THE LONDON GUARANTEE AND ACCIDENT COMPANY, LIMITED (DEFENDANT) ..... APPELLANT;

AND

THE CITY OF HALIFAX (PLAINTIFF) ... RESPONDENT.

1926
*Oct. 14.
1927
*Feb. 1.

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

Guarantee—Bond against embezzlement or theft by city employee—Bond limited to cover only embezzlement or theft committed within 12 months prior to notice of discovery—Employee's falsification of books to cover previous defalcations—Time of embezzlement or theft—Onus of proof—Particulars of claim—Amendment—Terms of bond—Renewal—Offence committed before, but discovered after, renewal—Complaint as to city's answers to questions in regard to proposed guarantee—Employee's failure to fulfil, and city's neglect to enforce, statutory requirements—Alleged failure by city to notify discovery of judgment against employee.

Defendant, by bond dated 20th June, 1907, agreed to make good to plaintiff city, to the extent of $10,000, pecuniary loss sustained through embezzlement or theft of money by its tax collector in connection with his duties. The bond was renewed yearly, the last renewal being for the year beginning 1st October, 1922. The collector received payment of taxes in currency or cheques. From time to time, usually daily, he handed to a clerk or placed in the cash books for entry such of the receipted tax bills as he desired to account for at that time. These were in due course entered in the cash books. The total amount of the bills so entered was made up, and the collector then gave the clerk a corresponding amount in cheques and currency, for which the clerk made out a deposit slip, which, with the cheques and currency, was handed to the city treasurer whose duty it was to make the bank deposits. From the collector's cash books the payments thus recorded were credited in the ledger accounts of the various taxpayers in payment of whose accounts they had been attributed. On 19th September, 1922, R., a taxpayer, paid two cheques which were deposited by or on behalf of the collector with the treasurer on 21st and 28th September. On 26th January, 1923, B., a taxpayer, paid a cheque which was deposited with the treasurer on 30th January. Except as to a portion of B.'s cheque, the collector did not give credit in his books to R. and B. for these payments, but appropriated the cheques in payment of other taxes which had already been paid, and for which he had issued receipted bills; but the taxpayers' money which the collector received in payment of these other taxes was not credited to their accounts in his cash books; instead, R.'s cheque, and B.'s cheque in part, were deposited so that it was made to appear that taxes other than those of R. and B. had been paid by their cheques, the collector suppressing the evidence that their taxes had

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

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been paid. The city claimed against defendant (up to the amount guaranteed) for misappropriations by the collector to the amount of the cheques of R. and B. not properly credited. Notice had been given defendant of the embezzlements or thefts, on 2nd June, 1923. The bond provided that no more than one claim, and that only in respect of acts of embezzlement or theft committed within 12 months prior to notice to defendant of discovery thereof should be made.

Held, as to the contention that there was no evidence of embezzlement or theft within said twelve months period, that it should be found or inferred that there was embezzlement or theft of the sums misappropriated on the dates when the cheques of R. and B. were by the collector's direction used and deposited with the treasurer to make up the credits for which they were not intended; that, in the absence of proof to the contrary, it should be found that the city then sustained pecuniary loss to the amount so misappropriated, by reason of embezzlement or theft by the collector in connection with his duties; there was *prima facie,* if not conclusive, proof of misappropriation at the time of the false accounting; if defendant relied upon an earlier date for the offence than that *prima facie* proved, it should have adduced evidence of it.

It was the appropriation of the cheques of R. and B. to the payment of the accounts which the collector knew had been otherwise satisfied by money in his hands, that constituted the commission of the crime, and its proof. *Rex* v. *Hodgson* (3 C. & P. 422 at p. 424) and other cases, referred to.

Held further, as to the contention that the R. and B. cheques, having been actually delivered to the treasurer and deposited in the city's bank account, thus reaching their intended and proper destination, were not misappropriated, and that, therefore, any charges of default or loss alleged by the particulars of the statement of claim failed, that, although the particulars were lacking in some allegations necessary fully to explain the nature of the case, yet in view of a previous explanatory letter by the city's solicitor to defendant, and the evidence and the course of the trial, the contention should not prevail; an amendment, if necessary, should be allowed.

Held further, that, in view of the terms of the bond, the provision to indemnify as to embezzlement or theft "committed during the continuance of this agreement, and discovered during the continuance of this agreement," covered embezzlement or theft committed before, but discovered after, the renewal of the bond on 1st October, 1922.

Held further, as to complaint 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," that, taking into consideration that, although the questions were not fully answered, the answers were accepted by defendant, and taking into consideration all the questions and answers made, including some made later, in 1918, relative to a renewal of the bond, and under all the circumstances and evidence, the answers complained of, when given a reasonable interpretation, could not be relied on to prevent recovery under the bond.

Held further, as to defendant's contention that it was discharged because the city had dispensed with certain duties of office with which the

collector was charged by statute, that the contention failed for lack of proof; that, although there was great neglect in enforcing the statutory requirement of a monthly return, the evidence did not satisfy the condition to the discharge of a surety affirmed in *Black* v. *Ottoman Bank* (6 L.T.N.S. 763) that there must be some positive act done by the employer to the surety's prejudice, or such degree of negligence as to imply connivance and amount to fraud; moreover, on the evidence, the statutory requirements did not influence the making of the agreement; and under it their performance was neither represented nor expressly or impliedly undertaken by the city; there was no evidence of fraudulent concealment, or of suppression of any fact which the city was bound to communicate. *Davis* v. *London and Provincial Marine & Ins.* Co. (8 Ch. D. 469) referred to.

