

61, 1939

No. 36 of 1939.

In the Privy Council.

ON APPEAL
FROM A JUDGMENT OF THE COURT OF KING'S BENCH
(APPEAL SIDE) OF THE PROVINCE OF QUEBEC.

BETWEEN :—

MONTREAL TRUST COMPANY
(Plaintiff in the Superior Court)

— AND —

GEORGES HENRI SEGUIN
(Mis-en-cause in the Superior Court)
Appellants

— AND —

CANADIAN NATIONAL RAILWAY
COMPANY
(Defendant in the Superior Court)
Respondent.

CASE FOR THE APPELLANTS.

RECORD.

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1. This is an appeal from a judgment of the Court of King's Bench (Appeal Side) of the Province of Quebec (Letourneau, Bond, Galipeault, St. Jacques and Barclay, J.J.) dated the 14th day of December, 1938, maintaining the judgment of the Superior Court (Delormier, J.) without adopting all the reasons assigned by that Court, and concurring in the annulment of a Lease from the Appellant Seguin to the Respondent and a transfer of the Lease from the Appellant Seguin to the Appellant Company, and dismissing the Appellants' action for Seven Thousand Eight Hundred and Sixty-two Dollars and Fifty Cents (\$7,862.50) for rent due under the Lease, and the Appellant Seguin's contestation.

APPELLANTS' CASE

2. The Railway Company Respondent (hereinafter referred to as "the Railway Company") is a trans-continental system incorporated by the Dominion Statute 1919, 9 and 10, George V, chapter 13, subsequently represented by chapter 172 of the Revised Statutes of Canada, 1927. It has no capital stock or shareholders, but by Section 3 of the Statutes the Directors who are to be nominated by the Governor-in-Council "shall be and are hereby incorporated as a Company". Among the Directors at the time relevant to this case were the former Deputy Minister of Railways and Canals and his successors in that office.

R.S.C.
Chap. 172,
Sec. 3.
p. 27, l. 10, l. 36.

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3. In the year 1929 the President Chairman of the Board and Managing Director of the Railway Company, was Sir Henry Thornton. By the nature of his position he was obliged to and in fact did extensive entertaining in the interests of the Railway Company; and on the 17th September 1929, the Executive Committee of the Railway Company at which the Deputy Minister of Railways and Canals was present met in Montreal and passed the following resolution:—

p. 167, l. 18.

p. 190, l. 24.

"Whereas in the opinion of the Executive Committee a suitable residence "in Montreal for the Chairman and President of the Company is essential 20 "for the proper conduct of the Company's business.

"It was unanimously resolved that the Executive Committee should "undertake to lease a suitable and properly equipped residence for the use of "the Chairman and President of the Company and on such terms and condi- "tions as the Committee may subsequently deem proper."

4. This resolution was approved at a meeting of the full Board of Directors of the Railway Company on the 23rd day of September, 1929. At the same meeting the renewal of Sir Henry Thornton's contract with the Railway Company was discussed and a resolution passed authorising his re-engagement as President and Managing 30 Director for a term of five years. This was followed by another resolution providing for a pension for Sir Henry Thornton; and then a resolution in these terms:—

p. 210, l. 10.

p. 210, l. 36.

p. 210, l. 45.

"Resolved that in the matter of the leasing of a suitable residence for "the use of the Chairman and President of the Company in Montreal the "Resolution adopted by the Executive Committee in this respect as its "meeting of September seventeenth is approved, and the Committee is hereby "authorised to lease a suitable and properly equipped residence for the use "of the Chairman and the President of the Company, under such terms and "conditions as the Committee may subsequently deem proper."

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5. On the same day the Railway Company executed the contract re-engaging Sir Henry Thornton for five years. p. 191, l. 39.

