

*Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeals of Carter v. Molson, and Cross Appeal No. 431, and Holmes and another v. Carter, Nos. 432 and 433 (four Appeals consolidated), from the Court of Queen's Bench for Lower Canada, Province of Quebec; delivered 4th July 1885.*

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Present :

LORD WATSON.

SIR BARNES PEACOCK.

SIR RICHARD COUCH.

SIR ARTHUR HOBHOUSE.

On the 9th February 1875, John Thorold Carter advanced \$30,000 upon a mortgage, by which the borrower, Alexander Molson, became bound to repay that sum in six years, and also to pay interest, half yearly, at the rate of  $7\frac{1}{2}$  per cent. per annum; and, in security for the due payment of principal and interest, mortgaged and hypothecated a lot of ground and a tenement erected thereon, situated in St. James Street, Montreal. Thereafter, on the 17th April 1877, in consequence of default in payment of interest, Carter recovered judgement in the Court of Queen's Bench against Molson, founded on his personal covenant in the deed of mortgage, for \$31,125, being the amount of principal and interest due at 1st January 1877. In virtue of that judgement, Carter proceeded to attach, by writ of Saisie-arrêt, the rents of the mortgaged property in St. James Street, which had been let

to one Allan Freeman, and also the dividends which had accrued or might accrue upon 148 shares of the stock of Molson's bank, which stood in the books of the bank, in the name of "Alexander Molson, in trust for Eliza A. Molson" *et al.*'

The right of his creditor to attach these rents and dividends was contested by Alexander Molson, upon the allegation that the St. James Street property, as well as the bank stock, formed part of his one-fifth share of the residue of the estate of his late father, John Molson; that, by the will of the deceased, his right to both was, *grèvé de substitutions*, in favour of his wife and family, and his usufruct was expressly declared to be *legs d'aliment*, and not arrestable for his debts. In the course of the litigation which followed, two separate petitions were presented for leave to intervene, the one by Eliza Ann Holmes, wife of the debtor, in her own right, and the other by the same lady as tutrix *ad hoc* to their minor children, along with their daughter Elizabeth, who had attained majority.

In the Superior Court, Mr. Justice Papineau, upon the 30th June 1881, rejected the contestation of the judgement debtor, with costs, and sustained the right of the arresting creditor, both as to rents and dividends; and, at the same time, in both applications for intervention the learned Judge decided, with costs, against the petitioners. The Court of Queen's Bench, upon the appeal of Alexander Molson, by their judgement rendered on the 24th March 1883, in substance affirmed the decision of Mr. Justice Papineau, so far as concerned the dividends, which they declared to have been validly arrested in the hands of the bank; but reversed his decision, in so far as it related to the rents of the St. James Street property, and quashed the attachment made in the hands of Allan Freeman. The debtor

was condemned to pay to the arresting creditor the costs of the contestation with regard to the bank dividends in the Court below ; whilst the creditor was condemned to pay to his debtor the costs of the contestation in the Court below with regard to rents, as well as the costs of the Appeal. By a separate judgement of the 24th March 1883, the Court of Queen's Bench, in the appeals taken by the intervening petitioners, rejected their contestation, and confirmed the decisions of Mr. Justice Papineau, with costs.

Against these judgements four separate appeals have been presented to Her Majesty in Council. Mr. Carter complains of the decision of the Queen's Bench, in so far as it reverses the judgement of the Superior Court and quashes his arrestment of the rents of the St. James Street property ; Alexander Molson complains of decisions of the Courts below sustaining the writ of Saisie-arrêt as regards dividends arising upon the 148 bank shares ; and the intervening petitioners complain of the decision by which their respective contestations have been rejected. These appeals have been consolidated, and heard as one cause, but must now be separately disposed of, inasmuch as they do not depend upon the same considerations either of fact or law.

To begin with the rents of the St. James Street property. It was argued for the Appellant Carter that there has been no deed or document registered which constitutes a legal act of substitution, or, in other words, discloses the fact that the title of his debtor to that property is derived by testamentary gift from his father, the late John Molson, and is therefore affected by the conditions and limitations appearing in the will of the deceased. It was said that, *ex facie* of the register, the property is vested in Alexander Molson, not as a legatee, but as a purchaser for value from the administrators of his father's

will; and, consequently, that the Appellant, an onerous creditor who advanced his money on the faith of the register, is not affected by the latent conditions of the will. It was also maintained for this Appellant that, inasmuch as, by the deed of mortgage of February 1875, Alexander Molson declared that the property well and truly belonged to him, he is now estopped from alleging, in this suit, that it is in reality held by him as an integral part of his share of his father's succession.