Held further, as to a clause in the bond avoiding it if the city should fail to notify defendant "of the discovery of any writ of attachment, execution issued, or judgment obtained against the salary or property of the employee" as soon as it became known to the city, that the judgment in question did not appear to have been one "obtained against the salary or property of the employee", moreover doubt was expressed that the city could be held to have discovered a judgment merely because the city auditor in the course of business heard of it.

Held, generally, as to the effect of the city's conduct on defendant's liability, the principle affirmed in *MacTaggart* v. *Watson* (3 Cl. & F. 525 at pp. 542, 543) should be applied.

Judgment of Chisholm J., of the Supreme Court of Nova Scotia, in favour of the city, affirmed.

Anglin C.J.C. dissented, on the ground that, certainly no moneys received from the R. and B. cheques mentioned in the city's particulars of claim were embezzled or stolen or lost to the city; and even on amendment of the particulars to accord with the statements in the city solicitor's previous letter to defendant, the claim so amended being regarded as based upon the embezzlements or thefts which the false entries in the books as to the proceeds of said cheques were designed to cover up, yet the actual embezzlements or thefts should not be taken *prima facie* to have occurred when said falsification of the books took place, nor did the proof of such falsification cast the burden on defendant to show that the actual embezzlements or thefts occurred at earlier dates; the city was required to establish loss within the terms of the guarantee; and without evidence warranting a finding that the moneys were actually embezzled or stolen within the 12 months period prior to notice of discovery, according to the limitation in the bond, the city could not recover.

APPEAL, *per saltum,* from the judgment of Chisholm J., of the Supreme Court of Nova Scotia, holding the plaintiff city entitled to recover against the defendant under a bond or agreement to indemnify the city against pecuniary loss (to the extent of $10,000), sustained by reason of embezzlement or theft of money on the part of a collector

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of taxes employed by the city. The material facts of the case and questions dealt with are sufficiently stated in the judgments now reported, and are indicated in the above head-note. The appeal was dismissed with costs, Anglin C.J.C. dissenting.

W. N. Tilley K.C. for the appellant.

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

The judgment of the majority of the court (Duff, Mignault, Newcombe and Rinfret JJ.) was delivered by

NEWCOMBE J.—The London Guarantee & Accident Company, Limited, agreed in writing with the city of Halifax to make good and reimburse to the city, to the extent of $10,000, such pecuniary loss, if any, as might be sustained by the city by reason of embezzlement or theft of money by the collector of taxes in connection with his duties. Losses, due to embezzlement or theft on the part of the collector, were alleged by the city, in excess of the amount for which the company had become surety; the liability was denied, and the city recovered judgment at the trial, in the Supreme Court of Nova Scotia, against the company, in the sum of $10,000. The company now appeals, *per saltum,* to this court.

The agreement, or bond, as it is called, upon which the action is brought, is dated 20th June, 1907, and is described as replacing bond no. 10855. It recites that Robert Theakston has been appointed collector of taxes in the service of the city, and has applied to the company "for a grant by them of this agreement." Two other recitals follow, namely:

> And whereas the employer has delivered to the company certain statements and a declaration, setting forth, among other things, the duties, responsibilities and remuneration of the employee, the moneys to be entrusted to him, and the safeguards and checks kept and to be kept upon his accounts, and has consented that such declaration and each and every other of the statements therein referred to or contained, so far as the same are material to the contract, shall form the basis of the contract hereinafter expressed to be made.
>
> And whereas the employer warrants the statements and declaration aforesaid, so far as the same are material to this contract, to be true, and agrees that the method of conducting the business, so far as the said statements and declaration are concerned, shall be in accordance therewith during the currency of this agreement (except as to such changes therein as may be agreed to by the company as hereinafter provided).

Then it is stipulated as follows:

It is hereby agreed and declared that from the date hereof, up to the first day of October, 1907, at 12 o'clock noon, and during any year thereafter, in respect of which the company shall consent to renew this agreement by accepting the aforesaid annual premium, and issuing a renewal receipt as hereinafter provided subject to the provisions of the memorandum and articles of association of the said company, and to the conditions and provisoes herein contained (which shall be conditions precedent to the right on the part of the employer to recover under this agreement), the company shall, at the expiration of three months next after proof satisfactory to the directors of the loss hereinafter mentioned has been given to the company, make good and reimburse to the employer to the extent of the sum of ten thousand dollars, and no further, such pecuniary loss, if any, as may be sustained by the employer by reason of embezzlement or theft of money on the part of the employee in connection with the duties hereinbefore referred to, committed during the continuance of this agreement, and discovered during the continuance of this agreement, in the case of the death, dismissal, or retirements of the employee discovered, within three months from the death, dismissal or retirement. And no more than one claim, and that only in respect of acts of embezzlement or theft of money committed within twelve months prior to the receipt by the company of the notice of discovery thereof, to be given as is hereinafter provided, shall be made under this agreement, which upon the making of such claim, as to any further or other liability hereunder, wholly cease and determine, and upon the payment of such claim this agreement shall be delivered up to be cancelled; * * * Provided that on discovery of any embezzlement or theft of money by the employee as aforesaid, the employer shall immediately give notice in writing thereof to the company, and that full particulars of any claim made under this agreement shall be given in writing addressed to the manager of the company, for the Dominion of Canada, Toronto, Ontario, within three months after such discovery as aforesaid: * * * This agreement is entered into on the condition that the business of the employer shall continue to be conducted and the duties and (except that it may be increased) the remuneration of the employee and the method of examining and checking his accounts shall remain in every particular in accordance with the statements and declaration hereinbefore referred to, and if during the continuance of this agreement any circumstance shall occur or change be made, either temporarily or otherwise, which shall have the effect of making the actual facts materially differ from such statements or any of them, without notice in writing thereof being given to the company at its chief office for Canada and the consent or approval in writing of the company being obtained, or if any suppression or misstatement of any material fact affecting the risk of the company be made at the time of the payment of the first or of any subsequent premium, or if the employer shall continue to entrust the employee with money or valuable property after having discovered any act of dishonesty on his part, or shall fail to notify the company of the discovery of any such act as hereinbefore provided (for which the company would be liable under the terms of this agreement) or of any writ of attachment execution issued or judgment obtained against the salary or property of the employee as soon as it shall have come to the knowledge of the employer, or if the employer make any settlement with the employee for any loss hereunder without the consent in writing of the company having first

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been obtained, then, and in every such case, this agreement shall be void and of no effect from the beginning, and all premiums paid thereon shall be forfeited to the company.

There is also this further provision:

Provided that if the company shall renew this agreement beyond the time herein limited and shall issue a renewal receipt to that effect this agreement shall be continued for the time therein specified and the statements, warranties and conditions made as aforesaid shall, except as materially varied by any statement, in writing, made at the time of such renewal and endorsed thereon or hereon, be deemed to be continued and of full force and effect as herein provided during the continuance of this agreement so renewed as aforesaid and together with such variations as aforesaid to form the basis of such renewal which shall be deemed to have been made upon the faith of such statements, warranties and conditions so varied as aforesaid.

The agreement was renewed from year to year, the last renewal being for the year beginning 1st October, 1922. The loss is alleged in the statement of claim, by the 6th paragraph, as follows:

6. During the period covered by such renewals the plaintiff city has suffered loss by the defalcation or theft of moneys by the said Robert Theakston to an amount exceeding the sum of $10,000 the particulars of which said loss are as follows:

(1) The sum of $7,398 which was paid to the said Robert Theakston, as such collector, on the 19th day of September, 1922, by one James E. Roy, a taxpayer of the plaintiff city, as and for taxes due by him to the the plaintiff city and was misappropriated and stolen by the said Robert Theakston.

(2) The sum of $4,303.54 which was paid to the said Robert Theakston, as such collector, on the 26th day of January, 1923, by one Charles Brister, a taxpayer of the plaintiff city, as and for taxes due by him to the plaintiff city and was misappropriated and stolen by the said Robert Theakston.

The facts brought out under these particulars had been stated substantially in a letter of 1st August, 1923, written by the city solicitor to the company's manager at Toronto. In this letter Mr. Bell states:

In compliance with the requirements of your bond to the city of Halifax, No. 70275, guaranteeing Mr. Robert Theakston, collector of the city, I beg herewith to submit a claim for an amount exceeding the sum guaranteed, namely, ten thousand dollars ($10,000) misappropriated by him during the twelve months preceding the date of the discovery of his defalcations, namely, the 2nd of June, 1923. I may say that the total amount of the defalcations already known to have been committed by him is greatly in excess of this amount. We have now proof of about seventy-five thousand dollars ($75,000) taken by him and further amounts are being discovered almost daily, as the work of auditing proceeds.

The amounts making up the sum above mentioned are:

(1) Amount of payment made by J. E. Roy on Sept. 19, 1922 for taxes for civic year 1921-22, paid by two cheques of that date, one for four thousand dollars ($4,000) and one for three thousand three hundred and ninety-eight dollars ($3,398)	$7,398 00
(2) Amount of part payment made by Charles Brister on January 26, 1923, for taxes. Payment was made by a cheque of that date for six thousand one hundred thirty-seven dollars and twenty-three cents ($6,137.23) of which only one thousand eight hundred thirty-three dollars and sixty-nine cents ($1,833.69) was credited and paid to the treasurer, the balance being misappropriated	$4,303 54
	$11,701 54

It will be noted that what is claimed is the amount indicated by the cheques. This is to avoid confusion. The cheques themselves were passed over by the collector to the treasurer. But, as only the amounts shown by the collector's cash book were ever paid to the treasurer and as with the exception of the amount credited to Mr. Brister, as above stated, neither the amounts covered by the cheques nor the persons by whom they were paid were entered in the cash book, it is clear that the collector misappropriated currency to the amount of the cheques, and substituted for it the cheques, which he was compelled to do in order to pass them through the bank, with the endorsation of the city upon them.