6. At this time, Sir Henry Thornton was occupying and had for some years been occupying a large house on Pine Avenue in the City of Montreal where he did a great deal of his entertaining and which he had rented from Mr. F. N. Beardmore under a lease, renewed from year to year by letter. Under the lease Mr. Beardmore reserved the right to sell the property and to terminate the lease on three months' notice. Mr. Beardmore had retired to live in England
10 and was anxious to sell the house, which was admirably suited for the purposes of the Railway Company's President. During the winter of 1929 and 1930, Mr. Beardmore put the house into the hands of The Royal Trust Company for sale and the President was naturally anxious, if possible, to continue residing in it. But the Directors, while willing to lease, had no funds wherewith to buy, and the Acting Minister of Railways and Canals, while he could not recommend the inclusion of an item in the estimates to provide for the purchase of a residence was of opinion that the leasing of a residence was a matter which was in the hands of the Directors
20 representing an operating expense and therefore was something the Government was not directly interested in. p. 221, l. 10
p. 161, l. 46.
p. 161, l. 43.

The Acting Minister reported to this effect to the Minister himself in October 1929. Thus the owner of the house was willing to sell but unwilling to lease, while the Railway Company was willing to lease but unwilling to buy. p. 168, l. 2.
p. 142, l. 17.

7. On the 24th of March 1930, at a meeting of the Executive Committee of the Railway Company reference was made to the resolution of September 23rd 1929, regarding the provision of an official residence for the President and in view of the fact that one
30 had not yet been secured it was decided that an adjustment should be made with the President with respect to the rent, which he himself was paying as from the 23rd September 1929. At this meeting Mr. Smart, the Deputy Minister of Railways and Canals, and Mr. Henry, his predecessor in office, as Directors, were present. p. 224, l. 48.
p. 225, l. 1.

8. Following this meeting one of the Members of the Executive Committee, Mr. Decary, a man of long experience in real estate transactions, was asked by the Executive to see if he could solve the problem by arranging the financing of a purchase of Mr. Beardmore's house so that it could be leased to the Railway
40 Company for the purpose of continuing to house its President. Mr. Decary was given full authority to act with Mr. Ruel, the general p. 135, l. 20.
p. 135, l. 30.
p. 141, l. 40.
p. 117, l. 44.

p. 118, l. 2.

legal adviser of the Railway. Mr. Decary although he considered the price asked by Mr. Beardmore too high agreed to act as an intermediary for the Board.

p. 219, l. 35.

p. 232, l. 28.

p. 233, l. 20.

p. 142, l. 37.

p. 233, l. 36.

9. The negotiations for the purchase of the property were carried on by the President, who had received from Mr. Decary on the 28th of January 1930, the architect's report on the value of the property, accompanied by Mr. Decary's own suggestion that the price offered should not exceed One Hundred and Fifty Thousand Dollars (\$150,000.00). Mr. Beardmore was asking a much larger figure but finally offered to accept One Hundred and Seventy-five 10 Thousand Dollars (\$175,000.00) for the house together with Ten Thousand Dollars (\$10,000.00) for the contents. Sir Henry Thornton then asked Mr. Decary if he could carry out the arrangements as contemplated by the Board.

p. 73, l. 21.

p. 71, l. 32.

p. 238, l. 8.

10. In order to carry through the transaction Mr. Decary found the Appellant Mr. Seguin (a Notary in his office) as purchaser of the property and arranged with the Appellant Company to finance the purchase on his (Decary's) personal guarantee and arranged for a lease to the Railway Company on terms which would provide the current interest at $6\frac{1}{2}\%$ per annum payable on the 20 purchase price plus 2% per annum amortization.

11. On June 16th, 1930, at a meeting of the Executive Committee of the Railway Company at which were present Mr. Smart, Mr. Henry and also Mr. Ruel, the Vice-President and General Counsel, the following resolution was adopted :—

p. 236.

