12, 1895

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In the Privy Council.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA.

Between GEORGE W. SIMPSON ès-qual, ALEXANDER MOLSON, AND HERBERT S. S. MOLSON - } *Appellants,*

AND

THE MOLSONS BANK - - - - - *Respondents.*

CASE ON BEHALF OF THE APPELLANTS.

1. This is an appeal from a Judgment of the Court of Queen's Bench for Lower Canada, dated the 27th February, 1894, by which that Court affirmed a Judgment of the Superior Court (Mr. Justice Taschereau), rendered on the 6th October, 1892, dismissing the action of the Appellants with costs. The question to be determined in the said action and upon the present appeal is whether the Appellants, or any of them, are entitled to recover from the Respondents (some times hereinafter referred to as "the Bank") 640 Shares of the Capital Stock of the Bank, or their value with arrears of dividends and interest, or damages for wrongfully transferring such Shares. The Appellant, Alexander Molson, is the youngest son of the late Hon. John Molson, of Montreal, who died on the 12th July, 1860, being then and having for many years been Vice-President of the Bank. The Appellant, George W. Simpson, is Curator to the substitution created by the Will of the said Hon. John Molson for the share of the said Hon. John Molson's estate, of which the said Alexander Molson is institute. The Appellant, Herbert S. S. Molson, is a son of the said Alexander Molson, and is one of the substitutes comprised in the said substitution. The Respondent Bank is a corporation constituted under an Act of Parliament of Canada (18 Vict. cap. 202, Public Act), to which Act further reference will hereinafter be made. Record, p. 262. Record, p. 10.

2. The following are the material facts. It should be stated that, although the inferences to be drawn from the facts are in dispute, there was as to the actual facts but little contest between the parties.

Record, p. 24. 3. By his Will, dated the 20th April, 1860, the said Hon. John Molson, after sundry legacies and bequests, devised and bequeathed the residue of his estate to his brother, William Molson (the President of the Bank), his wife M. A. E. Molson, and the Appellant, Alexander Molson, as trustees upon trust, to administer and manage the same for a term of ten years from his decease, and the Testator declared that at the expiration of the said term the said residue should become and be the property of his five sons for their respective lives in equal shares, and at the death of each of his said sons, or if any of them should have died before the expiration of the said term, the share of the one so dying, or who should have died, should become and be for ever the property of his lawful issue in the shares and subject as in the said Will mentioned.

4. The following are the more material clauses of the said Will:—

"Tenthly.—As to the residue of my estate, real and personal, wheresoever the same may be, and of whatsoever the same may consist, of which I may die possessed, or to which I may then be entitled, I give, devise, and bequeath the same to my said brother, William Molson, of the said City of Montreal, Esquire; Mary Ann Elizabeth Molson, my beloved wife, and Alexander Molson, my youngest son now living, the survivors and survivor of them, and the heirs and assigns of the survivor of them, upon the several trusts hereinafter declared: that is to say, upon trust, firstly, to hold, administer, and manage the said residue of my estate to the best advantage during the full term of ten years from and after the day of my decease, and further, if my said wife be living at the expiration of that term, and shall have acceded to the condition expressed in the sixth section of this my Will, until the expiration of one year from and after her decease; secondly, to sell and convey all such parts of my real estate as are not hereinbefore specially devised, and as they shall deem it advantageous to my estate to sell, and to grant deeds of sale and conveyance of the same, to receive and grant receipts for the purchase moneys, to invest the purchase moneys and all other moneys arising from or accruing to my estate and not already invested on good and sufficient security, either by way of hypotheque or mortgage of or on real estate or by the purchase of Government stocks or stocks of sound incorporated banks, so as to produce interest, dividends or profits, to secure the regular payment of the annuity payable to my said wife under her said marriage contract and the additional annuity hereinbefore bequeathed to her, and generally to comply with and fulfil all other the requirements of this my Will; and thirdly, at or so soon as practicable after the expiration of the term of the said trust to account for and give the said residue as the same shall then be found to my residuary devisees and legatees hereinafter named.

"In all questions touching the sale and disposition of any part of my estate, or the investment of moneys arising from my estate or accruing thereto, the concurrence of any two of my said trustees, of whom while living my said brother William Molson shall be one, shall be sufficient."

"Thirteenthly.—I further will and direct that, at the expiration of the term hereinbefore limited for the continuance of the said trust, the said residue of my estate, real and personal, as the same shall subsist, shall, under and subject to the conditions and limitations hereinafter expressed, fall to and become, and be for their respective lives only, and in equal shares, the property of my said five sons; and at

the death of each of my said sons, or if any of them shall have died before the expiration of the said term, the share of the one so dying, or who shall have died, shall become and be for ever the property of his lawful issue in the proportion of one share to each daughter and two shares to each son, subject, however, to the right of usufruct thereof on the part of his widow, if living, for so long only as she shall remain his widow. It is my will, however, that it shall be, and I hereby declare it to be, competent to each of my said five sons by his last Will and Testament, or by a codicil or codicils thereto, but not otherwise, to alter the proportions in which by the foregoing bequest and devise a share of the residue of my estate is bequeathed and devised to his lawful issue, and even to will and direct that one or more of his said lawful issue shall not be entitled to any part or portion of the said share of the residue of my estate, anything herein contained to the contrary notwithstanding."