I enclose copies of these cheques referred to; Mr. Roy has also his receipts in the usual form, Mr. Brister has no receipt and states that the collector at the time of payment said none was necessary. Both Mr. Brister and Mr. Roy are here and well known and are available at any time to any representative of your company.

If you require anything further, we shall be pleased to furnish it if in our power.

The action was brought on 9th November, 1923, and was tried before Chisholm J. The first objection to his findings is that the plaintiff failed to prove any pecuniary loss by reason of embezzlement or theft by the employee. It appears that the city collector, according to the course of business in his office, received payment of the taxes levied by the city for various purposes; that these taxes were paid, sometimes in money, sometimes by taxpayers' cheques; that the collector himself had the custody of the money and the cheques; that from time to time, usually every day, the collector handed out to one of his clerks or assistants, or placed in the cash books for entry, such of the receipted tax bills as he desired to account for at that time; that these were in due course entered in the appro-

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priate cash books; that the total amount of the bills so entered was made up, and that the collector then gave to the clerk a corresponding amount in cheques and money. Thereupon the clerk made out a deposit slip, specifying the amount of the cheques and the currency, and this deposit slip, with the cheques and currency, was handed over to the city treasurer, whose duty it was to make the bank deposits. From the cash books in the collector's office the payments thus recorded were credited in the ledger accounts of the various taxpayers in payment of whose accounts they had been attributed. What happened with regard to the cheques in question was this: James E. Roy, a large taxpayer, paid his taxes by two cheques, the one of $4,000, the other of $3,398, on 19th September, 1922, and these cheques were deposited by or on behalf of the collector with the treasurer on the 21st and 28th of that month. Charles Brister, also a large taxpayer, paid his taxes by his cheque for $6,137.23 on 26th January, 1923, which was in like manner deposited with the treasurer, four days later. These cheques were paid in discharge of taxes of various kinds, and divers amounts; but Mr. Roy received no credit; and while, as to an amount of $1,833.69, part of Mr. Brister's cheque, the payment was attributed to the account of the latter in the collector's books, he did not receive credit for the balance of $4,303.54. Therefore, except as to the $1,833.69, none of these cheques was used by the collector for the purposes for which it had been paid in. On the contrary, the collector appropriated the cheques in payment of other taxes which had already been paid, and for which he had regularly issued receipted bills; but the taxpayers' money which was received by the collector in payment of these other taxes was not credited to their accounts in any of the cash books. Instead, Roy's cheque, and that of Brister in part, were deposited so that it was made to appear that taxes other than those of Roy and Brister had been paid by their cheques, the collector suppressing the evidence that their taxes had been paid. It is urged against the findings that, while these facts constitute proof of embezzlement, there is no evidence of the time when the offence took place; but from the foregoing facts I think it may be found or inferred that there was embezzle-

ment, or, having regard to the provisions of the *Criminal Code,* theft, of the sums misappropriated by the collector, on the dates when these cheques were by his direction used and deposited with the treasurer to make up the credits for which they were not intended; and I think it may be found moreover, in the absence of proof to the contrary, that the city then sustained pecuniary loss, to the amount so misappropriated, by reason of embezzlement or theft of money on the part of the collector in connection with his duties. The failure to account for the money which the taxpayers had paid in discharge of their tax bills; the appropriation of the Roy and Brister cheques to the payment of these bills, and the omission to give credit to Roy and Brister for the cheques which they had paid, save as to $1,833.69, part of Brister's cheque, afford the necessary evidence. It is said that the time of the defalcation is, by the terms of the guaranty, material, and that the use of the cheques does not fix the time. There is however no evidence to fix the collector with criminal responsibility at any time earlier than the dates of deposit of the cheques with the treasurer; that was the act upon which the court could find with certainty an intention to misappropriate. It showed that the cheques paid in by Roy and Brister were applied by the collector in payment of taxes which had already been paid, the money which actually went to pay those taxes not having been accounted for, and therefore a falsification of the accounts. There was thus, *prima facie,* if not conclusive, proof of misappropriation at the time of the false accounting. When, therefore, the defendant company relies upon an earlier date for the offence than that which is *prima facie* proved, I think it must adduce evidence of it, but it has not done so.

There is a well known series of decisions with regard to venue in prosecutions for embezzlement, which includes such cases as *Rex* v. *Taylor* (1); *Reg.* v. *Murdock* (2), and *Reg.* v. *Rogers* (3), where it is held that the act of embezzlement is completed at the place where the representation is made which makes out the offence. When an agent collects money for his principal and fails promptly

(1) (1803) 3 B. & P. 596. (2) (1851) 2 Den. 298.
(3) (1877) 3 Q.B.D. 28.

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to account or remit, that fact does not establish the charge against him. But his innocence is incompatible with a false account, and, in this case, it was the appropriation of Roy and Brister's cheques to the payment of the accounts which the collector knew had been otherwise satisfied by money in his hands that constituted the commission of the crime, and its proof. *Rex* v. *Hodgson* (1).

Therefore I shall proceed upon the view that on 21st September, 1922, the collector misappropriated $4,000; on 28th September, 1922, $3,398; and on 30th January, 1923, $4,303.54, and that the city had, when the action was brought, sustained the loss of these several amounts.

