Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Simpson and others v. *Molsons' Bank, from the Court of Queen's Bench for Lower Canada, Province of Quebec ; delivered 23rd February* 1895.

Present :

THE LORD CHANCELLOR.
LORD WATSON.
LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD SHAND.
LORD DAVEY.
SIR RICHARD COUCH.

[*Delivered by Lord Shand.*]

The Honourable John Molson died on the 12th July 1860 leaving a will dated the 20th April of that year, and this appeal from a judgment of the Court of Queen's Bench for Lower Canada relates to 640 shares in The Molsons' Bank Canada which formed part of the residue of his estate. The complaint of the Appellants is that the Bank, the Respondents, wrongfully registered in the books of the Bank a transfer of these shares granted by William Molson and Alexander Molson executors under the will, in favour of Alexander Molson the testator's son, to the loss and injury of the Appellants, as having right to have the shares secured to them under a substitution in favour of Alexander Molson's children contained in the will of their grandfather John Molson. Their

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claim of damages has arisen in consequence of the insolvency of Alexander Molson who transferred the shares in question to third parties who cannot be affected by the substitution founded on.

By his will Alexander Molson made the following provisions relative to the residue of his estate :—

" Tenthly. And 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 " 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 . . . . secondly to " sell and convey all such parts of my real estate as are not " herein-before 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 herein-before 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 herein-after 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 ex- " piration 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 " 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 or 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."

The widow of the testator died in 1862. By her husband's will she was entitled to appoint a trustee and executor to succeed to her and act in the trust in her stead after her death, and in May 1861, professing to exercise this power, she executed a deed by which she nominated Joseph Dinham Molson, one of her sons, to be a trustee and executor. For some reason which does not appear his appointment was objected to by the

testator's brother William Molson, one of the two executors named in the will, and though on the 17th April 1863 he served a notice of his appointment on the executors, he took no further steps to insist on his claim to act, and never did act as a trustee ; so that William Molson, the testator's brother, and Alexander Molson, the testator's son, were in point of fact the only trustees and executors who acted in any way in the trust after the death of the testator's widow.

The shares in question were part of a larger number, viz., 3,200 shares of the Bank which belonged to the testator at his death. The dividends on all of these shares were paid as they fell due to the testator's trustees and executors, but it was not till the 11th May 1866 that the shares were transferred to them in the books of the Bank. On that date the transfer was made by a journal entry to this effect:—
" Declaration number twelve dated 11th of May
" 1866 Honourable John Molson" (that is the name in which the stock stood) " debtor to
" executors viz. William Molson and Alexander
" Molson for transmission, three thousand two
" hundred shares of stock of fifty dollars each,
" one hundred and sixty thousand dollars."

The period of ten years for which the trustees were directed to hold and administer the residue of the estate expired on the 12th July 1870, and early in 1871 the executors prepared and submitted to the parties interested a statement of accounts, showing their receipts and expenditure in the execution of the trust, and a statement of the assets of the residuary estate, including the 3,200 shares in the Bank. Some time thereafter, viz., on the 5th April 1871 five transfers each for 640 shares granted by the executors were executed and duly registered

in the Bank's register of transfers. The transfer now in question and acceptance thereof were in the following terms :—

" Schedule No. 39.

" For value received from Alex. Molson of Montreal we do " hereby assign and transfer unto the said Alex. Molson six " hundred and forty shares on each of which has been paid fifty " dollars currency amounting to the sum of thirty-two thousand " dollars in the capital stock of the Molsons Bank subject to the " rules and regulations of said Bank.

" Witness our hands at the said Bank this fifth day of April " in the year one thousand eight hundred and seventy-one.

" (Signed) WILLIAM MOLSON } Executors late
" (Signed) ALEX. MOLSON } Hon. John Molson.

" I do hereby accept the foregoing assignment of six " hundred and forty shares in the stock of the Molsons Bank " assigned to me as above mentioned at the Bank this fifth day " of April one thousand eight hundred and seventy-one.

" (Signed) ALEX. MOLSON."

A transfer was made in favour of John Molson, another of the testator's sons, of 640 shares in the same terms, while in the case of the other three members of the testator's family the transfers were given in the name of a person or persons designed as "tutor," or as "tutor and " curator," or trustee, with an acceptance of the stock signed by the transferee or transferees in that character, with the view of marking the stock in the hands of the transferee as being subject to a trust or substitution. There were thus two transfers in favour of the transferees, Alexander Molson and John Molson respectively, unqualified, and three transfers in favour of other members of the family, qualified in the way now stated. There have been produced in evidence certain deeds executed by the executors, by which a trust or substitution was created in regard to the shares included in each of the three last-mentioned transfers, so as to preserve the shares for the testator's grand-children, subject to their respective parents' right to the dividends during their lives; but these deeds were not in any way communicated to the Bank.

