JAMES MUIR, *es qual. et al.* (OPPOSANTS)..... } APPELLANTS;

AND

JOHN THORALD CARTER (CONTESTANT)..... } RESPONDENT.

DAME ELIZA ANN HOLMES, *et vir* (OPPOSANTS IN THE SUPERIOR COURT) } APPELLANTS;

AND

JOHN T. CARTER (PLAINTIFF CONTESTING OPPOSITION IN THE SUPERIOR COURT)..... } RESPONDENT.

DAME ELIZA ANN HOLMES, *et vir* (INTERVENANTS IN THE SUPERIOR COURT)..... } APPELLANTS;

AND

JOHN T. CARTER (PLAINTIFF CONTESTING INTERVENTION IN THE SUPERIOR COURT)..... } RESPONDENT.

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* Oct. 11.

1889
*Jan. 15.
*June 14.

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

Appeal—Matter in controversy—Bank shares—Actual value—Opposition—Shares held "in trust"—Substitution—Onus probandi—Res judicata—Art. 1241 *C. C.*

Where the matter in controversy is bank shares, their actual value at the time of the institution of the action and not their par value will determine the right of appeal under section 29 Supreme and Exchequer Courts Act, and the actual value of such shares may be shown by affidavit.

The fact of bank shares being purchased in trust at a time when the trustee was solvent imports an interest in somebody else, and the onus is upon a party who has seized such shares to prove that they are in fact the property of the trustee, and as such available

*PRESENT—Sir W. J. Ritchie C.J. and Strong, Fournier, Taschereau and Patterson JJ.

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to satisfy the demand of his creditors. *Sweeny* v. *Bank of Montreal* 12 App. Cas. 617 followed.

A final judgment setting aside an intervention to a seizure of the dividends of bank shares founded upon an allegation that such dividends formed part of a substitution is not *res judicata* as to the *corpus* of said shares nor as to the dividends of other shares claimed under a different title. Art. 1241 C. C.

Strong J. was of opinion, in the cases of *Holmes* v. *Carter*, that upon the facts shown the judgment of the Court of Queen's Bench should be affirmed.

APPEALS from the judgments of the Court of Queen's Bench for Lower Canada (Appeal Side) confirming the judgments of the Superior Court:—1. In *Muir* v *Carter* dismissing an opposition fyled by James Muir in his quality of curator to the substitution created by the will of the late Hon. John Molson; 2. In *Holmes et vir* v *Carter* (No. 28) dismissing an opposition fyled by E. A. Holmes *et vir*; and 3, in *Holmes et vir* v. *Carter* (No. 29), dismissing an intervention fyled by E. A. Holmes *et vir*.

Tha material facts which gave rise to the proceedings in the case of *Muir* v. *Carter* are as follows:—

The respondent Carter having obtained a judgment against A. Molson issued an attachment by garnishment in the hands of the Molson's Bank, who declared that they held 148 shares standing in the name of A. Molson "in trust for B. A. M. *et al.*" upon which certain dividends were then payable. The defendant, Molson, contested the attachment, as did his wife by an intervention. The contestation and intervention were both dismissed. This judgment was confirmed by the Privy Council in July, 1885. Thereupon the plaintiff issued a rule *nisi*, calling on the bank to declare what dividends had since fallen due: and also seized the stock itself under execution. The defendant, assisted by Muir, appellant, who was appointed curator to the substitution in place of the defendant,

opposed the seizure of 33 of the shares, and the sale of the remainder was opposed by defendant's wife, who also intervened again in the attachment proceedings and contested the declaration of the bank as to the 115 shares. At the trial it was shown the 33 shares were made up of two blocks, the larger of which consisted of 30 shares transferred by E. Ford, a stock broker, on the 19th of October, 1875, to the account of Alex. Molson, in trust for E. A. Molson *et al.* Mr. Ford had advanced the defendant money on 1,110 shares, 840 shares belonging to the defendant individually and 270 held by him in trust, transferred to Mr. Ford on 18th April, 1874. His advances not being repaid, Mr. Ford sold most of the shares pledged to him, 30 being left, being the shares in question in the present suit. Mr. Ford in his evidence stated that it was trust shares he transferred, and that he sold first Mr. Molson's own stock, then what was required of trust stock to recoup himself. Mr. Ford explained he had to get the money he lent from financial institutions or capitalists and transfer to them the shares transferred to him, and so long as he transferred the same number of shares in the same institution that was all that could be required of him, but the shares re-transferred were either the same as those he received or represented and replaced them.

It was also proved that these shares had been purchased, when A. Molson was solvent, with moneys belonging to the substitution, and had been originally entered in the books of the bank as shares belonging to "A. Molson, Esq., in trust."

In the case of *Holmes et vir.* v. *Carter* (No. 28) E. A Holmes fyled an opposition to the seizure of the 115 shares of the capital stock of the Molson's Bank, standing in the name of Alex. Molson in trust for E. A. M. *et. al.*, claming them as her property.

