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In the Privy Council.

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

BETWEEN G. W. SIMPSON, *es qual*, ALEXANDER MOLSON and HERBERT S. S. MOLSON - - - APPELLANTS,

AND

THE MOLSONS BANK - - - - - RESPONDENTS.

Case

ON BEHALF OF THE RESPONDENTS.

1. This is an Appeal from a Judgment of the Court of Queen's Bench for Lower Canada, confirming the Judgment of the Superior Court at Montreal, in favour of the Respondents.

2. The late Honorable John Molson died at Montreal on the 12th of July, 1860, before the coming into force of the Civil Code.

3. By Clause 10 of his Will, made at Montreal on the 20th day of April, 1860, he bequeathed the residue of his estate to three trustees, his brother William, his wife Mary, and his son Alexander, one of the Plaintiffs, and the survivor and survivors of them, and the heirs and assigns of the survivor in trust ; and he also, by Clause 22 of his Will, appointed the said trustees and the survivors and survivor of them, the executors and executor of his said Will. Rec., p. 29. Rec., p. 34.

4. Amongst other trusts were the following (Clause 10), (*a*), "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 ;" (*b*) "at or so soon as practicable after the expiration of the term of the said "trust, to account for and give up the said residue as the same shall then be "found to my residuary devisees and legatees hereinafter named." Rec., p. 29. Rec., p. 30.

5. It was also provided (clause 10) : "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."

Rec., p. 31.

6. Clause 13 is as follows: "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, of 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 sons by his said 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."

Rec., p. 33.

7. Clause 16 is as follows: "And I further will and direct that as " soon as it may be practicable after the expiration of the term herein- " before 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 " to said trustees may seem best), as well against risk of the capital, or 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 engagements " under the marriage contracts above referred to of my said 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."

Rec., p. 33.

8. By clause 18 all the estate, interest and property, whether by way of usufruct, annuity or otherwise, which the testator's sons respectively, or their widows respectively were to take, were declared to be *insaisissable legs d'alimens* and to be insusceptible by them, or either of them of being assigned or otherwise alienated for any purpose or cause whatsoever.

9. The last clause is as follows : " Provided always, and I hereby direct Rec., p. 35.
" and authorize 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 place and stead 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 to
" and become 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 afore-
" said 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 substituted as
" aforesaid."

10. The only trustees and executors who ever acted were William Molson and Alexander Molson.

11. Mary Molson died on the 5th of May, 1862.

12. On the 13th day of May, 1861, there was deposited with one Doucet, Rec., p. 37.
Notary, a private writing purporting to have been executed by Mary Molson before three witnesses, which writing purported to appoint Joseph Dinham Molson a trustee and executor, and on the 17th of April, 1863, this act of deposit was signified upon William Molson and Alexander Molson ; but the execution Rec., p. 39.
of this alleged writing is not proved.

13. It is not proved that Joseph Dinham Molson, who by the words of Rec., p. 35.
the Will could only be appointed to act from and after Mary Molson's decease was in fact so appointed, nor is it proved that he did, but on the contrary it appears that he did not either act or attempt to act as trustee or Rec., pp. 168-170.
executor, but it appears on the contrary that he acquiesced in the view that William Molson and Alexander Molson were the only executors and trustees.

14. After the death of the testator and on the 11th day of May, 1866, Rec., p. 151.
three thousand two hundred shares of stock in the Molsons Bank which stood at the time of his death in his name were duly transferred in the books of the bank as on a transmission of interest into the names of William Molson and Alexander Molson as executors of his estate.

15. On the 1st of March 1871 Alexander Molson on the advice of a Rec., p. 134.
family council was appointed tutor to his minor children and on the following Rec., p. 135.
day he was appointed curator to the substitution and was duly sworn.

16. On the 5th of April, 1871, " William Molson and Alexander Molson, Rec., p. 153.
executors estate late Honorable John Molson " transferred six hundred and

forty shares of Molsons Bank stock, being part of a greater number which stood in their names as aforesaid, to Alexander Molson upon the books of the Bank in the form required by the statute.

Rec., pp. 126-133.