"Sixteenthly.—And I further will and direct that, as soon as it may be practicable after the expiration of the term hereinbefore limited for the continuance of the said trust, the said trustees shall apportion and distribute the said residue of my estate to and among the parties entitled thereto, as hereinbefore directed, taking care in such apportionment and distribution to provide (as far as may be possible and in such manner as the said trustees may deem best) as well against risk of the capital of any of the shares being lost in the hands of any holder thereof under substitution, or as usufructuary thereof as against risk, by reason of my said engagement under the marriage contract above referred to, of my sons John and Alexander; and if, in making the apportionment and division of the said residue, the said trustees shall deem it necessary and advantageous to sell any part of the said residue, and in lieu thereof to apportion and divide the net proceeds of the sales thereof, it shall be competent for them so to do, anything hereinbefore to the contrary notwithstanding."

"Eighteenthly.—It is further my express will, and I hereby specially direct and ordain as an essential condition of my bequest aforesaid, in favour of my said five sons and of their widows respectively, that all the estate, interest, and property, whether by way of usufruct, annuity, or otherwise, and every part and portion thereof which my said sons respectively, or their widows respectively, shall or may in anywise take or receive, or be entitled to take or receive, under this my Will, and also all interest or revenues or income in anywise to arise therefrom, shall be and remain for ever exempt from all liability for the debts present or future of them or any of them, and shall be absolutely *insaisissable* for any such debts or for any other cause whatsoever, and shall be and shall be held and taken as being to all intents and purposes *legs d'aliments* by me hereby made and granted in favour of them and of each of them, and shall moreover be insusceptible of being by them, any or either of them, assigned or otherwise aliened for any purpose or cause whatsoever."

"Twenty-secondly.—I hereby constitute and appoint my said three trustees hereinbefore named, and the survivors and survivor of them, to be executors and executor of this my last Will and Testament, and I hereby give and transfer to them, as trustees and universal fiduciary legatees and devisees under the same and also as executors thereof, the seisin and possession of all my estate, real and personal, movable and immovable, wheresoever the same may be, and of whatsoever the same may consist.

"And my further will is, that the powers of my said executors and executor

as such shall be, and they are hereby, continued beyond the time limited by law in this part of the Province of Canada, and until all and every of the requirements of this my Will shall have been accomplished.

"And lastly, provided always, and I hereby direct and authorise my dearly beloved wife by any deed or instrument in writing to be by her signed, sealed, and delivered in the presence of, and attested by three credible witnesses, to nominate, substitute, and appoint any other fit person to be a trustee, executor, and universal fiduciary, legatee, and devisee of this my Will in the stead and place of my said wife from and after her decease; and when such new trustee and executor shall be nominated and appointed as aforesaid, all the trust, estate, moneys, and premises then subject to the trusts and provisions of this my Will shall be effectually assigned, transferred to, and vested in the said surviving and continuing and new trustees to be held by them, and the survivors or survivor of them, upon the trusts of this my Will in all respects as if such new trustee had been originally appointed by this my Will, and the person so to be appointed trustee as aforesaid shall have all the powers and authorities by this my Will vested in my said dearly beloved wife, in whose place and stead he shall be substitute as aforesaid."

Record, p. 36. 5. Probate of the said Will was granted on the 12th July, 1860, to the three executors therein named, and the said Will was duly registered on the 12th July, 1860.

6. Testamentary executors under the Canadian Civil Code are in an entirely different position from the executor of or a trustee under a Will in English law. Unlike executors in England, they take no property in the assets of their Testator; they are "seised as legal depositaries" of the movable property of the succession for a year and a day, or for such longer period as the Testator may determine. But (save in the case of insufficiency of moneys for the execution of the Will, in which case then they cannot sell without consent of heir or legatee or authorisation of the Court) they can only alienate the Testator's property under an express power in that behalf conferred by the Testator; in short, they are entrusted with powers and not with property. Joint testamentary executors must act together, unless the Testator has otherwise ordained. The following are extracts from the Section of the Code relating to testamentary executors:—

ARTICLE 905.—A Testator may name one or more testamentary executors . . . If there be no testamentary executors, and none have been appointed in the manner in which they may be, the execution of the Will devolves entirely upon the heir or the legatee who receives the succession.

ARTICLE 913.—If there be several joint testamentary executors with the same duties to perform, they have all equal powers and must act together unless the Testator has otherwise ordained.

ARTICLE 918.—Testamentary executors for the purposes of the execution of the Will are seised as legal depositaries of the movable property of the succession, and may claim possession of it even against the heir or legatee.

This seisin lasts for a year and a day, reckoning from the death of the Testator or from the time when the executor was no longer prevented from taking possession.

When his duties are at an end the testamentary executor must render an account to the heir or legatee who receives the succession, and pay him over the balance remaining in his hands.

ARTICLE 919.—He pays the debts and discharges the particular legacies with the consent of the heir or of the legatee who receives the succession, or after calling in such heir or legatee with the authorisation of the Court. In case of insufficiency of moneys for the execution of the Will he may, with the same consent or with the same authorisation, sell movable property of the succession to the amount required. The heir or legatee may, however, prevent such sale by tendering the amount required for the execution of the Will.

ARTICLE 921.—The Testator may modify, restrict, or extend the powers, the obligations, and the seisin of the testamentary executor, and the duration of his functions. He may constitute the testamentary executor an administrator of his property, in whole or in part, and may even give him the power to alienate it with or without the intervention of the heir or legatee, in the manner and for the purposes determined by himself.