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In the case of *Holmes et vir* v. *Carter*, (No. 29) E. A. Holmes fyled an intervention to the seizure of the said 115 shares claiming the *corpus* and dividends of said shares as her property. The evidence showing the dealings with these particular 115 shares is reviewed at length in the judgment of Patterson J. hereinafter given.

The evidence and documents of record having been made common to the three cases, it is only necessary to report the argument of counsel in the first case.

R. Laflamme, Q.C ; and *Robertson*, Q.C. for appellant.

The first question for consideration is whether or not the issues raised in the present cause have been already adjudicated upon. A reference to respondent's exhibits, viz., copies of the contestation by the said Alex. Molson of the former *saisie-arrêt*, of the present respondent's answer thereto and the judgments rendered thereon, shows that the conditions necessary to support a plea of *chose jugée* are not to be found in the present case, even on the issue with Mr. Molson in which the parties are the same. On the contestation of the former *saisie-arrêt* only the dividends were in question ; now it is the *corpus* of the shares themselves. In the former case dividends were claimed, not on the general ground that they were revenues of shares belonging to the substitution, but on the special ground that they were revenues of the balance of 640 shares belonging to the estate of the late Hon. John Molson, and referred to in an exhibit of respondent as standing in the acccunt of Alex. Molson individually. All that that Mr. Molson ever claimed was that the shares in question, under seizure, formed part of these 640 shares, and consequently all that was or could possibly have been decided against him was that they did not form part of these 640 shares. But there can be nothing in this to prevent Mr. Molson from making a new claim to the

shares on another ground, viz., that they are shares purchased with money belonging to the substitution, which appellants submit is proved by the evidence. Still less can the decision heretofore rendered be any bar to such a claim on the part of the appellant Muir.

In support of their position in this issue appellants refer to the words of the Privy Council in the former case (1). "It is not said that any judgment in this suit "can possibly enable the creditor to attach the estates "which they may eventually take, assuming the "substitution in their favor to be valid, nor is it "suggested that anything decided in this suit, between "the judgment debtor and creditor, with regard to "the validity of these substitutions, would be binding "upon them as *res judicata*."

There remains the one question of fact now raised for the first time, viz., do the thirty-three shares seized belong to the substitution created by the will of the Hon John Molson, as claimed by opposants, or do they not? The account in which the shares in question are found being on its face a trust account, the burden of proof was on respondent to establish that it was not. But the proof of the ownership and origin of the shares is as clear as it could be made under the circumstances.

But apart from the question of fact, we submit that in law Mr. Molson having pledged his own and trust shares for advances to himself, any balance remaining up to the full number of the trust shares transferred would be considered trust shares. A man must for his own debts dispose of his own property before he disposes of that in which others have an interest. *Sweeny* v. *Bank of Montreal* (2).

It being established that the 270 shares transferred to Mr. Ford, and of which he re-transferred the 30 in

(1) 10 App. Cas. 674. (2) 12 App. Cas. 617.

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question, were trust stock, it remains only to be proved what the trust represented and to whom the stock really belonged. The parties most capable of showing this are manifestly the trustee and such of his employees as acted for him in dealing with the stock. The trustee was Mr. Molson, one of the appellants, and his evidence is clear and satisfactory, and shows that the shares are an investment made with moneys of the substitution made by Mr. Molson in a natural and legal manner long before he had any transaction with Carter. As institute he had control of the moneys of the substitution, and was by his position the legal trustee for the substitution. The law gives the institute full control of the substituted property, subject to his duty to invest the capital, and account for it at the termination of his use (1). Consequently there, was no need of any specific appointment as trustee; the common law provides for that.

Abbott Q.C. for respondent.

The judgment of the Privy Council in the case of *Molson* v. *Carter* (2) constitutes *chose jugée* against the appellants.

It will be seen from the copies of the contestation or plea fyled by the defendant to the original writ of attachment and the answer thereto, and the judgments which have been rendered, that the whole question as to the ownership of this stock has been fully gone into and decided by the courts. All the pretensions now made by the opposants were made and adjudicated upon under the previous contestation. The proof which has been attempted to be made under the present contestation, namely, that these 33 shares belong to and form part of the substition, was made under the previous contestation, with the only difference that whereas the defendant in his first opposition said that they formed part of the 640 shares, originally trans-

(1) C. C. art. 947.

(2) 10 App. Cas 674.

ferred to him as his share in the estate, he now says they are part of 270 shares he bought with the money of the estate. In both the oppositions the object is the same, viz., to have the stocks declared to belong to and form part of the substitution; the reasons, or *moyens*, alone are different.

On the question of fact, the learned counsel, after reviewing the evidence, contended that the whole of the shares in question had been accounted for, and had been shown without doubt to be the property of the defendant, and always had been treated by him as such: while he had entirely failed to prove by any satisfactory evidence that any portion of the stock seized belongs to the substitution.

He contended, also, the case of *Sweeny* v. *Bank of Montreal* (1) did not apply to the facts of this case.

The following judgments were delivered in *Muir* v. *Carter*:—

SIR W. J. RITCHIE C.J.—We all think that this is a case in which the appeal should be allowed.

