

In the Privy Council.

ON APPEAL

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

BETWEEN

MONTREAL TRUST COMPANY (Plaintiff in the Superior Court)

and

10 GEORGES HENRI SEGUIN (Mis-en-cause in the Superior Court, both Appellants in the Court of King's Bench) Appellants

AND

CANADIAN NATIONAL RAILWAY COMPANY (Defendant in the Superior Court and Respondent in the Court of King's Bench) Respondent.

Case for the Respondent.

1. This appeal is brought from the unanimous judgment of the Court of King's Bench, Appeal Side, Province of Quebec, rendered on the fourteenth day of December, 1938, confirming a judgment in the Superior Court in and for the district of Montreal (de Lorimier, J.), rendered on the 20th September, 1935, annulling a lease from the Appellant Seguin to the Respondent and the transfer thereof from the Appellant Seguin to the Appellant, Montreal Trust Company, and dismissing the Appellant, Montreal Trust Company's action for \$7862.50, with costs. RECORD. p. 401. p. 322.

2. The action was one instituted by the Montreal Trust Company to recover two instalments of rental alleged to be due by the Respondent under a lease of a property on Pine Avenue, in the City of Montreal, as a residence for the late Sir Henry Thornton, then President, Chairman of the

RESPONDENT'S CASE

p. 241. Board, and Managing Director of the Respondent Company, which lease has been made between the Mis-en-cause, Seguin, and the Respondent on the 8th day of August, 1930, for a period of ten years, and which lease had been assigned to the Montreal Trust Company as collateral security for a loan of \$185,000.00 made by that Company to Seguin on the same 8th day of August, 1930.

p. 3. 3. By its Plea, which contained 37 paragraphs, the Respondent raised various grounds of defence to this action, but all substantially leading to the contention that the lease in question was null and void, and it reserved its rights to recover such sums of money as it had paid to the 10 Appellant in respect thereof.

p. 14.
p. 12.
p. 18. 4. The Appellant Company answered this Plea, also at length, and the Mis-en-cause likewise contested the Plea; the issues being joined by a Reply on the part of the Respondent.

5. The facts may be briefly summarised as follows :—

R.S.C. 1927,
c. 172, s. 3. The Canadian National Railway Company is a Company incorporated by the Statute of Canada, 1919, c. 13, now c. 172 of the Revised Statutes of Canada of 1927. It consists of not less than five nor more than fifteen persons chosen by the Governor-in-Council to be directors thereof; 20

s. 19. It was constituted for the purpose of having entrusted to it the management and operation of any lines of railway or parts thereof and any powers, rights or privileges over or with respect to any railways, properties or works which might be from time to time vested in or owned or controlled or occupied by His Majesty in the right of the Dominion of Canada;

s. 7. The directors are paid by the Company such sums for their services as directors as the Governor-in-Council may from time to time approve;

s. 17. The Company is subject to the Railway Act of Canada 30 (R.S.C. 1927, c. 170) but it is provided in the Special Act that whenever, under the provisions of the Railway Act, or any other statute or law, approval, sanction or confirmation by shareholders is required, such approval, sanction or confirmation may be given by the Governor-in-Council.

RECORD
p. 68, l. 44.
p. 69, l. 1.
p. 174. 6. On the 4th of October, 1922, Sir Henry Thornton and Mr. Ernest R. Decary, and certain other gentlemen had been appointed directors of the Respondent and Sir Henry Thornton had assumed from that date the duties of Managing Head, President and Chairman of the Respondent and on the 2nd September, 1925, he had entered into a contract with 40

Respondent to continue as such for a further period of five years from the 4th October, 1925, with as remuneration for the full and entire services to be performed by him a fixed annual salary (irrespective of the magnitude or extent of the work or duties to be performed from time to time and without any extra fees or remuneration of any description) of \$65,000 per annum. This agreement had been confirmed by Order of the Governor-General-in-Council dated the 5th September, 1925, and an additional contract between His Majesty and Sir Henry Thornton confirming that of the 2nd September, 1925, had been entered into. p. 171.

- 10 7. On the 23rd September, 1929, pursuant to a resolution adopted on the same day by its Board of Directors, the Respondent entered into a new contract with Sir Henry Thornton, superseding that of the 2nd September, 1925, engaging him as Managing Head, President and Chairman of the Respondent for a period of five years from the 4th October, 1928, at an annual salary of \$75,000 per annum, and this new contract was approved by Order of the Governor-General-in-Council on the 23rd October, 1929, and an agreement to the same effect was entered into between His Majesty and Sir Henry Thornton on the 25th October, 1929. p. 195.
p. 191.
p. 212.
p. 214.

