Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Bank of Montreal v. *Simson et Vir, from Lower Canada; delivered August* 2, 1861.

Present:

LORD KINGSDOWN.
SIR EDWARD RYAN.
THE MASTER OF THE ROLLS.

THE Appeal in this case involves a question of considerable importance as to the extent of the authority of a tutor over the property of his ward according to the law of Lower Canada, which is the old French law. The Respondent, Dame Eleonore Simson, is the only child and sole heiress of her father John Simson, who died in March 1835; she was a posthumous child born in the month of August after the death of her father. On the 9th October, 1835, her mother was appointed her tutrix, and a gentleman of the name of John Fisher was appointed sub-tutor. On the 19th July, 1843, the mother of the Respondent married Charles Michel De Lisle, and they were in October following appointed joint tutor and tutrix of the Respondent. In November following the mother of the Respondent died, whereupon in December 1844 the maternal grandmother was appointed tutrix. On the death of the grandmother, which took place in May 1846, Robert Simson, an uncle, was appointed sub-tutor, and Charles Michel De Lisle, the step-father, was appointed tutor of the Respondent. This appointment was made on the 27th May, 1846, and in such a manner as not to interfere with or abrogate the appointment previously made of Robert Simson as sub-tutor.

Part of the property of the infant, derived from her father, consisted of thirty shares in the Bank of

Montreal. Robert Simson on the 29th September, 1846, in his character of sub-tutor, gave a notice in writing to the Bank, through its cashier, informing them that C. Michel De Lisle had no power or authority to sell these shares. Notwithstanding this notification C. Michel De Lisle sold six of the shares in December 1848; two more in January 1849; ten more in June following; and the remaining twelve in the following month of September 1849. In all these cases the Bank of Montreal made the transfer of these shares in the books of the Bank, as required by De Lisle, out of the name of the father of the Respondent, in whose name they were standing, into the name of the various purchasers to whom De Lisle had sold them. The question in this Appeal is the validity of these transfers.

The Respondent in 1855 married her present husband Mr. Turner, who is also a Respondent. In September 1857, about a year after she attained her majority, and being by her marriage contract solely entitled to the property derived from her father, she instituted original proceedings against the Bank of Montreal in the Superior Court of Lower Canada, claiming the dividends which had accrued due on the thirty shares from the time of their sale in December 1848, and in January, June, and September 1849. The sole question in the cause was whether the transfer of the shares was valid and effectual. The case was fully argued before the Superior Court of Montreal on the 30th of November, 1859, when the Court pronounced a Judgment in favour of the Respondent, holding that the power of the tutor did not extend to the sale of the shares, and that the transfer of them by the tutor was null and void.

The Bank of Montreal appealed from this Judgment in 1860 to the Court of Queen's Bench in Canada, and the case was argued in March 1860, and judgment given on the 31st May, 1860, by a majority of the Judges affirming the decision of the Court below, and dismissing the Appeal with costs. The correctness of this decision is the question before us.

The facts are not in dispute, and the question to be determined is the extent of the authority of a tutor over the property of his ward; whether that authority extended to selling the Bank shares in question;

and if it did not so extend, whether the act can be considered as void in itself or only voidable. For the purpose of determining this question it is necessary to ascertain what the law of France was in this respect prior to the great French Revolution, which is the law which now obtains in Lower Canada. This law is the old Civil Law as applicable to this subject, regulated nevertheless by Article 102 of the Ordonnance of Orleans promulgated in January 1560, during the reign of Charles IX, and which modified to some extent in this respect the Civil Law which had previously prevailed on this subject.

The general power of the tutor over the ward and his property was that of a parent—"domini loco habetur:" he could get in the property of the minor and give a discharge for payment of debts due to him; in all matters relating to the tutelage the act of the tutor bound the minor. The power of the tutor to dispose of the property of the minor was originally by the Civil Law unlimited, unless accompanied by fraud; and in some cases he was compulsorily required to realize by sale all property that might by possibility suffer by being kept, such as houses, lest they should be burnt.