The evidence in this case establishes very clearly the fact that in November, 1871, Alexander Molson, when he was perfectly solvent, invested $15,000 of the money belonging to the estate of the late Hon. Mr. Molson, and that out of these moneys he lawfully purchased for the substitution two hundred and twenty shares in Molson's Bank. We think that the evidence of the fact sworn to by Mr. Molson is entirely corroborated by the evidence of Mr. Varey, and is also corroborated by the manner in which the property was dealt with.

It appears that when Mr. Molson transferred these shares, rightly or wrongly, to Mr. Ford as collateral, he gave instructions that when it became necessary to realize upon these shares Mr. Ford should first sell those shares of Mr. Molson's about which there was no

(1) 12 App. Cas. 617.

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question, and then if there was any deficiency to sell the shares held "in trust," and if there was any surplus they should be transferred back to the account "in trust." Mr. Ford appears to have acted upon that principle, for he did sell first the stock belonging to Mr. Molson and then he sold the shares "in trust," and there being still thirty-three shares left he transferred them back to Mr. Molson "in trust" as the property belonging to the substitution, and Mr. Ford thus repaired, at any rate, whatever wrong might have been done originally as regards these thirty-three shares, by putting them back to Mr. Molson's account "in trust."

With reference to the plea of *chose jugée*—the matter in controversy before the Privy Council was not in reference to the *corpus* of the shares, but with reference to the dividends; it is not the same subject matter and not between the same parties and, therefore, I do not see the attributes necessary to enable the respondent to succeed on his plea of *chose jugée*.

Under all these circumstances, the appeal must be allowed.

STRONG J.—It is proved beyond all doubt that these thirty-three shares belong to the substitution. These identical shares were bought by Mr. Molson with the monies of the substitution and for the substitution, and at a time when he was perfectly solvent. Therefore, this opposition to the sale of the *corpus* of these shares is well founded.

As regards *chose jugée*, it is out of the question here. The case in appeal before the Privy Council did not relate to the same thing and did not arise between the same parties. The curator to the substitution, in which character the present appellant has formed this opposition, was no party in that quality to the former action appealed to the Privy Council, and therefore the plea of *res judicata* cannot avail the respondent.

Indeed, the learned judge in the court below did not found his judgment upon that, but upon the other ground, which, in my opinion, the evidence fails to support, namely, that these shares did not belong to the substitution, but were the property of Mr. Molson himself, and so available to satisfy the demands of his creditors.

The appeal should be allowed with costs.

FOURNIER J.—I am also of opinion that this appeal should be allowed. The evidence is plain that these thirty shares belonged to the substitution, and that the requisites to sustain the plea of *res judicata* are wanting.

TASCHEREAU J.—I am of the same opinion.

PATTERSON J.—I think that in whatever respect the evidence of Mr. Molson might be criticised, it is got over by what must be borne in mind, that these shares, if they were transferred, should have been put back to the account "in trust," and the evidence being quite consistent with this fact,—the appeal must be allowed with costs.

Appeal allowed with costs.

In the two cases of *Holmes et vir.* v. *Carter* the following judgments were delivered:—

SIR W. J. RITCHIE C.J.—I have been favored with a perusal of the notes of my brothers Taschereau and Patterson in this case, and I entirely concur in the conclusion arrived at. At the close of the argument I would have been prepared to give judgment if the other members of the court had been so disposed.

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STRONG J. was of opinion that the judgments of the Court of Queen's Bench were in all respects correct and that the present appeals should be dismissed with costs.

FOURNIER J. concurred with TASCHEREAU J.

TASCHEREAU J.—In execution of a judgment against Alexander Molson the respondent seized 148 shares of the stock of the Molson's Bank. It appears that these shares were not registered as Molson's at all, but as Molson's in trust for E.A.M. *et al.*, which is established to be, and has always been understood to be, the appellant's name.

To this seizure the appellant filed an opposition claiming 115 of these shares as her property, and alleged that at the time the bank was founded, in 1855, she was proprietor of twenty shares; that she has since acquired other shares, and on the 6th October, 1873, she owned 115 shares, which, up to the 6th October, 1875, stood in her own name and in the name of Alex. Molson in trust for E. A. Molson (meaning appellant), and were on the last-mentioned date transferred to the account "Alex. Molson in trust for E. A. M *et al.*"

Respondent contested the opposition by three contestations, pleading:

1. *Chose jugée.*

2. That the shares seized never belonged to Mrs. Molson; that the twenty shares originally subscribed for in her name were subscribed for by the defendant, who had no authority to act for her.

That the shares in the name of Alex. Molson in trust for E. A. Molson and E. A. M. *et al.*, were his own, and so placed for his own benefit, and to prevent his creditors having any remedy against the said stock.

That about the 2nd October, 1878, plaintiff, in execu-

tion of his judgment against defendant, took a writ of attachment by garnishment in the hands of the Molson's Bank. That the bank declared they held the shares in question among others; that appellant intervened and claimed that said shares belonged to the estate of the late Honorable John Molson, and were *insaisissables*, and by reason of said claim she is estopped from now claiming the shares as her own.