“Resolved that the Company lease from Georges H. Seguin for a term
“of Ten (10) years commencing on the first day of August Nineteen hundred
“and thirty (1930) and expiring on the thirty-first day of July Nineteen
“hundred and forty (1940) that certain house bearing number Pine
“Avenue West, in the City of Montreal, for an annual rental of Fifteen 30
“thousand seven hundred and twenty-five dollars (\$15,725.00) payable
“quarterly on the first days of February, May, August and November of each
“year, the first payment to become due on the first day of November next
“(1930) and subject to the following conditions on the part of the Company,
“namely:

“To keep the house in good order of repairs during the entire term of the
“lease;

“To use the premises as a private residence only and for no other
“purpose;

“To pay all taxes and assessments, general or special or of any nature
“whatsoever which may be imposed on said property during the term of the
“lease.”

The rental mentioned represented interest at Six and one-half per centum ($6\frac{1}{2}\%$) on the sum of One Hundred and Eighty-five Thousand Dollars (\$185,000.00) plus Two per centum (2%) on the principal of that sum.

10 12. Mr. Decary in June 1930 discussed the matter in a general way with Mr. F. G. Donaldson, the General Manager of the Appellant Trust Company. On the 24th June 1930, following the above-mentioned resolution of the 16th of June 1930, he again put the matter before Mr. Donaldson who, on the 25th of June 1930, agreed to make a loan for One Hundred and Eighty-five Thousand Dollars (\$185,000.00) for ten (10) years at Six and one-half per centum ($6\frac{1}{2}\%$) on being given as security a first mortgage on the property and an assignment by Mr. Seguin of the lease to the Railway Company together with Mr. Decary's personal guarantee.

p. 42, l. 40.
p. 237, l. 40.
p. 238, l. 33.

13. Sir Henry Thornton then transferred to Mr. Seguin all his rights in the option to purchase the property from Mr. Beardmore.

p. 239, l. 40.

20 14. On the 8th of August 1930, three notarial contracts were passed before Lionel Joron, Notary Public, the first a Deed of Sale from Mr. F. N. Beardmore to Mr. Seguin for the price of One Hundred and Eighty-five Thousand Dollars (\$185,000.00) the second a Lease from Mr. Seguin to the Respondent Company, and the third a Deed of Loan and Hypothec and Assignment of Lease between the Appellant Trust Company and the Appellant Seguin for One Hundred and Eighty-five Thousand Dollars (\$185,000.00) on the terms arranged.

p. 253.
p. 241, l. 20.
p. 245, l. 20.

30 15. It had been intended to include in the Lease an option in favour of the Railway Company to purchase the property at any time by paying the Lessor the balance owing by him on the purchase price, but through an oversight this clause was omitted. This omission was referred to and repaired by a letter from Mr. Decary to Sir Henry Thornton of 6th November 1930, which contained the following paragraph:—

p. 149, l. 6.
p. 317, l. 20.
p. 318, l. 30.
p. 318, l. 41.

40 “As you asked me also, I hereby agree on behalf of the owner of property
“1415 Pine Avenue, which you now occupy, to sell you this property at any
“time during the term of its lease to Canadian National Railways, for the
“sum remaining due to us on the advances of \$185,000.00 and \$50,000.00.
“In order, however, not to encumber my estate in any way this option would

“have to be exercised within six months following my death should I die
“before the expiry of your lease”.

p. 319, l. 35. **16.** The sum of \$50,000.00 mentioned in this letter was the amount of a loan made to Sir Henry Thornton and evidenced by a contract of 31st October 1930, between him and G. H. Seguin to cover the cost of repairs and furnishings. In consideration of this loan Sir Henry Thornton undertook to pay a rent of \$521.00 per month over and above the rent already payable by the Railway Company and all furnishings purchased with the money at the end of the lease were to be sold by Mr. Seguin to Sir Henry Thornton for One 10 Dollar (\$1.00).

p. 317, l. 10. **17.** A copy of this contract, together with a copy of the letter of 6th November 1930, were forwarded by Sir Henry Thornton to the Minister of Railways, Dr. Manion, (Exhibit “A” attached to Admission of Parties) in a letter in which Sir Henry refers to the agreement with Seguin as enabling him “to finance some repairs
“and alterations to the house, including fixing up the garden,
“amounting to \$20,000.00, the balance of the amount of \$50,000.00
“being for refurnishing and equipment.” He adds, in explanation of the option to purchase the house that it had always been 20 Mr. Decary’s understanding “that I or the Company should have
p. 317, l. 35. “the right to purchase the property at any time before the expira-
p. 318, l. 13. “tion of the lease;” and in a postscript he says: “The option which
“I took in my own name is, of course, assignable to any nominee of
“my own.”

