A.D. 1895.

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,

(Respondent in Court of Queen's Bench, and Plaintiff)

APPELLANT,

AND

ANDREW ROUGH *et al.*,

(Appellants in Court of Queen's Bench, and Defendants)

RESPONDENTS,

AND

THE EASTERN TOWNSHIPS BANK,

(Respondent in Court of Queen's Bench, and Defendant)

APPELLANT,

AND

ANDREW ROUGH,

(Appellant in Court of Queen's Bench, and Plaintiff)

RESPONDENT.

APPELLANT'S CASE.

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APPELLANT,

AND

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(Appellant in Court of Queen's Bench, and Plaintiff)
RESPONDENT.

APPELLANT'S CASE.

I.

1. These appeals are from a judgment of the Court of Queen's Bench for Lower Canada (Appeal side), which in effect reversed a judgment of the Superior Court for the District of Montreal. This judgment though rendered in June 1893, was not handed down in writing, till January 1894.

2. The original judgment condemned the present Respondents, jointly and severally, to pay to the Bank Appellant the sum of $31,717.00, and dismissed an action of the Respondent Rough to set aside a deed of sale of certain real property, and to recover the sum of $11,000, alleged to have been paid on the price thereof.

3. The Appellant is a Canadian bank, having its head office at Sherbrooke, in the District of St. Francis, in the Province of Quebec.

In February, 1882, the Bank had a large claim, amounting at that time to about $40,000,00, against a Company known as the "Pioneer Beet Root Sugar Company," whose factory and place of business were at Coaticooke, where the Bank also had a branch office.

This claim consisted:—

First. Of the amounts due under two mortgages, originally given by the Company about 1880, to secure a balance of about $15,000, due by the Company to the vendors from whom the Company's properties were purchased, and which mortgages, and the amounts which they secured, had been transferred to the Bank.

Second. Of an amount due for advances made to the Company by the Bank in the ordinary course of its banking business. Amounting at that time to upwards of $23,000.00.

4. In February, 1882, the Bank took action against the Company, and recovered judgment on the 25th February, 1882, for about $23,000. This judgment was openly and publicly registered against the real property of the Company on the same day. The amount for which this judgment was rendered did not include the amounts due under the mortgages, but simply the amounts then overdue for advances. Before the end of the year 1882 the Bank's claim was increased to upwards of $50,000.

5. The correctness of the entire claim of the Bank against the Company has never been questioned or contested. Every dollar claimed was legally due, and this has been admitted both by the Company and by the Respondents in their subsequent dealings and agreements with the Bank.

6. The Respondent McDougall was a shareholder of the Company, and a creditor. He was also a Director of the Company at the time the Bank took its judgment and registered it. He was elected a Director at the meeting of shareholders of the Company on the 17th January 1882, at which meeting the statement of the Company's affairs showed an indebtedness to the Eastern Townships Bank of upwards of $43,000.00.

Mr. McDougall on the 7th August 1882 was elected Vice-President and Treasurer of the Conpany, and its minutes shew that he attended numerous meetings of the Board of Directors during the year 1882.

Respondent Beard was a son-in-law of a Mr. Lomer, the General Manager of the Company, and had been intimately connected with the affairs of the Company from the commencement. He had also been a co-lessee with Mr. Lomer, of the Company's property.

Respondent Rough was the book-keeper of McDougall, and his *prête-nom*, as well as that of the other Respondent Beard, in the consummation of the agreements hereinafter referred to between the Bank and the other Respondents.

7. The business affairs of the Company had been unsuccessful from the commencement. During the summer and autumn of 1882 they reached a crisis.

McDougall himself was a creditor for machinery which he had supplied, and in August, 1882, he obtained the consent of the Directors to secure himself by giving him $10,000 of the bonds of the Company, and also in November, 1882, a transfer of the next Government subsidy.

Other creditors were also pressing for payment, and on the 21st October, 1882, a creditor named Fairbanks attached, under execution of a judgment for about $200, all the real property of the Company, which the Sheriff of the District advertised for sale on the 12th January, 1883.

In December, 1882, two other writs of execution, neither of which was that of the Bank, Appellant, were issued, and also lodged with the Sheriff, and by him noted, according to the provisions of articles 642 and 643 of the Code of Civil Procedure of the Province of Quebec, upon the first seizing creditor's writ.

8. The effect of this noting was that even if the first execution creditor should become dis-interested, the Sheriff would nevertheless be bound to continue the sale at the instance of the next writ of execution noted.

9. On the 18th December, 1882, the Respondent Beard entered into negotiations with the Bank, through its Manager, Mr. Farwell, to endeavor to acquire the properties of the Company, through the medium of the Bank, at the Sheriff's sale which was advertised for the 12th January following. His object was admittedly purely speculative, and the Bank's claim was undisputed. The amount which the property would be sold for at the sale by the Sheriff would require to be paid in cash. Respondents were not prepared to pay this. They wished the Bank to finance it for them. Beard considered the property worth from $250,000 to $300,000.00, and he wished the Bank to buy it at the Sheriff's sale and transfer it to him, giving him a delay in which to pay the amount of the Bank's claim, which Mr. Farwell told him was all that the Bank desired. The Bank consented to an arrangement on this basis, but stipulated that Beard should associate some responsible person with him in the transaction.

Beard then suggested the name of Mr. McDougall (Respondent), with whom Beard had been discussing this method of obtaining the assets of the Company. The manager was satisfied with McDougall subtantiality. Beard returned to Montreal conferred with McDougall and reported to Mr. Farwell, who thereupon submitted the amount of the Bank's claim and addressed to McDougall and Beard the following letters :—

" 6th January, 1883.

" MESSRS. S. W. BEARD and JOHN MACDOUGALL,
" 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 realizing from Ellerhausen 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, five thousand dollars within twelve
" months, and five thousand dollars annually thereafter, until fully paid, with in-
" terest 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 accept-
" ances of the Company and of other parties endorsed by the Company forming
" our claim, to be cancelled and, if practicable, to be delivered over to you."

" Your obedient servant,

" WM. FARWELL,

" *General Manager.*"

" 8th January, 1883.

" MESSRS. S. W. BEARD and JOHN MACDOUGALL,

" Montreal.

" GENTLEMEN,—

" Referring to that part of my letter of Saturday last addressed to you,
" respecting the Pioneer Beet Sugar Co. property, in which I agree, in the event
" of your purchasing the property from us, should it come into our hands at Sher-
" iff's sale 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 condi-
" tions therein stated. Please acknowledge receipt of this, and state if satisfac-
" tory.

" Yours truly,

(S'd) " WM. FARWELL,

" *General Manager.*

" 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."

On the 9th January McDougall replied, accepting these terms, and using the phrase : " I hope you will be successful with the sale." This letter has some what mysteriously disappeared from the Record, though its purport and the clause in it above quoted are proved :—

10. On the 28th December, 1882, Beard bought the judgment of Fairbanks, and by a letter to the Sheriff, written on the 30th December, but posted only on the 2nd January, desired to know whether, in the event of his wishing to stop the sale, the transfer of the judgment was sufficient to show his authority for that purpose. He was then endeavoring to make his arrangements with Mr. Farwell, but had not succeeded. The Sheriff replied that two other writs had been filed with him, and that he was bound to continue the execution on account of these writs. Beard admits that these were for smaller amounts. Neither of them was that of the Bank.

11. After this arrangement was made, and the letters written and accepted, and acknowledged by both McDougall and Beard, the Bank, with Beard's full concurrence, for the first time issued its execution against the Company and filed it with the Sheriff.