20 Both agreements and the Order-in-Council provided in express terms that the total remuneration was to be such fixed annual salary irrespective of the magnitude or extent of the work or duties to be performed from time to time and without any extra fees or remuneration of any description.

8. At this time Sir Henry Thornton was occupying and had for some years been occupying, a house on Pine Avenue, in the City of Montreal (civic number 1415), which he had rented from Mr. F. N. Beardmore in September, 1926. This lease was for one year only, and was renewed annually by letter, but the lease contained a clause whereby it was provided that Mr. Beardmore reserved the right to sell the property at any time, and terminate the lease on three months' notice. Mr. Beardmore had gone 30 abroad to live and was anxious to sell the house, but up to that time had not succeeded in obtaining an offer acceptable to him. p. 183.
p. 186, l. 17.

9. Sir Henry Thornton appears to have disliked the precarious nature of his lease, and to have felt that the Respondent Company should provide him with a suitable residence from which he could not be summarily ejected. But it was known to him and to his co-directors that the Minister of Railways would not agree to ask Parliament to vote funds to cover the cost of purchasing one. p. 161, l. 43.

40 Consideration then seems to have been given to the possibility of a leasing arrangement and on 17th September, 1929, the Executive Committee

of the Board of Directors of the Respondent Company, at a meeting held in Montreal, passed the following resolution :—

p. 190.

WHEREAS in the opinion of the Executive Committee a suitable residence in Montreal for the Chairman and President of the Company is essential 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 under such terms and conditions as the Committee may subsequently deem proper.

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At this meeting of the Executive Committee there were present Sir Henry Thornton, Mr. E. R. Decary, and three other directors.

10. On 23rd September, 1929, i.e. the very day the new contract with Sir Henry Thornton was authorised and signed, the Board of Directors passed the following resolution :—

p. 210.

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 at its meeting on September 17th, is approved, and the Committee is hereby authorised to lease a suitable and properly equipped residence for the use of the Chairman and President of the Company under such terms and conditions as the Committee may subsequently deem proper.

p. 161, l. 32.

Apparently the plan that was being considered at that time was that some individual would purchase a suitable property and lease it to the Respondent on terms that would enable the purchaser to borrow the whole amount of the purchase price.

p. 218.

p. 220, l. 25.

In a letter dated the 29th November, 1929, Mr. Beardmore had offered Sir Henry Thornton to sell him his house at a price of \$250,000 and this price had been discussed with Mr. Decary who had expressed the opinion that it was too high and that \$150,000 would be quite enough.

p. 225.

11. On the 24th March, 1930, at a meeting of the Executive Committee of the Board of Directors, a reference was made to the resolution of the directors passed on the 23rd September, 1929 (supra), regarding the provision of an official residence for the President and to the unsuccessful efforts made to secure one, and it was decided—

THAT in order to carry out the intention of the directors as from the date of such resolution an adjustment should, when the residence is purchased, be made with the President in respect of rental, as of the date of his present contract.

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12. Sometime in May, 1930, Sir Henry Thornton went to Mr. Decary and said that he wanted the Beardmore house and asked him if he could finance the purchase of it at \$175,000. Mr. Decary stated in his evidence that he was getting sick and tired of the thing and said: "All right go ahead and offer \$175,000." Thereupon Sir Henry Thornton cabled to his representative in London to ascertain if Mr. Beardmore would consider selling for \$175,000 in cash. Mr. Beardmore replied that he would accept \$175,000 cash provided the furnishings were also purchased for \$10,000. Sir Henry Thornton then cabled his acceptance of this offer on the 10 26th May, 1930, and on the 31st May, 1930, Mr. Beardmore's agents, in Montreal, The Royal Trust Company, wrote to Mr. Decary that Sir Henry Thornton had agreed to purchase the house and furnishings at the above-mentioned prices and had advised them that he wished Mr. Decary to prepare the required deed of sale. (p. 233.)

p. 141, l. 30.

p. 230.

p. 230.

p. 231.

p. 233.

13. The next step was a resolution of the Executive Committee of Respondent dated the 16th June, 1930, to rent this house from Mr. Seguin for ten years at an annual rental of \$15,725 payable quarterly plus taxes and maintenance charges.

p. 235.

This resolution was not entered in the Minutes until the 19th 20 August, 1930.

p. 236.