17. On the 15th of June, 1871, a deed was executed between William Molson and Alexander Molson, executors and trustees of the estate and effects of the late Honorable John Molson of the one part, and Alexander Molson as well individually as in his several capacities of tutor to his different minor children and curator to the substitution of his share of the residue of the estate of the late Honorable John Molson, of the other part, by which it was set out that the residue of the said estate on the 25th of March, 1871, consisted of the several assets mentioned in Schedule No. 1 to that deed, including three thousand two hundred shares of Molson's Bank stock, and $50,370.83 of cash, besides certain bonds and notes and other property, and that the share of the party of the second part on the apportionment of the estate, consisted of moneys and securities for money amounting to the sum of $86,663.20, as appeared by the tabular statement of the division of the said residue annexed to that deed, and numbered Schedule No. 2. From the said deed and schedule it appears that assets of the total value of $86,663.20, including $47,957.79 in cash, but no shares of Molson's Bank stock, were accordingly by the said executors and trustees transferred to Alexander Molson in his several capacities aforesaid and on the conditions and terms of the said Will as being the share of his father's residuary estate to which he was entitled under his father's said Will and that he accepted the same as being such share.

18. The six hundred and forty shares which had been transferred to Alexander Molson on the 5th of April, 1871, were afterwards disposed of and transferred by him, and he and the other Appellants now contend that his action in the premises was in fraud of his own and his children's rights under the said Will.

19. The original Plaintiffs in the present Action were A. B. Stewart, in his capacity of curator (in lieu of Alexander Molson, resigned), to the substitution created by the Will of the late Honorable John Molson, for the share in his estate, of which Alexander Molson was institute, Alexander Molson personally, and Herbert S. S. Molson, one of his sons and one of the possible substitutes. After the commencement of the Action, Mr. Stewart died, and Mr. G. W. Simpson was appointed curator in his stead, and was authorized to take up the instance in the Action.

Rec. pp. 13-19

20. The Appellants in effect said by their declaration in the action that of the Three thousand two hundred shares which belonged to John Molson in his lifetime, and which in March, 1871, stood in the names of William and Alexander Molson as executors, six hundred and forty belonged under the Will, and necessarily went, to the Plaintiff Alexander Molson, as owner or legatee or institute for his life, but subject to his children's rights, if he left children ; that the Bank was not justified in allowing a transfer to Alexander Molson of these

shares without a specification that the transfer was made under the Will and subject to its provisions, as being substituted property, inalienable and insaisissable ; that the Bank were guilty of negligence and fraud in allowing the transfer without the concurrence of Joseph Dinham Molson, as one of the executors ; that Alexander Molson has become insolvent ; and the conclusions of this Action are to have the Defendants condemned to deliver over, transfer and place into the names of Alexander Molson, as institute, and of the substitution Six hundred and forty shares of stock within a delay to be fixed by the Judgment ; and that in default, they be condemned to pay the Plaintiffs Sixty thousand dollars for the value of the stock, and also be condemned to pay the Plaintiffs Seventy thousand dollars for the dividends declared and paid meantime to the persons in whose name the stock has been from time to time standing, the whole to be invested for the substitution in the name of the curator.

21. The pleas raised in defence the following grounds :—

(*a*) That 3,200 shares of Molson Bank stock at one time stood in the names of William Molson and Alexander Molson, executors of John Molson, which stock the executors had full power to transfer. Rec., pp. 64-68.

(*b*) That on the 5th of April, 1871, they required the Bank to allow a transfer of 640 shares to Alexander Molson, which was done, and he became the lawful owner of those shares.

(*c*) That the Bank was not bound to see to the execution of any trust to which these shares were subject, if any there were, and cannot be held responsible in the premises.

(*d*) That there was a *lis pendens* as to 160 shares ; a contention not now disputed, which limits the number of shares with which this Action is concerned to 480 shares.

(*e*) That Alexander Molson, the alleged institute, was a party to the disposal and transfer of the shares, and having disposed of all interest in the said shares, and dispossessed himself thereof, is estopped from making the present claim.

(*f*) That the curator and H. S. S. Molson have at present only an inchoate or contingent right or anticipation and no vested interest whereby to support an action.

(*g*) That others of the alleged substitutes, some of whom are of age and some are minors, are not parties to the suit.

(*h*) That the Plaintiffs are not entitled to the shares or money which they claim jointly, and it does not appear by the declaration how much or what part each seeks to recover.

(*i*) That no stock or shares in the Defendants' bank was by law or ever became subject to any substitution under the said Will in favour of the children of the Plaintiff, Alexander Molson, nor was any substitution created by the said Will which affected any stock or shares in the said Bank, nor was any property subject to any such substitution ever invested in the stock or shares of the Defendants' Bank.