12. After Beard and McDougall had received the Bank's agreement as contained in the above letters, an application was made by another large creditor of the Company, to stop the Sheriff's sale and for a winding up order against the Company. This application was successfully resisted by Beard, undoubtedly acting for himself and McDougall. The petition under this opposition was dismissed and the sale ordered to be proceeded with. The Bank took no steps in the matter.

13. On the 12th January the real property of the Company was sold at Sheriff's sale, openly and publicly, a number of bidders, and also Beard himself, being present. The property was adjudicated to the Bank for $1,400.00.

14. On the 13th January, immediately following this sale, both McDougall and Beard wrote to Mr. Farwell, and asked him to have the property transferred at once to them, and in the meantime to have the insurances transferred for their benefit, arrangements for which they had made with the President of the Company. They formally accepted the terms of the Bank as contained in Mr. Farwell's letters of the 6th and 8th January, and requested that a deed of the property be prepared, " subject to the conditions and terms made by " the Bank.—

Record, pp. 185 and 186.

15. On the 19th January a formal deed of the realty with the same descriptions as given in the Sheriff's notices, was passed from the Bank to Rough. The transfer was made to Rough at MacDougall's request, as owing to the fact that he (McDougall) was a Shareholder, Director and creditor of the Company, he did not wish to appear as thus acquiring the Company's assets.

This deed, which required to be put in notarial form, so as to give a valid transfer of the immoveable property, did not alter the agreement between the parties. The consideration named was the amount of the Bank's claim against the Company. No reference is made to collaterals or notes. $9,439 is acknowledged as paid on account in cash, and the balance, $40,000, was to be paid by annual instalments, failure to pay one of which should entail the exigibility of the entire balance.

By a deed of surety-ship executed at the same time, McDougall & Beard bound themselves jointly and severally for the fulfillment of Rough's obligations. By this deed, as it did not require to be registered, they concealed from the public their connection with the purchase.

16. In June, 1883, the Banque d'Hochelaga, a creditor of the Sugar Company, instituted an action by way of petition in the Fairbanks case, to set aside the Sheriff's sale, alleging informalities and irregularities in the sale and the notices thereof, and also fraud on the part of the Bank, which it was averred had the effect of preventing intending buyers from bidding. Rough was made a party to this action, as was also the Bank Appellant.

17. In May, 1884, the Appellant instituted the action now under consideration, against the Respondents, alleging their indebtedness under the deeds of sale and of suretyship, and claiming a balance of $31,853.56 as then due.

18. The Respondents pleaded non-liability, on the ground of disturbance in their possession and danger of eviction caused by the action of the Banque d'Hochelaga to set aside the sale by the Sheriff, and they also, on their own behalf repeated the same allegations as those made by the Bank of Hochelaga, as against the Appellant's title to the realty.

In September, 1884, Rough instituted an action on the same grounds as contained in his pleas, to set aside the deed of the 19th January, 1883, and to recover what he alleges to have paid thereon.

These pleadings were subsequently amended so as to ask that security be given by the Appellant against the eviction threatened, and in October, 1888, Respondents, against the strong protests of Appellant, amended both their pleas and their action, so as to set up, as an additional danger of eviction, a seizure made by the Government of the Dominion of Canada, for customs duties alleged to be due upon certain machinery imported by the Company before the Sheriff's sale, which seizure had been made against the Respondent in October, 1883, five years before it was pleaded.

19. The Bank Appellant answers, in effect :—The matters you set up, even if true, even though they result in your eviction from the realty, cannot affect us. You were well aware before you entered into the agreement with us prior to the Sheriff's sale, of all the matters which you now urge to avoid payment of our claim. You agreed,—if we would buy at the sale by the Sheriff then about to take place, and hand you over our title,—such as it was—and all our other privileges, collaterals and hypothecs against the Company and its

assets,—to pay us the amount of our claim against the Company in full. You were to pay the adjudication price through us. You were to have credit for any part of that price returned to us on a collocation of the proceeds of the sale. If we bought, we were to buy for you. The single condition of our agreement was that we were to buy at that sale, and we were to hand you over such title as we obtained, without any warranty. You well knew, at the time of this agreement, before we had any title to the realty, just how and under what circumstances we would acquire that title. You knew all the matters you complain of. It was you who bought the seizing creditor's judgment, and pressed the property to sale for your own purposes. You accepted our conditions. We bought for you, we have subrogated you in all our claims, rights and privileges. We have done all we undertook to do, in giving you the title we acquired, and you cannot escape from your agreement to pay our claim against the Company.

The formal transfer of the realty, made to Rough, at your request, is a mere corollary of the real agreement. It is a deed without warranty, taken by you with full knowledge of the dangers you plead. You bought at your own risk.

We have carried out our agreement to the letter. We have done nothing to disturb you in your possession. You have had full benefit of the collaterals and notes hypothecated to us by the Company.

And to Rough's action the Bank says: "You have never been evicted; you have remained in possession, and realized large amounts from the property."

20. Though the evidence and exhibits in the case of the Hochelaga Bank were admitted by consent to form part of the present record, the judgment in that case did not and has never been put of record herein. The same learned Judge (Taschereau), who considered the evidence in that case, presided at the trial of the present cases, and rendered judgment maintaining Appellant's pretensions.

An attempt was made before the Court of Queen's Bench at the hearing, to introduce by motion the judgment on the petition of the Hochelaga Bank. This permission was refused by the same judgment as that now appealed from. The Respondents have, however, succeeded in having it admitted to form part of the transcript in the present cases, in connection with their motion for its introduction before the Court of Queen's Bench which was rejected.

Appellants contend that this judgment cannot be considered as forming part of the case, but in any event there is nothing incompatible between the judgment on this petition and that of the Court of first instance in the present cases.

The causes which contributed in the mind of the Court to set aside the sale by the Sheriff were all well known to the Respondents at the time they made their agreements with the Appellant, and this very agreement was in itself relied upon by the petitioning creditor as a cause of nullity, having for its effect to prevent intending purchasers from bidding.

The same grounds cannot avail the present Respondents, who were parties to that agreement, to repudiate their obligations under it.

II.

21. The Respondents endeavor to restrict the controversy between the parties to a consideration of the deed of transfer, from the Bank to the Respondents' of the Bank's title to the real property. They contend that prior to this deed of transfer, the only agreement between the parties consisted of a "*promise of sale*" on the part of the Bank of a certain property which it was open to the Respondents to accept or not.

The area of conflict is really very much larger. The transfer from the Bank to the Respondents cannot be dissociated from the circumstances out of which it grew, and from the agreements between the parties under which this transfer was made, nor from the acts of the parties preceding, surrounding and following this transfer, which serve to show their intentions.

The letters above quoted of the 6th and 8th of January, which the Respondents rely on as constituting a mere promise of sale, make express reference to the title which the Bank was to acquire to the property in question. These letters were given by the Bank, and accepted by the Respondents, in full contemplation of a sale of the property in question to be made at a certain date and place and under a certain judgment and execution.

The Respondents were aware at that time of all the circumstances surrounding and which led up to this Sheriff's sale; they themselves were pressing on the sale; they strenuously and successfully resisted an attempt to stop the sale and allow the property to be disposed of by a liquidator; they were ready and anxious to acquire for themselves such title as would be given at that sale; they were aware also at the time of making the agreement of every matter subsequently urged against the title of the Sheriff, and of the dangers which attached thereto, they were also willing to pay whatever amount the Bank had to pay to acquire the property at the Sheriff's sale.