3. A general denial.

It is settled by *Sweeny* v. *The Bank of Montreal* (1) that the shares in question apparently and declaredly belonging, not to Alexander Molson individually, but being held by him for others, the burden of proof is on respondent to show that they are really Molson's. And if Molson ever admitted, while solvent, that the shares were not his, but Mrs. Molson's, such an admission would be for ever binding on him, and consequently on his general creditors, who can have no further rights than himself, in favor of his wife, unless error or fraud be clearly and positively established.

Such an admission is made both in the entries in the books of the bank and Molson's own books, as proved by Mr. Varey. Molson's evidence in *Muir* v. *Carter* forms also part of the present case.

But apart from the force of such an admission, appellant's title to the 115 shares is clearly proved.

1. The marriage contract proves her separate as to property in eighteen hundred and fifty-five, and that she had means of her own.

2. Her ownership of twenty shares at the date of the opening of the Molson's Bank is proved by Elliot and Exhibit B. of case.

3. Elliot proves, by statement A. of case, that the shares seized were standing in the name of Alexander Molson in trust for E. A. M. *et al.* That one hundred and

(1) 12 App. Cas. 617.

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fifteen of these were on the 6th of October, 1875, transferred from the account, Alexander Molson in trust for E. A. Molson. This account, produced as Exhibit B., shows shares standing in the bank for this account, back to 1860; that there were, on the 30th June, 1870, seventy-seven shares to the credit of this account, and these were increased by allotment to one hundred and fifteen, the other thirty-eight having been alloted to Mrs. Molson and transferred when paid up from the allotment account. That these shares were looked on as held for Mrs. Molson and understood to be hers. That Mrs. Molson had shares in another account, Exhibit B., in her own name. He proves also Mr. Molson's authority to act for his wife under a power of attorney. Elliot's evidence is corroborated by that of George Varey, Molson's confidential book-keeper and clerk. He shows clearly that Mrs. Molson was looked on and treated as the owner of stock which her husband used for her, and that as far back as eighteen hundred and sixty-six she was owner of seventy-seven shares. He also proves that Molson was very wealthy up to eighteen hundred and seventy-five, in fact up to the suspension of the Mechanics Bank in the fall of 1875, long after the account of Alexander Molson in trust for E. A. Molson was opened.

All this shows clearly that the the stock in the accounts "Eliza Ann Molson" and "Alexander Molson in trust for E. A. Molson" belonged to appellant and was treated as and looked on as hers, and must therefore be considered as hers until some proof is made to the contrary. No such proof has been made. The two accounts shown by Exhibit B. ran parallel for five years, and the irresistible conclusion is that the stock gradually worked from one to the other for convenience in dealing with it. The analysis of the two accounts together annexed to appellant's factum illustrates how the two

accounts were treated as one, the way in which shares coming from one account were returned to the other, for instance 25th April, 1861, eight shares were transferred to W. Molson from one account (E. A. M.); the same day twelve shares from the account A. M. in trust for E. A. M; the 1st April, 1869, W. Molson re-transferred forty shares, evidently made up of these two accounts. The evidence shows that the shares were transferred as pledges, and not as sales, and returned to one or other of the accounts upon repayment of the advance, the accounts thus nominally closed being really open, the shares being merely in the hands of pledgees.

As to plaintiff's pleas:

1. *Chose jugée.* That on the attachment of the 2nd October, 1878, in the hands of the Molson's Bank above referred to, the present appellant intervened and set up all her rights in said shares as in the present opposition; that her intervention was dismissed and consequently she cannot raise the same questions again in her present opposition. This plea is not borne out by the facts, and a comparison of the pleadings and judgments on the attachment and intervention referred to with the pleadings in the present cause, will show that the requisites of a plea of *chose jugée* are entirely wanting. Art. 1241 C. C. establishes these requisites:

"1. The authority of a final judgment applies only to that which has been the object of the judgment." We must therefore look to the judgment of the Superior Court rendered 30th June, 1881, and the judgment of the Court of Queen's Bench and Privy Council, which simply confirmed it. Read in the light of intervenant's claims in that case, it appears that the only thing decided by the judgment was that the present appellant was not entitled under the will of the Hon. John

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Molson to claim a privilege on the revenue of the shares seized for alimony nor to rank on her husband's estate as a creditor on the ground of his insolvency.

It will be seen on reference to the copies of pleadings, filed as plaintiff's exhibits Nos. 1, 2, 3 and 4, printed in the case in the intervention appeal, that the cause of the demand in intervention made in 1878 by the now appellant was the bequest under the Hon. John Molson's will. She claimed that the shares seized formed part of the estate and were *insaisissables* and affected to her under the will, for alimony.

The cause on which her present demand is founded is her acquisition of the shares as her own property. No such cause and nothing in any way similar thereto was ever set up by her before. In fact, Mr. Justice Papineau, by his judgment of the 30th June, 1881, specially rejected all proof of such a claim on the ground that the allegations of the intervention did not justify it.

"2. Between the same parties acting in the same qualities."

