Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Eastern Townships Bank v. Rough and others in the consolidated cases of The Eastern Townships Bank v. Andrew Rough, John McDougall, and Samuel W. Beard, and The Eastern Townships Bank v. Andrew Rough, from the Court of Queen's Bench for Lower Canada, Province of Quebec; delivered 11th December 1895.

Present:

LORD HERSCHELL.
LORD WATSON.
LORD DAVEY.

[*Delivered by Lord Herschell.*]

Although the facts of this case are somewhat complicated, the questions of law involved do not in their Lordships' opinion present any difficulty.

The Eastern Townships Bank carry on the business of bankers in Canada, having their head office at Sherbrooke in the Province of Quebec with a branch office at Coaticooke. Amongst the persons banking with the Eastern Townships Bank were the Pioneer Beetroot Sugar Company. In February 1882 this Company was indebted to the Bank in a considerable amount. As security for $15,000 a part of this indebtedness, the Bank held mortgages of the real estate of the Company. In respect of a further sum of $23,000 the Bank obtained a judgment by default against the Company on the 25th February 1882 and

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registered it against the real property of the Company on the same day.

On the 21st October 1882 Fairbanks & Co. creditors of the Sugar Company attached under execution of a judgment all the real property of the Company, which the Sheriff of the district advertised for sale on the 12th January 1883. The Respondent Beard who had leased the factory of the Sugar Company on favourable terms was anxious to prevent a sale and with this object he paid off Fairbanks & Co's debt and took a transfer of their rights. Having done so he inquired of the Sheriff whether he would stop the sale. The Sheriff however was not in a position to take this course inasmuch as writs had been noted in respect of other judgments which rendered it obligatory on him to proceed with the sale. Under these circumstances Beard entered into negotiations with the Bank with a view to obtaining the property which was to be sold. The nature of these negotiations sufficiently appears from the letter which, as their result, Mr. Farwell the manager of the Bank on the 6th of January 1883 addressed to Messrs. Beard and McDougall.

The letter was in the following terms:—

" 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 there- " after 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 realizing from Ellenhausen " notes now in suit to amount of ten thousand dollars more " within six months, with interest at 7 % per annum on whole " amt. unpaid five thousand dollars within 12 mos., and five " thousand dollars annually thereafter until fully paid within " semi-annually at the rate of seven 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

"realized 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."

On the 8th of January the following further letter was written:—

"Referring to that part of my letter of Saturday last
"addressed to you respecting the Pioneer Beet Root Sugar
"Co. 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 cord
"wood, 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.

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

The letter which Mr. McDougall on the 9th of January wrote in reply has in some unexplained manner disappeared from the record, but it appears clear that he expressed himself satisfied with the proposals made by Mr. Farwell.

On the 12th of January the real estate of the Sugar Co. was sold by the Sheriff and the Bank were adjudged the purchasers at the price of $1,400. On the 13th of January McDougall and Beard requested the Bank Manager to get the deed of sale from the Sheriff, so that the deed of sale from the Bank to McDougall and Beard, subject to the conditions and terms of the Manager, might be at once prepared.

On the 19th of January 1883 the Bank executed a conveyance of the property to Rough.

This was done at the request of McDougall and Beard for reasons into which it is not necessary to enter. The conveyance was made by the Bank "with warranty as regards their own acts only." The consideration was $49,439 of which $9,439 were acknowledged as already received leaving $40,000 still due.

On the 28th April 1883 the Hochelaga Bank who were creditors of the Pioneer Co. gave notice to the Appellant Bank of their intention to take proceedings to set aside the Sheriff's sale. On the 25th of June following such proceedings were initiated by a petition. The Appellant Bank appeared as Defendants. The Respondents Rough McDougall and Beard were all *mis-en-cause* as being in possession of the property. They did not defend the proceedings, but submitted themselves to the judgment of the Court.

On the 18th of May 1884 the Appellant Bank commenced an action to recover the sums due under the provisions of the deed of sale. In the month of September following Rough instituted an action to set aside that deed and to recover the sums paid in respect of the sale. The cross action and the petition of the Hochelaga Bank were consolidated by orders of the Court and by consent the evidence taken on the petition was made evidence in the actions.