18. Sir Henry Thornton continued to occupy the house until the Autumn of 1932, when he resigned as President of the Railway and in March, 1933, he died.

p. 301. **19.** The terms of the lease were duly complied with and the rent paid by the Railway Company up to 27th April 1933, on which 30 date the Solicitors for the Railway wrote to Mr. Seguin asserting that the lease was a nullity and offering to surrender possession of the property. A cheque was tendered for the rent up to 1st May. p. 302. As the cheque was tendered in full settlement it was refused and p. 309, l. 10. the Company was called upon to fulfil its obligations under the lease. On final refusal action was brought in the Autumn of 1933 for the instalments of rent due on May 1st and August 1st 1933.

p. 308, l. 16. The Railway Company was in occupation of the premises at least up to June 19th 1933 when the keys were sent to Mr. Seguin p. 308, l. 32. who sent them back on the following day.

21. The main plea of the Railway Company was that the lease was in reality a contract between it and Decary for the latter's benefit and advantage and that as Decary was a Director the lease was null and, together with transfer of the lease to the Montreal Trust Company, should be so declared. pp. 4 & 5.

22. On 20th September 1935, in the Superior Court, de Lorimier J. gave judgment for the Railway Company founding himself upon Section 121 of the Railway Act, R.S.C. 170, reading as follows :— p. 322-341.

10 “No person who is a Director of the Company shall enter into or be directly or indirectly for his own use and benefit interested in any contract with the Company other than a contract which relates to the purchase of land necessary for the Railway, nor shall any such person be or become a partner of or warrantor of any contractor of the Company”.

The Court found that the property was not within the exception as “land necessary for the Railway”, and then held :— p. 340, l. 25.

20 “I s'ensuit que M. Décary ne pouvait agir comme directeur pour faire l'acquisition de cette résidence pour la défenderesse parce que la loi spéciale ci-dessus mentionnée n'accorde à un directeur que le droit d'acquérir des terrains nécessaires au chemin de fer”.

While Mr. Seguin was characterised by the Judge as Mr. Decary's prete-nom, he did not find that the contract was one between Decary and the Railway or that it was directly or indirectly for his use and benefit.

23. The Plaintiff appealed and on 14th December 1938, the Court of Appeal (Letourneau, Bond, Galipeault, St. Jacques and Barclay JJ.) maintained the judgment, without adopting all the reasons assigned. p. 401.

30 24. Letourneau J. stated that he had doubted whether Section 121 of the Act imported the nullity of the contract and whether the only sanction for the prohibition was not that provided by Section 444 of the Railway Act providing a penalty for “any person who, being a Director or officer thereof . . . or who, being a Director . . . does, causes or permits to be done any matter, act or thing contrary to the provision of this . . . Act.” He held himself bound, however, until its reversal by the conclusions of an earlier judgment of the Court confirmed by the Supreme Court, (*McDonald vs. Riordon et al.* 8 K.B 555, 30 S.C.R. 619) although 40 he distinguished the facts and said :—

p. 402, l. 40.

“Comme mes collègues qui s'en sont exprimés, je suis d'avis qu'en tout ceci, le directeur E. R. Decary a eu en vue et pour mobile, moins son intérêt personnel—d'après la preuve, cet intérêt personnel peut difficilement se concevoir—, que ce que voulaient de lui ses co-directeurs. Mais la situation n'en reste pas moins la même, du point de vue d'une nullité du contrat, quisqu'a mon sens l'Intimée est fondée a prétendre que cet article 121 de la loi prohibe non seulement à raison d'un intérêt direct ou indirect, mais encore et de façon absolue toute participation (enter into) à un contrat qui n'en serait pas un se rattachant à l'acquisition des terrains nécessaires au chemin de fer.”