The Bank distinctly states: "If we buy at that sale we will sell to you *without any warranty*." The Respondents in express terms accept these conditions.

The only obligation of the Bank was to give to the Respondents such title as the Bank might acquire at the sale by the Sheriff. This they did, and gave also all the other assets of the Company held by it, and all their claims, rights and privileges against the Company, without other consideration than the payment of the amount of the Bank's claim.

The formal deed of transfer from the Bank to the Respondents mentions specifically how and where the property was acquired by the Bank.

This deed does not alter, vary nor contradict the pre-existing agreement between the parties, which was, that the Respondents were to pay the Bank's claim against the Company, in consideration of the Bank bidding upon and purchasing the property at Sheriff's sale on the 12th of January, and transferring that title to Respondents together with their other claims against the Company.

The deed of transfer of the 19th of January was the mere formal act, by which, in pursuance of this agreement, the Bank handed over this title to the Respondents. The warranty against their own acts is the mere formal warranty as against acts of the Bank subsequent to the sale, as against which

they could not by law exclude their warranty, and the clause cannot be otherwise interpreted in the light of the agreement, the letters and of the evidence which shows that at the time this deed was passed the Respondents asked for certain warranties against the Customs' claim, which were distinctly refused, and it was expressly stated and agreed to by Respondents that they accepted the title given them, *without auy warranty whatsoever* except as to the amount of their claim against the Company.

22. The Appellants contend further, that the evidence, as well as the letters, show that in bidding upon the property at this Sheriff's sale, the Bank were really bidding on behalf of the Respondents McDougall & Beard.

It was understood that the Respondents should pay, in addition to the Bank's claim, the amount which the Bank should pay to acquire the property.

The amount actually paid by the Bank to the Sheriff was assumed by the Respondents, and they received credit for the amount for which the Bank was subsequently collocated upon the proceeds of the Sheriff's sale. This was a part of the unwritten "arrangement" between the parties. The Bank's bid was really the bid of Beard and McDougall by arrangement and by final adoption. It was the Respondents who paid the amount of that bid, and were therefore the actual purchasers through the medium of the Bank. The first transfer from the Sheriff to the Bank simply veiled the actual transaction.

23. Any element of risk in the title to the real estate the Respondents were willing to assume, and their motive is obvious. If their title was not attacked, and it could not have been attacked after one year had elapsed from the date of the Sheriff'sale (Code of Civil Procedure, Arts. 716 and 1118), they anticipated a profit in the resale of the property, amounting, according to McDougall's estimate, to $80,000, and Beard considered he was getting the property at one-fourth its value in paying the claim of the Bank.

On the other hand, if they were dispossessed, they remained subrogated in all the claims, hypothecs, privileges and moveable assets of the Company held by the Bank. In holding these they were in a position to realize a large amount of money from the moveables, and were complete masters of the situation as against the realty. They were receiving full value for the amount which they were to pay, even though their then title might be threatened. Their motives and intentions are clear. They were content to pay the claim of the Bank if they stepped into its rights after the Sheriff's sale. The Bank was content with the payment of its legitimate claim against the Company. The Respondents hoped to make an enormous profit. Their sanguine expectations with regard to the property were perhaps not realized. If they have been disappointed in their hopes, they cannot ask the Bank to be the sufferer under the agreements which exist between them.

24. The property was not brought to sale on the Bank's execution, but on an execution purchased by the Respondent Beard from the execution creditor. Any informalities in connection with the sale are certainly not imputable to the Bank. The Sheriff's sale was the sale of the Respondents, and certainly as be-

tween them and the Bank they cannot impugn that proceeding. They, as it were, vouched for the proceedings, and said to the Bank: "If you will buy "under this proceeding, and transfer your title to us, we will pay you the adjud- "ication price, and will also pay you the amount of your claim against the Beet "Root Sugar Company, and will accept your title without any warranty."

This is the real agreement, and the Bank did all this, saying: "We give you what we have, but with no warranty whatever. You proposed this arrangement, you take it at your own risk; we vouch for nothing, except this, we will bid at the Sheriff's sale, and if we buy we will transfer to you. You must pay us the adjudication price and the amount of our claim and the costs of sale. We will give you all our claims against the Company and all rights that we have to the property, and credit you with every penny realized from any collaterals in our hands and any collocation from the proceeds realized from the Sheriff's sale."

In the face of such an arrangement it is idle to discuss warranties and the technical rights of a vendor and purchaser of real estate. The only warranty that the Bank was under towards the Respondents was to carry out its actual arrangements with them, and there is no pretension on the part of the Respondents that the Bank failed to do so.

25. As to the pretended acts of the Bank, antecedent to the sale, and as to the claim of the Customs Department, it is only necessary to say that the Respondents were fully aware of all these matters at the time that they entered into the arrangement with the Bank. Moreover, the Respondents have remained in possession of the property till the present day, have realized large amounts of money from the sale of different portions of it, and have even paid sums on account to the Bank since the institution of the Bank's action.

As to the Customs' claim, it has never been pressed, nor did the Respondents think of pleading it until nearly five years after the Bank's action had been taken against them, and after the Government first asserted their claim. The Bank stood to make nothing but the amount of their legitimate and indisputable claim against the Sugar Company, which the Respondents agreed to pay, and which they cannot now avoid paying, on the plea which they advance that the Bank's title to the property was bad. The title was not the Bank's, it was the title created on the lines proposed and sanctioned by the Respondents, and which it acquired at a sale carried on in their interests, and of all the circumstances connected with which they had full and complete knowledge before the Bank bought. Under the arrangement with the Respondents, the Bank had no concern in either appreciating or depressing the price at which the real estate was sold by the Sheriff. The Respondents had every interest in not letting the amount exceed the privileged claim of the Bank.

26. The judgment of the Court of Queen's Bench regards only the formal deed of the 19th of January. The judgment of Mr. Justice Taschereau of the Superior Court has regard to the whole transaction and to the agreements and the intentions of the parties, and correctly exploits the facts and applies the law.

27. The transfer of the real estate by the deed of 19th January, 1883, is simply a corollary of the agreement between the Bank and the Respondents, and for convenience and because the unpaid balance of the Bank's claim was to be secured by a mortgage on the realty, the consideration in the deed is expressed to be $49,439.70—or exactly the amount of the Bank's claim—after giving credit for some $5,000 realized on collaterals before that date—*including adjudication price*, less the amount received from the Sheriff, on collocation (or ranking) on the $1400, for which the property was sold.

III.

28. The judgment of the Court of Appeals, with submission, it is urged, is founded on a complete misapprehension of the actual position.

Its first proposition (considérant) is pre-eminently fair and applicable, viz.:

"That it is necessary, in order to appreciate the rights and obligations of the parties, to search out their respective intentions in the facts and actions (*faits et agissements*) which preceded, accompanied and followed the Sheriff's sale."

Record 507, line. 40.

This is a sound principle, and the present Appellant readily assents to it. What the Appellant complains of is that it was not applied.

29. The judgment now appealed from proceeds on the assumption:

1st. That the Appellants brought the property to Sheriff's sale, and bought the same in their own interest only, and that it was due to their execution having issued that the Respondents, who, it is asserted, desired to stop the sale, were forced to enter into the agreement with the Appellant.

2nd. It holds that the deed of sale of the 19th January, 1883, conveys a warranty on the part of Appellants against any act or promise (*faits et promesses*) of theirs, whether *prior to* or subsequent to the date of the deed, and draws the conclusion that such a warranty was intended by the parties.