It is said that, inasmuch as the cheques of Roy and Brister were actually delivered to the city treasurer, who deposited them to the credit of the city in its bank account, these cheques, having reached their intended and proper destination, were not misappropriated, and therefore that the only charges of default and loss alleged by the particulars of the statement of claim fail. It is true that the particulars are lacking in some allegations which are necessary fully to explain the nature of the case, but these are supplied by the letter of 1st August, 1923, which I have quoted, and which preceded the delivery of the particulars by several months, and, in view of the explanation made by the letter, I can see no ground to suppose that the defendant was misled by the plaintiff's pleading or particulars. The case as stated by the letter, was proved at the trial, so far as necessary for the purposes of this action, and the witnesses were cross-examined upon it, and, if it be necessary to expand the particulars in order to state the additional facts comprised in the letter, I would see no injustice in allowing an amendment for the purpose of making the pleading correspond with the facts in proof. But, in view of the course of the trial, I am disposed to think that such an amendment is unnecessary.

Attention is directed to the fact that the Roy cheques were deposited with the treasurer on 21st and 28th September, 1922, and that, under the terms of the agreement, the company is to indemnify the city only with respect to

(1) (1828) 3 C. & P. 422, at p. 424.

embezzlement or theft of money on the part of the employee

committed during the continuance of this agreement, and discovered during the continuance of this agreement,

and it is urged that since the agreement, which was in force during the year 1921-22, terminated on 30th September, 1922, before which date the embezzlement or theft, as to the Roy cheques, had taken place though not discovered until later, the agreement was not continuing, notwithstanding the fact that it was renewed for the year beginning 1st October, 1922. That contention is not, however, consistent with the fair interpretation of the agreement, which, by its express terms, provides for renewal by consent, and the issuing of renewal receipts. The phrase

committed during the continuance of this agreement and discovered during the continuance of this agreement

obviously must refer, not only to the original term of the agreement, but also to the subsequent years for which it was renewed in manner provided for by the agreement. In one of the subsequent provisions, which I have quoted, there is a clause providing

that if the company shall renew this agreement beyond the time herein limited, and shall issue a renewal receipt to that effect this agreement shall be continued for the time therein specified.

This describes expressly the condition which existed with relation to the agreement during the year beginning 1st October, 1922, and nothing could more clearly evince an intention that the continuance of the agreement extended to that year.

Reference is also made to the questions submitted on behalf of the company with regard to the proposed guaranty. There are two sets of these, the first bearing date 7th October, 1902, signed by Mr. Crosby, the mayor. The acting manager of the company had submitted a printed form requesting a reply to questions which were listed, and stating that

your answers and the declaration hereto will form the basis of the contract between you and this company.

Among the questions were the following, and the answers quoted were returned:

D. How often do you require him to pay over to you and is he then allowed to retain a balance in hand? If so, how much? And do you see that he has that amount in his possession?—Ans. Daily.

E. How often do you inspect the office and balance your cash book, and check the entries with vouchers and bank pass book?—Ans. Daily.

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F. How often do you balance your books and what are your checks to discover any irregularity on the part of the proposer?—Ans. Daily.

At the foot of the list is a statement in the following words, which I take to constitute the declaration referred to in the printed form with which the questions were submitted:

The above answers are to be taken as the basis of the contract between the employer and the London Guarantee & Accident Company, Limited.

It will be perceived that these questions are not fully answered, but the answers were accepted by the company; and, interpreting D. as a statement that the collector is required to pay over to the city daily; E. that the cash book is balanced and the entries checked with vouchers daily, and F. that the books are balanced daily, the evidence is sufficient to establish a practice to that effect. As to inspecting the office however, which is one of the subjects of inquiry in E., if this refer to inspection by the city auditor, or an individual not employed in the collector's office, there is no proof of any, except the inspection which was carried out monthly by the city auditor. Now it would seem that question E. taken by itself, with the answer "daily," may involve an assurance that there is a daily inspection of the office, but it is necessary to read all the questions and answers together; and G., question and answer, reads thus:

When was the office last inspected and were matters all satisfactory then?—Ans.: 30th September. Yes.

The whole list is dated, as appears at the foot of it, 7th October, 1902. Afterwards, during the year 1918, further questions were submitted relative to renewal of the guaranty. The last two of these bear upon the point now under consideration. They are, with their answers:

When were his books or stock last checked and audited and up to what date?—Ans.: 1st May, 1918.

Were all things found correct?—Ans.: Yes.

This statement is dated 27th May, 1918, showing a lapse of 26 days since any check and audit had been made. Moreover there is in evidence a letter of 22nd September, 1921, from A. M. Jack & Son, the general agents of the company at Halifax, to Mr. Weir, its general manager at Toronto, reading as follows:

We duly received your favour of the 12th instant in connection with Mr. Robert Theakston, City Collector, insured under guarantee bond No. 702075, and in reply thereto beg to state that Mr. Theakston is still able

to perform his duties satisfactorily and to all appearances enjoys the full confidence of the city officials. We are advised that Mr. Theakston's accounts are audited every month by the City Auditor and we do not know of any reason why you should not continue this bond. We might say that although Mr. Theakston is, as you state, over seventy years of age, still he is very active indeed and in full possession of his faculties.