(*j*) That the stock could not be the subject of a substitution under the law ; and that if its proceeds could have been made subject to such substitution none of the steps necessary to subject it to any such substitution were ever performed.

22. The witnesses, except Joseph Dinham Molson, who was examined out of Court by consent were examined and the case was argued before Taschereau, J. The judgment of the Superior Court will be found at pp. 10 & 11 of the Record, and the reasons given by Taschereau, J., for such judgment at pp. 249-260 of the Record.

23. He found in favor of the Defendants on all the following propositions, though he based his formal judgment only upon the third :

Rec., p. 258. (1) That by section 36 of the charter of the Bank, 18 Vict., Chap. 202, the Bank was exempted from any responsibility with regard to the execution of trusts to which its stock might be subjected, and was not therefore bound to see that either the executors of the Will of the Hon. John Molson or Alexander Molson himself, carried out any trust that may have been made with regard to this particular stock, if any there was.

Rec., pp. 254-257 (2) That there had been in accordance with the powers given by the said Will a definite partition of the estate of the Hon. John Molson between the parties entitled to shares in it, at which the Plaintiffs being duly represented had received certain assets in payment of their share, and that by Article 746 of the Civil Code they were precluded from claiming an interest in any other assets of the estate, they being deemed never to have had any interest in any other assets.

Rec. p.p. 249-254 (3) That the shares of stock in question were by statute moveable property, and that by the Ordinance of 1629, the substitution of moveable property was prohibited and consequently the Plaintiffs' claim failed.

24. The Plaintiffs appealed to the Court of Queen's Bench, Appeal side, when the case was decided against them by the unanimous judgment of the Court. The judgment of the Court of Queen's Bench will be found at pp. 262 and 263 of the Record, and the reasons for such judgment at pp. 271—287 of the Record.

25. Blanchet and Bosse, J.J., concurred in the following reasons :—

(1) That although, according to their view, the shares could by the law anterior to the Code be the subject of a substitution, yet under the Hon. John Molson's Will, his executors were empowered to sell any part of his estate and divide the proceeds among the legatees, and were the sole judges of the necessity or advantage of so doing, and they acted on this power ; and under the apportionment made between the legatees, the Alexander Molson share included a money equivalent for, but no shares in specie of the Molson's Bank stock, and Plaintiffs therefore never became the proprietors of or interested in any shares as part of any share of the John Molson estate. Rec., p. 283.

(2) That the Appellants could not succeed in their action against the Bank, which was an action for damages, without proving the latter's default or negligence, which they had failed to do, and the loss of the value of the said shares to the substitution; whereas the evidence showed that Alexander Molson as institute had received the value of the shares in a partition freely made between himself and his co-heirs.

26. Hall, Baby and De Lorimier, *ad hoc*, J.J., agreed with the other judges upon the question of the power to make a substitution of Bank stock, but confirmed the judgment upon the ground that under the general Banking Act, 34 Vict., c. 71, sec. 26, and by its own charter, 18 Vict., c. 202, sec. 36, the Bank Respondents were not bound to see to the execution of the trust imposed by the Will of the late Hon. John Molson upon his executors. Rec., pp. 283-287.

27. The Plaintiffs and Appellants now Appeal from this Judgment of the Court of Queen's Bench to the Privy Council.

28. The burden of proof was on the Plaintiffs. Mr. Elliot, the bank manager, who had no personal knowledge, was examined as to the entries in the Bank books connected with the shares of stock belonging to the late Honorable John Molson, and stated that on the 11th of May, 1866, a journal entry appeared as follows :—" Declaration No. 12, dated 11th May, 1866. Hon. " John Molson debtor to executors, namely, William and Alexander Molson, for " transmission 3,200 shares of stock of $50.00 each, $160,000," and that a transfer for value received from Alexander Molson was recorded of 640 of these shares to Alexander Molson on the 5th April, 1871, by " William Molson and " Alexander Molson, Executors Estate late Hon. John Molson." He stated that Mr. William Molson, one of the executors, was president of the Bank from 1859 to 1875, that Mr. John Molson was accountant from 1859 to 1870, and that dividends were paid to the executors up to the time of the transfer of the stock. Mr. William Robb and Mr. Simpson were examined to prove the insolvency of Mr. Alexander Molson. Mr. Robb was uncertain as to the data upon which he gave his opinion. Mr. Simpson, on cross-examination, admitted his opinion to be of no value. Rec., p. 151. Rec., p. 153. Rec., 162-165.

