3. Was there evidence upon which the jury as reasonable men could find that the representations contained in the certificates were true?

Before referring to the evidence it may not be inadvisable to point out that the bond in question in this action was not a contract of warranty. There was no express agreement in this case that the truth of any representation made should be a condition precedent to the validity of the bond as in the cases referred to in the respondents' factum, of *Town of Arnprior* v. *U. S. Fidelity & Guaranty Co.* (1); *Railway Passengers' Assurance Co.* v. *Standard Life Assurance Co.* (2); *Dominion of Canada Guaranty & Accident Co.* v. *Housing Commission of Halifax* (3).

(1) (1915) 51 Can. S.C.R. 94. (2) (1921) 63 Can. S.C.R. 79.
(3) [1927] S.C.R. 492.

When the truth of a particular statement has been made the subject of warranty, it is no defence to say that the declaration was made in good faith and with a firm conviction of its accuracy. Neither is it a defence to shew that the representation was immaterial or not relied upon. Where the parties have agreed that the truth of the representation shall form the basis of the contract, the contract is voidable unless the representation is true in fact. Where the truth of the representation is not warranted, its materiality and the reliance placed upon it may be inquired into. Where, however, the truth of the representation is not warranted, but the jury have found that the representation was material and was relied upon, the contract is likewise voidable unless the representation is true, for a material misrepresentation which induces a contract, though innocently made, entitles the other contracting party to have the contract set aside. In the case before us, the jury having found that the representations made in the certificates of March 1, 1922, and March 16, 1923, were material and were relied upon, the company is entitled to have the bond set aside if it can successfully challenge the truth of the statements made. Their truth has been challenged by the company in their notice of appeal to the court below in respect of four representations—two contained in each certificate. The representations challenged in each certificate are: (*a*) That all moneys in the control and custody of the defendant Paisley had been accounted for, and (*b*) that the said Paisley had performed his duties in an acceptable and satisfactory manner.

Dealing first with the challenged representations contained in the certificate of March 1, 1922: What evidence had the jury before them as to their truth or falsity?

In the first place, they had the questions and answers furnished by the municipality when the bond was applied for, and which it was agreed should be taken as the basis of the bond and any subsequent renewal.

Question 12 reads as follows:

(*a*) What means will you use to ascertain whether his accounts are correct? Answer: Auditors.

(*b*) How frequently will they be examined? Answer: Has to be decided by council.

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In view of these questions and answers the jury, in my opinion, would be amply justified in concluding that the company knew and understood that the municipality would depend upon the auditors, and the auditors alone, to ascertain the correctness of Paisley's accounts. As to the correctness of these accounts they had the certificate of Inkster that he had examined the books and accounts for the year 1921, and that he found the same to be correct. They also had his evidence in court that when he finished the final audit for 1921, which was in the month of February, 1922, he checked up the cash and found that Paisley had on hand the amount of money which the audit shewed he should have. Inkster, although not a chartered accountant, had a certificate from the Government of Saskatchewan as an official auditor. As against Inkster's evidence the jury had the testimony of W. T. Scott of the firm of Griggs & Co., chartered accountant, who made the special audit, and whose testimony was to the effect that Paisley had not accounted for all the moneys coming to his hands in 1921. As between these two the jury were at liberty to accept the testimony of one and reject the other.

As to the proper performance by Paisley of his duties, it was contended before us, and held in the court below, that the books were not kept in an acceptable and satisfactory manner; that the test must be: Were they kept in a manner which would be satisfactory to a reasonable man? The fault attributed to Paisley was that he did not keep the books posted up to date. When money was paid to him he would give a receipt therefor, and the stub of the receipt would shew the amount which had been paid, and by whom. But when the auditor came to make his audit he found that all the amounts on the stubs had not been posted in the books, and he himself made the entries in the books which Paisley should have made. This was admitted by Paisley. Notwithstanding that Inkster swore that in making the entries he had written them up as well as he knew how, W. T. Scott, in his evidence, stated that the books had never been properly kept from the first.

Now it is important to note the information the company was seeking to obtain from the municipality by means of the certificate. Although put in the form of an allegation the company was really asking the question: Has he

performed his duties in an acceptable and satisfactory manner? Counsel for the appellant contended that the reeve by that question would understand that the company was asking him if Paisley had performed his duties in a manner satisfactory to him and his fellow councillors, and not if he had performed them in a manner which would be satisfactory to a reasonable man. It is not, in my opinion, material in this case to determine the construction which the reeve should put upon the question, because, applying the test adopted by the Court of Appeal, any man occupying the position of reeve and having before him the auditor's report for the preceding year, might very reasonably answer the question in the affirmative.

Furthermore the certificate, being in the language of the company, is to be construed in favour of the municipality, if it is ambiguous. In *Ontario Metal Products Co.* v. *Mutual Life Ins. Co. of New York* (1), Anglin J. (now Chief Justice) said:

> The insurers put such questions and in such form as they please, but they "are bound so to express them as to leave no room for ambiguity." To such a case the rule *contra proferentem* is eminently applicable.