Mr. Weir's letter, which is acknowledged in the opening line, is not produced; but, when it was written, the time for renewal of the Theakston guaranty was close at hand. It may be inferred that the general manager was inquiring, having regard to the collector's age, as to the expediency of renewing the agreement, and as to the auditing of accounts. He is informed that the accounts are audited every month by the city auditor. It was in these circumstances, and upon the information to which I have alluded, that the company renewed the agreement for the years beginning 1st October, 1921, and 1922. The question is, how are these inquiries and answers, which by the stipulations of the agreement are, so far as material, warranted true, to be construed? It appears to me not supposable that the mayor, in his answers of 7th October, 1902, using the verb in the same sense, intended to say that the city inspected the office daily, and also that it had not been inspected for a week. Moreover it seems difficult to imagine that the company was relying upon daily inspection, when told that, between 30th September and 7th October, 1902, there had been no inspection, and later, when informed, on 27th May, 1918, that the books had been last checked and audited on and up to 1st May. One must endeavour to reach a reasonable interpretation, realizing that the questions were framed by the company; that they are in some cases not very applicable to a municipality, and that the company has, without demur, accepted the answers, such as they are, returned by the city. In considering the question,

How often do you inspect the office and balance your cash book and check the entries with vouchers and bank pass book?

it may be observed, by the way, that the bank pass book affords no check for the collector's office, as the collector deposited with the treasurer, and it was the latter who carried on the banking business; the collector had no bank pass book. The word "inspect" is used in connection with the balancing of the cash book and the checking of the entries with

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vouchers, and it may not improbably have been considered that, when the cash book entries were balanced and checked, the office was inspected. There is an independent question, G., which is confined to inspection, and which evidently was answered upon the understanding that it referred to inspection by the city auditor, which took place at the end of the month, and which, as required by City Ordinance, No. 3, sec. 2, was to be made monthly. I think it reasonable to suppose that "inspect," in E., was regarded on both sides as affording a general description of which the particulars are stated in what follows, namely "balance your cash book and check the entries with vouchers." In any case, reading E. and G. together, it is plain that if "inspect" in E. and "inspected" in G., with relation to the office, refer to the same operation, the office was not, upon fair construction, represented to have been inspected daily, unless in the manner which I have indicated; and, having regard to the subsequent information which the company obtained from the city, it seems apparent that the company either so understood, or did not attach materiality to the use of the word "inspect" in E. It did not allege any inconsistency between the two questions, nor did it call for any explanation in order to reconcile them. In these circumstances, I do not find it necessary further to consider the effect of the renewals of 1921 and 1922, as based upon the information, which the company had obtained by special inquiry, that the collector's accounts were audited monthly by the city auditor; but, it seems unlikely that, when the company accepted the premiums and renewed the contract upon the representation that the inspection was monthly, it intended to tolerate the inequitable contention that the policy was void for neglect of daily inspection.

Another point arises in this way. Theakston had been tried and convicted of theft upon indictment, and, by agreement of counsel at the trial of the present action, the defendant introduced some extracts from the notes of the evidence taken in the criminal cause; among others the following from Mr. Foster, the city auditor:

> Q. Section 321, page 94 (cap. 67, 1913, of Nova Scotia) says in connection with the duties of the collector: "He shall every month make a return to the council: (*a*) of the amount of rates and taxes, including

water rates, collected by him, specifying the name of each ratepayer or taxpayer with the amounts paid by him, and (*b*) of the aggregate amount of rates and taxes and of such water rates respectively remaining uncollected."

Q. Do you as city auditor, and with reference to the term you have served as such, remember any such statement as that having been made to the council by the collector?—A. Away back when I first went in it was done.

Q. And subsequently to that it was not done?—A. Instead of getting help he was eased of that amount of work by the council.

Q. The board of control had office during that period, too?—A. I will not be sure about the time the easement was given.

and, from Mr. Murphy, the mayor:

Q. Was it within your time as a member of the city council either as alderman, controller or mayor, that the rendering of the city collector's statement as called for by the Charter was dispensed with?—A. Before my time, during my eleven or twelve years in the council there has never been such a statement presented; it has been asked for by resolution on more than one occasion.

Q. And the reply has been that the work cannot be done with the staff that is there?—A. I don't know the reply but the request was never complied with. That would be a reasonable assumption that would be the reply.

Q. Will you say as a matter of fact you never heard that reply made?—A. I would not say; probably I have heard it made; it would be the most reasonable reply that would be expected.

Q. You say all the time you have been there such a statement has never been presented?—A. No.

Q. Was the advisability considered of giving the collector sufficient clerical force to enable that statement to be made?—A. I don't think the question of lacking sufficient help entered into it except the last two or three years; I think the requests were entirely ignored.

Q. When were they first made?—A. I think on one occasion I myself, and I think on a second occasion Alderman Godwin, presented resolutions asking for information called for under certain sections of the Charter, to be rendered by the collector. I cannot say just when it was. In Alderman Godwin's case I think it was four or five years ago, not more.