On the 24th June, 1930, Mr. Decary who had previously discussed the matter of the loan verbally with the General Manager of the Plaintiff Company wrote him a letter stating he or his nominees, subject to his personal guarantee, would purchase this property for \$185,000 cash and that the Respondent would lease it for ten years at a rental representing 8½ per cent. net outside of taxes of any kind, repairs and improvements, and requesting the Plaintiff to make a loan of this amount of \$185,000 for ten years at 6½ per cent. the difference between the amount of interest paid and 8½ per cent. to be applied as a sinking fund on the amount of the loan, Plaintiff to have a first mortgage on the property and an absolute 30 transfer of the lease to the Railway Company as guarantee for the loan.

p. 237, l. 40.

The Plaintiff agreed to make this loan and thereupon on the 4th July, 1930, Mr. Decary wrote asking that Sir Henry Thornton sign a transfer to Mr. Seguin as his nominee, of all his rights in the option to purchase from Mr. Beardmore, the property in question, and request to have the deed of sale made in the name of Mr. Seguin and this was done.

p. 233, l. 44.

p. 239.

14. Then on the 8th August, 1930, there were executed before Mr. Joron, a member of the firm of notaries of Decary, Barlow & Joron,

of which Mr. E. R. Decary was the head and in which firm Mr. Seguin was also employed as a Notary :—

p. 253. (A) Under No. 14068 of Mr. Joron's records, a deed of sale of the property from Mr. Beardmore to Mr. Seguin, for the price of \$175,000 for the immoveable and \$10,000 for the contents and furnishings ;

p. 241. (B) Under No. 14069 of his records a lease of the property to the Respondent for ten years for a rental of \$157,250 payable in forty quarterly equal and consecutive instalments of \$3,931.25, in addition to the water tax and all other taxes and assessments 10 which might affect it ; cost of repairs and fire insurance premiums.

p. 245. (C) Under No. 14070 of his records a loan agreement for \$185,000 from Plaintiff to Mr. Seguin.

p. 267. 15. Sir Henry Thornton had been paying \$500 per month as rental for the same property and \$4,000 was reimbursed to him out of the Respondent's funds as the rental thereof for the eight months from October, 1929, to May, 1930.

p. 264. The rental for the months of June and July had been paid by Decary, Barlow & Joron and had been reimbursed to them.

p. 242, l. 10. 16. This lease to the Respondent had been signed on its behalf 20 by Sir Henry Thornton as President and Mr. Ormsby as Secretary, acting, as is stated in the deed, under the authority of a resolution of the Board of Directors of the Respondent passed on the 15th March, 1926.

This resolution was not produced at the Trial and it is not elsewhere referred to in the record of proceedings.

p. 36. 17. Sir Henry Thornton continued to occupy this property as his residence for himself and his family until he resigned as President of the Respondent in the autumn of 1932 and personal belongings of his remained in it until after his death in March, 1933.

p. 315. Up to February, 1933, there had been paid out of the Respondent's 30 funds sums aggregating \$39,312.50 for rent and \$6,669.03 for taxes and insurance.

p. 155, l. 22. The payments for rent had been made by means of cheques drawn to the order of Mr. Seguin and endorsed by him to the order of either Mr. Decary, or to his firm, Messrs. Decary, Barlow & Joron, and corresponding amounts were paid by that firm to the Montreal Trust Company as interest and sinking fund.

18. On 27th April, 1933, Mr. John W. Cook, K.C., and Mr. J. C. H. Dussault, K.C., on behalf of the Respondent wrote Mr. Seguin repudiating the lease and stating that the property covered thereby would be surrendered on the 1st May, then next, and tendering a cheque for \$3,931.25 in full settlement. p. 301.

Mr. Seguin refused to acquiesce in this repudiation and on the 21st August, 1933, returned the cheque and asserted a claim for \$7,862.50 as rental having matured on 1st May, 1933, and 1st August, 1933. p. 309.

10 In the meantime, the Montreal Trust Company had caused a copy of the assignment of the lease to be served upon the Respondent, and on the 13th October, 1933, instituted suit for this amount of \$7,862.50. p. 304.

19. The Respondent having pleaded the nullity of the lease the case came to Trial before de Lorimier, J., who, by his judgment of the 20th September, 1935, declared the lease and the assignment thereof to be null and void and dismissed the action with costs. p. 10, l. 9. p. 341, l. 5.

20 He found that in fact Mr. Decary was a director of the Respondent when these transactions took place, that it is he who had acted through Mr. Seguin, the latter having merely lent his name for that purpose, that Mr. Decary had under this borrowed name, acquired the property in question for Sir Henry Thornton, that the contracts in question did not relate to the purchase of land necessary for the railway, that Decary had no right as a director to acquire this residence for the Respondent, and that the lease thereof by him to the Respondent was null and void. p. 339, l. 41. p. 339, l. 38. p. 340, l. 20. p. 340, l. 33. p. 340, l. 38.