7. On the 13th May, 1861, by deed attested by three witnesses, the said M. A. E. Molson, pursuant to the provision lastly hereinbefore set out of the said Will, duly appointed Joseph Dinham Molson to be a trustee, executor, and universal fiduciary legatee and devisee of the said Will, so that under and by virtue of the said appointment all the trust, estate, moneys, and premises, subject to the trusts and provisions of the said last Will, should be assigned, transferred to, and vested in the surviving and continuing and new trustees, as provided by the said provision. The said deed was deposited to be of record in the office of T. Doucet, a Notary Public, and copies thereof were served upon the said William Molson and the Appellant, Alexander Molson. The said M. A. E. Molson died on the 5th May, 1862, and it is submitted that thereupon and by virtue of the said appointment the rights and powers of testamentary executors in and over the estate of the said Hon. John Molson became vested in the said William Molson, the Appellant, Alexander Molson, and the said J. D. Molson jointly. The said J. D. Molson appears never to have taken any active part in the administration under the said Will. He stated that he served his appointment, and was always willing, prepared, and anxious to act as executor, but that his uncle, the said William Molson, refused to recognise him as such.

Record, p. 37.

Record, p. 38, 39.

Record, p. 168.

8. The Testator's estate included 3,200 Shares of 50 dollars each of the Capital Stock of the Bank, which at his death were standing in his name in the books of the Bank. Such shares remained in the Testator's name in the said books for nearly six years, viz., until the 11th May, 1866, when they were transferred by journal entry "To Executors, viz., William Molson and Alexander Molson, for transmission." This entry on the face of it, by the mention of the word "executors," gives notice that the Shares are the subject of a Will which is on the public records and is open to inspection; but the words "for transmission," read by the light of Act XXXIV. (hereinafter set out) of the Banks Act of Parliament, are of even greater importance. It was the duty of the Bank to enter the names of the parties entitled under the Will to receive the dividends on the Shares, that is to say, the names of the executors (as being entitled to

Record, p. 151.

receive the dividends for ten years) and the names of the legatees (as the persons entitled to receive the dividends after the ten years), and the words "for transmission" are in reality a compendious description of the legatees; at any rate, they indicate that the Shares are not the property of the executors, but must hereafter be delivered over by the executors to the persons, viz., legatees, to whom they actually belong.

9. The said William Molson and the Appellant, A. Molson, are for convenience sometimes hereinafter referred to as "the two executors."

10. During the six years between the death of the Testator and the said transfer, and afterwards until the month of April, 1871, the dividends on the said 3,200 Shares were paid by the Bank by dividend cheques, drawn by and on the Bank to the order of "the Executors of the estate of the late Hon. John Molson." These cheques were always paid upon the endorsement of the two executors as executors of the said estate, and do not appear to have been in any case endorsed either by the said M. A. E. Molson during her lifetime, or afterwards by the said J. D. Molson.

Record, p. 160.

11. The term of ten years limited by the tenth clause of the said Will expired on the 12th July, 1870, and it is submitted that at that date the rights of the executors in the said residuary estate, other than those of and incidental to apportionment and partition under the sixteenth clause of the said Will, came to an end, and *inter alia* the said Shares were, at any rate from that date, vested jointly in the residuary legatees, each of whom would or might become entitled to a particular number thereof upon the making of the apportionment and partition prescribed by the sixteenth clause of the said Will. From that date the executors had only to apportion the said residue between the five sets of legatees, to deliver over to each set of legatees their apportioned one-fifth share, and to render to the legatees an account of their administration of the said estate.

12. In winding up and distributing the said estate, the two executors acted throughout under, and in accordance with, the legal advice of the Hon. J. J. C. Abbott, of Montreal, who was also Counsel for the Bank and was a personal friend of the Appellant, A. Molson.

Record, pp. 56, 168.

Record, p. 135.

13. Some little delay took place in the apportionment and delivery over to the legatees of the said residuary estate, and such delay appears to have given rise to an assertion on the part of the said J. D. Molson of his position as executor. He met the said Abbott in the street and threatened that, if the business regarding the said estate was not settled at once, he would place the matter in the hands of another lawyer.

Record, p. 163.

14. Early in the year 1871, however, the two executors, pursuant to Article 918 of the Code of Civil Procedure, prepared, or caused to be prepared, and rendered to the legatees a detailed account which is set out in the record of their receipts and expenditure in connexion with the said estate. They

also prepared, or caused to be prepared, a statement showing the assets of which the said residuary estate consisted on the 25th March, 1871. The assets shewn by such statement included the said 3,200 Shares in the Bank, being exactly 640 Shares for each of the said five sets of legatees, and a sum of 50,370 dollars 83 cents cash. They also prepared and submitted to the legatees five several tabular statements of the division of the said residue, shewing in the case of each of the five sets of legatees the items of property proposed to be apportioned and allotted to such legatees.

Record, p. 131.

Record, pp. 98, 106, 116, 124, 132.

15. It did not appear when the said account was prepared or rendered, but a dépôt thereof was made in the office of W. A. Phillips, Notary Public, on the 25th or 27th March, 1871. Neither did it appear when the said tabular statements were prepared or submitted, but from the fact that the apportioned Shares of two of the sets of legatees were formally handed over to them on the 27th March, 1871, the apportionment effected by the said tabular statements must have been accepted by all the legatees and have taken effect on or before that date.

Record, pp. 91—107.