30. Appellants contend that there is error in the judgment in these respects:—

1st. By two long *considérants*, the judgment holds, as regards the first ground mentioned, that the Respondents desired to stop the sale, but were prevented from doing so by the Bank; and that the Appellants forced the property of the Company to sale, and that the Respondents were compelled, on account of the Bank's execution, to enter into arrangements with the Bank. These *considérants* are as follows:—

Attendu qu'il résulte de la preuve et des documents des dites causes, que les propriétés immobilières de la Compagnie dite The Pioneer Beet Root Sugar Company, ont été saisies et annoncées en vente par le shérif du district de St. François, en vertu d'un bref d'exécution émané sous l'autorité d'un jugement obtenu par Fairbanks & Company contre la dite compagnie; que, dans le but

d'arrêter la vente des dites propriétés dont il était le locataire, l'Appelant Beard a acquis de Fairbanks & Company le jugement en vertu duquel elles avaient été saisies et annoncées en vente ; mais découvrant que l'Intimée, qui avait obtenu jugement contre la Compagnie saisie, et fait enregistrer ce jugement avec hypothèque sur les dites propriétés, avait fait noter un bref d'exécution émané sur ce jugement, comme opposition afin de conserver au bref émané et exécuté sur le jugement de Fairbanks & Company ; et que s'il se désistait de la saisie, le shérif serait tenu de continuer ses procédés au nom du premier saisissant et aux frais de l'Intimée (the present Appellants), dont le bref avait été noté comme susdit ; il a laissé les procédés suivre leur cours ordinaire, et il est entré en pourparlers pour l'acquisition des dites propriétés de l'Intimée.

* * * * * *

Considérant qu'il est constant par la preuve et les documents de la cause que l'Intimée désirait la vente par décret des propriétés immobilières de la compagnie saisie ; qu'elle voulait même enchérir sur ces propriétés, et s'en rendre adjudicataire, si c'était nécessaire, pour sauve'garder ses droits et intérêts, et faire bonne la créance réputée douteuse qu'elle avait contre la dite compagnie, mais que le dit décrêt n'aurait pas eu li u après que le créancier saisissant eut été payé et désintéressé par l'Appelant Beard, dans le but de mettre fin à la saisie, si le dit shérif n'eut pas été tenu, en loi, de continuer ses procédés au nom du premier saisissant et aux frais de l'Intimée, dont le bref avait été au préalable noté, pour satisfaire à la créance spécifiée dans le bref d'exécution subséquent, et que c'est après avoir constaté son impuissance d'arrêter les procédés sur la dite saisie, et partant d'empêcher la dite vente par décrêt, que l'Appelant Beard s'est mis à rechercher l'avantage d'acquérir aux prix, termes et conditions que l'Intimée (the present Appellants) pourrait lui faire.

(Judgment of Court of Appeals.)

(Record p. 505, ll. 32 to p. 506 line 1; also p. 507, ll. 43 to p. 508, line 10.)

These reasons or considerants are complete errors of fact.

It was not the Bank's execution which compelled the Respondents to make arrangements with the Bank.

It was Beard & McDougall who wished to bring the property to sale, to obtain possession of all the assets of the Company, and thus to "recoup" their previous losses. It was to them a good speculation if they could induce the Bank to "finance it" for them—to use Beard's own expressions. Beard considered the property worth $250,000.00.

(Record, p. 434, l. 45 et seq., and p. 440, ll. 20-25.)

And he speaks of his "arrangement" with the Bank as one which enabled him to obtain the property at *one-quarter of its value.* He says that was his impression and the impression of those who had to do with it.

(Record, p. 435, ll. 10-35.)

It will be noticed that he says he had "an arrangement" with the Bank, by which the Bank should purchase the property, "in which they pledged themselves to purchase the property," (p.437, l 9,) and that on account of this arrangement he "was anxious that it (the property) should come into the hands of the Bank, so that they could finance it."

(p. 435, ll. 12-16.)

And again at p. 440, line 33, he says he "looked upon it as a cash sale, and the Bank were better prepared to finance it."

McDougall is more modest in his views of the value of the Company's property, but he considered the property "cheap anywhere in the neighborhood of from $75,000 to $100,000 at that time."

(Record, p. 395, ll. 30-35.)

And if they acquired it from the Bank, he expected to get back $80,000 from selling the property in Paris.

Here then was their motive in wishing to bring the property to sale, and to have the Bank become the buyer, that they might, with the payment of very little cash, step into the Bank's rights and "recoup" their losses. They invoked the Bank as the medium of purchase for them, as the sale by the Sheriff was for cash, and the Respondents did not wish to expend sufficient cash to bid up the property beyond the amount of the privileged claims.

Respondents did not take the other stockholders and creditors into their confidence in this respect.

So fearful was Mr. McDougall particularly, of appearing in a transaction which would hand over to him all the Company's property and assets, at the expense of the other creditors and shareholders of a company of which he was a principal officer, vice-president and treasurer, that he put forward Mr. Rough, his book-keeper, to take the formal transfer of the property which required to be registered and thus made public.

31. It was understood, moreover, that the Respondents were to pay any amount which the Bank should have to pay to acquire the property from the Sheriff. This the Respondents did, though not expressed in the letters above mentioned

32. Appellants contend that this evidence shows that the Bank, in bidding upon and buying the property under the "arrangement," were merely bidding on behalf of Messrs. McDougall & Beard.

Did the Bank compel this arrangement by forcing on the Sheriff's sale in their own interests as the judgment holds?

Manifestly not. Beard telegraphed for an appointment to meet Mr. Farwell on the 18th December, 1882, and went to Sherbrooke and met Mr. Farwell that day. Negotiations were being carried on between them from that day until the 6th January, when Mr. Farwell gave the letter already quoted to Messrs. Beard & McDougall,—Beard & McDougall being in the meantime in communication regarding the negotiations.

On the 28th December, Beard bought the judgment of Fairbanks, the seizing creditor. The judgment appealed from holds that he did so in order to stop the sale, and that he so wrote to the Sheriff.

A reference to this letter (Record, p. 141, Schedule 84) shows he did nothing of the sort. He simply sent to the Sheriff the letter of transfer of

the judgment, and asks: "*should it be so arranged* by the date of the sale that *it is* "*desired* that the sale shall not take place," whether the letter is sufficient for the Sheriff to take his (Beard's) instructions. This letter, though ostensibly written on the 29th December, he did not mail till the 2nd January, as appears by the reply of the Sheriff.

At that time, though negotiating with the Bank, he had not got the "arrangement" completed.

Though Beard endeavors to make out that he did not submit his agreement with the Bank to Mr. McDougall until he had arranged with Mr. Farwell, it is clear that his memory in this, as in other important respects, is conveniently defective, and he admits on cross-examination that McDougall knew that he was negotiating, and even asked him (Beard) "how the thing was shaping," and that he sounded Mr. McDougall several times to see if he would assist in case anything came of it, and he adds: "I found he was favorable to a good speculation as I always found him to be." He admits, further, on being pressed, *that Mr. McDougall may have suggested to see what Mr. Farwell might do.* (Record, pp. 238, ll. 20 and following, and 239, ll. 8-13). His evidence as to what took place at the time of the Sheriff's sale is equally untrustworthy. There is no doubt that Beard was acting for McDougall as well as for himself in all the negotiations which he had with the Bank, McDougall keeping himself in the background, as he subsequently did when he caused the property to be put in Rough's name instead of his own.