In *Condogianis* v. *Guardian Assurance Co.* (2), Lord Shaw, in giving the judgment of the Privy Council, said:—

> The more serious proposition arose on the construction of the question and answer. In a contract of insurance it is a weighty fact that the questions are framed by the insurer, and that if an answer is obtained to such a question which is upon a fair construction a true answer, it is not open to the insuring company to maintain that the question was put in a sense different from or more comprehensive than the proponent's answer covered. Where an ambiguity exists, the contract must stand if an answer has been made to the question on a fair and reasonable construction of that question.

That the reeve did consider Paisley's work satisfactory is clear. Both he and the other members of the council were abundantly satisfied, not only as to Paisley's integrity, but also with the manner in which he performed his duty.

It was further contended that if any reasonable man had looked into the books he would have known that they had not been kept posted up. I fail to see how he would have known that, unless he also checked over the stubs of receipts for money received. But in any event the reeve testified that he looked at the books generally at each monthly

(1) [1924] S.C.R. 35 at p. 41. (2) [1921] 2 A.C. 125 at p. 130.

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meeting of the council and that as far as his knowledge went the books were kept in good shape. He further says that up to the time he signed the certificate, on March 1, 1922, the auditor had never made a suggestion that there was anything wrong with Paisley's performance of his duties. In his testimony at trial Inkster said that on one occasion he had addressed the council and drawn attention to the fact that Paisley was not keeping his books up to date. At first, he said that this was at the meeting in March, 1922, afterwards, he said it was in 1921. If the jury accepted his first statement they could readily find on the evidence of the reeve that up to March 1, 1922, Inkster had not informed the council of any failure on Paisley's part to keep his books posted to date. The duty of the reeve was

> to be vigilant and active in causing the laws governing the municipality to be duly executed, to inspect the conduct of all municipal officers and so far as in his power to cause all negligence, carelessness and violation of duty to be duly prosecuted and punished. (s. 42).

He was, however, under no obligation to re-audit the auditor's statement, nor was he required to have such a knowledge of book-keeping as would enable him to know whether or not the books were being properly kept. It is clear from his testimony that he did not have that knowledge and I have no doubt that in the western provinces, particularly in those districts which were settled by people from southern or central Europe, there are hundreds of reeves who, if they looked through the books of their respective municipalities from cover to cover, would be unable to tell if they were being properly written up.

As the reeve was not called upon to check either the auditor's statement or the secretary's books, and as the company knew he would rely upon the auditor's statement, the jury, in my opinion, were entitled to affirm the truth of the representations made by the municipality on March 1, 1922: (*a*) that all the money in Paisley's control and custody had been accounted for, and (*b*) that he had performed his duties in an acceptable and satisfactory manner.

There was another contention to which I refer merely to shew that it has not been overlooked. That contention was that the knowledge of the auditor that the books were not written up was the knowledge of the municipality and,

therefore, the certificate of March 1, 1922, could not be true. The answer to this, in my opinion, is two-fold. First, where the parties contract on the understanding that the means which the municipality will take to ascertain the correctness of the accounts contained in the books will be the auditor, and the auditor certifies that he has examined the books and accounts and found them correct, the company cannot be heard to say that any knowledge as to the want of correctness of the books possessed by the auditor, but not communicated to the council, is the knowledge of the municipality. And secondly, that the jury found (3*a*) that the representation that the books had been examined and found correct was true, and no appeal was taken from the finding.

Now we come to the representations contained in the certificate of March 16, 1923. In addition to the matters already referred to we have here additional evidence to consider. That evidence is, that when the representations of March 16, 1923, were made, the reeve and the other members of the council had in their hands the auditor's balance sheet for the year 1922, which shewed a surplus on hand of over $23,000, and they knew that the money representing that surplus was not on hand. To their knowledge they owed the bank over $4,000, and they knew that the school districts were clamouring for payments due which the municipality had no funds to meet. Being convinced that the municipality did not have the money which the balance sheet shewed should have been on hand, Swan asked Paisley for an explanation. His evidence as to the explanation received, is as follows:—

> he explained that that was redemption account, cross-entries, some of it, and some of it was bank loans. Cross-entries and bank loans anyway, I am sure of that. And he seemed to give a fairly good explanation of the matter.

Swan testified that he was satisfied with this explanation. In my opinion he should not have been. However plausible the explanation might appear to Swan to be, he, knowing that the surplus shewn was not on hand, should not have certified to the company that Paisley's accounts were correct, without calling attention to the fact that there was a discrepancy between the auditor's surplus and the treasurer's cash. On this point I need say no more

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than that I agree with the Court of Appeal. The representation of March 16, 1923, that all moneys in Paisley's custody had been properly accounted for was not true, and, even if innocently made, it induced a renewal of the bond for that year. This renewal the company is entitled to have declared void.

In the result, therefore, the finding of the jury that the representations contained in the certificate of March 1, 1922, were true, should be restored. The jury found that when the bond was renewed in 1923, Paisley was already in default to the municipality in the sum of $3,600. For that sum the company, in my opinion, is liable.

I would, therefore, allow the appeal in part and enter judgment for the municipality for $3,600, with interest, the costs of this appeal and the costs of the action, but not the costs of appeal in the court below which go to the appellant in that court.

Appeal allowed in part, with costs.

Solicitor for the appellant: *G. H. Yule.*

Solicitors for the respondent: *Cross, Jonah, Hugg & Forbes.*