In the Privy Council.

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

IN THE CONSOLIDATED CASES

BETWEEN

THE EASTERN TOWNSHIPS BANK . . . *Appellant,*

AND

ANDREW ROUGH, JOHN McDOUGALL and SAMUEL W. BEARD . . . . . *Respondents,*

AND BETWEEN

THE EASTERN TOWNSHIPS BANK . . . *Appellant,*

AND

ANDREW ROUGH . . . . . *Respondent.*

RESPONDENTS' CASE.

1. This is an Appeal from a Judgment of the Court of Queen's Bench for Lower Canada (Appeal side) dated the 23rd June 1893 reversing unanimously a Judgment of the Superior Court for Lower Canada sitting at Montreal (Taschereau J.) dated the 10th March 1890 and given in two Consolidated Actions, in the first of which No. 2157 the above-named Appellant The Eastern Townships Bank was Plaintiff and the above-named Respondents Rough McDougall and Beard were Defendants and in the second of which No. 910 the Respondent Rough was Plaintiff and the Appellant Bank was Defendant.

2. In the first Action No. 2,157 the Appellant Bank sought to recover from Rough as principal and from McDougall and Beard as sureties the balance of the price of certain premises, alleged to be due under a deed of sale of said premises to Rough and a collateral deed of guarantee by the other two Respondents.

3. In the second Action No. 910 Rough sought to have the said deed of sale, on which the first action was brought, set aside and cancelled.

Action No. 2157. Declaration. Record, p. 20.

4. The first Action No. 2157 was commenced on the 10th May 1884. The declaration states that by a deed of sale dated the 19th January 1883 the Appellant Bank sold with warranty as regarded its own acts only to the Respondent Rough certain lots of land therein specified, for $49,439.70, whereof the Bank by said deed acknowledged to have received $9,439.70, and the Respondent Rough thereby promised to pay the balance to wit, $40,000, by certain specified instalments at certain dates, and also interest at 7 per cent. per annum payable half yearly, that by said deed it was further agreed that if any payment of capital or interest was not met 15 days after maturity the whole balance then due should become immediately recoverable.

That by a deed of guarantee (*cautionnement*) made the same 19th January 1883 the said other Respondents McDougall and Beard became sureties for Rough to the Appellant Bank for the said payments under said deed. That on the 16th July 1883, and again on 16th January 1884 Rough made default in payment of certain instalments, that thereby the Respondents became indebted to the Appellant for principal and interest due up to 16th January 1884, $31,853.56 and interest thereon from that date at 7 per cent.

Pleas. Record, pp. 92-100. p. 100, l. 26. pp. 94-96.

5. The Respondents pleaded severally substantially the same defences, viz., in addition to the general issue the following special pleas—

(1) A peremptory exception to the action :—

That Rough is troubled and evicted and refuses consequently to pay the balance claimed under the said deed which he claims to have set aside;

That the premises sold by said deed were acquired by the Appellant Bank at a sheriff's sale on the 12th January 1883 under a writ of execution in an Action No. 1198 of Fairbanks *v.* The Pioneer Beetroot Sugar Company;

That all the proceedings under said writ were illegal and the sheriff's sale was and should be declared null; the lots were insufficiently and improperly described;

That the sheriff sold the said lots in block and in one lot, without the owner's consent, but at the request of the Appellant with the object of procuring a sale at a low price to the Bank; that the sheriff thus sold at $1,400 property worth $40,000 to $50,000; that on 9th February 1882 the Appellant knowing the Pioneer Company was then bankrupt, and had many creditors with a view to obtaining a fraudulent advantage, brought an action secretly against the Poineer Company, entitling it "The Eastern Townships Bank *v. Amos Cummings et al*," and served the writ on one of the Bank's own directors named Thornton who was also a director of the Pioneer Company, that by arrangement with Thornton this was not communicated to the Board of the Pioneer Company, that thus judgment by default was obtained for more than was actually due to the Bank, that the very same day the judgment was registered against the real estate of the Pioneer Company. That by reason of the *bankruptcy* of the Pioneer Company, the Appellant Bank did not by such registration acquire any rightful charge (*droit d'hypothèque*) on said real estate, but the Appellant Bank, though well knowing this, made use of the said registration to prevent others from attending and bidding at the sheriff's sale, that by these and other artifices

C.C.L.C., s. 17, sub-s. 23.

C.C.L.C., s. 17, sub-s. 23.

of the Appellant, the said real estate was fraudulently and to the prejudice of the other creditors sold to the Appellant for much less than its real value. That an action to set aside the sheriff's decree and sale has been brought by the Bank of Hochelaga, one of the other creditors of the said Pioneer Company which action was still pending before the Superior Court, that the Respondents have been made parties as *mis-en-cause* in that action, that the grounds of claim in that action of nullity are the same as those stated in this plea, and are true, that thus Rough is exposed to an imminent trouble and certain eviction, that on 5th September 1884, the Respondent Rough commenced an action in this Court, No. 910 to set aside and annul the deed of sale of 19th January 1883 on the same grounds as above stated which are true, that under these circumstances Rough was justified in refusing payment.

(2) After repeating the last plea down to the averment "that the grounds "of action of the Bank of Hochelaga were the same as herein pleaded and "were true," and adding that when the interest and instalments claimed fell due Rough gave the Appellant notice of the trouble and eviction but that the Appellant being already well aware of these, took no notice of the notification, and without causing the trouble and eviction to cease, commenced illegally the present action, that the property in question had suffered a great deterioration in value, that the total price could not be claimed unless Rough was in default in not paying, but that Rough being troubled and evicted had a right to delay payment so long as the Appellant Bank did not cause the trouble to cease and did not offer security, as required by law, which it had not done.