This general power was limited first by the Law of Alexander Severus, which forbade the sale of "prædia" belonging to the ward, and afterwards by the Edict of Constantine, which prohibited the sale not merely of "prædia" without judicial authority, but even the sale of any other property of the minor, unless such as was liable to perish by use, and also the superfluous animals. And this was the law obtaining in France in the earlier part of the sixteenth century, when it was further regulated by the Ordonnance of Orleans in January 1560, by which, in Article 102, it is enacted that tutors and curators shall be bound, as soon as they have made an inventory of the property of their wards, to sell "par autorité de justice" the perishable moveables, and to lay out the produce, under the advice of relations and friends, in the purchase of "rentes ou héritages," that is, in the purchase of property producing a permanent income. It is to be observed, therefore, that the Ordonnance of Orleans recognizes the law then subsisting in France in this matter to be regulated by the Edict of Constantine, which prohibits the sale of any property of the minor except

those moveables which perish by use and the superfluous animals; and then in order to extend the power of sale of the tutor not merely over such moveables as are within the class specified by the Edict of Constantine, but also over those which are liable to decay or risk from other causes, enacts that the tutor shall have power to sell all "meubles périssables," but these only under the authority of the law ("par autorité de justice").

By "meubles périssables," as distinguished from moveables which perish by use, we understand to be meant all property which is liable to deteriorate from permanent causes. It is obvious that an Ordonnance which declares that for the sale of perishable property of a moveable character the sanction of a Court of Justice shall be required, infers that moveable property which is of a permanent character, and producing a permanent income, cannot be disposed of without such authority.

The effect and extent of the Ordonnance of Orleans on the power of a tutor over the property of his ward has been the subject of much discussion by the writers and jurists versed in French law, and has also been the subject of many judicial decisions, several of which have been cited and commented upon in their works. After carefully examining the various authorities and the writers on this subject prior to the enactment of the French Codes, and testing their opinion by the decided cases cited in their works, we are of opinion, though various passages may be found dispersed through their writings on which arguments may reasonably be founded leading to opposite conclusions, that no considerable or irreconcileable diversity of opinion appears to exist between them, and that the result of the law so far it is applicable to the case before us may be thus stated:—

The tutor's duty is to make a inventory of all the property of his ward, and to take an administrative care in the protection and management of it; but without the sanction of a Court of Justice having been previously obtained, his power does not extend to selling any portion of the immoveable property of his ward, or any portion of that property which is of mixed character; and further that his power is also restricted from selling any portion of the moveable property of the ward without the intervention and

previous sanction of a Court of Justice having been first obtained, except such portion of it as is unproductive of revenue, and such portion also as being of a perishable character will necessarily either cease to exist or will from permanent causes become deteriorated in value at the period of timewhen the ward shall attain his majority; and even this qualified power of disposing of property of an unproductive character is still further limited by a restriction from disposing of articles in the nature of heir-looms, as to which an hereditary "pretium affectionis" is attached. Although this is an incomplete statement of the law, it is, we think, accurate, and sufficiently comprehensive for the purposes of this case.

It has been contended on behalf of the Appellant, that as in the Civil Law, the original principle was that the tutor stood in the place of the father, and was dominus of the property of the ward, and as such had power to dispose of all his property, the case must be considered as one in which the burthen of proof lies on the Respondent to establish that the property in question falls within the range of the various classes of property which, by regulations made subsequent to the original Law, should be excepted from the general rule which gave the tutor complete control: these exceptions, it is said, were of three sorts: first, immoveable property; and next, *quasi* immoveable property, which was called "immeubles fictifs;" and thirdly, moveable property of a peculiar value as possessing a "pretium affectionis," and being in the nature of heir-looms: that these were the only three classes of property excepted from the control of the tutor. That all property not falling within one of these three classes is still subject to the general control of the tutor, and that bank-shares do not fall within the description of any one of these classes of property, and consequently that the power of the tutor over them was absolute, and the right of the Respondent to recover them gone.

