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*Nov. 22, 25.
*Dec. 13.

MEREDITH ROUNTREE (DEFENDANT) ..... APPELLANT;

AND

THE SYDNEY LAND AND LOAN COMPANY (PLAINTIFFS) ..... RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Trust—Company law—Extra remuneration—Ultra vires act of directors—Ratification—Recovery of moneys illegally paid—Mistake of law.

By a resolution of the directors, the secretary of the company had been authorized to sell the company's bonds, for which he was to be paid a commission at the rate of 5 per cent. on the amounts received. Subsequently, at a time when they had no authority to do so, the directors converted the preferred stock held by certain shareholders into bonds, and paid the secretary for his services in making the conversion at the rate of 5 per cent. on the amount of bonds thus disposed of. In an action to recover back from the secretary the moneys so received by him as commission.

Held, that, although the secretary had received the commissions under mistake of law, yet, as he must be assumed to have had knowledge of the illegality of the transaction, the moneys could be recovered back by the company.

Subsequently the scheme of conversion was approved of by a resolution of the shareholders, but it did not appear that they had been fully informed as to the arrangement for the payment of a commission to the secretary in that respect, in addition to his regular salary.

Held, that the resolution of the shareholders had not the effect of ratifying the payment of the commissions.

APPEAL from the judgment of the Supreme Court of Nova Scotia affirming the judgment at the trial whereby the plaintiffs' action for the recovery back

*PRESENT:—Sir Charles Fitzpatrick C.J. and Girouard, Davies, Idington and Duff JJ.

of the moneys claimed to have been illegally paid was affirmed with costs.

The circumstances of the case are stated by Idington J. in his judgment now reported.

The action was to recover money received by the defendant as commission on the conversion of preferred stock of the plaintiff company into bonds. The defendant, who was manager and secretary of the company at the time the services were performed, counterclaimed for damages for wrongful dismissal.

The trial judge, Russell J., entered judgment for the plaintiffs for the amount paid defendant, holding the contract to be *ultra vires*. He also found that there was no evidence of bad faith on his part, nor of any conduct that would warrant his dismissal, and awarded him, as damages on the counterclaim, the amount of his salary during five months, the unexpired portion of his year.

By the judgment appealed from this decision was affirmed, in so far as it related to the plaintiffs' claim, but the amount awarded to the defendant on his counterclaim was increased to $750, the full amount of six months' salary at the rate of his engagement.

Lafleur K.C. and *Mellish K.C.* for the appellant.

W. B. A. Ritchie K.C. for the respondents.

THE CHIEF JUSTICE agreed with Idington J.

GIROUARD J. concurred in the dismissal of the appeal.

DAVIES J.—In this case some questions were raised in the Supreme Court of Nova Scotia on the

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counterclaim of the appellant (defendant) and decided by that court.

No appeal was taken to this court from that decision.

This appeal related entirely to the right of the respondent company to recover back from its manager and secretary, Rountree, certain moneys alleged to have been improperly and illegally paid to him by the officers of the company, he himself being one of the signers of the cheques on which the moneys were obtained.

For the reasons given by Mr. Justice Meagher, in delivering the judgment of the Supreme Court of Nova Scotia, I am of opinion that these moneys were recoverable back and that this appeal should be dismissed with costs.

IDINGTON J.—The respondent company was promoted by the appellant and incorporated for dealing in land and loaning money and he became the secretary and also under the powers of that office, I think, manager.

The following section of the company's by-laws defined his duties:—

> Section 9. The secretary shall also be manager of the company and attend all meetings of the shareholders and board of directors. He shall keep all accounts fully and accurately, as well of *the company as between the company and its shareholders, have the custody of the records and seal, and issue all notices on the order of the president or vice-president; sign all certificates of shares and agency appointments, and have the general management of the company. He shall present to the directors at each meeting a statement of monies received and disbursed during the preceding months, and shall also perform such other duties as may be assigned to him by the board of directors.*

Section 7 of the same by-laws also shews he was required to countersign cheques.