29. Mr. Phillips, Notary, produced a paper which purported to be an act

of deposit of an account made by Samuel E. Molson, Joseph D. Molson and W. H. Kerr, and deposed that he could find no other deposits of accounts. The object of this evidence was to show that the executors of the late Honorable John Molson had rendered an account, the design being to argue that they were therefore *functi officio* at the time of the transfer of the stock. This witness also produced certain deeds of conveyance and discharge, which show the different transfers made to effectuate the partition of the Hon. John Molson's estate. Copies of such documents being those Nod. 36, 37, 38, 39 and 40, are to be found at pp. 91, 99, 107, 117 and 126 of the Record respectively.

Rec., pp. 167-170. 30. The Plaintiffs examined Mr. Joseph Dinham Molson, from whose evidence it appears that he never acted as an executor or trustee of his father's estate. He saw his uncle William Molson during his mother's life who refused to deal with him as executor or to do business with him. It does not appear that after his mother's death he ever acted or attempted to act as executor. The deeds show that he was a party to the division of the estate and made no objection to William and Alexander Molson acting as sole executors.

Rec., p. 171. 31. Mr. George W. Simpson deposed that Mr. Alexander Molson has eight children, all of whom are possible claimants to this substitution and all Rec., pp. 172-173 but two of whom are of age. Mr. Phillips, Notary, proved that there had been between the time of the death of the Honorable John Molson and 1875, some thirty odd deeds executed on behalf of his estate, in none of which did Mr. Joseph Dinham Molson act. There were several deeds in which he in his individual capacity dealt with and recognized the remaining executors as authorised to act for and represent the estate.

32. The following questions of fact and of law are in dispute between the parties :—

(1) Was the Bank, having regard to the provisions of its charter, affected by the existence of the alleged trusts in favour of the Appellants or their rights or interests, or was it bound or entitled to take notice of, or to inquire into, or to act upon, the provisions of the Will creating such trusts, rights or interests ?

(2) Was Joseph Dinham Molson an executor and trustee ? And if so, was the transfer by William and Alexander Molson, as executors good, without his concurrence ? And if it was not good, is the Bank responsible under the circumstances ?

(3) Had the executors and trustees power to deal by transfer with the 640 shares in question, and had they power so to apportion the estate as to exclude from the share of the assets of Alexander Molson as institute under the substitution, any stock in specie of the Bank ?

(4) Were the executors and trustees *functi officio* when they executed the transfer to Alexander Molson ?

(5) What is the effect of the transfer? And can the Appellants (having regard to that transfer and to the existing documents of apportionment) claim in this Action any interest in the subject matter of the transfer without attempting to set aside the transfer or to vary the document of apportionment, and in the absence of the executors and of the other substitutes?

(6) Whether apart from or having regard to the Ordinance of 1629, does the Will create a valid substitution of the moveables and in particular of the shares, the subject matter of this litigation in favor of the children of Alexander Molson, as between them and him and the executors?

(7) If it does in any sense create or provide for such substitution, were any steps necessary in order to bind or affect the interests or position of third parties, such as the bank or transferees, and were such steps taken?

(8) Had the executors a discretionary power as to the course to be taken, the existence of which power relieved the bank and third parties from any obligation (if such obligation might otherwise have existed) to enquire into the propriety or validity of the action of the executors in making the said transfer?

(9) Is Alexander Molson, who took part in and profited by the transaction impeached, entitled to urge the present claim by virtue of the prohibition to alienate or otherwise?

(10) Can the representatives of the suggested substitution make the present claim during the life of Alexander Molson, and without any preliminary legal proceeding or judicial declaration, and, if so, even should they succeed, would they be entitled to more than security for the capital value of the shares as it might be at the decease of Alexander Molson, and are not the other alleged substitutes necessary parties to the action?