Record, pp. 97-100.

C.C.L.C., s. 1,535,

(3) By leave of the Court the following plea was added later :—

Record, p. 92.

That Rough was troubled and evicted in respect of the possession and property of and in the said premises, that on the 6th October 1883 the Dominion Government by its collector of customs seized the machinery in the buildings, which the Appellant Bank had sold as part of the said buildings for unpaid customs dues and has continued in possession ever since, and has deprived Rough of possession of the property sold ;

That when the Appellant sold to Rough, they knew those dues were still unpaid, and that the Government intended to seize, but it concealed this from Rough;

That the bank is not entitled to demand payment without first causing the trouble and eviction to cease.

6. The Appellant pleaded in reply:

Reply. Record, p. 45.

(1) To the peremptory exception

That Rough was a mere *prête-nom* for the other two Respondents who were the real purchasers,

That prior to the sheriff's sale, Beard acquired the judgment of Fairbanks and acting for himself and McDougall brought the premises to sale and was responsible for the proceedings thereon with which Appellant had nothing to do;

That having purchased the judgment of Fairbanks, McDougall and Beard, being impecunious, requested the Appellant to bid the property in for them and to give them time to pay the Appellant its claim against the premises, which the Appellant for their accommodation consented to do;

That McDougall and Beard when they purchased knew all about the sheriff's sale and the Appellant's claim on the premises and purchased at their own risk and without any warranty from the Appellant:

That the proceedings taken by the Bank of Hochelaga were to the knowledge of McDougall and Beard frivolous and unfounded;

Record, p. 47. (2) To the 2nd plea.

It repeated the 1st replication, and averred further:

That the judgment of Appellant against the Pioneer Company was regularly and openly obtained and registered and the premises were charged for the payment thereof to the knowledge of the Defendants.

p. 121. (3) To the third plea:

A general traverse; and also

That the Government of Canada had no right to seize the machinery, and that an unlawful seizure was not a trouble entitling Rough to delay payment.

Further that the Government's claim was known to Respondents before they bought; that said claim was publicly announced by the collector of customs at the sheriff's sale, which was conducted under Respondents' directions that Beard was present, and knew of the said announcement, that Respondents bought knowing and at their own risk

That it is specially false that Appellant concealed any facts, or that the sale was in any respect fraudulent.

7. All three Respondents severally joined issue on Appellant's reply, and Respondents Beard and McDougall severally rejoined specially, as follows:—

p. 130, l. 40. (1) That before the sheriff's sale the Appellant offered by letter to sell him the said premises for a sum equal to the lawful debt due to it by the Pioneer Co.:

That he was himself a creditor of the Pioneer Coy. for a considerable amount:

That having regard to the hypothecary claim of the Bank he ceased to have any interest to serve by bidding because the hypothecary claims were payable in priority to his:

That he was not aware of the irregularities committed by the Appellant:

That he bought in good faith believing the Bank to have a good title free from irregularities, committed by the Appellant, or otherwise.

p. 131, l. 23. (2) Same as 1st Rejoinder, but adding—

That it was true Beard had paid out Fairbanks before the sheriff's sale.

That Beard after paying Fairbank's judgment debt, wrote the sheriff not to sell and to suspend the proceedings.

C.P.C., ss. 642, 643. That the sheriff replied he could not comply, because there were other writs of execution noted by him, and that the sale must take place and that Beard could not prevent it.

That Beard seeing he could not prevent the sale and that the Appellant Bank had a registered judgment for a considerable amount, enquired of the bank manager whether he intended to buy the real estate, and on his replying that the bank had a large claim established and privileged by a registered judgment, and that it would buy at the sheriff's sale, he (Beard) enquired whether the bank would afterwards sell the premises to him:

That the bank manager then gave an undertaking to sell the premises at a price equivalent to its lawful debt:

That Beard was a creditor of the Pioneer Company for a large amount, and also lessee of the said premises taken in execution:

That the rent paid by Beard was very small and the enjoyment of the premises would enable him to do a business which would help to recoup him his losses by the Pioneer Company:

That Beard in view of the bank's hypothecary claim had no longer any interest to serve by bidding because the bank had to be paid in priority.

Respondent McDougall pleaded further

That he never had any communication (*pourparler*) with the bank except the letters produced. That he never authorised Beard to negotiate with the bank and that these negotiations were conducted without his knowledge. That he had never any knowledge of what may have passed beyond the letters written by the bank manager to him McDougall. Record, p. 132, l. 20.

10 8. The pleadings in the cross action No. 910 are the same *mutatis mutandis* as in the first action. The amended declaration will be found at p. 554, the pleas at pp. 543-49, and the replication at p. 552 of the record.

9. On the 13th November 1889 the Court ordered that these two actions should be consolidated with each other and with the suit or petition brought by La Banque d'Hochelaga against the Eastern Townships Bank, Defendant and Rough and others, *mis-en-cause* for the purpose of judicially setting aside and annulling the decree and all other proceedings of the sheriff under the writ of execution in Fairbanks *v.* The Pioneer Beet Root Sugar Company (No. 1198) referred to in the 1st plea, or peremptory exception of the Respondents in the above Action No. 2157 and by consent the evidence taken on that petition was made part of the evidence in this case. p. 14, ll. 14-29. p. 491, l. 33.