And it is said that here is evidence of dispensation by the city of duties of office with which the collector was charged by statute; that the surety was entitled to rely upon the performance by the city authorities of their statutory duties, and that, by the license or connivance of the city council in the neglect of the collector to make monthly returns to the council, the surety was discharged. In support of this argument the appellant relies upon the Scotch case of *Mein* v. *Hardie* (1). That, however, as stated in the leading judgment, was not a case of mere omission, but of employment of a trustee in a way not sanctioned by the

(1) (1830) 8 Shaw, Court of Session, 346.

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statute. There are also other distinctions, and reasons why this case does not apply, which might be mentioned, but the point must fail for lack of proof, and the other grounds which I am going to mention. Mr. Foster had stated that he was city auditor in 1922, and for a long time previously. He speaks of the occurrence as "away back when I first went in." He cannot fix the time. Mr. Murphy had been in the service of the city, as alderman, controller or mayor, for 11 or 12 years, and, if the council ever had dispensed with the monthly statement, it was before his time. Indeed during that period, the council had been endeavouring unsuccessfully to obtain such a statement. If, as said by Mr. Foster, the collector, at an indefinite though remote time, was eased of the work connected with the monthly return by the council, one would like to see the evidence of it. It is unlikely that the council would attempt to sanction the breach of a statutory requirement. The presumption is against it. If the council did commit itself, the decision should have been mentioned in the minutes, but nothing was produced. Moreover when Mr. Foster gave the evidence, he was speaking in the criminal case, where the present issue was not involved, and what he said does not amount to proof that the council consented to dispense with the monthly statement. It was amply proved that there was great neglect in enforcing the provision which required the monthly return, but I see no evidence to satisfy the condition to the discharge of a surety affirmed by Lord Kingsdown in the Privy Council, in *Black* v. *Ottoman Bank* (1):

> that there must be some positive act done by him (the employer) to the prejudice of the surety, or such degree of negligence as in the language of Wood V.C. in *Dawson* v. *Lawes* (2), to imply connivance, and amount to fraud.

It remains to be said upon this point that there is no evidence that the incident which Mr. Foster had in mind occurred after the giving of the guaranty, and that Mr. Weir, who had been manager of the defendant company for 10 or 11 years, and who had previously been assistant for four years, disclaims any knowledge of the requirements of the legislation relating to the city of Halifax. Evidently, in fact, these did not influence the making of the agree-

(1) (1862) 6 L.T.N.S. 763. (2) (1854) Kay 280.

ment. The suretyship agreement is not conditioned for the due performance of the collector's duties of office. The indemnity is promised only for embezzlement or theft in connection with the duties referred to in the recitals, but these do not mention or include the statutory duties, and, according to my interpretation of the agreement, the performance of these is neither represented not expressly or impliedly undertaken by the city. Moreover the questions and answers in the proposals for the policy entirely ignore the requirements of the statute.

It is suggested that there was suppression of material facts with relation to the statutory requirements and the manner in which they were performed; but, although the city kept silence as to some facts which I have no doubt would have been communicated if attention had been directed to them, I find no evidence of fraudulent concealment, or of the suppression of any fact which the city was bound to communicate. *Davies* v. *London and Provincial Marine Insurance Co.* (1).

There is one other clause in the agreement upon which the appellant relies. It is provided that if the city shall fail to notify the company

> of the discovery of any writ of attachment, execution issued, or judgment obtained against the salary or property of the employee, as soon as it shall have come to the knowledge of the employer, * * * this agreement shall be void and of no effect from the beginning, and all premiums paid thereon shall be forfeited to the company.

It is admitted that a judgment was entered on 4th February, 1922, at the suit of Colin C. Tyrer & Co., Ltd., against the Eureka Lumber Company, Ltd., Robt. Theakston and Arthur C. Theakston for $42,373.28. Evidently the Robert Theakston here mentioned was the collector. Mr. Foster, the city auditor, called by the appellant, gave this evidence:

> Q. There was a judgment entered by Mr. Tyrer against Robert Theakston and others on February 4, 1922; when did you first know about that judgment?—A. Within a month or so we will say probably that is as near as I can come to it; in the course of business I heard of it.
>
> Q. You knew about the judgment?—A. I knew about the judgment; the circumstances was told to me.
>
> Q. Within a month or so?—A. Yes.

(1) (1878) 8 Ch. Div. 469.

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Mr. Murphy, the mayor, who was called for the plaintiff, gave the following evidence in his cross-examination:

Q. When did you know that there was a judgment entered against Theakston and others for a large amount?—A. That did not come to my knowledge I doubt very much until after the break and it then did not come to me in the form of any acknowledgment of a judgment, but my recollection in (*sic*) a statement to the effect that Theakston had paid some money, if I recollect perhaps $20,000 to adjust some old judgment, but the information as to the judgment itself I had not heard of at the time.

Q. This judgment was entered in February, 1922; did not Mr. Foster the auditor tell you about it?—A. No sir, he never exchanged a word with me respecting it.

And, upon this groundwork, the contention is raised that the agreement became void under the clause quoted. I am not satisfied however that the city can be held to have discovered the judgment merely because the city auditor in the course of business heard of it; in any case, it does not appear to have been a judgment obtained against the salary or property of the employee, and is therefore not of the description specified in the agreement.