In the argument addressed to their Lordships from both sides of the bar, it was conceded that the substitution imposed by the 13th article of John Molson's will upon the share of Alexander Molson, in favour of his widow and issue, cannot receive effect against a creditor in the position of the Appellant, unless the substitution be duly registered (C. C., Sects. 938, 939), so as to give him due notice of the interests of the substitutes. Mr. Justice Papineau decided this branch of the case against the judgement debtor, upon the assumption that the will of John Molson had not been registered. That assumption seems to have been based upon a somewhat strict and technical interpretation of an answer made for Alexander Molson to the 13th interrogatory contained in the articulation of facts filed for the Appellant on the 16th March 1879. There is ample evidence to show that the will was, in point of fact, duly registered in November 1860; and having regard to the very inartificial and ambiguous character of the interrogatory in question, their Lordships do not hesitate to agree with the Court of Queen's Bench in holding that the registration of the will has been sufficiently established.

In February 1875, when the Appellant lent his money to Alexander Molson, there were already two deeds on the register, evidencing the title by which the borrower held the St. James Street

property. The one of these was the will of John Molson already referred to, and the other was a deed, dated the 15th June 1871, and registered the 11th June 1872, by which William Molson, and the judgement debtor Alexander Molson, as acting executors and trustees under the will, sold, assigned, and transferred that property to the said Alexander Molson. It does not appear to their Lordships to admit of dispute that all persons who transacted with Alexander Molson on the faith of his being the owner of the St. James Street property were bound to inform themselves of, and must be held to have known, the tenor of these two deeds, because the deed of 15th June 1871 constituted Alexander Molson's immediate and only title to the property, and it sets forth, *in gremio*, that his authors held the property under the trusts of John Molson's will, and had transferred it to Alexander Molson by virtue of a power of sale said to be contained in the will. Accordingly, if it be the case (as the Court of Queen's Bench have held), that the deed of June 1871, though professing to give effect to a transaction of sale, was in reality a conveyance to Alexander Molson of that which had been allotted to him as part of his fifth share of the residue of his father's estate, and that the terms of the registered deeds were sufficient to notify that fact to the Appellant, or to put him upon his inquiry in regard to it, it seems to follow that he cannot prevail in this appeal. In that case, the property would be identified, on the face of Alexander Molson's title, with his share of residue under his father's will; and every person dealing with him on the faith of that title would either have the knowledge, or the means of informing himself, that the property, as part of that share of residue, was *grèvé du substitutions*, in favour of Alexander Molson's wife and children, and that his usufructuary interest was not arrestable.

The evidence adduced in the Superior Court establishes, beyond all doubt, that there never was any contract, between Alexander Molson and the administrators of his father's will (of whom he was one), for the purchase and sale of the St. James Street property. The property was, no doubt, exposed to public auction, along with other heritable subjects forming part of the residue, and the whole subjects so exposed were knocked down to two gentlemen, other than Alexander Molson, who each represented beneficiaries entitled to one fifth of residue. But these gentlemen were merely nominal purchasers. The auction sale was not resorted to for the purpose of selling and dividing the proceeds,—the only purpose for which a sale was authorized by the will,—but for the purpose of ascertaining the value of the subjects exposed, in order to their partition among three of the five residuary legatees. Accordingly these legatees, after the auction sale, at which Alexander Molson was not a buyer, agreed to divide the subjects which had been exposed, not according to the prices at which they had been knocked down, but according to an estimate based on an average of these prices. Upon that footing, the St. James Street property was allotted to Alexander Molson, as part of his share; and there appears to be no ground whatever for supposing that the trustees of the will thereafter sold to him his allotted portion for the amount of the estimate, even if such a sale had been within their power, which it clearly was not.

The deed of 15th June 1871 purports to be a conveyance of the property in question to Alexander Molson, in pursuance of a contract by which the trustees of his father's will had sold it to him for the amount at which its value was estimated for the purpose of partition, as already explained. In point of fact, the deed appears to

have been framed by the grantors 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 *insaisissabilité* of his sons' usufruct. Although that is proved, in the estimation of their Lordships, to have been the true nature of the deed of 15th June 1871, it does not follow that the conditions of John Molson's will could be held to affect the property in a question with any onerous creditor of Alexander Molson, to whom the deed itself gave no notice, and who had no knowledge otherwise of its real character. But the deed of June 1871 refers to, and by reference incorporates, certain deeds of transfer and agreement executed by the executors and trustees of the will of John Molson, for the purpose of vesting his share of residue in Alexander Molson, and one of these deeds, dated 15th June 1871, appears to their Lordships to indicate very plainly that the St. James Street property had not been sold for the purpose of dividing the price, but had been allotted to Alexander Molson as part of the *corpus* of his share of residue. At all events, the terms of that deed, and its relative schedules, appear to their Lordships to be quite sufficient to notify to any person dealing with Alexander Molson, on the faith of the deed dated 25th June 1871, and registered 11th June 1872, that the transaction which it professes to embody was, in reality, either a legal partition or an illegal sale.