20 The complicated litigation thus consolidated arose out of the following facts appearing in the evidence on Record:—

10. The Eastern Townships Bank the present Appellant is a banking corporation having its head office and principal place of business in the City of Sherbrooke in the District of St. Francis, in the Province of Quebec, of which Mr. Wm. Farwell is the general manager. It has also a branch bank at Coaticooke in the same district of which Mr. Benjamin Austin is the manager.

11. About the year 1880 the Pioneer Beet Root Sugar Company was started and commenced the erection and fitting up of a sugar factory upon certain land acquired by it at Coaticooke; Mr. Gerald Lomer was its managing director it banked with the Appellant Bank which held certain shares
30 in it as security and also lent it a large amount partly unsecured. One of the directors of the Appellant Bank Mr. Thornton was vice-president and treasurer of the Pioneer Company. The Bank's attorney Mr. Doak was also a director of the Company and the Bank's general manager Mr. Farwell and also the local manager Mr. Austin attended the annual general meeting of the Pioneer Company as the representatives of the Appellant Bank. It was thus from the first in possession of the amplest knowledge as to the Pioneer Company's financial position. p. 381, ll. 16-28. p. 424, l. 7. p. 809, l. 12.

12. That position was almost from the beginning one of insolvency. It was p. 395, l. 16.

Record, p. 398, l. 18. p. 402, ll. 9-39. p. 406, l. 19; p. 407, l. 20. p. 415, l. 6; p. 420, l. 14. p. 362, l. 36. p. 381, l. 28. p. 384, ll. 3-29.

started with wholly insufficient capital and carried on upon borrowed money the mere interest of which it was unable to repay. The machinery for the factory was paid by acceptances which the Company had to renew repeatedly having no money to take them up. It could not even pay the customs dues upon the machinery which was first "bonded" and ultimately seized by the Dominion Government for non-payment of the dues.

Mr. Thornton the Appellant Bank's director and treasurer of the Company states that though he nominally acted as treasurer he never at any time had any funds in his hands.

As early as 12th October 1881 the Appellant Bank's general manager writes to the local manager that the Bank's inspector Mr. Morey had reported so unfavourably of the Company's position as to cause the Bank directors great anxiety, that the securities were shakey, the current account overdrawn by nearly eleven thousand dollars and no interest paid on account. On 13th October the local manager replies admitting that since early in 1881 the Company had not been in a position to pay any interest. Things go from bad to worse. On 9th November 1881 Austin writes to Farwell that he is "harassed about the account" that if the Bank stops its accommodation the Company must stop and that if it stopped, "it "would relieve us all of a great deal of anxiety." On the 29th December he adds, "I feel very anxious about the matter and would like to reduce or strenghten "the Company's account but do not see a way to bring that about They are "renewing every one of their bills both here and elsewhere in fact there is no "other alternative. Lomer has been at his wit's end to procure funds to meet the "cash disbursements." Farwell replies on 30th December 1881 and again on 10th January 1882 that "in the position the Company now stand we cannot con-"sider their indorsation of much value. Please send statement as we feel great "anxiety."

p. 313, l. 30. p. 314, l. 28. p. 323. p. 324, ll. 26-37. p. 325, l. 18. pp 318, 319.

On 11th January 1882 Austin writes again. "I have as you say renewed "some of their paper but could not see my way at the time to do better. *The* "*company are paying no bills*, and can barely pay running expenses. It is "exceedingly difficult to get along with them, and for my part I should like to "break with them entirely. It might even be well to at once press our claims to "judgment but that is a matter which requires serious consideration and "I think you had better as you suggest come up here and we will all discuss it "together."

p. 326, l. 11.

Farwell does come to Coaticooke and both he and Austin are present on January 27th 1882 at the general annual meeting of the company at which the auditor's report and balance sheet was submitted. This as the liquidator points out shows the company unable to meet its liabilities, the whole of its capital gone, the property heavily mortgaged, unadjusted accounts $41,600; bills under discount in the Appellant's bank $43,473 and cash in hand $159! At this meeting it was proposed to apply for powers to increase its capital or to issue debentures for $125,000 as the only means of liquidating its floating debt, it having no available assets.

p. 309, l. 11. Balance Sheet, pp. 305-308. Liquidator's Evidence, p. 429. p. 309, l. 21. pp. 383-84.

13. It was in this state of total insolvency to the Bank's knowledge that the Appellant Bank gave its attorney Mr. Doak instructions to take steps as quietly as possible to procure a judgment against the Company for $23,000 of which only

$15,000 was in the judgment of the bank manager himself certainly due, and to register it against the real estate of the Company so as to procure an hypothec or preferential charge on it. Extraordinary steps were taken to conceal the action from the public and from the board of directors and manager of the Defendant Company. The action was entitled "The Eastern Townships Bank *v.* Amos H. Cumming *et al*" the "*et al*" being the Pioneer Company. Instead of serving the writ on the managing director Mr. Lomer or on the secretary of the Company, Mr. Doak arranged with the Appellant Bank's director, Mr. Thornton who was also a director of the Pioneer Company, but who acted in the matter wholly in the interest of the bank that he should attend at the offices of the Company at a day and hour when the managing director was not there for the purpose of being served with the writ. This was successfully accomplished. Mr. Churchill, the Company's secretary who was in the office at the time, opportunely withdrew and was actually afterwards paid by the Appellant Bank a "well-earned" reward for his "faithful" services to the bank in keeping it posted up as to the movements of the "enemy," a title applied by the bank manager to such of the officers of the Pioneer Company as were not its creatures and in especial to the managing director Mr. Lomer. Mr. Thornton when served with the writ, instead of laying it before the board of directors of the Pioneer Company, straightway handed it back to Mr. Doak the Appellant's attorney and did not inform the board, nor any of the officers of the Pioneer Company of the service of the writ. When asked in Court why he handed the writ back to Mr. Doak, he replied, "I did not know who else to give it to than Mr. Doak. I thought that was the best way to get rid of it"!