16. In the case of two of the legatees, viz., the Appellant, A. Molson, and the said John Molson, the two executors, acting under the advice of the said Abbott, allowed themselves to participate in certain dealings by which it was hoped that the trusts and provisions of the said Will would, as to some of the property apportioned to such legatees thereunder, be effectually defeated, and an absolute title conferred on the institutes to the exclusion of the substitutes. Some of such dealings came to be considered before the Privy Council in the case of *Carter v. Molson* (10 App. Ca. 664), which was referred to in the arguments and judgments in the present case. There Lord Watson, in delivering the opinion of their Lordships, referred to a deed of the 15th June, 1871, by which it had been purported to vest certain of the real property comprised in the said estate in the said A. Molson absolutely, and said: "In point of fact, the deed appears to have been framed by the grantors"—*i.e.*, the two executors—"in flagrant disregard of their duty as trustees, and to have been a colourable and not very creditable device for giving Alexander Molson a larger interest in the property than he was entitled to, and for defeating the intentions of the testator with respect to substitutions and the *insaisissibilité* of his son's usufruct."

17. The dealings aforesaid, so far as relates to the 640 Shares claimed in the present proceedings, appear to have been as follows:—

18. On the 1st March the Appellant, A. Molson, and the said John Molson were appointed respectively tutor and sub-tutor to the minor children of the Appellant, A. Molson, for the purpose of representing them in the estate and succession of the said Hon. John Molson. And on the following day the Appellant, A. Molson, was appointed curator to the said substitution, the said John Molson and the said Abbott, being members of the family council, advising the appointment. The protection of the rights of the said minors and of the said substitution was thus placed exclusively in the hands of the Appellant, A. Molson.

Record, p. 134.

Record, p. 135.

Record, pp. 98, 106, 116.

19. In the tabular statements rendered in respect of the respective shares of the said J. D. Molson, G. E. Molson, and S. E. Molson, the total amount of each of such shares appears as 80,263 dollars 20 cents; but in the tabular statements rendered in respect of the respective shares of the said John Molson and the Appellant, A. Molson, the total amount of each of their shares appears as 86,663 dollars 20 cents —that is to say, in each case 6400 dollars in excess of each of the other three shares. Moreover, in the case of each of the first three shares, 640 Shares in the Bank are allotted, while in the case of the two latter shares no Shares in the Bank appear at all, but sums of cash are allotted—viz., 48,737 dollars 31 cents and 47,957 dollars 79 cents, each of which amounts to nearly the whole cash comprised in the estate.

20. The explanation of these discrepancies in the said tabular statements is as follows:—In the case of each of the first three shares the 640 Bank Shares were entered as Shares at their par value, viz., 32,000 dollars, while in the case of the latter two shares the 640 Bank Shares appear in the guise of cash, and are
Record, p. 82. therefore necessarily taken at their cash value, which was then about 120. The premium of 20 per cent. upon 640 Shares of 50 dollars each caused the above-mentioned apparent difference of 6,400 dollars. Further, the said sum of 48,737 dollars 31 cents cash, pretended to be allotted to the said John Molson, was made up of the sum of 38,400 dollars, the cash equivalent of the 640 Bank Shares belonging to his share, and 10,337 dollars 31 cents, which was the proportion of bonâ fide cash assigned to his share. The said sum of 47,957 dollars 79 cents cash, pretended to be allotted to the Appellant, A. Molson, was in like manner made up of the sum of 38,400 dollars, the cash equivalent of the 640 Bank Shares belonging to his share, and 9,557 dollars 79 cents, which was the proportion of bonâ fide cash assigned to his share.

Record, p. 91.

21. On the 27th March, 1871, two several instruments of Agreement and Conveyance were entered into before a Notary Public. By one of such instruments, which was made between the two executors of the one part, and the said J. D. Molson, as well individually as in his capacity of tutor to his minor children, and curator to the substitution created by the said Will of his share of the said residue of the other part, the shares of residue as specified in the Second Schedule to the said Agreement and Conveyance (which schedule was a copy of the said tabular statement rendered in respect of the share of the said J. D. Molson) were accepted by and expressed to be conveyed and transferred to the said J. D. Molson in his several qualities aforesaid. By the other of such
Record, p. 99. instruments, which was made between the two executors of the one part, and William H. Kerr, tutor, and the Appellant, A. Molson, of the other part, the several components' shares of residue, as specified in the Second Schedule thereto (which schedule was a copy of the said tabular statement rendered in respect of the share of the said G. E. Molson), were in like manner accepted by and were expressed to be conveyed and transferred to the said William H. Kerr, and the Appellant, A. Molson, in their qualities aforesaid.

22. The fact of two sets of the legatees under the said Will having received their shares of residue as aforesaid, on the 27th March, 1871, shews conclu-

sively that the allotment of the residue between the five sets of legatees must at that date have been accepted by them all.

23. On the 5th April following, four several parcels of 640 Bank Shares were transferred by the two executors as follows, viz. (1) 640 Shares to W. H. Kerr, tutor, and the Appellant, A. Molson, trustee (this was in respect of the share of the said G. E. Molson); (2) 640 Shares to the Appellant, A. Molson, personally; (3) 640 Shares to the said J. D. Molson, tutor and curator, and (4) 640 Shares to the said John Molson personally. The remaining 640 Shares were in like manner transferred to Samuel E. Molson, tutor and trustee, and John Crawford, trustee, on the 11th May, 1871. The terms of the actual entries of such transfers in the books of the Bank will be found in the deposition of James Elliott. It was apparent at a glance, on the face of such transfers and entries, that the purported transfers to the said John Molson and the said Alexander Molson were made to them as individuals, and not in any representative capacity, as in the other three cases. These transfers were certified by the Bank.