On the 20th February 1890 Mr. Justice Taschereau gave judgment in favour of the Hochelaga Bank on their petition, annulling the Sheriff's sale and all proceedings thereunder. On the 10th of March following he gave judgment in the cross actions in favour of the Eastern Townships Bank, with the result that whilst the purchasers were deprived of the subject matter of the sale they were held still liable to pay the price agreed upon. The ground upon which this decision proceeded was mainly

that the purchase from the Sheriff was made by the Appellant Bank as mandatory only for McDougall and Beard of whom Rough was the *prête-nom*. Their Lordships agree with the Court of Queen's Bench which on appeal rejected this view of the facts as inadmissible.

The circumstances under which the Appellant Bank purchased and subsequently conveyed to Rough, appear from the letters written in January 1883, there is no trace of any other agreement or arrangement than that which these letters disclose. In their Lordships' opinion they are inconsistent with the view that the Bank in purchasing acted as mandatory for Beard and McDougall. The letter of the 6th of January contains an agreement by the Bank, in case they should purchase the property at the Sheriff's sale, to sell it to Beard and McDougall. There is no indication of an arrangement that the Bank should act for McDougall and Beard in making the purchase, indeed the terms on which they were to acquire the property, the price they were to pay the Bank, appear quite inconsistent with any such idea. Although the letter probably constituted what is termed a firm offer on the part of the Bank to sell at the price and on the conditions named, that is to say they were bound to sell on those terms if within the time limited Beard and McDougall elected to buy, no obligation was imposed on the latter to do so. Even if the Bank obtained the property at the Sheriff's sale Beard and McDougall might have refused to become the purchasers and unless they exercised their option within the ten days limited by the letter they could not have insisted upon becoming the purchasers. This is made quite clear by Mr. Farwell's letter of the 8th of January already quoted. He speaks of his having agreed in the previous letter "in the " event of your purchasing the property from

" us should it come into our hands at the
" Sheriff's" and concludes—" 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."

It was argued for the Appellant Bank that even assuming that the sale was made with a warranty as regards their own acts, this afforded no answer to their claim to be paid the purchase money and no ground for setting aside the sale, inasmuch as it was not by reason of any act of theirs that the sale was declared void. After the judgment on the petition of the Hochelaga Bank had been pronounced and whilst the appeals in the cross actions were before the Queen's Bench, the Respondents McDougall Beard and Rough sought to put in evidence that judgment. The application made with that view was refused by the Court on the ground apparently either that the judgment not being a final one it was not competent to introduce it, or that the rules of procedure did not admit of its being then introduced. The judgment of the Queen's Bench in the action brought by the Appellant Bank condemned the Defendants in that action to pay the sum demanded by the Bank, but suspended the execution of this condemnation until the Bank had put an end to the trouble and danger of eviction complained of. In the action brought by Rough it remitted the proceedings to the Court of First Instance to be proceeded with according to the rights and obligations of the parties defined and established by the judgment of the Court of Appeal, after the regular introduction in that cause of the definitive decree of nullity pronounced at the instance of the Bank of Hochelaga.

The Court of Queen's Bench in the judgment now under review came to the conclusion that

the Appellant Bank were not strangers to the acts which rendered the sale by the Sheriff invalid and that their warranty was therefore not fulfilled. Their Lordships see no reason whatever to differ from that conclusion.

The Appellant Bank insist however that seeing that the postscript to the letter of the 8th of January made it one of the conditions that they should "deed without warranty," they are entitled to the purchase money and are under no obligation to the purchasers even though these should be evicted from the property on the ground that the Bank acquired no title from the Sheriff. It was contended that although the deed of sale by the Bank to Rough contains an express warranty as regards their own acts, the Bank are entitled to appeal to the agreement which the deed of sale was intended to carry out and which when examined shows that there was to be no warranty at all.

It is not necessary for their Lordships to consider whether it is competent to the parties thus to go behind the provisions of the deed and to absolve themselves from one of its express stipulations. Assuming it to be so their Lordships do not think that this appeal to the documents of January 1883 is calculated to improve the case of the Bank. It is clear that the basis of the whole transaction was to be a purchase by the Bank from the Sheriff, and this must mean a valid and effectual purchase and not a mere apparent or pretended one. The circumstances show that the Bank did not really become the purchasers, not by reason of any defect in the prior title but because of a vice in the sale itself, which prevented its being a sale. It was only in the event of their becoming the purchasers that the terms and conditions of the letters of January 1883 became applicable and their Lordships think that the Bank never did, within the

true meaning of those documents, become the purchasers.

For these reasons their Lordships will humbly advise Her Majesty that the judgment appealed from should be affirmed and the appeal dismissed with costs.