"3. For the same thing." This requisite too is wanting. By her intervention of the 5th April, 1880, appellant claimed that the dividends on the stock seized, not the stock itself, were affected for her support as being part of the estate of the late Hon. John Molson. She claimed an alimentary right in the dividends and nothing more. By the present opposition she claims the stock, the shares themselves, as her own personal property. She never asked for the shares before; she never even asked for the dividends, but merely a limited and subsidiary interest in the latter. The judgment decided simply that she had no real existing interest to make such a claim. The only possible ground for maintaining that there is *chose jugée* in this respect would be that, having failed in a

claim for the revenues, appellant cannot in effect renew her claim by now making a demand for the principal. But appellant in reality never claimed the dividends or revenues, or any right of property in them, but merely that while they belonged to her husband she had a right as depending on them for alimony to oppose their seizure by her husband's creditors. The authorities are clear that in such cases a judgment refusing the revenue is a bar to a claim for the principal only when the claim for revenue has been founded in a pretended right of property in the principal and (this being a second indispensable requisite) the claim for revenue has been rejected on the ground that the claimant had no right or title to the principal. A reference to respondent's exhibits 1, 2, 3 and 4 shows appellant's claim was not met in this way nor does the judgment of the Superior Court show any such ground: the question was never even raised.

The two courts below have not supported the respondent's plea of *res judicata* and the authorities cited under Art. 1241 C. C. are clear that it is utterly unfounded.

Next comes respondent's second contestation, which is in effect, that the shares in the name of Alex. Molson in trust for E. A. M., were his own shares, so placed to defraud his creditors and especially to prevent respondent's having any remedy against the said stock. It is to be noticed that the account Alex. Molson in trust for E. A. Molson was open in 1860, fifteen years before the date of respondent's mortgage. So that clearly there could have been no intention at the time of defrauding respondent.

The whole proof establishes, moreover, that the stock in both accounts "E. A. Molson" and "Alexander Molson in trust for E. A. Molson" was appellant's stock. Being separate as to property she could own stock and the

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stock was in her name from the date on which the bank opened its doors. It is true that the respondent shows that the subscription to the original twenty shares was in Molson's handwriting but he does not show that Molson's money paid for them. There is nothing either unnatural or illegal in Molson's subscribing for his wife, more particularly as he had the full management of her affairs. It is not proved that Molson paid for the shares, and at this late date—thirty years after the purchase—appellant cannot be called on to point out what particular moneys of hers paid for them. She makes the best proof possible considering the lapse of time, viz. :—that she had a right to hold shares in her own name and that until the seizure made by the respondent her ownership of them was never questioned. If a ratification of her husband's act in subscribing for her was required it is found in the power of attorney, in the handwriting of one of the officers of the bank and witnessed by another. The court below admitted these shares to have been appellant's, but held that her account was closed in 1866 and that the power of attorney applied only to the stock in the account in appellant's own name, "E. A. Molson." This is true in a sense ; the power of attorney is dated in 1859, when only one account was in existence, but its terms are full, including the right to transfer. The account in Mrs. Molson's own name was nominally closed in 1866, the fact being that the shares transferred from her account were held by those who had made advances on them ; but the account in the name of Alex. Molson in trust for E. A. Molson had been opened five years before and both accounts had always been treated by Molson and his book-keeper, and had always been considered by the bank, as appellant's. The evidence of Varey and Elliot is clear on this point. Varey's evidence goes further. He proves that Molson carried

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on an extensive banking business on his own account; that in addition he carried on an entirely different business, and one which was kept separate and distinct in his books, by dealing in stock for and on account of his wife. He had control of her stock and he used his power of transfer to borrow money on it but all along he kept the stock, dividends and profits separate. The stock was transferred as security for loans but was always repaid and in the course of the transfers and re-transfers found its way finally to the account "Alex. Molson in trust for E. A. Molson" where on the 1st January, 1871, was a balance to the credit of the account of 77 shares, increased by allotment to 115 shares. This balance of 115 shares in this account appears as standing in the name of Alexander Molson in trust for E. A. M. in the published lists of shareholders for the years 1872, 1873, 1874, 1875, which lists are filed as opposant's Exhibit G. There was nothing illegal in all this. Mrs. Molson had a perfect right to carry on operations in stock and she had a pefect right to employ her husband as her agent and he would be bound to her in the same way as any third party who had been employed by her. Between her and her husband, even had there been no power of attorney, admissions found in his books or in his course of dealing, would have been binding against him, and his creditors can have no better rights than he has. On this point see Laurent (1):

Peut-on opposer l'aveu aux créanciers de celui qui l'a fait? L'affirmative n'est pas douteuse. Quand les créanciers exercent un droit de leur débiteur, ils agissent en son nom, et on peut leur opposer toutes ces exceptions qui peuvent être opposées au débiteur. Sauf aux créanciers à attaquer l'aveu comme fait en fraude de leurs droits. La jurisprudence est en ce sens.

Dalloz (2):

(1) L'aveu fait foi non-seulement contre celui de qui il émane,

(1) Vol. 20, No. 180, p. 208 et note p. 209.

(2) Jurisprudence Générale Oblig. 5104.