But this is not the view we take of this case: we think that the Edict of Constantine changed the law on this subject, and exempted all property of the ward from the saleable control of the tutor, with the exception of the property there mentioned, and that if the matter had remained as fixed by that Edict, such must be considered to have been the law of France prior to the year 1560. And we also

think that the Ordonnance of Orleans has only altered the law in this respect by extending the power of sale by the tutor over the moveable property of the ward there specified, and this only with the previously obtained sanction of a Court of Justice.

Although the various authorities cited to us are susceptible of various meanings, and without some qualification of the generality of their terms are not entirely reconcileable, yet this is, we think, the general effect of them; and this view is confirmed by the cases cited and commented upon in such authorities; as an instance of which one case which was cited before us may be referred to, where an office belonging to the ward, which had during the vacancy caused by the death of her father lapsed to the profit of the State, had been disposed of by the widow as the guardian of her daughter, the sale was annulled on the ground that the office was in the nature of "immeuble fictif."

But the case proceeds to say:—"Il en serait de même s'il s'agissait d'une chose purement mobiliaire, mais d'une grande valeur, et qui formerait, pour ainsi dire, toute ou la majeure partie de la succession."

If this be the correct view of the case, the burden of the proof falls on the Appellant to show that the Bank shares fell within the property which De Lisle as tutor was entitled to dispose of without the sanction of a Court of Justice.

It is always to be borne in mind that, as the wants and exigencies of society increase, new denominations of property will come into existence, to which the observations made and rules laid down in previous cases do not precisely apply; but we entertain no doubt, upon a full review of this subject, that the Bank shares in question do not fall within any class of property which the tutor has power to dispose of without the sanction of a Court of Justice. It was not, in our opinion, open to the tutor to speculate upon, or to decide for himself or for his ward, whether such shares as these were likely to rise or fall in value. We think that no distinction can be taken in this respect, and so far as the power of the tutor is concerned, between the shares in the Montreal Bank and shares in the Company of the Bank of England, and stock in the English or foreign funds, and that the sale and realization of such property requires the interposition

and sanction of a Court of Justice, and the re-investment of the proceeds in property producing a permanent income, according to the terms of the Ordonnance of Orleans.

It has also been argued before us that the power of the tutor is, by all the authorities, held to include administration, and that administration necessarily includes sale. But we dissent from that argument; we think that the supposition that the administration of the affairs of a ward necessarily involves the sale of any portion of his property, is one derived from the ideas which in England attach to the word "administration," which in its technical sense applies only to a legal personal representative; but this is, in our opinion, wholly distinct from the functions of a tutor, and which, in order to avoid confusion, it is essential to keep distinct. Administration, as applicable to a tutor, includes management, but does not include sale, unless to the limited and qualified extent already pointed out.

It is partly for this reason that we have not thought it necessary or desirable to comment on the authorities cited from the decisions of the English tribunals, and the arguments deduced from them: they have not, in our opinion, any relevancy to the matter to be decided in this case.

Neither have we thought it of any moment to consider the Articles in the present French Code, or the discussions in the Conferences which took place when that Code was framed, except so far as these Conferences illustrate any ambiguous point in the earlier law which up to that time obtained in the Kingdom of France. So far as these latter have any bearing on the subject, they concur in bringing us to the conclusion already stated, that by the law of France prior to that period, and which is that now in force in the Province of Lower Canada, it was not in the power of the tutor to sell the Bank shares without the assistance and sanction of a Court of Justice.

The next question to be considered is the effect of the sale which has actually take place, and the transfer of these shares to persons who are strangers to the record.