The first ground on which it was maintained in the argument for the Appellants, that the Bank had no right to register the transfer now in question in favour of Alexander Molson, was that the executors of John Molson had no power to grant any transfer of the shares in question after the lapse of ten years prescribed for administration. It was argued that the title of the trustees and executors was limited to administration, and was of a temporary nature only, expiring at the end of the ten years after the testator's death, during which they were directed to hold and administer and convert parts of the estate, and that the testator's sons, and their children respectively substituted to them, took their shares of the residue including the bank shares by direct gift and bequest from the testator under his will, which superseded and extinguished all title in the trustees and executors to grant any transfers. Their Lordships are clearly of opinion that there is no ground for this argument. It is true that the will provides under the head "thirteenthly," that after the lapse of ten years from the testator's death the residue of his estate shall fall to and become the property of his respective sons and their families substituted to them. But the legal interest in the whole estate real and personal was vested by words of direct devise and bequest in the trustees and executors, who had to make up their title, as they did, to the Bank shares for an administration directed to be continued for ten years; and at the end of that time these gentlemen were directed to divest themselves by "giving," that is by conveying or transferring the respective shares to the sons and their families, after settling the particular allocation and distribution which was to be made of the different parts of the residue of the estate. The sons and their families, whilst having right to their respective shares under the will, were thus

to acquire the legal title from the trustees in whom it had been vested for ten years. This appears clearly from the whole scheme of the will, and from nothing perhaps more clearly than the provision which was so strongly pressed upon their Lordships' notice, directing that the trustees and executors should take care to provide against the risk of the capital being lost in the hands of the testator's sons to the prejudice of their children, which they would do by a transfer of the legal interest in the different parts of the estate vested in them.

Assuming then that the title was to be granted by transfer from the trustees (and it is not easy to see how any title could otherwise be obtained after these gentlemen had been themselves registered as shareholders) it was maintained, not only that the trustees and executors were bound to execute transfers in such terms as would either give effect to the substitutions directed in the will in favour of Alexander Molson's grandchildren, or would at least give notice to any purchaser from Alexander Molson that the shares were affected by substitution, but further that the Bank were bound to refuse to register the transfer in question because of the absolute terms in which it was expressed. Their Lordships have not thought it necessary to call for any answer to the Appellants' argument on this point, as they entertain no doubt that the decision of the Court of Queen's Bench on this question should be affirmed.

It must be here observed that a question was raised in the Courts below, as to whether the substitutions provided for by the testator in his will, in so far as regards moveable estate, including the shares in question, could be made effectual under the law of Canada. Mr. Justice Taschereau, before whom the case came in the first instance, held that the substitution

could not be made effectual. This judgment was reversed on appeal, the learned Judges holding that the substitution could be made and was directed in such terms as might have been carried into effect. The point is fully argued in the Respondents' case, but the question has not been the subject of argument before this Board. For the purpose of the present appeal their Lordships will assume that it was the duty and in the power of the trustees and executors to see that either by transfers qualified as in the case of certain of the other children, or in some other way the substitution was provided for or declared.

The argument of the Appellants involves the consideration of two questions; first, whether the Bank had any notice, and if so what notice, of the trust created by the testator's will, in so far as the testator directed substitutions to be made to affect the divided parts of the residue of his estate; and, secondly, whether if the Bank had notice it was such as to make it the duty of the Bank to refuse to register the transfer in question because of the absolute terms in which it was expressed.

The Statute incorporating the Molsons' Bank (18 Vict. c. 202) contains this provision in Section 36, viz.:—" 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." This language is general and comprehensive. It cannot be construed as referring to trusts of which the Bank had not notice, for it would require no legislative provision to save the Bank from responsibility for not seeing to the execution of a trust, the existence of which had not in some way been brought to their knowledge. The provision seems to be directly applicable to trusts of which

the Bank had knowledge or notice; and in regard to these the Bank, it is declared, are not to be bound to see to their execution.