It is perfectly clear that the desire of Beard & McDougall to control the Fairbanks' judgment and the Sheriff's sale was due to an apprehension that they might not be successful in making their arrangements with the Bank, *in which event only* they might desire to stop the sale.

After they had made their arrangements with the bank and received Mr. Farwell's letters, they not only did not wish to stop the sale, but they successfully opposed an application made by another creditor to stop the sale and for a winding up order against the Company.

(Record pp. 233-4 and pp. 237-8.)

33. The Bank, moreover, took no steps to note its judgment on the Fairbanks writ of execution until after the arrangements with Beard & McDougall were completed, and then with the full concurrence of Beard, who acted throughout on behalf of McDougall and himself. The Sheriff, by his answer to Beard's letter (schedule 85, p. 141), says that two other writs of execution had been lodged with him. The judgment appealed from assumes that one of these was that of the Bank, which was thus forcing the property to sale, and that Beard was thus compelled to make arrangements with the Bank.

This is altogether contrary to the facts. As already pointed out, Beard's negotiations had been commenced some time before he bought Fairbanks' judgment; and the judgment is in further error as to the Bank's execution. As matter of fact, the two writs mentioned by the Sheriff were those of two other creditors of the Company. The Sheriff states they were lodged by Messrs. Robertson & Co., well known advocates of Montreal. Beard

admits that Mr. Fleet, a member of this firm, attended the sale (pp. 441-2), and that two smaller executions were filed.

It is abundantly clear from Mr. Farwell's letter of the 8th January, 1883, to Mr. Austin (sched. 139, Record, p. 302, ll. 43 et seq. and 303), that the first instructions were given on that day to file the Bank's execution with the Sheriff. This was after Beard had made his " arrangement " with the Bank, and was done with Beard's full approval.

As a matter of fact, it will not be disputed as a reference to the official return upon the writ of execution and the record of the Sheriff's proceedings thereon in the case of Fairbanks will show, the two writs filed with the Sheriff prior to his letter to Beard were those of the Canada Paper Company for $507.88 and $101 costs, and of the Goodyear Rubber Company for $931.00 and $114 costs, both filed by Messrs. Robertson & Co., and noted on the 30th December, 1882. There was also filed and noted on the 9th January, 1883, a writ on behalf of the Commercial Bank of Windsor for $1,512.91, and the execution of the Bank Appellant was only filed and noted on the 10th January, 1883, and was for $23,677.

34. Beard tries to avoid responsibility by saying, that having made his arrangements, he left the matter of the Sheriff's sale in the hands of the Bank. If he did, he there by made the Bank his and McDougall's agents in this respect.

But he did more. Another creditor, a German firm named Von Ruffer, which had supplied a large amount of machinery to the Company, made a petition to put the Company into liquidation under the Winding Up Act and to stay the sale. This petition was presented to the Superior Court at Sherbrooke, on the 11th January, 1883, the day before the Sheriff's sale.

The Bank Appellant took no steps to oppose this application, but Beard did. He retained Counsel to go to Sherbrooke and to resist the application and to oppose proceedings which would stop the sale by the Sheriff, and he succeeded in defeating the application, thus compelling the sale to go on. Beard is forced to admit this, and it is proved beyond question. His evidence on this point is illustrative of his remarkable readiness to forget facts prejudicial to Respondents' pretensions, but which in this case it is clear he remembers perfectly, as his last answers show.

He admits that when he opposed this petition, he had Mr. Farwell's letters. (Record, p. 233-4 and p 237, ll. 32 et seq., and p. 238, ll. 1-3.) Mr. Doak's evidence is complete on this point.

(Record p. 246, lines 31 et seq., and p. 247, lines 1-12.)

How can the Respondents reconcile such actions with their pretended anxiety to stop the sale, and with their contention which lies at the base of their defence, that the letters of the Bank of the 6th and 8th January were mere promises of sale, binding on the Bank but not on them.

Here was the opportunity which Respondents should have welcomed of stopping the sale and having an equitable distribution of the assets of the Company under the Winding Up Act, yet they opposed such an application, and succeeded in their opposition and compelled the sale by the Sheriff which they now attack.

Appellant submits that it is clear that the Court of Appeals has fallen into a very serious error as regards the above facts, an error which lies at the base of their judgment.

IV.

35. The second holding of the judgment, which Appellants contend is erroneous, is, that the deed of the 19th January conveyed a warranty in favor of the Respondents as against the Bank's "acts and promises," whether anterior to or subsequent to the date of the deed.

In applying this interpretation to the deed in question, the judgment is manifestly affected by the error into which it has fallen, in holding that the Bank brought about the sale in its own interests and against the wishes of Respondents.

The judgment also rather enlarges the scope of the clause which it says imports the warranty into the deed. It speaks of this clause as containing a "garantie des faits et promesses."

(Record, p. 509, ll. 22–23, and again ll. 27–28.)

And in fact wherever this warranty is referred to, the judgment uses these words.

The exact wording of the deed is as follows:—The Bank, etc., etc., "do "hereby sell, assign, transfer, and make over with warranty as to *their own acts* "*only*."

(Record, p. 538, line 14, Schedule 136.)

A comparison of these words with the wording of article 1509 of the Civil Code of Lower Canada will at once show that their insertion in the deed is a mere formal repetition of the words of that article.

Civ. Code 1509.—"Although it be stipulated that the seller is not "obliged to any warranty, he is, nevertheless, obliged to a warranty against his "personal acts. Any agreement to the contrary is null."

This article corresponds with Art. 1628 of the Code Napoleon.

The Bank was simply assuming the warranty which the law prohibited them from excluding—nothing more.

It is well settled under Article 1628 of the Code Napoleon, that the prohibition to exclude warranty as to the vendor's own acts merely applies to acts subsequent to the sale The parties are not forbidden to exclude warranty as to acts previous to the sale.

36. Appellants submit the following comparison between the relevant articles of the Civil Code of Lower Canada and of the Code Napoleon, and the authorities under the articles of that Code, as bearing upon the present case :—

CIVIL CODE OF LOWER CANADA.

1508. The seller is obliged to warrant the buyer against eviction of the whole or any part of the thing sold, by reason of the act of the former, or of any right existing at the time of the sale and against incumbrances not declared and not apparent at the time of the sale.

1509. Although it be stipulated that the seller is not obliged to any warranty, he is nevertheless obliged to a warranty against his personal acts. Any agreement to the contrary is null.

1510. In like manner when there is a stipulation excluding warranty, the seller in case of eviction is obliged to return the price of the thing sold, unless the buyer knew at the time of the sale the danger of eviction, or had bought at his own risk.

1512. If in the case of warranty the causes of eviction were known to the buyer at the time of the sale, and there be no special agreement, the buyer has a right to recover only the price of the thing sold.

1535. If the buyer be disturbed in his possession or have just cause to fear that he will be disturbed by any action, hypothecary or in revendication, he may delay the payment of the price until the seller causes such disturbance to cease or gives security, unless there is a stipulation to the contrary.

CODE NAPOLEON.

1626. Quoique lors de la vente il n'ait été fait aucune stipulation sur la garantie, le vendeur est obligé de droit à garantir l'acquéreur de l'éviction qu'il souffre dans la totalité ou partie de l'objet vendu, ou des charges prétendues sur cet objet, et non déclarées lors de la vente.

1627. Les parties peuvent, par des conventions particulières, ajouter à cette obligation de droit ou en diminuer l'effet; elles peuvent même convenir que le vendeur ne sera soumis à aucune garantie.