Record, pp. 379-381. pp. 357-359. p. 380, l. 6. p. 328, l. 35. p. 331, l. 45. p. 361, l. 44–p. 362, l. 20. p. 381, ll. 5-25. p. 382, l. 45–p. 383, l. 7.

14. In due course the Appellant Bank obtained judgment for default of appearance, and the same day they registered the judgment against the real estate of the company. The managing director and the board of the company had no information or knowledge of the existence of an action until after the registration of the judgment. Betrayed by their own officers, utterly without funds, and at the mercy of the bank which was their principal creditor, the Pioneer Company was in no condition to contest the fraudulent action of the bank. It almost immediately after in the spring of 1882 ceased all manufacturing operations, which it had only begun in the end of November 1881 and in August 1882 it finally leased its factory to the Respondent Beard.

p. 254, ll. 5-18. p. 402, ll. 1-8.

15. In October 1882 Fairbanks and Co. obtained a judgment against the Pioneer Company for a small debt and seized in execution the factory and other real estate of the company at Coaticooke which was advertised by the sheriff for sale on the 12th January 1883. The Respondent Beard, who had leased the factory on very favourable terms, was anxious to prevent a sale, and with that object paid off the judgment debt of Fairbanks and took a transfer of their rights and on the 29th December 1882 he wrote to the sheriff to ascertain whether he would stop the sale at his (Beard's) request or whether anything more was required to entitle him to stop the sale. But the Appellant Bank who were determined to force a sale and to control the sale in their own interests, had been before him and had caused the sheriff to note their judgment against the Pioneer Company and had also arranged with another judgment creditor to have his judgment noted under C. P C. ss. 242, 243 so as to force the sheriff to proceed

pp. 433, 434. p. 437, l. 41–p. 438, l. 15. p. 141. p. 253, ll. 15-43. p. 327, ll. 4-34.

with the sale under the original writ of execution (Fairbanks') but at the cost of the *noted* creditor.

Record, p. 141, l. 38.

16. Accordingly on the 3rd January 1883 the sheriff informed Beard of these noted judgments and that he must proceed with the sale. This forced Beard to try and arrange matters with the bank and being unable to pay off the heavy claim of the bank, but having ascertained from the bank manager that the bank meant to buy at the sale he proposed that the bank if it should become the purchaser should resell the property to him at a price sufficient to cover the whole claims of the bank against the Pioneer Company and all their costs provided the bank gave him time. This the bank refused to do unless some more wealthy and responsible name was joined with his in the purchase. Beard suggested McDougall and the bank accepted, and forthwith gave him the following written undertaking:—

p. 433, l. 40–p. 434, l. 42. p. 235, l. 8–p. 236, l. 18.

Undertaking, p. 300.

6th January 1883.

17. Messrs. S. W. Beard and John McDougall
Montreal.

Gentlemen,

In the event of the bank becoming the purchaser of the Pioneer Beet Sugar Company property now advertised to be sold at sheriff's sale on the 12th inst. we hereby agree to sell the same to you jointly and severally within ten days thereafter at such sum as will pay our claim and all expenses connected with the sale upon the following terms and conditions, viz. a cash payment of a sufficient amount to reduce our whole debt to $40,000, a further sum in cash with what we may succeed in realising from Ellenhausen notes now in suit to amount of ten thousand dollars more within six months, with interest at 7 per cent. per annum on whole amount unpaid, $5,000 within twelve months, and $5,000 annually thereafter until fully paid with interest semi-annually at the rate of 7 per cent. per annum, the property to be mortgaged to the bank as security for due payment of above sums, and to be kept insured in good companies to the satisfaction of the bank to full amount of their claim, on the execution of the deeds the cash already realised from collateral to be applied in reduction of our claim, and the cordwood bone-black, and ground bones now in possession of the bank to be transferred to you, all notes and acceptances of the company and of other parties endorsed by the company forming our claim, to be cancelled if practicable, to be delivered over to you.

Your obedt. Servt.
(Sgd.) W. FARWELL
General Manager.

p. 301.

18. Two days later this undertaking was modified by the following letter:—

8th January 1883.

Messrs. S. W. Beard & John McDougall.

Gentlemen,

Referring to that part of my letter of Saturday last addressed to you respecting the Pioneer Beet Root Sugar Company property in which I agreed in the event of your purchasing the property from us should it come into our

hands at sheriff's on the 12th inst., to transfer the cordwood bone-black and ground bones to you. I find it is questionable whether we should legally be able to do this as some of the notes for which this is held as collateral are included in our Judgment and application of a portion of proceeds of the sale could be demanded to apply on those notes. I must therefore withdraw that portion of my letter and can only undertake to subrogate you in respect to those collaterals in such rights as we have, that have not been extinguished by the sheriff's sale. In other respects my letter to remain in force and the property held by us for ten days from date of sale subject to your acceptance on the terms and conditions therein stated.—Please acknowledge receipt of this and state if satisfactory.

Yours truly,
(Sgd.) W. FARWELL.