Record, pp. 85—87, and 152—154.

Record, pp. 152, 154.

Record, p. 154.

24. In referring to the above documents and entries of the 5th April, 1871, as "transfers," it is not intended to assert that they did or could have the effect of passing the property in the said Shares to the transferees.

25. Three other instruments of Agreement and Conveyance similar to those of the 27th March, 1871, already noticed, were afterwards entered into before a Notary Public, viz. (1) on the 11th May, 1871, an Agreement and Conveyance made between the two executors of the one part, and the said S. E. Molson, as well individually as in his capacities of tutor and curator, of the other part; (2) on the 25th May, 1871, an Agreement and Conveyance made between the two executors of the one part, and the said John Molson, as well individually as in his capacities of tutor and curator, of the other part; (3) on the 15th June, 1871, an Agreement and Conveyance made between the two executors of the one part, and the said Alexander Molson, as well individually as in his capacities of tutor and curator, of the other part.

Record, p. 107.

Record, p. 117.

Record, p. 126.

26. The said instrument of the 11th May, 1871, calls for no further remark.

27. Each of the said instruments of the 25th May, 1871, and the 15th June, 1871, contained a recital in the following terms:—"And whereas the said Dame Mary Ann Elizabeth Molson, the wife of the late Hon. John Molson, departed this life on or about the fifth day of May, eighteen hundred and sixty-two, and the said parties of the first part have since acted as surviving and acting trustees and executors of the said last Will," no mention being made of the said appointment of the said J. D. Molson as executor.

28. The said instrument of the 25th May, 1871, recited that "the mass of the residue of the estate as it now exists consists of the several assets mentioned and detailed in the Schedule number one hereto annexed," which schedule was a copy of the said statement of assets, and included the said item of 3,200 Bank Shares.

Record, p. 118.

Record, p. 127. 29. The said instrument of the 15th June, 1871, recited as follows: "And whereas by the said account it appeared, as the parties hereto declare, the fact is that the mass of the residue of the said estate as it existed on the twenty-fifth day of March last past, consisted of the several assets mentioned and detailed in the Schedule number one hereto annexed, whereof the share of the said party of the second part consists of moneys and securities for money amounting to the sum of eighty-six thousand six hundred and sixty-three dollars and twenty cents, as appears by the tabular statement of the division of the said residue, also annexed hereto, and numbered Schedule number two, which said share the said parties hereto have agreed shall be paid and delivered over to the said party of the second part for the purposes detailed in the said Will."

30. This recital was untrue. The share of the Appellant, A. Molson, did not consist of *inter alia* the sum of 47,957 dollars 79 cents cash, as appearing in the said schedule, nor was such sum a proportion of the cash belonging to the Testator's estate, nor had the parties agreed that such sum of cash should be paid or delivered over to the Appellant, A. Molson, for the purposes detailed in the said Will, or at all. It was never at any time intended that any such sum as 47,957 dollars 79 cents in cash should be handed over to the Appellant, A. Molson. All the cash that was handed to him was the said sum of 9,557 dollars 79 cents, his share of the actual cash comprised in the Testator's estate.

31. No direct evidence was given as to the nature of the agreement or arrangement between the Appellant, A. Molson, and the two executors under which the value of the said 640 Shares was attributed to the Appellant, A. Molson, in cash.
Record, p. 166. The Appellant, A. Molson, was called as a witness for the Plaintiffs, but his evidence was rejected on the objection of the Defendants that he was incompetent. The Bank did not offer any evidence as to what such agreement or arrangement really was. All the Judges in the Courts below appear to have taken it for granted that there was a bonâ fide sale of the said 640 Shares by the two executors to the Appellant, A. Molson, but there was in reality no evidence whatever to justify such a finding.

32. There was nothing in the evidence to show that the Appellant, A. Molson, had ever paid or agreed to pay for the said Shares, and no mention in the said detailed account of any such sale; nor could a sale by two of the executors to one of themselves have been legally entered into. (*See* Article 1484 of the Civil Code.) Even if the transaction had been proved to have been a bonâ fide sale by the two executors to the Appellant, A. Molson, for cash, such a sale was clearly not authorised by any clause in the said Will.

33. The Appellants contend that the correct inferences to be drawn from the facts above stated are as follows:—That the Appellant, A. Molson, desired to deal with the said 640 Shares as his own property, freed from the substitution under the said Will and the claims of the substitutes thereunder; That by way of carrying such desire into effect it had been arranged some time before the month of March, 1871, between the two executors, under the advice of the said Abbott, that the said 640 Shares to be allotted to the Appellant, A. Molson, as

aforesaid, should be transferred to him in his individual capacity, while their market value in cash should be attributed to him on behalf of the said substitution; That the Appellant, A. Molson, was accordingly appointed tutor and curator to the said substitution; That the said tabular statements were prepared so as to shew, contrary to the fact, that the said substitution would receive the cash equivalent of the said 640 Shares; That by or before the 27th March, 1871, the two executors had, pursuant to the sixteenth clause of the said Will, apportioned and distributed the said residue, and had allotted one-fifth part of the said 3200 Shares, viz., 640 Shares, to each of the parties entitled thereto, who had respectively accepted such apportionment and allotment; That the said tabular statements were prepared so as to show, contrary to the fact, that the said substitution would receive the cash equivalent of the said 640 Shares, and that in short the whole proceeding was a mere colourable device by which it was attempted to vest the said 640 Shares in the Appellant, A. Molson, individually.