1628. Quoiqu'il soit dit que le vendeur ne sera soumis à aucune garantie, il demeure cependant tenu de celle qui résulte d'un fait qui lui est personnel; toute convention contraire est nulle.

1629. Dans le même cas de stipulation de non-garantie, le vendeur, en cas d'éviction, est tenu à la restitution du prix, à moins que l'acquereur n'ait connu, lors de la vente, le danger de l'éviction, ou qu'il n'ait acheté à ses périls et risques.

No Corresponding Article.

1653. Si l'acheteur est troublé, ou a juste sujet de craindre d'être troublé par une action, soit hypothécaire, soit en revendication, il peut suspendre le paiement du prix jusqu'à ce que le vendeur ait fait cesser le trouble, si mieux s'aime celui-ci donner caution, ou à moins qu'il n'ait été stipulé que, nonobstant le trouble, l'acheteur paiera.

The vendor may validly stipulate for an exclusion of warranty even as to his own acts if anterior to the sale. If such is the effect of the agreement between the parties, the purchaser has no action to recover the price if the act of the vendor which causes him trouble be known to him at the time of sale.

A comparison with art. 1510 Civil Code L C. (*Supra*) makes this apparent. The knowledge of the causes of eviction which this article speaks of does not distinguish between causes attributable to the acts of the vendor or otherwise.

Laurent, Vol. 24, vo. " Vente," Nos. 256-259.

" 256. L'article 1628 dit que toute convention contraire est nulle. Cette disposition est trop absolue, il faut la limiter aux faits personnels du vendeur qui seraient postérieurs à la vente. S'il s'agit d'un fait antérieur, le vendeur peut le déclarer, et stipuler qu'il ne garantira pas l'acheteur de l'éviction qui procèderait de ce fait. Cette clause n'a rien de contraire aux bonnes mœurs; elle fait connaître à l'acheteur une cause d'éviction, c'est à lui de voir s'il veut s'y soumettre. Tous les auteurs sont d'accord sur ce point.

" La jurisprudence va plus loin ; il a été jugé que le vendeur n'est pas garant de son fait personnel antérieur à la vente quand l'acheteur le connaissait. En effet, il est inutile à déclarer à l'acheteur pour le lui faire connaître, un fait dont celui-ci a connaissance ; la stipulation de non-garantie résulte, dans ce cas, de la volonté tacite des parties contractantes ; or la loi n'exige pas qu'elle soit expresse. Dans l'espèce jugée par la Cour de Cassation, delà n'était pas douteux. Le maire d'une commune achète une usine ; par suite d'une transaction intervenue antérieurement entre l'administration et le vendeur, l'acheteur est privé de tout droit à une indemnité pour chômage résultant de travaux publics; il agits en garantie contre son vendeur ; celui-ci lui oppose que, comme maire de la commune, il a eu nécessairement connaissance de la transaction et de l'ordonnance royale qui l'approuve, puisque le conseil municipal a été appelé à donner un avis sur le projet de transaction. La Cour d'Agen donna gain de cause au vendeur. Sur le pourvoi en cassation, l'acheteur objecta qu'il s'agissait d'un fait personnel du vendeur ; la Cour répond que, ce fait étant connu de l'acheteur au moment de la vente, il ne pouvait réclamer une indemnité pour un trouble qu'il aurait dû prévoir.

(Rejet, 2 mai, 1864, Dalloz, 1865, 1,181).

" 257. Quel est l'effet de la stipulation de non-garantie ? L'article 1629 répond que le vendeur est tenu, en cas d'éviction, à la restitution du prix. La raison en est que l'acheteur n'a promis le prix et ne l'a payé que parce que le vendeur s'engageait à lui transférer la propriété de la chose; or, par suite de l'éviction, la propriété ne lui étant pas transmise, il se trouve qu'il a payé le prix sans cause, et que le vendeur le retiendrait sans cause. Il suit que la clause de non-garantie n'a d'effet que pour les dommages-intérêts que, d'après le droit commun, le vendeur doit payer à l'acheteur. Celui-ci, sachant qu'en cas d'éviction il n'aura droit qu'à la répétition du prix, stipulers le prix en conséquence du danger qui le menace ; en ce sens, la restitution du prix l'indemnisera complètement.

" 258. Il y a des cas où le vendeur ne doit pas même restituer le prix ; c'est quand la vente est aléatoire. Le prix ne représente alors la valeur de la

chose, il représente une chance; en réalité, l'acheteur n'achète pas la chose, il achète une chance, et c'est pour cette chance qu'il paye le prix. S'il est évincé, il ne peut pas dire qu'il a payé le prix sans cause, car la cause n'était pas l'objet dont il se trouve évincé, c'est la chance qui pouvait lui être favorable. Par la même raison, on ne peut dire que le vendeur retient le prix sans cause; il y a droit comme compensation de la chance qu'il a vendue, et qui pouvait tourner contre lui.

"Reste à savoir quand la vente est aléatoire. L'article 1629 répond à la question, mais la rédaction en est défectueuse, et donne lieu à difficulté. Voici les termes de la loi: 'Dans le même cas de stipulation de non-garantie, le ven-10 'deur, en cas d'éviction, est tenu à la restitution du prix, à moins que l'acqué-'reur m'ait connu, lors de la vente, le danger de l'éviction, ou qu'il n'ait acheté 'à ses périls et risques.' Ainsi la loi prévoit deux cas dans lesquels le vendeur qui a stipulé la clause de non-garantie ne doit pas la restitution du prix: 1o. lorsque l'acheteur connaissait au moment de la vente le danger de l'éviction; 2o. lorsque l'acquéreur a acheté à ses risques et périls. Faut-il, pour qu'elle le soit, qu'il y ait stipulation de non-garantie? Ou suffit-il que l'acquéreur ait connu le danger de l'éviction, ou qu'il ait déclaré acheter à ses périls et risques? Si l'on s'en tient aux termes de l'article 1629, il faut dire que cela ne suffit, pas, que la loi exige en outre qu'il y ait une stipulation de non-garantie. 20

"Telle n'est pas l'interprétation que l'on donne généralement à l'article 1629. Les auteurs distinguent. Quand l'acheteur déclare qu'il achète à ses risques et périls, il dit par cela même qu'il prend sur lui tout le risque, tout le péril de la vente: n'est-ce pas dire que, quoiqu'il arrive, l'acheteur ne peut avoir aucun recours contre le vendeur? Donc la vente est aléatoire en vertu de la déclaration même de l'acheteur; est-il besoin d'ajouter que le vendeur n'est pas tenu de la garantie alors que l'acheteur le dit? A l'objection tirée du texte on répond que l'article 1629 dit seulement que la clause de non-garantie, sans celle des risques et périls, oblige le vendeur à la restitution du prix, mais qu'il ne règle pas l'effet de la clause des risques et périls quand il n'y 30 a pas de stipulation de non-garantie. On peut ajouter que la question de savoir si une vente est aléatoire dépend de l'intention des parties contractantes; celles-ci ne sont pas liées par les termes de l'article 1629, elles sont libres d'y déroger, et, par suite, les tribunaux peuvent décider que la vente faite aux risques et périls de l'acheteur est aléatoire, ce qui dispense de vendeur, en cas d'éviction, de restituer le prix.

37. The following decision of the Cour de Cassation is remarkably in point, with the present case.

Cass. Requête, 16th June, 1885.