It is argued by the Counsel for the Appellant, even on the assumption that the tutor exceeded his authority, still that the sale was good; and that.

assuming that the transfer ought not to have been made, still that, being made, it is valid, and that the act can only be treated as a voidable transaction, and not as one actually void, and that, if it be only voidable, the persons who bought the shares, and in whose names they now stand, ought to have been brought before the Court to answer to a matter in which they were so materially interested.

We are of opinion, however, that the act of the tutor, exceeding the limits of his power and the scope of his authority, is actually void. The authorities on this subject, amongst the authors cited to us, are conclusive on this head. It is not necessary to refer to them in detail, but it may be useful to refer to one passage, where the principle which governs them and the reasons for it appear to us to be well and lucidly stated by Pothier, in his "Traité de Personnes," Part I, Titre VI, Article III, Section 2.

After stating in this passage that a minor can, after his minority is over, reclaim immoveable property sold by the tutor, Pothier observes that he can do so without having "besoin pour cela de lettres de rescission ; car on n'a besoin de ces lettres que pour revenir contre son propre fait. Un mineur a besoin de lettres contre le fait de son tuteur, parce que le fait de son tuteur est censé son propre fait : mais cette règle n'a lieu qu'à l'égard des choses renfermées dans le pouvoir d'un tuteur, c'est-à-dire, qui concernent l'administration du tuteur. Or, cette vente faite par le tuteur, étant une chose qui excède les bornes du pouvoir du tuteur, n'est pas plus à cet égard le fait du mineur que ne le serait le fait d'un étranger qui se serait avisé de vendre cet immeuble. Le mineur n'a donc pas plus besoin de lettres pour revendiquer cet immeuble, que s'il avait été vendu par un étranger sans caractère ; et le tuteur lui-même dans les choses qui excèdent son pouvoir, doit être regardé sans caractère."

This passage, besides bearing on the point now considering, is useful also as pointing out that in the sense in which the word "administration" was employed by the French jurists on this subject it did not include in it the idea of sale, which is derived from our English notions on this subject. The observations just read are made, it is true, by Pothier with relation to the sale of immoveable property, but the principle is the same with respect to all property

sold by the tutor which he had no power to sell, and which the authority of a Court of Justice could alone entitle him to dispose of. When this excess of power is once established, then the sale is, in fact, the sale of a stranger, and the act here complained of is as if a stranger had sold these shares, and had then, by fraud or forgery, induced the Bank to make the transfer of them in their books. In that case they would still remain liable to the rights of the minor, both for the shares themselves and for the dividends which accrued on them.

Though it cannot, in our opinion, affect the ultimate decision of the case, which must rest on the principles already stated, it is not an immaterial circumstance in the consideration of this case, that the sub-tutor, Robert Simson, on the 29th of September, 1846, a year and a-half before the first sale of shares took place, gave regular and formal notice to the Bank that De Lisle, the tutor, had no authority to sell the shares, and that the circumstances of the ward were such that the disposal of them was not required for her benefit. The distressed circumstances of De Lisle seem also to have been notorious, and likely to be known to the Bank, in which case it was probable that any sale by him would be for his own sole advantage.

The functions and duties of the sub-tutor seem to be not very clearly defined; he has no power of actively interfering, but his duty seems to be to watch over the conduct of the tutor, and endeavour to prevent injury being inflicted on the person or property of the ward. Nothing could be more formal or precise than the notice served by him on the Bank in that character, which is set out in p. 26; and as the Bank have thought fit, on their own determination, without even giving notice to the sub-tutor, or to the friends of the minor, of the attempt the tutor was making to sell his ward's property, to allow the transfer in their books of all these shares by the tutor to mere strangers, they must now take the consequences, their Lordships being of opinion that the act of making that transfer was, so far as regards the minor, merely nominal, that it took away no property from her, and that the decision of the Superior Court of Lower Canada and of the Court of Queen's Bench is correct, and must be affirmed, with costs; and they will humbly advise Her Majesty accordingly.