34. As regards the participation by the Bank in the proceedings above described it will be remembered that, at the time above referred to, the said Abbott was Counsel for the Bank; the said William Molson was President of the Bank; Mr. John Henry Molson, another member of the family, was Vice-President; Mr. H. Markland Molson, another member of the family, was Accountant; and the said John Molson had been Accountant up to about the end of the year 1870, and at the time aforesaid had his office at the Bank, although he held no position there. It was the practice to submit any such transfer or transmission of Shares, as above referred to, to the Counsel for the Bank, and there appears to have been a regulation of the Bank to that effect. It was proved by Mr. Thomas, the General Manager since 1870 of the Bank, that transfers of stock were outside his department and cognisance, and that the official whose duty it was to attend to any transfer of Shares at Montreal was Mr. Elliott, the Accountant and Local Manager there. He was called and stated that the transfers were (except a few words) in his handwriting, and that they were made under the supervision of the said Abbott as Counsel for the Bank. A copy of the said Will had been formally deposited with the Bank some time before the said transfers, and was then in the possession of the Bank. It did not appear when such deposit was made, but it probably took place on the occasion of the said transfer of the said 3,200 Shares to the executors in the year 1866.

Record, pp. 156, 161.
Record, p. 86.
Record, pp. 156, 154.
Record, p. 161.
Record, p. 160
Record, p. 151.
Record, p. 157.
Record, p. 155.

35. No attempt was made on the part of the Bank to prove that, in making and permitting the said transfers, the said Abbott or the other officials of the Bank went beyond the scope of their authority, or to prove that the Bank was not fully acquainted with all that took place. It is submitted that in the absence of any such proof, and in the presence of the facts just above stated, it must be taken as established that the Bank had by its agents and officers notice that the transfers in which it participated, and to which it gave effect, were not only irregular, but illegal and fraudulent; and that in any case the facts known to it made it the duty of the Bank to hold its hand, and make it responsible for the loss occasioned to the substitution by its acts.

Record, p. 68. 36. The 640 Shares so transferred or purported to be transferred to the Appellant, A. Molson, individually, were afterwards transferred by him or by the Bank to other parties, and, unless some of the Appellants are entitled to succeed on this Appeal, have been wholly lost to the said substitution.

Record, pp. 82, 85. 37. The said 640 Shares are worth 60,000 dollars, and the dividends accrued thereon with interest are worth the further sum of 70,000 dollars.

Record, p. 165. 38. The Appellant, A. Molson, is, and has since the year 1875 or thereabouts, been insolvent.

39. The said Act of the Parliament of Canada (18 Vict. c. 102, Public Act), under which the Bank was incorporated, contains the following provisions in reference to the Shares of Capital Stock of the Bank :—

"II. The Capital Stock of the said Bank hereby incorporated shall be Two hundred and fifty thousand pounds current money of this Province, divided into twenty thousand Shares of twelve pounds ten shillings currency each, which said Shares shall be and are hereby vested in the several persons who shall subscribe for the same, their heirs, legal representatives, and assigns."

"XIX. The Shares of the Capital Stock of the said Corporation shall be held and adjudged to be personal estate and be transmissible accordingly, and shall be assignable and transferable at the Bank, according to the form of Schedule A annexed to this Act; but no assignment or transfer shall be valid and effectual unless it be made and registered in a book or books to be kept by the Directors for that pursose. . . ."

"XXXIII. If the interest in any Share in the said Bank becomes transmitted in consequence of the death or bankruptcy or insolvency of any Shareholder, or in consequence of the marriage of a female Shareholder, or by any other lawful means than by a transfer, according to the provisions of this Act, the Directors may require such transmission to be authenticated by a declaration in writing, as hereinafter mentioned, or in such other manner as the Directors of the Bank shall require, and every such declaration, or other instrument so signed, made, and acknowledged, shall be left at the Bank with the cashier or other officer or agent of the Bank, who shall thereupon enter the name of the party entitled under such transmission in the Register of Shareholders, and, until such transmission shall have been so authenticated, no party or person claiming the virtue of any such transmission shall be entitled to receive any share of the profits of the Bank, nor to vote in respect of any such share or shares as the holder thereof . . ."

"XXXIV. If the transmission of any Share in the Bank . . . have taken place by virtue of any testamentary instrument, or by intestacy, the Probate of the Will, or the Letters of Administration, or of tutorship or curatorship, or an official extract therefrom, shall, together with such declaration, be produced and left with the cashier or other officer or agent of the Bank, who shall then enter the name of the party entitled under such transmission in the Register of Shareholders."

"XXXV. Whenever the interest in any Share or Shares of the Capital Stock of the said Molsons Bank shall be transmitted by the death of any Share-

holder or otherwise, or whenever the ownership of, or legal right of possession in, any such Share or Shares shall change by any lawful means other than by transfer, according to the provisions of this Act, and the Directors of the said Bank shall entertain reasonable doubts as to the legality of any claim to and upon such Share or Shares of Stock then" [an application may be made to the Superior Court, which shall adjudicate and award the Shares "to the party or parties legally entitled to the same"].

"XXXVI. The Bank shall not be bound to see to the execution of any trust, whether express, implied, or constructive, to which any of the Shares of the Bank may be subject, and the receipt of the party in whose name any such Share shall stand in the books of the Bank, or if it stands in the names of more parties than one, the receipt of one of the parties shall from time to time be a sufficient discharge to the Bank for any dividend or other sum of money payable in respect of such Share, notwithstanding any trust to which such Share may then be subject, and whether or not the Bank have had notice of such trust, and the Bank shall not be bound to see to the application of the money paid upon such receipt; any law or usage to the contrary notwithstanding."