Apart from the provision of the Statute it may be that notice to the Bank of the existence of a trust affecting the shares would have cast upon them the duty of ascertaining what were the terms of the trust; and that in any question with the beneficiaries, whose rights had been defeated by the absolute transfer in favour of Alexander Molson, the Bank, whether they had inquired or not, might have been held to have constructive knowledge of all the trust provisions. Assuming this point in favour of the Appellants, their Lordships however see no reason to doubt that by the clause in question the Bank are relieved of the duty of making inquiry, and that they cannot be held responsible for registering the transfer, unless it were shown that they were at the time possessed of actual knowledge which made it improper for them to do so until at least they had taken care to give the beneficiaries an opportunity of protecting their rights. In the present case their Lordships are satisfied that at the date of the transfer the Bank had not any notice which could warrant the inference that they were aware that a breach of trust was intended or was being committed. What amount of knowledge would be sufficient to imply that the Bank must know that a transfer is in breach of a trust is a question which must depend on the circumstances of each case. In the present case their Lordships do not find it necessary to consider what might be the legal effect of their having such knowledge, because they are satisfied that at the date of the transfer in favour of Alexander Molson the Bank had not any notice which was sufficient to bring to their knowledge, or to lead them to believe, that any breach of trust was being committed or

intended by the trustees or executors under the will.

The Bank had notice that the shares in question were acquired and held by William Molson and Alexander Molson in the character of trustees and executors for the execution of trust purposes. The entry of the transfer of the shares by transmission was made in their names as executors in the Bank's books, and the will of the testator, in virtue of which the transfer entry was made, directly gave devised and bequeathed the shares to them as trustees and executors for the execution of trust purposes. But it was maintained by the Appellants that the Bank had further notice, not only of the general trust created by the will, but of the terms of the particular trust in favour of Alexander Molson's children directed by the testator to be provided for by the trustees by way of substitution of them to their father Alexander Molson.

Their Lordships are, however, of opinion that it has not been proved that the Bank had any notice of this particular trust purpose, or at least any notice which could affect them with knowledge of the way in which it ought to have been executed by the trustees. The facts alleged and relied on by the Appellants as proof of such notice were (1) that a copy of Alexander Molson's will was in the possession of the Bank; (2) that in the case of the families of three of the testator's children notice of the substitution of grandchildren was contained in the transfers by the executors registered in the Bank's books in April 1871; and (3) that William Molson, the testator's brother and one of the executors, was President of the Bank, while Mr. Abbot, the law agent of the executors, was also the Bank's law agent, and as both of these gentlemen must be taken to have been fully aware of the detailed pro-

visions of the testator's will, the Bank through them, as its officers, had full knowledge of the trust. It is clear, however, that these facts are quite insufficient to prove the alleged notice.

The evidence does not clearly show how the Bank came into possession of the copy of the testator's will, which was produced by Mr. Elliott, the local manager. It may have been left with the Bank, as evidence of the title of the executors to receive the dividends on the shares which were paid to them from the first after the testator's death, or it may have been given to the Bank six years afterwards when the executors desired to have their title as owners by transmission registered in the Bank's books. It appears that on this last occasion a notarial declaration of the executors' title, which has not been produced, was presented to the Bank, in compliance with the provisions of their Charter, and the probability is that the copy of the will was then given to the Bank as evidence of the executors' right to have the shares transferred to them. The production of the will or probate at that time would be in accordance with the usual practice, which entitles the Bank to require evidence by production of the title in virtue of which the entry of any transfer of shares in the Bank's books is asked. But the only question with which the Bank were concerned was that of legal title. They had to satisfy themselves only that the will gave a right to the shares which entitled the executors to be registered as owners. They were not called upon, on an application to enter a transfer by transmission of the Bank's shares, to examine the will with reference to an entirely different matter which did not concern them, viz. the testator's directions as to the ultimate destination and disposal of his estate; and there is no reason to suppose that anything more was done

on this occasion than is usual in such cases. Again, the entries of transfers in favour of other members of the testator's family, in terms differing from that in favour of Alexander Molson, was not a circumstance calling in any way for the notice or attention of the Bank, and even if observed these gave no notice to the Bank that the shares transferred to Alexander Molson and to his brother John were held under similar trusts, to which effect should be given. It might well be that in the allocation and distribution of the residue entirely different arrangements would be in compliance with the testator's directions. Nor can the knowledge of Mr. William Molson as a trustee and executor, and of Mr. Abbott as law agent in the execution of the testamentary directions of the deceased, and the execution of the transfer in question, be imputed to the Bank so as to affect them with liability. It is not proved that these gentlemen or either of them intervened in any way in reference to the registration of the transfer in favour of Alexander Molson. But, apart from this, their knowledge was not that of the directors or manager of the Bank. They were clearly not agents of the Bank, so that notice to them could be regarded as notice to the Bank.

Their Lordships will on these grounds humbly advise Her Majesty that the appeal ought to be dismissed, and the Appellants must pay the costs.