33. Dealing with these questions *seriatim*, the Respondents make the following submissions :—

(1) The Bank by its charter, which is in accordance with the general Act, is not bound to see to the execution of any trust, express, implied or constructive, to which its stock may be subjected. There was no trust here, except to divide the value of a certain amount of assets. In the present instance the executors were entitled to sell the stock, or they were entitled in making a general division to transfer more, or less, or none of it to Alexander Molson or any individual allottee. The Bank could not tell whether the acts of the executors whatever they were, were done with the one intention or with the other, for every transfer, whether it be by way of sale or pledge, or gift, or allotment, must be upon the books of the Bank in a form specified by Statute. The Bank had no right and was under no

obligation to enquire as to who the transferee was, or what was the nature or object of the transaction. Alexander Molson was, by the act of the executors put in the position of transferee of the stock, of which, under the most favorable assumptions for the Appellants' case, he was at least the owner, subject to a trust in certain events to deliver it over on his death.

(2) The Respondents contend that Joseph Dinham Molson was not an executor.

Mrs. Molson had power by an instrument before three witnesses to name an executor to act after her death. The proof that she did so is defective.

Rec., pp. 37-39. The notarial instrument filed only proves the fact that it was signified upon the parties named in it. It does not prove whether or not the original document deposited in the Notary's office was signed by Mrs. Molson, or signed by the witnesses, and on these points there is no proof.

No action by Joseph Dinham Molson under the instrument would have any effect by the terms of the Will until after his mother's death. It is not
Rec., p. 168. proved that after her death he ever did act as executor. He admits the contrary himself, and the different deeds and instruments that were passed
Rec., p. 172. without his being a party as executor, and those to which he was a party individually, corroborate the fact.

Even had he been an executor, the Will provides that in all questions touching the disposition of any part of the estate, the concurrence of two,
Rec., p. 30. of whom William Molson should be one, should be sufficient, and thus the transfer was good ; but, if not good, then the Bank, which had no knowledge and was not bound to take notice of the alleged appointment, is not responsible ; even though the result may be that the transfer was ineffective.

Rec., p. 33. (3) The Will contained express power, in making the apportionment and division of the residue of the estate, to sell any part of the residue and in lieu of such part to apportion and divide the net proceeds of the sales. The executors thus had power to transfer the stock either on sale to pay debts or with a view to apportionment, or upon apportionment.

(4) The Trust was to last for ten years, at any rate. The trustees were not precluded from doing after the ten years such things as were necessary to terminate their mandate. The testator himself contemplated
Rec., p. 30. the Trust lasting for a longer period than ten years, for, by Clause 10 of his Will, he directs the account to be rendered at or so soon as practicable
Rec., p. 31. after the expiration of the term of the Trust. In Clause 13, he refers to

these periods as " the term hereinbefore limited," and does not again use the expression " end of ten years," nor could he reasonably do so, because he had extended it by the words " so soon as practicable after the expiration of the term." In clause 16, dealing with the distribution he says : " as Rec., p. 33. soon as may be practicable after the expiration of the term hereinbefore limited for the continuance of the said trust, the trustees are to apportion," etc., and that if in this apportionment and division the trustees found it necessary to sell, they should have the power to do so. It is therefore submitted that so far as their powers of sale were concerned, they were intact until the apportionment and distribution should be entirely finished. If any argument might be founded on the alleged rendering of an account, Rec., pp. 40-57. it fails, because the document is not proved, nor does it appear to have been an account rendered by the executors and trustees of the Will, but only a statement of receipts and payments not acknowledged as authentic by anyone. It does not correspond to the account referred to in the deeds of transfer and conveyance.

(5) The transfer of the stock stands, even if obnoxious to the criticism of the Appellants, till it is avoided. It is voidable only, and not void ; and no attempt is made to avoid it ; nor can it be avoided in this suit in the absence of the executors and trustees or the other parties in interest. The document of apportionment or deed of transfer Rec., pp. 132-133 and conveyance of the 15th June, 1871, by which the Alexander Molson share was determined and transferred, does not purport to include any Molson's Bank stock. Such deed constituted, as was held by the Judicial Committee of the Privy Council in Carter *v.* Molson, 10, App. Cas. at p. 669, the immediate and only title to the share allotted to Alexander Molson under the provisions of his father's Will. Article of the Code 746 says that such co-partitioner is deemed to have inherited alone and directly all the things comprised in his share or which he has obtained by licitation and to have never had any ownership in the other property of the succession. These shares, therefore, not having been conveyed as part of the Alexander Molson share, the Plaintiffs cannot claim ever to have had any interest in them by virtue of the Will alone ; and whatever rights Alexander Molson individually may have acquired by the transfer, such rights were entirely unaffected by the provisions of the Will and have been alienated by Alexander Molson himself.