In the conclusion, I am in agreement with the learned trial judge, and I think the case should be disposed of upon the principle affirmed by Lord Brougham in the House of Lords in *MacTaggart* v. *Watson* (1), an authority which, as said by the Divisional Court in *Durham* v. *Fowler* (2), had been regarded as the leading authority for years. Lord Brougham said, in addressing the house:

> The error, however, in the present case arises in supposing that any want of care on the commissioners' side, in making the trustee do that which the surety had covenanted that he should do, was like a postponement of the surety's equities, or diminution of his rights at law.
>
> However, we need not discuss such questions in this case, nor deal with the English decision in *Mountague* v. *Tidcombe* (3), which was that of a positive and express covenant given to the surety by the obligee. Neither are we called upon to dispute the doctrine of the court below, laid down here, and in *Mein* v. *Hardie* (4), that where any one gives security for the conduct of another, in a certain office which brings him in contact with persons also in the office, he has a right to expect that these persons will, in all things affecting the surety, conduct themselves according to law and discharge their duties. All this may be generally true, and yet it cannot avail to discharge a surety who has expressly bound himself for a person's doing certain things, unless it can be shown that the party taking the security has, by his conduct, either prevented

(1) (1835) 3 Cl. & F. 525, at pp. 542, 543.
(2) (1889) 22 Q.B.D. 394, at p. 419.
(3) (1705) 2 Vern. 518.
(4) (1830) 8 Shaw, Court of Sess. 346.

the things from being done, or connived at their omission, or enabled the person to do what he ought not to have done, or leave undone what he ought to have done, and that but for such conduct the omission or commission would not have happened. The present is not such a case; the facts are not here to govern any such conclusion.

I would dismiss the appeal with costs.

ANGLIN C.J.C. (dissenting).—The material facts are sufficiently stated in the opinion of my brother Newcombe, which I have had the advantage of reading. While I agree with his disposition of most of the points raised by the appellant, there is one matter on which I find myself unable to accept my learned brother's view—and that is so fundamental that the contrary opinion which I entertain upon it leads to the conclusion that this appeal should be allowed and the action dismissed.

It is quite certain that no part of the moneys received from the three cheques mentioned in the plaintiff's particulars, aggregating $13,445.23, was embezzled or stolen by the city collector Theakston, or was lost to the city of Halifax. Every cent of the proceeds of those three cheques went to the city's credit in its bank account. That fact would suffice to dispose of the plaintiff's case upon the record as it stands before us, because the embezzlement and loss alleged is in respect of the proceeds of these three cheques.

I agree, however, with my brother Newcombe that the particulars should, if necessary, be amended so as to make them broad enough to cover the defalcations pointed to in the solicitor's letter of the 1st of August to the appellant company, which states the nature of the city's claim. So amended, the claim may be regarded as based upon the defalcations, embezzlements or thefts in an effort to conceal which the collector's books were falsified in regard to the proceeds of the three cheques specified in the particulars.

By more or less adroit manipulation in the collector's book-keeping, the proceeds of these cheques (except $1,833.69 credited to Mr. Brister) were credited to other taxpayers whose cheques had already been similarly dealt with, or (perhaps) whose cash payments the collector had appropriated to his own use, i.e., embezzled or stolen. It may well be that evidence or proof of the embezzlements or thefts was available to the city only when the three cheques were so dealt with in Theakston's books, but the actual

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embezzlements or thefts, which the false entries in his books were designed to cover up, may have occurred at some earlier date or dates. Nothing definite as to this is shewn. I am, with respect, unable to accept the view that the actual embezzlements or thefts should *prima facie* be taken to have occurred when the falsification of the books took place in respect of the three cheques, or that the proof of such falsification cast any burden on the defendant company to show that the actual embezzlements or thefts had occurred at some earlier date or dates. The plaintiff was required to establish loss to it by embezzlement or theft within the terms of the defendant's guarantee.

One of the stipulations of the bond sued on is that

> no more than one claim, and that only in respect of acts of embezzlement or theft of money committed within twelve months prior to the receipt by the company of the notice of discovery thereof, to be given as is hereinafter provided, shall be made under this agreement * * *

The required notice was given to the company of the embezzlements or thefts in a letter from the mayor of the 2nd of June, 1923. To come within the guarantee the embezzlements or thefts claimed for must be shewn to have taken place not earlier than the 2nd of June, 1922. Assuming the particulars to be amended as already indicated, there is no evidence in the record to show at what time or times the moneys, the theft or embezzlement of which by Theakston the manipulation of his book-keeping entries in regard to the three cheques was meant to cover up, were actually misappropriated or stolen. Nothing appears which is inconsistent with the idea that the moneys had all been stolen or embezzled prior to the 2nd of June, 1922. It is that the embezzlement or theft shall have been committed within 12 months prior to the notice of discovery thereof, and not that the doing or omission of some act shall have made possible the proof thereof, that the condition of the bond requires. Without evidence warranting a finding that the moneys in question were stolen after the 2nd of June, 1922, the plaintiff, in my opinion, does not bring its loss within the terms of the defendant company's guarantee and, therefore, cannot recover in this action.

Appeal dismissed with costs.

Solicitor for the appellant: *L. A. Lovett.*
Solicitor for the respondent: *F. H. Bell.*