P.S.—It is understood our whole debt with interest and costs is to be paid and we should deed without any warranty.

W. F.

19. At the time when Beard received this undertaking from the bank he had no authority from McDougall to treat for him nor was McDougall aware of the nature of the proposal until afterwards. But no such authority was needed as the document does not bind Beard and McDougall, but only gives them an option of purchase for ten days after the sale when they could judge whether it was worth their while to buy on the terms therein contained. The only binding undertaking in it is on the part of the Bank. Armed with this undertaking Beard saw McDougall who expressed himself satisfied with it. Thereupon Beard ceased to have anything more to do with the sheriff's sale; the only person subsequently interfering was the Bank. Record, p. 235. p. 328. ll. 7-13. p. 434, ll. 6-24.

20. Thus the bank had by the registration and noting of its judgment succeeded in forcing a sale by the sheriff for its benefit against the wish of the Respondent Beard, had obtained control of the sale, had got rid of the competition of Beard and McDougall and had laid the lines for a resale of the property on terms most advantageous for it, if only it could get the property cheap enough to make it worth the while of Beard and McDougall to buy from it on the terms of the written undertaking. One event only could frustrate its plans—if the property went so dear as to induce Beard and McDougall not to exercise their option of purchase; for whatever the bank had to pay for the property it had to add to its own claim against the Pioneer Company as "expenses connected with "the sale" in order to ascertain the price at which it gave the Respondents the option of purchase: otherwise the bank would not be paid in full. If the property fetched a high price they would decline to buy from the bank which would then be left with the property on its hands and its claim not only unpaid but increased by the price it had paid at the sheriff's sale. p. 272, l. 12.

21. To obviate this it became its interest to frighten away bidders and for this purpose it had three means at its disposal.

1st. To represent that it had a valid hypothec or charge upon the property and to let it be known that it meant if necessary to bid high in order to protect itself, but if permitted to buy cheap was ready to negotiate for a resale.

2nd. To employ a "scarecrow" to attend the sale and alarm intending bidders with threats of Government claims for unpaid dues.

3rd. To induce the sheriff who had advertised the separate properties for sale in separate lots to sell all of them *en bloc* and in one lot. These properties included (1) the factory under lease to Respondent Beard (2) The sawmill under lease to Packer and by him sublet to Lamoureux (3) Fifty acres of farm land (4) Some house property. Plainly, the sale of these separate, and separately occupied properties in separate lots as advertised would be likely to increase competition.

Letter, 6th Jan., 1883. Record, p. 327. p. 416, l. 11; p. 422, ll. 15-28. p. 436, ll. 31-43. pp. 276, 278. p. 416, l. 3.

22. That the Appellant Bank had under discussion the employment of all three means and had actually arranged for the "scarecrow" appears from the letter of Austin manager to Farwell general manager dated 6th January 1883 set out at p. 327 of the Record and the evidence shows that those present at the sale abstained from bidding under the impression that the bank had a valid hypothec and meant to buy: that the "scarecrow" Williams designated by Austin for that duty, did actually perform it, and that the sheriff did actually sell the whole of the separate lots *en bloc* and in one lot and this without the authority of the Pioneer Company.

23. But although the two bank managers and Mr. Doak deny having induced any of these things or used any artifices to prevent bidding, it is unnecessary to go elaborately here through the evidence of their having done so, inasmuch as it has been adjudged on the hearing of the petition of the Bank of Hochelaga which was consolidated with this action "that the said real properties have been sold by the "sheriff *en bloc*, although announced to be sold separately and that such sale was made "without the regular consent of the owner of the goods seized, but illegally on the "solicitation of the *adjudicataire* (the Appellant Bank) and at a price far below "its value" and further "that the evidence reveals that in addition to the above "illegal conduct the *adjudicataire* (the Appellant Bank) was privy to the em- "ployment of deceit and artifices to prevent bidding" and on these two grounds, amongst others, the seizure sale and sheriff's decree have been judicially vacated and annulled and all parties to the said Petition (including the Appellant Bank and the Respondents) have been remitted to the same position as before the seizure: and further the Appellant Bank has given notice that it is not its intention to appeal against that Judgment which was delivered as far back as the 20th Feby. 1890. In their cases in the Court of Queen's Bench both parties refer to this Judgment Rec. p. 476 l. 37, p. 483 l. 45, p. 491 l. 36-42.

p. 502, l. 29. p. 502, l. 33.

24. By the use of the deceit and artifices above mentioned the Bank succeeded in preventing bidding to such an extent that the whole of the properties belonging to the Pioneer Coy. which had cost about $250,000 were sold to it for $1,400 There is no doubt that this was largely the result of selling *en bloc*, as this had the effect of making it useless for those interested only in one or other of the separate properties to bid at all.

p. 272, l. 20. p. 465, l. 15.

25. After the sale the Respondents Beard and McDougall exercised their option to buy the property from the Appellant Bank, although the account as made out by the bank came to $54,696 less $5,257 amount of cash from collateral securities already realised by the bank, leaving $49,439 to be paid by the said Respondents which was much more than they had anticipated. Beard was unable

to find his moiety of the first immediate payment of $9,439 which was paid by McDougall, and it was arranged between them and the bank that the bank should execute a conveyance of the property to Rough, McDougall's cashier, who should protect McDougall and at the same time secure Beard in his rights by a letter undertaking to hold half the property for him on his paying one half the charges: whilst the bank should be secured by a joint deed of suretyship (*cautionnement*) guaranteeing to the bank the payment of the agreed price as well as by a mortgage to them of the premises. Record, p. 465, l. 15.