Dalloz, 86-1-238. 40

Guignette sold to Villeneuve with the usual legal warranties (*s'obligeant aux garanties ordinaires de droit*), certain immoveables, and agreed to give his time and attention to procuring certain expected sales of portions thereof to divers persons with whom he had been in treaty. The sale was in reality the

outward form of a previous agreement between the parties as contained in a letter addressed by *Guignette* to *Villeneuve*, to the effect that the former would sell to the latter all his immoveables in *Orleansville* in consideration of the latter's agreeing to pay off *Guignette's* creditors to the extent of 185,000 fr. The real agreement was therefore a mere transfer of *Guignette's* interest, such as it was, to *Villeneuve*, who accepted it as such. *Villeneuve* afterwards suffered a partial eviction, and sued *Guignette* upon his warranty.

The *Cour de Cassation* considered that the facts surrounding the sale and the terms of the original agreement proved that the intention of the parties was to exclude warranty; and, accordingly, that the clause as to warranty was nugatory and inconsistent with the other terms of the contract. The action was therefore dismissed, as falling within the exception as to a sale at the purchaser's risks and perils, contained in C.N. 1629. The following reasons of judgment are noteworthy because of their applicability to this case:

"Attendu qu'il résultait de cette convention que le contrat n'était autre chose qu'une cession de tous ses biens, en quoi ils pussent consister, faite par Guignette à Villeneuve, et acceptée à forfait par ce dernier "

"Attendu que cette interprétation, fondée sur l'intention commune des parties révélée par les termes mêmes de la convention, par les circonstances particulières et les documents de la cause, par la minimité du prix, par la connaissance qu'avait Villeneuve du danger d'éviction on de non-réalization, et par ses propres agissements, rentrait dans le pouvoir du jugé du fond; que donnant au contrat le caractère d'une vente aux risques et périls de l'acheteur, elle excluait, malgré la clause de garantie, tout recours de celui-ci contre son vendeur."

It will be noted that in that case the deed of sale contained an express clause of warranty against all troubles, yet the Court looked to the agreements between the parties and to their previous letters to interpret it.

The striking similarity with the present case is apparent. The present Appellants' case is the stronger.

The above decision consecrates the principle embodied in Art. 1512 of the Civil Code of Lower Canada, viz., that any special agreement may control and even render nugatory the obligation of warranty which the deed of sale may impose.

38. Pothier, Vente No. 186: "Ily a néanmoins un cas auquel le vendeur n'est pas tenu même de la réstitution du prix en cas d'éviction; c'est lorsqu'il paraît que ce n'est pas tant la chose qu'il a vendue que la prétention incertaine qu'il avait à cette chose."

Merlin vo. "Garantie," Art. 1st.

"Cependant, il y a un cas où le vendeur n'est pas même obligé de rendre le prix de la vente, quoique l'acheteur soit évincé. C'est quand il paraît que l'objet de la vente à bien moins été la chose vendue que la prétention incertaine que le vendeur avait a cette chose, ou (comme le dit l'article 1629 Code Napoléon, —1512 Civil Code of Lower Canada) "quand l'acquéreur a connu le danger de l'eviction ou qu'il a acheté à ses perils et risques." Une telle vente ressemble à un coup de filet.

39. The judgment appealed from applies Article 1535 of the Civil Code (Code Napoleon 1653).

This article is not applicable in cases where article 1510 applies, as in this case.

The French authorities moreover hold that this latter Article is only applicable where there is no period, named and agreed to by the purchaser, at which he will pay the price. Where he has agreed to pay at a certain date knowing the causes of trouble he must pay; as he must be held to have promised to do so in spite of the trouble.

He, as it were, waives, by his promise to pay with knowledge of the defects in his vendors title, his right to require more from the vendor than a delivery of the title in question.

Laurent, Vente, Vol. 24, No. 323;

" Il suit de là que l'acheteur ne peut pas invoquer le bénéfice de l'article 1653 " (1535 Civil Code) "lorsque, en supposant qu'il soit évince, il n'a aucun recours contre son vendeur, s'il achète à ses risques et périls, il doit payer, car il à acheté une chance, quand même la chance tournerait immédiatement contre lui; c'est la consequence naturelle du caractère aléatoire de la vente."

Marcadé, Treatise on Code Napoléon. Art 1653, No. 1.

" Cet article (C. N. 1655) se comprend assez par lui-même. Ajoutons seulement * * * qu'il faut assimiler au cas de stipulation qu'un acheteur payera, nonobstant tout trouble, celui d'un acheteur qui, au moment où il s'obligeait à payer à telle époque, connaissait le danger de l'éviction; car il y a là consentement tacite de payer nonobstant le trouble."

Aubry et Rau, Vol. 4, Section 356:

" La faculté de retenir le prix cesse lorsque l'acheteur s'est engagé à payer, nonobstant tout trouble, ou lorsque, connaissant le danger d'éviction, il a cependant promis de payer son prix dans un délai déterminé."

Masse & Verge, vol. 4, Section 687, p. 311, note 21:

" *Quid*, si l'acquéreur lors de son acquisition, a connu le danger d'éviction? Il peut, même dans ce cas, suspendre le paiement de son prix, cette connaissance n'équivalant pas à une convention particulière. Cass., 24 mars 1829. Mais il en serait autrement si, nonobstant la connaissance du danger d'éviction, l'acquéreur s'était obligé à payer son prix dans un certain délai; il serait par là réputé avoir renoncé a exciper de ce danger d'éviction pour se refuser au paiement du prix."

Guillouard, Vente, Vol 2, n. 556:

" Le droit de retenir le prix cesse pour l'acheteur, aux termes de l'article 1653, s'il a été stipulé dans l'acte qui nonobstant le trouble l'acheteur paiera; la disposition de l'article 1653 n'a été introduite que dans l'intérêt privé de l'acheteur, et il peut y renoncer de même qu'il peut renoncer à toute garantie envers le vendeur, camme nous l'avons vu avec l'article 1627.

" Il faut assimiler à cette hypothése, prévue par l'article 1653, celle ou l'acheteur, connaissant le danger d'éviction qui menace le bien qu'il acquiert,

promet néanmoins â payer le prix dans un délai déterminé. Un arrêt de la Cour de Cassation a cependant jugé le contraire par le motif que l'acheteur ne peut être privé des garanties que la loi lui accorde sans une renonciation formelle à son droit, et que la connaissance du danger d'éviction n'équivaut pas à cette renonciation. Nous croyons avec M. Laurent que cette doctrine est trop absolue ; sans doute la renonciation à un droit ne se présume pas, mais il est permis d'y renoncer tacitement ou expressément, *et presque toujours le fait par l'acheteur de consentir à payer à une époque précise, en présence d'un danger d'éviction qu'il connaît, donnera la preuve de sa volonté de renoncer au bénéfice de l'article* 1653. Sans doute il peu en être différemment, et le dèlai fixe a pu n'être, dans la pensée de l'acheteur qu'un moyen pour le vendeur de faire disparaître le danger d'éviction ; les circonstances devront donc être interrogées, mais si elles révèlent de la part de l'acheteur l'intention de ne pas suspendre le paiement du prix, nous croyons que cette renonciation tacite équivaut à une renonciation expresse, et produira les mêmes effets."