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p. 403.

25. Bond J. recites the facts in detail and then summarises Section 121 of the Railway Act as including two express prohibitions :—

p. 412, l. 30.

“(1) No person who is a Director of the Company shall enter into . . . any contract with the Company other than a contract which relates to the purchase of land necessary for the Railway

“(2) No person who is a Director of the Company shall be directly or indirectly, for his own use and benefit, interested in any contract of the Company other than a contract which relates to the purchase of land necessary for the Railway”

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With regard to the first prohibition he says :—

“It is not necessary that the Director who so contracts shall acquire any advantage or benefit from the contract. The mere fact that he is a Director brings him within the prohibition”.

Dealing, then, with this alternative, he holds that the contract was one between Decary and the Company and, as such, prohibited; and that it was not within the exception as land necessary for the Railway.

He further refers to the case of *McDonald vs. Riordon et al*, as disposing of the view that Section 444 of the Railway Act was the only sanction of Section 121, and that the contract itself stood unaffected.

Speaking of what he calls the second prohibition of Section 121 and the contention that Decary was interested directly or indirectly for his own use and benefit, the learned Judge says :—

p. 423, l. 21.

“In view of the conclusion which I have already reached on the first ground of nullity it becomes unnecessary for me to consider this second ground of nullity”.

p. 423, l. 39.

26. Galipeault J. concurred but gave no reasons.

27. St. Jacques J. holds the Trial Judge in error in saying that Mr. Decary had acquired the property for the Railway Company and that this was prohibited by Section 121 of the Railway Act. He find that Seguin, as *prete-nom* for Decary, bought the property for Decary personally and that Decary was a party by his *prete-nom* to a contract of lease with the Railway Company. He then says:—

p. 424.

“La Défenderesse a allégué que le notaire Décarv avait un intérêt personnel dans ce contract de louage et devait en tirer un profit.

p. 424, l. 38.

10 “Sur ce point, la Cour Supérieure s’est abstenue de se prononcer, et, “quant à moi, je suis d’avis que la preuve produite à ce sujet par la compagnie “ne justifie pas l’allégation qu’elle a faite”.

He then accepts the principle enunciated in the case of *McDonald vs. Riordon*, although based on facts essentially different, and holds that Section 121 of the Railway Act applies and, besides prohibiting the Director, imports the nullity of the contract:—

“En présence des dispositions exceptionnelles de l’article 121, les tribunaux ne peuvent tenir compte de la bonne foi des directeurs et des motifs qui les ont inspirés pour donner leur adhésion à ce contract de louage “fait à la compagnie par l’un de ces directeurs”.

p. 426, l. 8.

20 28. Barclay J. concurs with Bond J. and finds the latter’s construction of Section 121 confirmed by the French version of its text.

p. 426.

29. It is submitted that the proved facts established that the transaction was entered into at the instance of and with the authority of the Railway Company in all its incidents. The Deputy Minister of Railways and Canals was present at meetings at which the arrangements and contracts were discussed and decided upon including the meeting of 17th September 1929, when it was first resolved to provide a house for the President and the meeting of 30 16th June 1930, at which the terms of the lease were approved; and copies of the minutes of all meetings were sent to the Minister himself, who was also continuously informed personally or by correspondence.

p. 30, l. 27.

30. The Appellant Company entered into the transaction at the instance of the Railway Company and advanced the sum of \$185,000 on the faith of the lease entered into by the Railway Company and assigned to it. It is submitted that the Railway Company is estopped, and cannot set up against the Appellants the alleged invalidity of its own act.

