

had been no undertaking regarding them, or no duty as between the corporation and the company, I am of opinion that, as a consequence of the promise of the corporation, in the answers to the questions put to them, that the auditors would examine the rolls yearly, and of the annual statements of the corporation that the books and accounts of Mattson for each year were examined by them from time to time in the regular course of business and found to be correct in every respect, they were in duty bound to do so. It is proved and not denied that these promises and statements were material to the risk. . . .

The auditors themselves declare they did not examine the collector's rolls, and never even saw them; so that there is no pretence that the promised annual examination of the rolls by the auditors was ever made. As to the annual certificate of the collector's books and accounts having been examined from time to time in the regular course of business, it is true to this extent: when the collector handed in his roll at the end of the year, the collections recorded were added up by the town clerk, when he was adding five per cent. to the amounts unpaid, and he compared this with the receipts given by the treasurer to the collector, and he found that they substantially agreed.

The roll was then handed back to the collector for the purpose of his collecting these arrears, and he was never subsequently asked for any statement, nor did any person on behalf of the corporation ever examine these rolls or inquire as to the collection of these arrears. It is in evidence that about two-thirds of the taxes were usually collected during the first year. As to the remaining one-third collected subsequently, no examination was made by any one as to whether the collector had handed over to the treasurer the whole of these collections. His defalcations arose from his not handing over the full amount of these subsequent payments.

The fact that neither the auditors nor any other person on behalf of the corporation checked over these subsequent collections no doubt tempted and led the collector to retain and use these moneys. This neglect was a violation of the promise in the statement on behalf of the corporation that the auditors would examine the rolls yearly. In order to render this examination of any use it was necessary that the old rolls as well as the new one should be examined and checked. The examination of the new roll by the town clerk might possibly have served as a substitute for the examination by the auditors, but he never saw or examined the old rolls.