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Section 7. *The funds of the company shall be deposited in a chartered bank of Canada* to be selected by the directors, and shall so remain until drawn therefrom by cheque or drafts, signed by the president, *or in his absence, the vice-president and manager.*

The company were to allow him under a written agreement between it and him a stated salary and 2½ per cent. for selling stock of the company.

Sometime later the company decided upon issuing bonds and passed a resolution authorizing appellant to sell the same to the amount of $150,000 and allowing him a commission of 5 per cent. on such sales upon the amounts paid for such bonds.

Later on and at a time when the company was evidently falling behind the directors conceived the scheme of converting the preferred stock, that was to bear 8 per cent. interest, and was previously sold, into bonds of the issue just now mentioned. The appellant had been allowed for sales of this preferred stock and for the additional trouble of canvassing for its conversion desired 5 per cent. more.

The company had no power, however, to make this conversion.

The president asked the secretary to look after this business and the appellant said he supposed he would get the 5 per cent. commission on such conversion as he might get agreed to. He says the president assented to this and also that later on the other directors also assented to it. No resolution of that kind was passed. It may be observed that the rate seems excessive as compared with 2½ per cent. for canvassing for original subscriptions for stock. It suggests the assent so far as got may have been through mistake.

The entire arrangement for conversion was so obviously *ultra vires* one is surprised to see it ventured on.

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The secretary made claim for the 5 per cent. commission for conversion, and got paid in great part by cheques countersigned under the above by-law by himself and the company now sue to recover back the commission thus paid and the learned trial judge adjudged appellant do pay this claim and on appeal the Supreme Court of Nova Scotia dismissed his appeal and now he appeals here.

It was urged in support of this appeal that the company had no right to recover, as moneys so paid could not be recovered, and, even if in law it ever could be held that such a recovery was possible, the company had ratified and adopted the secretary's services and became thereby so bound that recovery should not be allowed.

I think one holding such relations as this secretary did to the company cannot claim to hold such commission for legal services and that he either had or should have had knowledge of the illegality and when he ventured to countersign cheques to himself for such commissions he was bound to inquire for the legal authority for the act he was pretending to do, professedly as such secretary.

There could never be any safeguard for a company if one entrusted with such duties did them with so little regard so the law or what the law might be as this appellant evinced under the facts of this case.

There was no ratification as I view the facts.

There may have been culpable negligence on the part of the directors also but the two blacks could not make a white.

Each official in such place of trust must inquire for himself.

The last part or balance of this commission ac-

count was not paid by such cheques as appellant countersigned but by other officers, but I think that does not place such later payments in a better position in law for the appellant's case. Had he not neglected his duty in regard to the first payments he never would have applied for the later ones.

I think also that the duty devolved on the appellant to have explained more fully to the shareholders and directors than he did the nature of his claim and especially that he ought to have seen they each knew at their meetings that the auditor's written refusal to sanction the first payments, was read and the nature of the auditor's objection made quite plain. And more than that; when, if ever, he was unable to have brought all that could possibly have arisen thereout home to the minds of shareholders and directors, beyond all doubt, he should have refrained from touching the pen, to countersign the cheque, or the money it brought, if by accident he had countersigned.

When a man occupies any position of trust and it so happens as it sometimes almost unavoidably does that he is made to appear as acting where his duty and his interest conflict he should as he regards his own honour, to say nothing of the law, see that his conduct in the premises is thoroughly well understood by those entitled to know and that he, if acting, is but obeying their command and desires and not his own mere volition.

Secretaries having as this appellant had to sign or countersign cheques for or to themselves should, by thus clearing things up as far as possible reduce the act of doing so, when it enures directly to their own benefit, to the mere needful mechanical duty.

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Companies might do well to provide for such cases so that even the appearance of acting the dual part need not exist.

I think the appeal should be dismissed with costs.

DUFF J. agreed with Idington J.

Appeal dismissed with costs.

Solicitors for the appellant: *Burchell & McIntyre.*

Solicitor for the respondents: *Joseph A. Gillies.*