30 21. In the Court of King's Bench, Appeal Side, all the judges agreed in the findings that Mr. Seguin was merely a dummy for Mr. Decary, that the lease was really a contract between him and the Railway Company, that the land to which it related was not land necessary for the Railway and that the making of the lease constituted a violation of the prohibition contained in section 121 of the Railway Act and that it was in consequence null and void. Mr. Justice Bond, who read the leading judgment moreover held that even if the Appellant, Montreal Trust Company, could be regarded as an innocent third party, it would none the less be powerless to enforce this invalid lease, but that in fact it could not be so regarded because the nature of the transaction had been disclosed to its General Manager and because it must be held to have had knowledge of the fact that Mr. Decary was a director of the Respondent Company, if for no other reason than because of the fact that Sir Henry Thornton was himself at the time one of its own directors. p. 401, l. 28. p. 402, l. 40. p. 413, l. 45. p. 423, l. 38. p. 424, l. 19. p. 426, l. 25. p. 422, l. 40. p. 423, l. 1.

22. The following are extracts from the Canadian National Railways Act (R.S.C. 1927, chap. 172) :—

Section 7.

The directors may be paid by the Company such sums for their services as directors as the Governor-in-Council may from time to time approve.

Section 17, s.s. 1.

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 10 of lines of railway, the making and filing of 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, 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 33.

Actions, suits or other proceedings by or against the Company in respect of its undertaking or in respect of the operation or 20 management of the Canadian Government Railways, may, in the name of the Company, without a fiat, be brought in and may be heard by any judge or judges of any court of competent jurisdiction in Canada, with the same right of appeal as may be had from a judge sitting in court under the rules of court applicable thereto.

2. Any defence available to the respective corporations, including His Majesty, in respect of whose undertaking, the cause of action arose shall be available to the Company, and any expense incurred in connection with any action taken or judgment rendered against the Company in respect of its operation or 30 management of any lines of railway or properties, other than its own line of railway or properties, may be charged to and collected from the corporation in respect of whose undertaking such action arose.

3. Any court having under the statutes or laws relating thereto jurisdiction to deal with any cause of action, suit or other proceeding when arising between private parties shall, with respect to any similar cause of action, suit or other proceeding by or against the Company, be a court of competent jurisdiction under the provisions of this section. 40

23. The following are extracts from the Railway Act, R.S.C. 1927, chap. 170.

Section 113, s.s. 2.

2. No person who holds any office, place or employment in the company, or who is concerned or interested in any contract under or with the company, or is surety for any contractor with the company, shall be capable of being chosen a director, or of holding the office of director.

Section 121.

10 121. 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 surety for any contractor with the company.

24. Articles 14, 984 and 986 of the Civil Code of Lower Canada are as follows :—

Article 14.

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

Article 984.

984. There are four requisites to the validity of a contract.
 Parties legally capable of contracting ;
 Their consent legally given ;
 Something which forms the object of the contract ;
 A lawful cause or consideration.

Article 986.

986. Those legally incapable of contracting are :—

30 Minors in the cases and according to the provisions contained in this code ;

Interdicted persons ;

Married women, except in the cases specified by law ;

Those who, by special provisions of law, are prohibited from contracting by reason of their relation to each other, or of the object of the contract ;

Persons insane, or suffering a temporary derangement of intellect arising from disease, accident, drunkenness or other cause, or who by reason of weakness of understanding are unable to give a valid consent ;

Persons who are afflicted by civil degradation.

25. In 1899 the Quebec Court of Appeals, dealing with the provisions which are now section 113, s.s. 2 and section 121 of the Railway Act, held as follows :—

Held : (affirming the judgment of the Court of Review, Montreal) :

1. The provisions of the enactment above cited are 10 constitutional. The Dominion Parliament having the right to legislate on matters concerning railways, it has also the power to legislate on all incidents which may be required to carry out the object it had in view, provided such incidents are essentially and strictly connected with the principal object, and are primarily intended to assist in carrying out such principal object ; and the capacity or incapacity of directors is a matter essentially connected with the internal economy of a railway company.

2. Where a contract is prohibited by statute, such contract is void, although the statute itself does not state that it is so, 20 and only imposes a penalty on the offender.

Macdonald v. Riordan, et al, 8 Que. K.B. 555.

This judgment was confirmed by the Supreme Court of Canada, 30 S.C.R. 619.