31. It is submitted that in any event the technical defence based on Section 121 of the Railway Act is not available in this case. Section 17 paragraph 1 of the Canadian National Railway Act reads as follows :—

“17. All the provisions of the Railway Act, excepting those provisions which are inconsistent with this Act, and excepting also the provisions of the Railway Act relating to the location of lines of railway, the making and filing plans and profiles—other than highway and railway crossing plans—and the taking or using of lands, shall apply to the Company and its undertaking, it being declared that all the provisions of the Expropriation Act, 10 except where inconsistent with this Act, apply *mutatis mutandis* to the Company and its undertaking, in lieu of the provisions of the Railway Act so excepted”.

Section 121 of the Railway Act is, it is submitted, inconsistent with the Canadian National Railway Act and inapplicable to a corporation which consists of directors only.

32. If Section 121 of the Railway Act can apply, the concurrent findings of the Courts below have disposed of the alternative that Decary was interested directly or indirectly for his own use and benefit and leave for consideration only the question whether the 20 lease was a contract between Decary and the Railway Company.

33. It is submitted that the description of Seguin as *prete-nom* merely means that he was the person found by Decary acting for and on behalf of the Company; that Seguin in fact and in law was the owner and lessor of the property and the only contracting party with the Railway; and that if Decary was the real party he should have been impleaded.

34. Even if Decary were the undisclosed principal of Seguin the contract would not be Decary's. Article 1716 of the Civil Code provides :—

“1716. A mandatory who acts in his own name is liable to the third party with whom he contracts, without prejudice to the rights of the latter against the mandator also”.

It is because there is no contract between the mandator and the third party that a special recourse is given against the mandator in favour of the third party, although no reciprocal recourse is given to the mandator.

35. The Appellants submit that the interest of Decary, if that of principal, would only be an interest coming under the second

alternative of Section 121 and that this matter has been disposed of by the Courts below.

36. Section 121 of the Railway Act does not in terms invalidate the contract executed by the director. It is submitted that the penalty provided by Section 444 is only sanction; and that Article 14 of the Civil Code upon which the decision in *McDonald vs. Riordon* was founded and which is as follows:—

“14. Prohibitive laws import nullity, although such nullity be not therein “expressed”.

10 is not applicable to the construction of a Dominion Act, or to any act which makes provision for the consequences of any prohibition imposed by that Act.

The Court of Appeal held itself bound by the decision in the case of *McDonald and Riordon*. The Appellants will contend that the facts in that case have no relation to the facts in this case and that so far as the decision could be applicable to this case it was wrong in law and should be overruled.

37. It is further submitted that if Section 121 applies the lease should be considered as a contract within the exception as to land 20 necessary for the Railway.

The Appellants submit that the judgments below should be reversed and the action maintained for the following among other

REASONS.

- (1) Because the lease with Seguin and the assignment thereof to the Appellant Company are valid.
- (2) Because the Courts below have erred in holding them to be contracts with Decary and null in law.
- (3) Because the Courts below were wrong in holding that the provisions of Section 121 of the Railway Act apply.
- 30 (4) Because the Courts below were wrong in holding that Section 121 imported the nullity of the contract.
- (5) Because the Court of Appeal was wrong in finding that they were concluded by the judgment in *McDonald and Riordon*.

- (6) Because the decision in *McDonald and Riordon* was wrong in law.
- (7) Because the Respondent has adopted the lease and cannot now repudiate it.
- (8) Because the Respondent is estopped from setting up the invalidity of the lease against the Appellants.
- (9) Because the Appellant Company is in any event entitled to recover the rent for the period during which the Respondent had the use and occupation of the premises.

W. F. CHIPMAN.

In the Privy Council.

ON APPEAL

FROM A JUDGMENT OF THE COURT OF KING'S
BENCH (APPEAL SIDE) OF THE PROVINCE OF
QUEBEC.

MONTREAL TRUST COMPANY
(Plaintiff in the Superior Court)

— AND —

GEORGES HENRI SEGUIN
(Mis-en-cause in the Superior Court)

Appellants

— AND —

CANADIAN NATIONAL RAILWAY COY.
(Defendant in the Superior Court)

Respondent.

CASE FOR THE APPELLANTS.

LAWRENCE JONES & Co.,
Lloyd's Building,
London, E.C.3.