26. Accordingly on the 19th January 1883 the bank executed a conveyance to Rough by which they purport to sell the said premises "with warranty as "regards their own acts only" and "with all and every the members and appur- "tenances thereunto belonging—without any reservation of any part or portion "of the aforesaid bargained and sold premises on the part of the said bank, *who* "*are lawfully seized thereof* as having acquired the same from the sheriff of the "district of St. Francis under deed of sale bearing date the 21st day of October "1882 To have and to hold use and enjoy the said hereby bargained and sold "lots of land and premises with all and singular their rights members and "appurtenances unto the said purchaser his heirs and assigns as his and their "own property for ever by virtue of these presents and to enter upon and take "possession thereof immediately." Then follows the price and amount and time of instalments; then the mortgage and hypothecation of the premises to the bank as security for the said consideration price: then a provision that if any payment of principal or interest should be unpaid for 15 days after maturity, the whole balance then unpaid should become immediately due and demandable; finally a clause by which the bank agree "that the said purchaser be and remain seised "and invested with the full and entire possession of the said premises *as of right*." The deed of suretyship of even date is set out at p. 25 of the Record. p. 22, l. 30. p. 23, l. 13.

27. The conduct and language of the two bank managers Farwell and Austin after the successful completion of this transaction, as disclosed by their letters to each other, shows very plainly who were the tools whom they had employed to carry through their design, and also that their exultation at their success was shadowed by a fear that their fraudulent artifices might yet be discovered, the sale upset, and the Bank compelled to refund to the Respondents the amount they had received from them for the property. Already on the 14th January, two days only after the sheriff's sale, Austin writes to Farwell "Churchill will go to "you to-morrow morning on the mixed train I gave him two dollars for expenses "which I herewith debit you as directed. Churchill has been very faithful to "us throughout and it is in great measure due to his having kept me posted in "regard to the movements of the 'enemy' that our measures have worked so "successfully." This Churchill was still secretary of the Pioneer Company, for on the 17th January Austin proposes to get his official counter-signature. See Record p. 329 l. 28. As such he had for long been employed by the bank as a spy upon the company and its manager Mr. Lomer, whom Mr. Austin explains in his evidence to be the "enemy" referred to in this letter. This is the same gentleman, who when the writ in the bank's surreptitious action against the company was to be served on Mr. Thornton instead of on the manager or the secretary, conveniently withdrew from the office of the company, although he p. 328, l. 32. Churchill. Record, p. 329, l. 28. p. 415, ll. 14-22. p. 361, l. 44–p. 362, l. 18. p. 380, l. 6.

was there at the time the bank's solicitor arrived to serve the writ. In Farwell's letter to Austin of 22nd January 1883, three days after the conveyance to Respondents and the receipt of McDougall's first payment, he writes "if you "think he (Churchill) has been useful enough to us you can give him *for his wife* "perhaps $50 you might do so." And on the 24th January Austin advises Farwell of the payment of the *fee* "Churchill (*well earned*) $50."

Record, p. 311, l. 24.

p. 331, l. 45.

28. On the very day after the receipt of McDougall's first payment Austin writes to Farwell 20th January 1883. "I was rejoiced to learn from your "telegram to Doak that the sale of the Pioneer property had been satisfactorily "closed I suppose that nothing now remains but to square our books.—Lomer is "anxious to get his money which I explained to you I had been holding "as security and *which he did not include in the list of collaterals furnished* "*Beard. Is it all right to give it to him now? And can the* $1,000 *fee now be* "*applied on Doak's liabilities?* Doak says you "made no conveyance of "the Hogan lot; so much the better and I wonder they overlooked "that." This letter discloses the defrauding of the Respondents by concealing from them the existence of some of the collateral securities and other property held by the bank for its debt and to the benefit of which they were entitled under the bank's undertaking of 6th Jany. and 8th Jany. 1883 *vide* Rec. pp. 300, 301 and p. 278, l. 42, and further that Mr. Doak, who was the bank's solicitor; who had devised the trick of concealing the action against the Pioneer Coy. under the style "The Bank agst. Cummings *et al;*" who had arranged with the bank's own director Thornton for private service of the writ upon him instead of the manager or secretary of the Pioneer Company, who had snapped the Judgment by default and registered it as a charge on the realty of the company on the same day, who had no doubt had a part in manipulating the "faithful" Churchill and in inducing the "scare-crow" to frighten bidders and the sheriff to sell *en bloc* contrary to the law; who as Mr. Farwell says "Knows more about this matter than any one else" had been promised the heavy fee of $1,000 for his services, and had already been allowed credit from the bank on the strength of it.

p. 330, l. 43.

Doak. Record, p. 358, l. 33– p. 359, l. 30. p. 482, l. 44. p. 379, l. 22– p. 381, l. 10. p. 382, l. 45– p. 384, l. 8.

p. 313, l. 10.

29. Mr. Farwell's reply to this letter, dated the 22nd Jany. 1883, is equally instructive, he says: "Yours of the 20th is received and I am sure we can all "congratulate ourselves upon the successful results of our negotiations. I think "you and Doak and director Thornton deserve special mention—I see no reason "why you may not settle with Doak, but as a matter of *precaution* you had "better have him give an *undertaking that in event of the sale being upset in* "*any way and we have to refund the amount received*, he will repay us the "amount. Of course I do not anticipate anything of the kind, but Doak says in "case of any informality it might be done within one year. So it is well enough "to have it, as the amount is considerable—*Re* Romer collaterals, I do not see "that we can hold them any longer, but *go very cautiously and surrender them,* "*so that there will be no back fire.*" So, the collateral security which they had concealed from the Respondents who were entitled to it was surreptitiously returned to Lomer, and Mr Doak was credited with $1,000, conditional upon the sheriff's sale not being upset and the Respondents' payments consequently refunded.

p. 311, l. 7.

p. 311, l. 26.

p. 311, l. 41.