40. By the general "Act relating to Banks and Banking" (34 Vict. c. 5), which received the Royal Assent on the 14th April, 1871, the said Act of Incorporation of the Molsons Bank was continued, so far as the clauses above set out are concerned until the 1st July, 1871, and until the end of the then next Session of Parliament, from and after which date the said general Act was to form and be the Charter of the said Bank.

41. Under the above circumstances the present proceedings were commenced in the month of February, 1890, by Andrew B. Stewart (who then was and sued as curator to the said substitution, but afterwards died and was replaced as such curator and Plaintiff by the Appellant, George W. Simpson) and the Appellant, A. Molson, and H. S. S. Molson, in their respective qualities aforesaid against the Respondents. By their declaration filed on the 17th February, 1890, the Plaintiffs, after setting out the facts as or to the effect hereinbefore stated, alleged that the said 640 Shares were then the property of the said substitution, that the Bank had negligently and fraudulently permitted the said transfer to the Appellant, A. Molson, and that by two only out of three executors, one of which two executors had no capacity to transfer to himself, and after the powers of such executors had come to an end, and that the Bank ought to be adjudged to transfer and put into the names of the said substitution the said 640 Shares, or in default thereof to pay and satisfy to the Plaintiffs the said sum of 60,000 dollars, and further to pay and satisfy to the Plaintiffs the said sum of 70,000 dollars for dividends and interest. The Plaintiffs also claimed 160 Shares of the Bank as having been wrongfully transferred at a later date.

Record, p. 12.

Record, p. 13.

42. The Bank pleaded a dilatory exception, and also an exception to the form, both of which pleas were subsequently dismissed. To the above-stated claim for 160 Shares they pleaded a *lis pendens*, which was admitted by the Plaintiffs, and such claim was subsequently withdrawn. To the remainder of the Plaintiff's

Record, p. 19.

Record, p. 82.

Record, p. 65.

claim they pleaded a general denial, and also a special plea to the merits, which in effect was as follows:—

(*a*) That the alleged institute was still living and was a consenting party to the transfer of the said Shares.

(*b*) That the Plaintiffs, Stewart and H. S. S. Molson, had not then any vested right to or interest in the Shares, nor were entitled to recover or receive the same.

(*c*) That there were other substitutes living who were not parties to the proceedings.

(*d*) That the Plaintiffs, Stewart and H. S. S. Molson, had not been legally authorised to prosecute the action.

The Respondents also pleaded to the merits a second plea to the following effect:—

(*a*) That the Appellant, A. Molson, was a party personally and in his qualities to all that was done, and was estopped from maintaining the conclusions of the action.

(*b*) That there was a misjoinder of parties, in that it did not appear what part of the Shares or Stock, or interest, or dividends, any particular Plaintiff was entitled to claim, and that they were not by law entitled to claim jointly.

(*c*) That none of the Shares claimed ever became subject to the said substitution, nor was any property of the substitution ever invested in such Shares.

(*d*) That the executors had power under the Will to sell, assign, and transfer the said Shares, and that the executors required the Bank to accept and receive the transfer of the 5th April of 640 Shares to the Appellant, A. Molson.

Record, p. 68. (*e*) That . . . the Appellant, A. Molson, became and was the absolute owner of the said 640 Shares, and did at divers times assign and transfer the same upon the books of the Bank in the manner required by law to divers parties for value received, as appears by the transfers thereof upon the books of the Bank, and the Bank were not bound by law to see to the disposal of the proceeds of any such Stock if the same was ever subject to any trust, express, implied or constructive, which the Respondents did not admit, but expressly denied.

Record, p. 69. 43. To these pleas the Appellants answered, traversing the allegations thereof, and alleging that the said Shares were always the property of the said substitution, and that the trusts established by the Will were established substitution, and the power of the executors appointed in the Will, which was limited to a sale for investment only, and to a period of ten years, and that the Appellant, A. Molson, never had possession of the said Shares otherwise than as institute.

44. The Respondents made a general replication. Record, p. 71.

45. The case was tried at *enquête* and merits, before Mr. Justice Taschereau, when the facts were proved, as above stated, and on the 6th October, 1892, the learned Judge gave judgment dismissing the action with costs.

46. The formal judgment proceeds expressly upon the sole ground that Record, p. 10.
an Ordonnance of 1629, which prohibited Fidei-Commis in the case of *choses mobilières*, was in force in Canada at the date of the death of the Testator, and that the said Shares could therefore not be made the subject of a sub- Record, p. 249.
stitution; in his reasons, however, the learned Judge further expressed his
10 views upon the other points which had arisen during the argument.

47. The Plaintiffs appealed from the above judgment to the Court of Queen's Bench for Lower Canada. The appeal was heard before Baby, Bossé, Blanchet, Hall and De Lorinier, JJ., and on the 27th February, 1894, the Record, p. 262.
Court gave judgment dismissing the appeal with costs. On the question of law, whether the Bank Shares could be made the subject of a substitution, the Court of Queen's Bench differed from the Court below and held that they could. The appeal, however, was dismissed on the following grounds:—

(1) That it had been established that the 640 Shares never formed part of the Share of Alexander Molson under the apportionment shewn
20 by the evidence, and more particularly by the said Agreement and Conveyance of the 15th June, 1871.

