

1927  
\*May 13.  
\*June 17.

THE DOMINION OF CANADA GUAR-  
ANTEE AND ACCIDENT COM-  
PANY, LIMITED (DEFENDANT)..... } APPELLANT;

AND

THE HOUSING COMMISSION OF  
THE CITY OF HALIFAX (PLAIN-  
TIFF) ..... } RESPONDENT.

ON APPEAL (PER SALTUM) FROM THE SUPREME COURT OF  
NOVA SCOTIA (CHISHOLM J.)

*Guarantee—Insurance against embezzlement or theft by employee—  
Renewal of policy—Statements by insured forming basis of renewal  
—Statement untrue in fact, though made in good faith and in ignor-  
ance of untruth—Conditions of contract—Right of recovery.*

Defendant issued a policy insuring plaintiff against pecuniary loss by embezzlement or theft by an employee in connection with his duties. One of the conditions (expressed to be conditions precedent to plaintiff's right to recover under the policy) was that "This policy may be continued in force by renewal receipt upon the company's form, and, if so continued, the material statements made in writing upon the application for this policy shall be deemed to be repeated at the time of such renewal, and to form the basis of such renewal, together with any further material statements made on the occasion of such renewal." For the purpose of a renewal, plaintiff certified to defendant that the employee "during the year \* \* \* performed his duties faithfully and satisfactorily. He is not at present in arrears or default." The employee was in fact in arrears and default at the time, but the certificate was made without knowledge of this and without fraud.

*Held*, plaintiff could not recover under the policy; it was renewed on the faith of an express declaration, the truth of which was made a condition precedent to liability attaching, and which was untrue in fact; it was no answer to say that the declaration was made in good faith and in ignorance of its untruth. *Railway Passengers Assur. Co. v. Standard Life Assur. Co.*, 63 Can. S.C.R. 79, referred to.

APPEAL, *per saltum*, by the defendant from the judgment of Chisholm J. in the Supreme Court of Nova Scotia, holding the plaintiff entitled to recover from the defendant the sum of \$3,851.85 on a certain guarantee bond issued by the defendant insuring the plaintiff against pecuniary loss by embezzlement or theft on the part of one of its employees in connection with his duties. The material

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

facts of the case are set out in the judgment of Newcombe J. now reported. The appeal was allowed with costs.

*G. Grant K.C.* and *S. Jenks K.C.* for the appellant.

*F. H. Bell K.C.* for the respondent.

The judgment of Anglin C.J.C. and Mignault and Lamont JJ. was delivered by

MIGNAULT J.—I accept in full the statement of the pertinent facts made by my brother Newcombe in his judgment which I have had the advantage of reading. The policy was renewed on the faith of an express declaration, the truth of which was made a condition precedent to liability attaching, and which is shewn to have been untrue in fact. It is no answer to say that this declaration was made in good faith and in ignorance of its untruth. On the authority of *Railway Passengers Assurance Co. v. Standard Life Assurance Co.* (1), the appeal must be allowed and the action dismissed.

The judgment of Newcombe and Rinfret JJ. was delivered by

NEWCOMBE J.—The plaintiff, respondent in this appeal, is the Housing Commission of the City of Halifax, constituted under c. 4 of 1919 of the Statutes of Nova Scotia, an Act to provide for the erection of dwelling houses and incorporation of housing companies. The defendant, appellant, is the Dominion of Canada Guarantee and Accident Company, Limited, which issued a policy dated 28th March, 1921, insuring the good conduct for one year from 18th February, 1921, of Thomas M. Hayes, who was employed by the Commission in the capacity of secretary. It was recited by the policy that the Commission had made certain statements in writing to the company in the application, and it was agreed, in consideration of the material statements, warranties and conditions contained in the said statements, which it is agreed shall be the basis and form part of this contract of insurance, and of the sum of \$25, to insure the employer, in the sum of \$5,000, against pecuniary loss by any embezzlement or theft on the part of the said employee in connection with any of the duties of the said employee mentioned in said application which shall have been discovered and notified to the com-

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pany during the continuance of this agreement, or, in case of the death, dismissal or retirement of the employee, notified to the company, within three months from the death, dismissal or retirement.

The conditions set out are expressed to be "conditions precedent to the right of the employer to recover under this policy." By the 10th of these conditions it is stipulated that

This policy may be continued in force by renewal receipt upon the company's form, and, if so continued, the material statements made in writing upon the application for this policy shall be deemed to be repeated at the time of such renewal, and to form the basis of such renewal, together with any further material statements made on the occasion of such renewal.