30. This letter however is important from another point of view. It is plain that the bank manager, contrary to his present contention, perfectly well understood that in event of the sheriff's sale being upset *in any way*, the necessary effect would be that the Bank would have to refund the amount which they had received from the Respondents for the property. There is little doubt he was apprehensive of the discovery of the fraudulent artifices on the ground of which it was afterwards actually attacked and upset; but if he was only thinking of the informalities committed by the sheriff in the insufficent description of the property, it is equally strong to show that he himself considered the upsetting of the sheriff's sale for the most innocent informality would entitle the Respondents to a return of their payments on account of the sub-sale to them. Indeed his own phrase "*in any way*" suggests that he had *both* in his mind as possible grounds of nullity.

31. How present the graver grounds of nullity were to Mr. Austin's mind is evident from his reply dated 24th January 1883: "Thanks for your praise. As "you say we have reason to congratulate ourselves. *I know it is a great relief to* "*me and hope I shall never go through a similar experience.* It is however a "great satisfaction to have come out so completely 'at the top of the heap,' in "spite of all the machinations of the 'enemy.'" Then he announces a *net credit balance* on this transaction of no less a sum than $4,235.82, against which he proposes to charge "*fees* Doak $1,000, Churchill (well earned) $50. This will "leave $3,185.82" and he asks Mr. Farwell's advice what to do with it. It would therefore appear they had so loaded the account of their debt and expenses delivered to the Respondents under their agreement of 6th and 8th Jany., as to leave them this large surplus to reward their tools and to play with. No wonder then the Respondents were surprised at the heaviness of the account. Record, p. 331, l. 37.

32. But Mr. Farwell, though apprehensive, is grateful to all concerned, and on 25th Jany. 1883 he writes to Mr. Thornton "I suppose you have heard from "Coaticooke of the successful result of our beet-sugar purchase and sale. I think "we are all right now, and, as I wrote Austin, Doak himself, and you are "specially worthy of mention in connection with the transaction. *If* any of us "ever did *take anything* I think the present would be the right time." Whether he and Mr. Thornton did "*take anything*" does not appear. Mr. Thornton is the bank director, who seems to have gone on the board of the Pioneer Company exclusively in the interests of the bank, and who planned and carried out with their solicitor Mr. Doak the secret service of the writ upon him as a director of the company, the immediate return of it to Mr. Doak, and the concealment of the fact of service from the board and the manager of the company until after registration of the judgment. See Record pp. 379—383. Thornton. Record, pp. 379-383.

33. But Mr. Farwell's apprehensions were only too well founded and on the 28th April 1883 the Hochelaga Bank give notice to Mr. Doak as solicitor to the Appellant Bank of their intention to take proceedings to set aside the sheriff's sale on the grounds amongst others p. 340.

(1) Of the secret service of the writ above-mentioned on Thornton and concealment from the directors of the company.

(2) That the writ was for a larger amount than was due.

(3) That artifices were employed by the bank to keep persons from bidding at the sheriff's sale.

(4) That at the time of registration of its judgment the bank could (by C.C. art. 2023) have acquired no hypothec on property of the Company, said Company being then notoriously insolvent, and said registration made within 30 days previous to its bankruptcy (as defined in art. 17 No. 23 C.C.).

Record, p. 313, l. 1. 34. On the 25th June 1883. the Hochelaga Bank served on the Appellant Bank the writ in their petition to annul the sheriff's sale and adjudication as procured by the fraud of the bank. Mr. Farwell in announcing this to Mr. Austin says " As Doak knows more about this matter than *anyone else*, I think we must " have him attend to it, as it would never do, having got on so far well, to go " under now."

35. In this action of the Hochelaga Bank the Appellant Bank was Defendant, and did defend the action. The Respondents were all *mis-en-cause* as detainers of the property in question. They did not defend the action, but submitted themselves to the judgment of the Court, and refused to make the agreed payments to the Appellant Bank until it should remove the trouble; but as certain of the machinery and tools were perishable and were rapidly deteriorating the Respondents sold some of these and paid over the proceeds to the Appellant Bank who were mortgagees of the premises.

p. 297, ll. 32-42. p. 401, l. 17. p. 487.

p. 288, l. 30. p. 289. pp. 290, 291. pp. 298, 299. p. 399. 36. By reason of this trouble the Respondents were unable to deal with the property: and lost advantageous opportunities of disposing of it. Their situation was still further troubled by the action of the Dominion Government which in October 1883 seized the machinery in the sugar factory for unpaid custom dues due by the Pioneer Coy.

p. 14, ll. 14-29. p. 491, l. 93. 37. On the 13th November 1889, the Court ordered that the petition of the Hochelaga Company, and the two actions of the Appellant Bank against the Respondents and Rough against the Appellant Bank should be consolidated, and by consent the evidence taken on the said petition was made part of the evidence in this case.