It is, however, hardly necessary, for the purposes of this appeal, to determine what would have been the effect of these indications of the true character of the so-called deed of sale, derivable from its own terms, upon the rights of a creditor of Alexander Molson, who had no

information except that which he had obtained, or might have obtained, through the register. The Appellant, Mr. Carter, does not occupy that position. His agent in negotiating and carrying through the loan transaction of 9th February 1875 was the Hon. J. J. C. Abbot, who is proved to have been cognizant of the whole proceedings in the distribution of the residue of John Molson's estate, and to have taken an active part in advising and completing the arrangements by which his fifth share, including the St. James Street property, was transferred to Alexander Molson. The Appellant is affected by the knowledge of the agent to whom he confided the duty of attending to his interests, and that knowledge was amply sufficient to inform its possessor that the deed conveying the St. James Street property to Alexander Molson, though professedly a deed of sale, was in substance and reality the transfer of an estate which had been specifically allotted to him as part of his share of residue. In these circumstances, their Lordships are of opinion that the Appellant Carter must be treated as having full knowledge that the property was vested in his debtor, subject to all the conditions and limitations imposed by the will of John Molson.

Next, as to the appeal of Alexander Molson with regard to bank dividends. The writ of Saisie-arrêt has only been sustained, as an attachment of the dividends which may become payable to Alexander Molson in respect of the 148 shares in question. The sole ground upon which these dividends are said to be placed beyond the diligence of his creditors is, that the 148 shares either are, or represent, part of 640 shares of the stock of Molson's Bank which were transferred to Alexander Molson, as an integral portion of the fifth share of residue, settled upon him and his wife and family by his father's will. Their Lordships see no reason to differ from the law laid down



by C. J. Dorion, to the effect that these dividends would be protected from arrestment by the 18th article of John Molson's will, if it were proved to be the fact that the 148 shares form part of the 640 shares originally transferred to Alexander Molson by the executors of the will, or were purchased with the proceeds of these original shares. Accordingly the only question requiring to be decided, in this appeal, is one of fact. Their Lordships are willing to assume (although it is unnecessary to decide) that the *onus* of proving that these 148 shares neither are nor represent any part of the residue of John Molson's estate lies upon the arresting creditor. He has proved, by clear and satisfactory evidence, that, at and prior to the 12th May 1873, Alexander Molson had divested himself of the whole of the 640 shares which had been transferred to him, in 1871, by his father's executors; and that 115 of the 148 shares in question never belonged to his father's estate, having been vested in Alexander Molson before the residue was divided. That evidence, in the opinion of their Lordships, not only establishes the right of Mr. Carter to attach the dividends arising upon these 115 shares, but throws upon the Appellant, Alexander Molson, the *onus* of showing that the remaining 33 shares were either part of or purchased with the proceeds of the 640 shares, neither of which facts has he made any attempt to prove.

Then as to the appeals presented by the intervening petitioners. Both of these depend upon precisely the same considerations, and may be disposed of as if they were one appeal. The petitioners have not, and do not assert that they have, any direct or legal interest, either in the rents of the St. James Street property, or in the dividends on the 148 bank shares, which may accrue and become payable to Alexander Molson during his lifetime. On the other hand, it is

not disputed that they have material interests, entitling them to resist any attachment of the *corpus* of the property or of the shares, at the instance of a creditor of Alexander Molson, which might have the effect of defeating their right as substitutes, in the event of Alexander Molson's death. They do not, however, allege that the writ of Saisie-arrêt will attach either the *corpus* of the 148 bank shares, or the dividends accruing upon them, after the death of Alexander Molson. All that they do allege is, that these shares, as part of the residue of his estate, are subject to the substitution in their favour contained in John Molson's will, and that the dividends payable to the institute are, in terms of that will, not arrestable. The only interest in respect of which their right to intervene in the present litigation is maintained, is the apprehension that some points may be incidentally decided, between the arresting creditor and Alexander Molson, which may prejudice their rights at some future time. It is not said that any judgement in this suit can possibly enable the creditor to attach the estates which they may eventually take, assuming the substitutions in their favour to be valid; nor is it suggested that anything decided in this suit, between the judgement debtor and creditor, with regard to the validity of these substitutions would be binding upon them as *res judicata*. What they do plead is that such a decision might afford an objectionable precedent, if and when they require to assert their rights judicially, and, consequently, that they have the right to intervene. That plea appears to their Lordships to be untenable. Section 154 of the Procedure Code, which regulates this matter, gives the right of intervention to parties who are "interested in the event of a pending suit." The event of the suit can only refer to the operative

decree which may ultimately be given in favour of one or other of the parties to it, and not to the views of fact or law which may influence the Court in giving decree. To admit the Appellant's plea would involve the admission of a right to intervene on the part of every person who had an interest in preventing a decision being given *inter alios*, which might be cited as an authority against him in some other suit. Section 154 appears to have been framed for the very purpose of limiting the right of intervention to those persons who can show that a final judgement may possibly be obtained in the suit, which will enable the party who obtains it to possess himself of their estate, or otherwise to impair their legal rights.

Their Lordships are accordingly of opinion that the judgments appealed from ought to be affirmed, and they will humbly advise Her Majesty to that effect. There will be no order as to the costs of any of these appeals.

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