26. It is submitted that in fact and as was concurrently held by both Courts below—

(A) the lease for the Beardmore property was really a contract between Mr. Decary, a director of the Respondent, and the Respondent ;

(B) that this property was not “land necessary for the 30 Railway.”

pp. 58-59. This last fact was clearly established by the uncontradicted evidence of Mr. Bond, General District Superintendent of the Respondent.

p. 257, l. 35. Moreover, the deed whereby Seguin, as Mr. Decary's dummy, acquired the property expressly states that it was subject to a servitude preventing user for any other than residential purposes. The lease itself reproduced this condition.

p. 244, l. 10.

27. It is further submitted that quite apart from the specific prohibition contained in the Railway Act the contract of lease invoked by the Appellant is null and void as having been made in contravention of the well established legal principles which prohibit persons standing in a fiduciary capacity from placing themselves in a situation where their duty as fiduciaries and their personal interest conflict. *Aberdeen Railway Company v. Blaikie* (Scotch Appeal Cases) (MacQueen 461); *North West Transportation Company v. Beatty*, 12 App. Cas. 589 at p. 593; *Wright v. Morgan*, 1926, A.C. 788; *Cape Breton Cold Storage Company, Limited, v. Rowlings*, 1929, S.C.R. 505.

28. It is further submitted that the total remuneration of Sir Henry Thornton having been fixed by contract approved by the Governor-in-Council under section 7 of the Canadian National Railways Act, no increase thereof, such as provided by this lease could validly be made without further approval by the Governor-in-Council and none was obtained.

p. 165, l. 1.

29. It is submitted that the Appellant, the Montreal Trust Company, is in no better position than Mr. Decary himself or his dummy, Mr. Seguin. It took the assignment of the lease, knowing that the Beardmore property was being acquired for Sir Henry Thornton and that the various contracts were being made for the purposes of raising the money required to pay the purchase price thereof for him, and that he and Mr. Decary were both directors of the Respondent and while Sir Henry Thornton was one of its own directors vide paragraph 12 of the Plea in which the holding of such offices by the parties is alleged, and paragraph 9 of that Appellant's answer admitting the allegations of that paragraph of the Plea.

p. 5, l. 15.

p. 13, l. 10.

30. Respondent submits that the judgment appealed from should be affirmed and the appeal dismissed for the following among other

REASONS.

- (1) BECAUSE of the concurrent findings of the two Courts below that the lease sued on was in fact a contract between the Respondent and one of its directors.
- (2) BECAUSE of the concurrent findings of the two Courts below that this contract did not relate to the purchase of land necessary for the Railway.
- (3) BECAUSE of their concurrent findings that the property to which the contract relates was not land necessary for the Railway.

- (4) BECAUSE any contract for any other purposes between Respondent and one of its directors, either in his own name or through a dummy, was prohibited by Statute.
- (5) BECAUSE Mr. Decary was incapable of contracting with the Respondent, either in his own name or through a dummy, by reason of his relation to the Respondent as one of its directors.
- (6) BECAUSE the contract of lease sued on was for the purpose of providing Sir Henry Thornton with remuneration from Respondent additional to that restrictively fixed by his contract with Respondent and with the Crown and approved by the Governor-in-Council and because such additional remuneration could not be so provided without the approval by the Governor-in-Council of modifications to the contracts. 10
- (7) BECAUSE the Appellant, Montreal Trust Company, even if an assignee for value without notice of any irregularity, could have no greater rights against the Respondent, an agency of the Crown and acting as such than Mr. Decary or his dummy Mr. Seguin. 20
- (8) BECAUSE the Appellant, Montreal Trust Company, had knowledge of all the facts upon which the defence is based and must be deemed to have had knowledge of the provisions of the public statutes applicable thereto.
- (9) BECAUSE of the reasons given by the learned Trial Judge in his judgment and of those given by the learned Judges in the Quebec Court of Appeals and because of the reasons contained in the Factum of the Respondent before the said Court of Appeals.

LOUIS S. ST. LAURENT. 30
 HUGH E. O'DONNELL.

In the Privy Council.

ON APPEAL

*From the Court of King's Bench (Appeal
Side) Province of Quebec.*

BETWEEN

MONTREAL TRUST COMPANY (Plaintiff
in the Superior Court) and
GEORGES HENRI SEGUIN (Mis-en-cause
in the Superior Court, both Appellants
in the Court of King's Bench) *Appellants*

AND

**CANADIAN NATIONAL RAILWAY
COMPANY** (Defendant in the Superior
Court and Respondent in the Court of
King's Bench) - - - *Respondent.*

Case for the Respondent.

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