(2) That under Act 746 of the Civil Code, Alexander Molson had inherited alone and directly all the things comprised in his share, and had never had the ownership of the other property of the succession.

(3) That the Appellant, Simpson, as curator had no title to recover from the Bank any property which had never belonged to the substitution whereof he was curator.

(4) That the Bank was by the terms of its Charter under no obligation to see to the execution of any trust.

30 48. Two separate opinions were delivered, one by Mr. Justice Blanchet Record, p. 271
stating the reasons of himself, and Baby, Bossé, and de Lorinier, JJ.; the other by Mr. Justice Hall. All the Judges were of opinion, contrary to the decision of the Court below, that Bank Shares could, at the date of the death of the Testator, be made the subject of a substitution; they were, however, unanimous in holding that the appeal ought to be dismissed, though upon different grounds.

49. The opinion of Mr. Justice Blanchet proceeded upon the following reasoning, viz:—That for the purpose of apportioning the residue, the executors had power, if in their judgment it was necessary or expedient, to sell any part thereof, and to divide the proceeds of sale; that the Bank Shares had never
40 belonged to the share of the Appellant, A. Molson, who had in lieu thereof accepted their value in cash, and that the grevé having received the value of

the Shares under an agreed apportionment, no action for damages would lie against the Bank without proving negligence on their part, and the consequent loss of such value.

50. The Appellants submit that, if such reasoning is applicable at all, the result cannot be supported because—

(1) The executors had at the time and in the circumstances no power to sell the 640 Shares;

(2) No such sale could be required for the purpose of apportioning the residue, nor could the executors have judged such sale to be necessary or expedient for any purposes of the Will;

(3) There never in fact was any sale of shares to the Appellant, A. Molson;

(4) The true inference from the facts proved is that the 640 Shares had been allocated to the Appellant, A. Molson's share, before the arrangement had been come to by which he pretended to take their value in cash;

(5) That the shares were lost to the substitution in consequence of the Bank acting improperly and negligently according to the scheme adopted by the parties.

Record, p. 283. 51. The opinion of Mr. Justice Hall proceeded upon the ground that, under the general Bank Act and its own Charter, the Bank was not bound to see to the execution of the trust imposed by the said Will. He says: "The executors . . . had ample powers to sell the Shares . . . The Bank accepted the transfer, as it had a right and was bound to do. The only questions which they were bound to investigate were the quality and powers of the vendors, which covered, as I contend, the precise limitation of the Bank's responsibility . . . The act of partition which the executors had previously made of the estate between the legatees . . . was not communicated to the Bank, which had therefore no means of knowing whether the transfer of the 640 Shares of its Capital Stock by the executors to Alexander Molson was a *pro formâ* transfer in fulfilment of an act of partition or an ordinary sale."

52. The Appellants submit, however, that the provision of the Bank Charter on which the learned Judge relied is not applicable to the facts of the case, and that the inferences of fact drawn by the learned Judge are incorrect.

Record, p. 264. 53. The Appellants afterwards, on the 15th March, 1894, duly obtained leave from the said Court of Queen's Bench to appeal to Her Majesty in Her Privy Council.

The Appellants humbly submit that the said judgment of the Court of Queen's Bench is erroneous, and ought to be reversed, and that judgment in the said action ought to be entered for the Appellants, for the following amongst other

REASONS.

1. Because the purported transfer of the said Shares on the 5th April, 1871, did not operate to transfer any title to or property in the said Shares.
2. Because the executors had no property in the said Shares, and under the circumstances had no right merely as executors to make any valid transfer of them.
3. Because the executors had no special power under the said Will of selling or alienating the said Shares so as to make any valid transfer of them under the circumstances of the alleged transfer.
4. Because, if the executors had any such power, the said transfer to the Appellant, A. Molson, was not made under or in exercise of any such power.
5. Because upon the true construction of the journal entry of the 11th May, 1866, the said Shares stood in the books of the Bank in a form which expressed and acknowledged that the executors could not unconditionally transfer the said Shares.
6. Because, even if the executors had any such title or power as aforesaid, the two executors could not validly transfer the Shares without the concurrence of their co-executor, the said J. D. Molson.
7. Because, even if the executors had any such property or power as aforesaid, the two executors could not make a valid transfer of the said Shares to one of themselves.
8. Because the said Shares were allotted to and became subject to the said substitution, and were *legs d'aliments* and inalienable.
9. Because, even if the property in the said Shares was effectually transferred to the Appellant, A. Molson, the said Shares were inalienable in his hands, and the subsequent transfers by him to other persons were altogether void.
10. Because the Respondents in the circumstances were guilty of a breach of trust in transferring the said Shares to the Appellant, A. Molson, and in afterwards transferring the said Shares from the Appellant, A. Molson.
11. Because the said transfer of the said Shares and the pretended receipt by the Appellant, A. Molson, in his individual capacity, of the cash value of the said Shares was a colourable device to which the Bank was a party for the purpose of defeating the rights of the Appellants under the said substitution, and was therefore fraudulent as against the Appellants and the Bank cannot set up the said transfer against the Appellants claiming the said Shares.
12. Because in any case the Bank had notice of facts which made it their duty to hold their hand, and make them responsible for the loss to the substitution occasioned by their acts.

R. W. M. FULLARTON.

F. F. DALDY.

No. 36 of 189

In the Privy Council.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA.

SIMPSON AND OTHERS

v.

THE MOLSONS BANK.

Case on behalf of the Appellants.

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