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mais aussi contre ses héritiers et ayants cause, et notamment contre ses créanciers agissant en vertu de l'art. 1166. Ceux-ci ne pourraient repousser cet aveu qu'au cas seulement où ils l'attaqueraient comme fait au préjudice de leurs droits. Il a été jugé en ce sens que l'aveu fait par le débiteur ou par ses hériters qu'il n'est que propriétaire apparent des titres dont la restitution lui est réclamée, peut être opposé à ses créanciers intervenant dans l'instance ; s'ils ne rapportent point la preuve d'un concert frauduleux entre les parties contendantes.

And it is to be noticed that Carter, the respondent, is a subsequent creditor. These shares were treated as Mrs. Molson's in 1871, on the books of the bank, and as far back as 1866, Molson admitted in his books that seventy-seven shares, the number claimed by the present opposition (together with the 38 allotted her, one for every two held at the date of the allotment as explained by Mr. Elliott), were appellant's. The date of Carter's mortgage is 9th February, 1875, so that the declaration in Molson's books that the stock was the property of his wife, the appellant, could not possibly have been made with any intent to defraud respondent. Nor could there have been any intention of defrauding his creditors generally, for two years afterwards he was worth from two to three hundred thousand dollars. The learned judge of the Superior Court has come to the conclusion that the shares in question were the property of defendant, on the ground that the account in appellant's name was closed in 1866, and that the defendant treated the stock in the other account as his own, and controlled it as such. Mr. Molson had power to sell and transfer, he exercised that power and did transfer and re-transfer the stock, but as the evidence shows, and as he was bound to do as an agent, he kept appellant's business separate from his own and her stock where it could always be traced, in effect marked it with appellant's name. Mrs. Molson had stock from the opening of the bank ; her

husband up to 1873, at least, carried on a large and profitable business both for himself and as agent for her. Is it to be supposed under these circumstances that in 1871 her stock had vanished, or is it not much more reasonable to suppose that the apparent state of affairs is the true state, and that the stock marked as appellant's, considered by the officials of the bank as hers, treated as hers by her husband—her authorized agent, and by his confidential clerk—and admitted by her husband in his books to be hers (and all this long before respondent was a creditor and while Mr. Molson was still wealthy) is in reality hers? To hold this stock to be Mr. Molson's would be not only to presume fraud, contrary to law, but to presume fraud committed without any definite or immediate object. Moreover, if Molson, at any time, had acted illegally with these shares, how could this affect the appellant's rights.

In his second contestation, respondent raises another ground against appellant, namely a plea of estoppel, to which the Superior Court in one of the *considérants* of the judgment appears to attach some weight. The allegation is that appellant in her intervention in the former case, alleged that the shares now claimed by her formed part of the estate of the late Hon. John Molson. She did make such a claim, but the judgment of the court rendered 30th June, 1881, was against her and decided that the shares in question did not belong to the said estate.

There it was decided that the shares did not belong to the estate of the Hon. John Molson. The question to be decided now is a question raised for the first time, viz: Who is the owner of the shares under seizure? The authorities on Art. 1351 C. N. (1241 C.C.) are in point on this question of estoppel and show beyond a doubt that a party to a suit who has failed

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to substantiate his claim under one title may do so under another.

I resume by saying that both the object and grounds of appellant's present claim are altogether different from the object and grounds of her former claim; therefore the plea of *chose jugée* cannot avail against her. On the facts in issue, respondent as a creditor of Alex. Molson can stand in no better position than his debtor, can exercise only his rights and is bound by his admissions unless he proves that such admissions were made in fraud of his rights. Molson admitted the shares claimed by appellant to be her property previous to the date of respondent's claim and under circumstances that negative all suspicion of fraud. Moreover, the burden of proof is on respondent to show fraud. And he has made none. The acts of Molson on which he relies are acts that in themselves are perfectly legal and easily accounted for. Against the appellant herself there is no proof whatsoever. And, even if Molson had acted fraudulently, she, surely, should not thereby be deprived of her property. She is shown to have been the nominal and reputed owner of the shares from the beginning and her hus band's control over them is fully explained by his position as her agent.

What is the position of the respondent here? He seizes shares which are registered, as "in trust." Now *Sweeny* v. *The Bank of Montreal*, in this court (1) and in the Privy Council, (2) is a clear authority, that these words "in trust" mean "not for himself, but for others." They mean that Molson did not possess these shares *animo domini*. Now, a seizure cannot be had but against goods in possession of the party seized *animo domini*. Leaving this view of the case aside, what are the respondent's contentions? Does he claim to exercise the action of his debtor, Molson, under Art.

(1) 12 Can. S. C. R. 661. (2) 12 App. Cas 117.

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1031 C. C.? If so, he must fail, for the simple reason that Molson, it is clear, could not question his wife's title to those shares. Does he profess to exercise the action *Pauliana* under arts. 1932 *et seq.*? He must there also clearly fail. He has not proved fraud, then, under Art 1039, being a subsequent creditor, he has not got that action. Moreover, the conclusions of his pleas do not ask for the rescision of any contract. He then must fall back on the proof he attempted to make that, as a matter of fact, these shares do not belong to the appellant. On him was the burden of proof, as per *Sweeny* v. *Bank of Montreal*, and that proof, in my opinion, he has failed to make. The facts themselves are not disputed. Inferences of facts, from the evidence adduced, are, here, what we have to determine upon.