(6) The question as to whether the Will did or did not create a substitution of the particular shares, involves two points :

(*a*) Assuming that the shares could be substituted by the mere effect of a Will properly framed to that end, the Respondents submit that such is not the case here ; that the shares were only left as an investment of the funds of the estate ; that the executors and trustees were not bound to preserve them in specie, or to deliver them or any part of them to any of the different interested parties ; and therefore that except by con-

veyance, none of the sons nor the substitutions in favour of their issue could acquire any interest in any of the stock in specie, but only a general right to have the trustees account for the stock as an asset, by delivering either equivalent investments or cash.

(*b*) The shares being moveable property, are within the Ordinance of 1629, the effect of which was to prohibit the substitution of moveables except precious stones. A great deal of argument turns upon the question as to whether this ordinance was, as the Respondents contend, registered and so in force in Quebec. The Respondents argue that the Ordinance of 1629 prohibited the substitution of moveables. A substitution is a gift to A, who is called the institute, and confers upon him the rights of an owner, subject to his estate being divested of the ownership in favor of someone else called the substitute, upon the happening of a given event; that is to say, the institute is the owner, subject to a resolutory condition. The substitution of specific moveables would have the effect of leaving them in the hands of the institute who might alienate them, as he may alienate all substituted property subject to the happening of the resolutory condition. Upon this happening it would be free for the substitutes to revendicate the moveables (which ex hypothesi are substituted in specie) in the hands of whoever they might be. This would be an injustice to third parties, as the moveables would not be ear-marked and buyers might have no notice of the risk they were running in purchasing them. The Respondents do not contend but that a testator might direct his moveables to be sold and converted into immoveables, and might direct that a substitution should be created in respect of such immoveables, nor do they deny that in case such directions were observed such substitution might be so created, but they deny that a substitution can be effected of specific moveables in specie.

(7) If the ordinance was in force it settles the question. If not, the law in force must have been such as is described in Pothier, or such as exists under the present code. Under both these systems it would be necessary that an act of investment should have been made of the moveables, in order to affect them with a substitution as against third parties, the intention of the law being to protect the interest of third parties as well as of the substitutes : but no such act was made.

Rec., p. 33.

(8) The executors, under Clause 16 of the Will, were to take care in the apportionment and distribution, to provide as far as might be possible, and in such manner as the trustees might deem best, against the risk of the capital being lost. The assets of the estate comprised, amongst other things, railway stock, corporation bonds, promissory notes, and a large amount of cash. The trustees might have exercised precautions in a variety of ways. They might have made an act of investment of the properties which were suitably invested, and might have disposed of the others and invested the proceeds in real estate or mortgages, and made

further acts of investment, so that the instruments would have shown the existence of a substitution ; or they might have taken security from the institutes that the funds would be forthcoming on the opening of the substitution. It was left to their discretion to do what they might deem best. The Bank had no control whatever over the trustees as to what, if any, their precautions should be, or any right to enquire into or judge of the matter. The executors had a legal right to transfer the stock to Alexander Molson individually, even if it was substituted, and the Bank could not have resisted such a transfer.

(9) Unless this matter is affected by the prohibition of alienation, Alexander Molson's position would be that of an owner for life, subject to a resolutory condition. He might if the substitutes survived him become responsible ultimately to hand over his share of his father's estate to other people. He himself was one of the executors of whose acts he now complains, and he also received himself and himself disposed of the shares which he now says have been dissipated; and he would, it is submitted, so far as the Bank are concerned, be estopped from recovering them.

With regard to the possible effect of the prohibition to alienate, it must be observed that a prohibition to alienate may be either one of two things firstly, a prohibition to an individual in his own interest, in which sense it is regarded as a counsel or advice and is without effect to prevent alienation so far as his rights are concerned ; or it may amount to a substitution in favor of the heirs of the donor, in which case it does not prevent the party to whom it is directed from alienating to the extent of his own interest, but merely amounts to a substitution in favour of the testator's heirs, and is still a simple counsel so far as the institute is concerned, and therefore only prevents the disposal by him of the substituted rights in the property and not of his own rights. In the present instance it is to be noted that by Clause 18 of the will the prohibition to alienate is only made as a condition Rec., pp. 33-34. of the bequests in favour of the testator's sons, and of their widows, and not of those in favour of the testator's grandchildren, and that a usufruct is given to the widows during life or widowhood. The prohibition to alienate therefore, so far as it affects Alexander Molson, is a simple advice and not binding on him. It is therefore submitted that he is estopped ; and under any circumstances he cannot recover without restoring what he has obtained.