The policy was renewed in the company's form from 18th February, 1922, to 18th February, 1923, and in like manner the policy was again renewed from 18th February, 1923, to 18th February, 1924. During the latter year irregularities and embezzlement or theft on the part of the employee were discovered in connection with his duties. Deficits had been running or accumulating for a considerable period. Hayes had been in the employment of the Commission since 19th June, 1921. The city auditor at Halifax, who was discharging the duties of auditor for the Commission, discovered in October, 1922, that he was not depositing his receipts; the auditor thought the deficiency was about \$1,800, but this amount was made up, after some delay, and he did not inform the Commissioners. Hayes was suspended by resolution of the Commission of 21st August, 1923, upon report of the special auditors whom the Commission had employed to investigate his accounts, and it was directed that the defendant company should be notified of a shortage, as then found, of \$3,700. The auditors, in their report of 5th October, 1923, which is one of the documents in evidence, state that:—

A reconciliation of all cash receipts and disbursements as shown by the Cash Book with the deposits and withdrawals as shown by the Bank statements, disclosed the fact that all cash entered in the Cash Book up to October 31, 1922, had not been deposited in the bank as received. The under-deposit in bank was apparently made up in November, 1922, during which month the deposits were approximately \$3,300 in excess of the receipts shown by the Cash Book. We understand that the additional deposits were made as the result of the insistence of the City Auditor that the bank deposits should be brought up to date, but so far as we can ascertain the matter was not reported to the Commission.

It appears, however, from a statement of moneys received by Hayes, which have not been restored, that these

include receipts month by month from August, 1922, until August, 1923.

At the trial the plaintiff recovered \$3,851.85, and there is an appeal *per saltum* to this Court. The learned trial judge found that the plaintiff Commission had no knowledge of the dishonesty of Hayes until the special auditors made their report in August, 1923, and it was upon this finding that the judgment proceeded.

Now it is not disputed that the Commission had not been informed of any of these deficits or irregularities, and it is admitted that there is no evidence of fraud against it. My difficulty about the case arises from the contract, and some additional facts which I am going to mention.

For the purposes of the first renewal, Mr. Brookfield, the Chairman of the Commission, certified to the company, under date of 20th February, 1922:—

Bond No. 058054.

I certify that Thomas M. Hayes, of Halifax, N.S., has, during the year ended on the 18th day of February, 1922, performed his duties faithfully and satisfactorily. He is not at present in arrears or default. His accounts have been examined up to the 1st day of December, 1921, and found correct. The examination was made by W. W. Foster, City Auditor, Halifax, N.S.

I know nothing of any habit or past deportment unfavourably affecting his title to general confidence, or why suretyship guaranteeing his honesty should not be granted to him.

And, when the policy came to be renewed the second time, Mr. Healey, the Vice-Chairman of the Commission, gave a certificate to the company, dated 21st February, 1923, in the same terms, with reference to the year ended 18th February, 1923, mentioning 17th February of that year as the date up to which the accounts had been examined by the city auditor. Now according to my interpretation of the contract, these certificates are intended to operate under the 10th clause which I have quoted, and in which it is provided that, if the policy be continued upon the company's form, as it was on both these occasions, the material statements made in writing upon the application, "together with any further material statements made on the occasion of such renewal," shall form the basis of such renewal. I am unable to escape the conclusion that the certificates must be regarded as "further material statements" within the meaning of this clause, and therefore they go to

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constitute the basis of the renewals. It is stated explicitly that "He is not at present in arrears or default." This is the language of warranty. At the argument I was inclined to think that the words might, in the light of the circumstances and context, be held to go no further than the information and belief of the officer who signed, and I was not indisposed to yield to the view that, inasmuch as an employee might be dishonest and would, if he misappropriated money of his employer, endeavour to conceal it, and as therefore there might be default or arrears for the preceding year which had not been discovered, and against which it was a stipulated purpose of the expiring policy to indemnify, it could not reasonably be supposed that the insurer would exact an absolute undertaking, or that the insured would assent to it, or that the Commission, in order to have a renewal of the policy, would make a representation opposed to its right to recover for losses already incurred; the undertaking construed in its strict sense seems to be unreasonable. But, after more careful consideration, the contract of the parties seems to be plainly expressed, and I have come to the conclusion that it admits of only one interpretation. Hayes was in arrears and default on both occasions when these certificates were made. A material condition of the contract was not satisfied. Good faith, even of the utmost, is no defence against a breach of warranty.

The appeal should therefore be allowed and the action dismissed with costs.

*Appeal allowed with costs.*

Solicitor for the appellant: *L. A. Lovett.*

Solicitor for the respondent: *F. H. Bell.*

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