pp. 501-504. 38. On the 20th February 1890 the Superior Court (Taschereau J.) gave judgment on the petition of the Hochelaga Bank setting aside and annulling the sheriff's sale and adjudication and all the proceedings therein and remitting all the parties, including the Appellant Bank and the Respondents, to the same position as before the seizure by the sheriff with costs against the Appellant Bank, on the ground that the *procès verbal* of the seizure, and the advertisements of the sale were irregular as not containing a sufficient description of the properties to be sold: that the properties were sold *en bloc* although announced for sale separately, and this without the regular consent of the company, and illegally on the solicitation of the Appellant Bank, and at a price far below their value and that fraud and artifices had been employed with the privity of the Appellant Bank to prevent bidding. Against this judgment the Appellant Bank have not appealed By this judgment the Respondents have been finally evicted from the properties in question.

p. 491, l. 41. p. 476, l. 40.

pp. 15-18. 39. On the 10th March 1890 the Superior Court (Taschereau J.) gave judgment in the two present causes Nos. 2157 and 910, in favour of the Appellant Bank in both actions and in the first action (No. 2157) condemning the Respondents to pay the Appellant $31,717.16.

The reasons of this judgment were mainly.

(1) That the bank bought only as agent for Rough who was *prête-nom* for McDougall and Beard.

(2) That the Respondents knew the dangers of eviction and bought at their own peril.

(3) That McDougall and Beard were assignees of the judgment which the sheriff was executing, and therefore could not complain of the irregularities attending the sale.

(4) That the Appellant Bank only warranted against its own acts, which had no application to this case.

(5) That the Respondents by continuing in possession after the commencement of the petition for nullity and by exercising acts of ownership and making payments to the Appellant Bank had forfeited right to complain or refuse repayment.

40. Against this judgment the Respondents appealed to the Court of Queen's Bench, and on the 23rd June 1893 that Court (Baby, Bossé, Blanchet, Wurtele, and Tellier, *ad hoc*) gave an unanimous judgment rejecting the proof of the judgment on the petition as irregular and inadmissible at that stage; but reversing the judgment of the Superior Court with costs and declaring the Appellant Bank bound to defend the Respondents against ths troubles they have been put to, and the eviction with which they are threatened: adjudging the amount still due to the Appellant Bank at $31,717.16 but staying execution of that judgment until the Appellant Bank should have caused the troubles and threatened eviction to cease, or have given security as required by Art. 1535 C. C. with costs to the now Respondents; and in the action of Rough *v.* the Appellant Bank, declaring that it should abide the result of the action of the Bank of Hochelaga, and of the seizure by the Dominion Government, or of the former only, if in it the decree of the sheriff should be annulled, and sending back the parties and the record to the Court of First Instance for re-hearing and final judgment on the principles laid down by this judgment of the Queen's Bench after the regular introduction in this cause of the definitive judgment given in the Hochelaga Bank's demand to quash and annul the sheriff's decree.

Judgment of Queen's Bench. p. 505.

41. The reasons of the Judges are fully set out in the said judgment. They include amongst others:—

(1) That the Appellant Bank desired the sale and compelled the sheriff to sell, and frustrated the attempt of Beard to stop it.

(2) That the Appellant Bank bought on its own account as principal and not as agent for the Respondents.

(3) That the consideration for the agreed price was the transference of a legal title acquired from the sheriff, and the guarantee by the bank of its own acts and promises included a guarantee that they had acquired such title.

(4) That knowledge at the time of the contract of the causes of eviction falling within the guarantee might desentitle the Respondents from claiming damages, but not from claiming restitution of the price on failure of the consideration and condition of payment and that this case fell within Art. 1512 of the Code Civil, and not within Art. 1520.

(5) That in every case the fraud and artifices alleged to have been committed

by the Appellant Bank to obtain its judgment and hypothec, to prevent bidding and to lower the price are acts of the Appellant falling within its guarantee.

(6) That no fault was proved against the Respondents, who were entitled to defer payment till the Appellant Bank had caused the trouble and eviction to cease, or given security under Art. 1535 of the Code Civil.

42. Against this judgment the Appellant obtained leave to appeal to the Queen in Council on the usual terms.

But the Respondents humbly submit that the said judgment is right and ought to be affirmed for the following amongst other

REASONS.

(1) That the Appellant bought at the sheriff's sale as principal and for its own behoof and not as agent for the Respondents;

(2) That it was a condition of the Respondents purchasing from the Appellant, that the Appellant should have acquired a legal title from the sheriff by a legal purchase from him;

(3) That this condition was not performed;

(4) That the trouble and eviction which the Respondents have suffered is due wholly or in part to the acts and defaults of the Appellant;

(5) That the Appellant's purchase at the sheriff's sale was tainted with their own fraud, and their title bad in consequence;

(6) That the Appellant's guarantee was not fulfilled;

(7) That the Respondents have done nothing to disentitle them as against the Appellant from claiming that it should either cause the trouble to cease, or give them security under Art. 1535 of the Code Civil;

(8) That until the Appellant should do one or other of these, the Respondents are entitled to withhold further payment;

(9) That the judgment appealed from is right in fact and in law.

R. W. MacLEOD FULLARTON.

In the Priby Council.

On Appeal from the Court of Queen's Benc
for Lower Canada, Province of Queb
(Appeal Side).

BETWEEN

THE EASTERN TOWNSHIPS BANK . . . . . *Appellant,*

v.

ROUGH and Others. . . . . *Respondents*

AND

THE EASTERN TOWNSHIPS BANK . . . . . *Appellant,*

v.

ROUGH . . . . . *Respondent.*

RESPONDENTS' CASE.

SIMPSON & CO.,
6, Moorgate Street, E.C