(10) The representative of a substitution which is not yet opened have certain rights in respect of the substituted property. They can take conservatory measures for the preservation of specific assets, and, if necessary they can have the institute declared to have wasted the property, and can get possession as sequestrators. In this case, no attempt has been made to declare the institute to have forfeited his rights, although that was apparently contemplated by the Court that authorized the suit. The present action is not in the nature of a conservatory action. The

shares which it is sought to recover have long since been alienated. The present Action cannot benefit the representatives of the substitutes by putting them in possession of the shares, for they are not on any hypothesis as yet entitled to them. They may never become entitled to them, as they may all die in their father's lifetime, when the property will fall to the general heirs of the testator. If entitled at all, they would not be entitled to Molsons' Bank shares at their present value, but only to security for Molsons' Bank shares at the value they may be at the time when, if ever the substitution opens in their favor.

The curator is only entitled to represent the substitutes, in the case of inventories and partitions and proceedings of a like nature. He is not entitled to have possession of any of the assets, nor are any of the substitutes, until the substitution opens. There are eight substitutes, who, if they survive their father and he makes no Will altering the distribution, would be entitled in a fixed ratio, whilst, if he makes a Will only one of them may be entitled. Of these, only H. S. S. Molson is a party to the suit, and as the Plaintiffs by their action could not bind the other substitutes it is submitted that they are not entitled to maintain the present Action, to which the other alleged substitutes are necessary parties.

The Respondents submit that the Judgment appealed from should be confirmed for the following amongst other

REASONS.

1. Because the Bank by its charter is exempt from the obligation of seeing to the execution of any trust express, implied or constructive, to which its stock may be subject.

2. Because Alexander Molson is estopped from denying the legality of the transactions made by him so far as they affect himself.

3. Because the curator has no legal title to the stock or dividends which he now seeks to recover.

4. Because Herbert S. S. Molson has no title to any part of the stock or dividends, and has no legal status *per se*, or in the absence of the other parties interested who are not parties to the suit.

5. Because the representatives of the substitution have no right to the possession of the assets of the substitution until the substitution has opened, or until the institute's rights have been declared sequestrated in their favour.

6. Because there is no evidence to show that the executors and trustees ever apportioned any shares of Molson's Bank stock to the Alexander Molson share in the substitution.

7. Because the deed of partition and apportionment does show that assets to the full value of that share were transferred to Mr. Alexander Molson, as institute and curator to the substitution, which transferred assets included no shares of Molson's Bank stock, and those interested are excluded by the terms of the code from claiming that they are entitled to any part of the estate not included or mentioned in the deed.

8. Because even if the stock was included in Mr. Alexander Molson's share, and if the transfer upon the books of the Bank was made as a part of a partition of the property, Alexander Molson, as institute, would be entitled to the possession, and the Bank would be unable to resist his claim.

9. Because the executors, in the exercise of their discretion chose to put him in possession, and the Bank could not enquire into the circumstances of the security or the precautions which they took.

10. Because as the holder of the stock in virtue of the transfers made by the executors, he became the legal owner *quoad* the Bank.

11. Because the particular shares were not affected by any substitution under the Hon. John Molson's Will.

12. Because if they might have been so affected, yet the formalities required by law were not complied with in respect of them, so as to subject them to such substitution as regards third parties.

13. Because the prohibition to alienate had no effect, and is to be deemed mere advice addressed to Alexander Molson.

14. Because the Plaintiffs do not seek to set aside the deed of partition, but claim under it; and they have under it no claim; and because the other alleged substitutes and the executors and trustees are necessary parties to the suit.

15. Because on the assumption that there was any breach of duty on the part of the Bank, the action ought to have been an action for damages, which this is not, and such action would not lie either at the suit of Alexander Molson, or the substitution not being yet open, at the suit of the other Plaintiffs.

16. For the reasons appearing in the Judgments below.

EDWARD BLAKE.

TYRRELL T. PAINE.

In the Privy Council.

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

BETWEEN

G. W. SIMPSON, *es qual*, ALEXANDER MOLSON and HERBERT S. S. MOLSON - *Appellants*,

AND

THE MOLSONS BANK - - *Respondents*.

Case

ON BEHALF OF RESPONDENTS.

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