I would allow this appeal with costs *distraits*. On the intervention, for the same reasons, I would also dismiss the appeal.

PATTERSON J.—These two appeals, which have been argued together, raise the question of the ownership of 115 shares of the capital stock of the Molsons Bank, the contest in one case relating to the shares themselves which have been seized by Carter under an execution issued upon a judgment against Alexander Molson, and the other case relating to the dividends on the shares which have been garnished under the same judgment.

Mr. Carter's claim against Alexander Molson is for a sum of $30,000 lent to him on a mortgage of real estate on the 9th of February, 1875. He recovered the judgment, which is for $31,125, on the 17th of April, 1878, on the covenant to pay contained in the mortgage deed.

The history of the 115 shares, so far as material, may be said to be entirely connected with dates much earlier than the loan from Carter to Molson.

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According to the evidence before us, Mr. Molson was in good circumstances until late in the year 1875.

In 1873 he is said to have been worth from $250,000 to $300,000, and his insolvency is attributed by Mr Varey his confidential clerk, either wholly or to a great extent, to his connection with the Mechanics Bank which failed in or about the year 1875.

We are not told of any debt or liability, or of anything tendering to cast doubt on the perfect solvency of Mr. Molson, until after the loan from Mr. Carter.

The appellant Eliza Ann Holmes, or Eliza Ann Molson, is the wife of Alexander Molson, duly separate as to property.

Much of the evidence touching the 115 shares in question is derived from the books of the Molsons Bank, where there are several accounts which have been put in evidence showing dealings with the stock of the bank.

The earliest of these accounts is in the name of Eliza Ann Molson. It begins on the 1st of October, 1855, with a credit of twenty shares "by subscription." That was, as I understand, the date of the opening of the bank. The subscription is said to be in the handwriting of Mr. Molson, the husband of the appellant, and there is evidence that he acted for his wife in her business transactions. The account contains in all eleven credits of shares acquired and six debits of shares parted with, the last debit, which bears date the 3rd of April, 1866, closing the account.

This account, which is not shown to include any transaction that was not strictly a transaction of Mrs. Molson's, is referred to chiefly because a connection is apparent between it and another account through which the 115 shares are directly traced.

That is an account headed "Alex. Molson in trust for E. A. M." the initials being those of the appellant.

It begins with a credit, on the 9th of August, 1860,

of ten shares, followed on the 13th of the following September by another credit of two shares, and on the 16th of January, 1861, by another of twenty shares. These three credits make thirty-two shares. The first debit entry is of thirty-two shares transferred on the 25th of April, 1861, to W. Molson, and some years later, but before any other entry appears in the account, viz., on the 1st of April, 1869, W. Molson transfers to the credit of this account forty shares. Now, in the account first referred to, which was in Mrs. Molson's own name, we find eight shares transferred to W. Molson on the 25th of April, 1861, the same day of the transfer of the thirty-two shares from the trust account. The explanation suggested, and apparently borne out by the books, is that forty shares were on that day pledged to W. Molson, eight from the one account and thirty-two from the other, and that those are the forty shares retransferred on the 1st of April, 1869, on the repayment of the loan for which they were pledged. The whole forty going then into the trust account, we perceive the connection between the two accounts. The effect of the entry was to place at the credit of A. Molson in trust for his wife, forty shares, eight of which had stood in the name of the wife herself, but the other thirty-two of which were as fully hers as the eight. That is what the account indicates and no evidence is given to cast doubt upon the matter. This is the only purpose, as I have before said, in referring to these figures, namely to confirm the inference that what is noted as held in trust for Mrs. Molson was really her property, because no part of the forty shares are seized or are now in question. They are apparently all gone. But the same trust account contains, on the same date as the retransfer of the forty shares, viz. the first of April, 1869, a credit of seventy-seven shares transferred from an account kept in the name of "Alex Molson in trust."

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We arrive, when we reach this entry of seventy-seven shares, at what I understand to be the essential proof of the title of the appellant to the 115 shares, as I now proceed to explain.

The account "Alex Molson, in trust," is, like the others, a short account, with eight or ten items on each side. It begins on the 12th of May, 1863; represents transactions with one hundred and eighty-eight shares; and is closed, for the time, by a debit of seventy-seven shares on the 1st of April, 1869, to "A. Molson, in trust for E. A. M."

We have seen the corresponding credit in the account so designated Now, these seventy-seven shares, so transferred from the general trust account, in April, 1869, to the specific trust for E. A. M., appear to have been at the credit of the general trust account, as early as April, 1866, but thirty-five of them were parted with in 1867, doubtless by way of pledge, and reacquired in March, 1868.

Connect with this the testimony of Mr. Varey, who shows that Alexander Molson employed the shares belonging to his wife, as he did those of others, in speculations, and who kept a memorandum, which was put in evidence of stock held up to and before the 1st of September, 1866, by his employer, in trust, which memorandum includes seventy-seven shares in trust for E. A. M.

The right of the appellant to these seventy-seven shares, dating back to April, 1866, is thus very satisfactorily established.

It is sufficient to say that it is *primâ facie* established, for it would of course be open to rebuttal by proof that the reality was not what this evidence indicated. But there has been no such proof, nor any attempt to adduce evidence in that direction. Nor is there anything in the further examination of the books to discredit the *primâ facie* inference. It is true that in the

account in trust for E. A. M. there appear a few further entries after the 1st of April, 1869, indicating dealings by way of sale or pledge with the forty shares and the seventy-seven shares, or some of them ; but the result was the restoration of the whole of the seventy-seven shares, that number remaining at the credit of the account on the 13th of June, 1870. There is nothing to indicate that these were to any extent bought with the money of Alexander Molson, or that they were not always the separate property of his wife. Had this been otherwise, the result would, I apprehend, have nevertheless been the same, for Alexander Molson was in affluent circumstances, without debts and without apprehension of falling into adversity, and could have made a valid gift to his wife, who was separate as to property. However this may be, the onus of proving that the shares were his and liable to seizure for his debts is clearly on those who assert that proposition, and no such proof has been made.

I have so far traced only seventy-seven of the shares. The other thirty-eight of the 115 are the increment of the seventy-seven, being new stock issued, one share for every two, and placed to the credit of the trust account for E. A. M. on the 31st of May, 1873.

Whatever foothold there has been for the contention against the appellant seems to have arisen from something to which it is proper to advert, if only for the purpose of showing that it does not affect the question before us.

On the 1st of October, 1875, another account was opened in the stock register of the bank, headed : "Alex. Molson in trust for E. A. M. *et al.*" It contained three items only, viz. :—

1875, Oct. 1,	By A. Molson	Shares 3
" 6, "	" in trust E. A. M.	115
" 19, "	" E. Ford	30
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The first and last items, making thirty-three shares, are not in question at present. We have had to deal with them in another appeal.

The 115 shares ought not to have been transferred to this account. The addition "*et al.*" indicates the children of Mr. and Mrs. Molson. But the transfer from the trust for Mrs. Molson alone to the trust for her and her children does not in any way alter the position so as to let in the judgment creditors of Alexander Molson.

Having traced the 115 shares as we have done, it will suffice to touch briefly on some other matters formally placed on the record, and discussed on the argument before us.

The Hon. John Molson died on the 12th of July, 1860. His will directed his trustees to manage his estate for ten years, and then to divide the residue among his five sons, of whom Alexander was one. They were to take their respective shares for life only. After the death of each son his share was to go to his children, subject to the right of his widow, if he should leave a widow, to the usufruct during her widowhood.

The distribution took place on the 25th of March, 1871, when, amongst other things, 640 shares of Molson's Bank stock were allotted to Alexander.

Alexander was appointed curator of the substitution of the shares of which he was institute, and tutor of his minor children.

The 640 shares were transferred to an account opened in his name in the stock register of the bank, on the 5th of April, 1871, and the result of transactions, in apparent breach of his duty as trustee, was that on the 1st of April, 1875, three shares only remained to the credit of that account. Those were the three shares transferred on the 1st of October, 1875, to the account

"Alex. Molson, in trust for E. A. M. *et. al.*" They undoubtedly belonged to that particular trust, though the 115 shares did not.

We are not told why Mr. Molson assumed to transfer the 115 from the trust for his wife to that for his wife and children. From what we have seen, it is apparent that he could not properly do so. But if we were to assume, as the respondent invites us to do, that the 115 shares were his and not his wife's, it is plain that his substitution of them for so many of the 640 that had been lost in his speculations would have been an act of duty and honesty and not a fraud.

Mr. Carter, the respondent, attached on a former occasion the rents of certain premises in Montreal which were part of Alexander Molson's share of his father's estate, and also the dividends on the 148 bank shares.

The present appellant intervened in that proceeding and claimed that the shares were part of the estate in which she was interesed as substitute.

It appeared, as it appears from what I have said, that the 115 shares never formed part of the estate, and it was pointed out in the judgment of the Judicial Committee of the Privy Council, on appeal from the Court of Queen's Bench, *Carter* v *Molson* (1), that if they had been part of the estate the dividends, which alone were in question, would belong to Alexander and be attachable for his debts; and further, or as a consequence of that holding, that the present appellant had not the right to intervene, not being interested in the event of the suit which touched only the dividends (2). That decision of the Privy Council has been pleaded and relied on as affording a conclusive answer of *res judicata* to the present contention of the

(1) 10 App. Cas. 664.
(2) C. C. P. Art. 154.

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appellant. It is obvious from what I have just said, and without going more at large into the subject, that the matter is not *res judicata*.

In my opinion, the judgment of the court below should be reversed and the appeals allowed with costs.

Appeals allowed with costs.

Solicitors for appellants: *Robertson, Fleet & Falconer.*

Solicitors for respondents: *Abbotts & Campbell.*