" A plus forte raison en serait-il ainsi, et l'acheteur serait-il privé du droit que lui donne l'article 1633, s'il ne pouvait agir en garantie contre son vendeur au cas d'évicion parce qu'il aurait achete à ses périls et risques'. La disposition de l'article 1653 a pour but de protéger le droit de l'acheteur à la garantie, et d'éviter qui'l ne puisse obtenir la restitution du prix qu'il aurait payé, à raison de l'insolvabilité du vendeur condamne à faire cette restitution ; mais s'il ne peut avoir droit à la restitution du prix, la loi n'a pas à vir a son aide."

40. When the sale is without warranty, the buyer in case of eviction cannot recover the price paid, if he knew at the time of the sale the danger of or had bought at his own risk.

The deed of sale in the present case is merely a formal conveyance of the Appellants' rights to the real property to Rough, under the agreement previously made between the Bank and McDougall & Beard, and binding upon both,—an agreement without warranty.

It was, and was intended to be, a deed without warranty, except as to acts which the Bank could not by law exclude. No such acts are complained of by Respondents. All the pretended causes of trouble existed at the time they made their agreement with the Bank, and were known to them before the Bank acquired the title in relation to which the parties contracted.

This was the interpretation put upon the deed by the Court of first instance, and Appellant contends that no other interpretation is possible, if we consider the intention ofthe parties from the facts which preceded, accompanied and followed the Sheriff's sale, as the Court of Appeals says is necessary.

41. The Respondents' contention is that prior to the passing of the deed the 19th January, 1883, there was merely a " promise of sale," binding on the Bank but not on the Respondents, McDougall & Beard, and the Court of Appeals maintains this pretension.

This certainly was not true at the date of the deed of transfer of the 19th January, 1883, which the Respondents rely on.

By his letter of the 8th January, Mr. Farwell distinctly states: "It is "understood our whole debt, with interest and costs, is to be paid, and we should "deed without any warranty."

There is no objection raised by Respondents to this stipulation. Beard accepts it. McDougall writes on the 9th January, accepting it. On the 13th January, the day immediately following the sheriff's sale, McDougall again writes to the Bank as follows:—

(Record, p. 185, Schedule 106.)

Montreal, 13th Jan., 1883.

WM. FARWELL, ESQ.,

Cashier, Eastern Townships Bank,

Sherbrooke, Q.

Dear Sir,

I saw Mr. Cole, manager of the Commercial Union Insurance Co., this a.m. about the policies now existing, "Loss if any payable to me," signed by the President and accepted by the different Companies. Mr. Cole recommended me to get Mr. Hagar, President, to sign the following: "The Eastern "Townships Bank having purchased the property of Coaticooke Pioneer Beet "Root S. Co., please keep the Policies valid for the Bank subject to the Lien of "Mr. McDougall." This matter I will try and put to rights on Monday; in the meantime, get your Deed from the Sheriff and notify me when completed, so that the new Deed can be prepared at once subject to the conditions and terms made by you. I will keep you posted as to the completion of the policies Hagar has signed the letter as above quoted.

Please acknowledge receipt.

Yours truly,

JOHN McDOUGALL.

Beard writes as follows on the same day;

(Rec., p. 186, Sched. 107.)

Dear Sir,

I have seen Mr. McDougall this morning, and he has had all the Insurance Companies notified by letter signed by Chas. Hagar as President of the Sugar Co., in the following terms:

"The E. T. Bank having purchased the property of the P. Beet Sugar Company at Coaticooke, please keep the Policy valid for the Bank subject to the interest of Mr. John McDougall."

Kindly have the deed from the Sheriff in order as soon as possible, so that your deed to us may be executed without delay, and the matter closed off.

Yours, etc.,

S. W. BEARD.

Here is a complete acceptance of the terms of the Bank, and an agreement on the part of Respondents to take the property upon the terms mentioned in Mr. Farwell's letters.

Beard is asked if he ever wrote accepting the Bank's offer. He answers: " Yes. The letters will show."

(Record, p. 236, ll. 17–18.)

The Respondents, the moment after the Sheriff's sale, caused the insurance policies to be transferred to the Bank, *subject to the interest of Mr. McDougall.* What interest had he unless he had made a definite agreement as to the property?

The Respondents further appear to have made some attempt at the time of the execution of the deed of the 19th January, to obtain some guarantee from the Bank against the Customs claim, but such guarantee was distinctly refused.

Mr. Farwell states, Record, p. 272, ll. 35–38:—" At the time of the taking " of the deed, my recollection of the matter was that this (the Customs claim) " was mentioned incidentally, but it was stated distinctly that the Bank turned " over the property to them (Respondents) *without any guarantee at all.*"

And again (p. 273, ll. 38-46), Mr. Farwell says:—

Q. Before the deeds of sale were signed in this cause, did you have any conversation with Mr. McDougall in Montreal, or elsewhere?

A. At the time of executing the deeds there was not very much, as I mentioned before. The question of the government claim was spoken of incidentally, and I don't know but that he had the paper drawn, that the Bank should guarantee it.

Q. What was said with regard to that?

A. It was that the Bank simply acted for them, and guaranteed nothing; we simply handed over the title that we had got, and nothing more.

This evidence is uncontradicted.

The judgment of the Court of Appeals has fallen into the error of overlooking entirely the stipulation in the agreement between the parties that there should be no warranty, as the following *considérant* shows:

Considérant que par la dite stipulation de garantie des faits et promesses, l'Intimée serait bien exemptée du recours pour les évictions dont la cause lui serait étrangère; mais qu'elle ne serait pas affranchie du recours pour de l'éviction dont la cause procéderait des vices de son titre ou de l'annulité de son acquisition; qu'en effet, une telle cause d'éviction ne lui serait pas étrangère, *puisque par la convention antérieure au décrêt, il entrait dans les faits, actes et promesses de l'Intimée de se procurer les dits* immeubles, afin de les faire avoir aux Appelants Beard & McDougall, et de remplir par là sa dite promesse de vente envers eux, pour le cas où ils s'en prévaudraient dans le délai fixé.

(Record, p. 509, ll. 27-38.)

This *considérant* plainly shows that the Court considered the agreement *anterior* to the Sheriff's sale (*la convention antérieure au décret*) to be an agreement by which the Bank should deed *with* warranty.

The judgment ignores completely the plain expression and meaning of the agreement, that if the Bank bought, it " would deed *without any* warranty," and is in direct conflict with the case of Guignette and Villeneuve cited above, § 37.

42. The sale at which the Bank was to buy was the sale pressed on by Respondents under a judgment purchased by them, and of all the steps leading up to which they not only had knowledge but were accountable for. They knew of all the matters which might affect such title as the Bank might acquire, if it bought at the Sheriff's sale, yet entered into an agreement to take that title "without any warranty."

43. This deed of sale cannot be considered alone. It did not supersede nor vary the agreement between the parties by which the Respondents were to acquire all the claims and rights of the Bank against the Company.

The price mentioned in the deed is not the consideration merely for the property thus transferred, it is the amount of the Bank's entire claim. If it is to be considered as conveying a warranty, expressly excluded by the original agreement, it might as reasonably be contended that the Bank could have exacted the sum mentioned for the real property alone, and have claimed that the Respondents were to pay an additional amount for the other assets and claims held by the Bank.

44. The Respondents, subsequently to this deed of the realty, themselves invoked the terms of the original agreement, and insisted on their rights thereunder.

On the 19th January, 1883, Mr. Farwell gave Mr. Rough a letter agreeing to have the bone black, etc., which formed a portion of the collaterals transferred by the Bank under the agreement, brought to sale as quickly as possible, and if purchased by the Bank, to deliver over to Rough, upon payment of the purchase money and charges, and Rough by letter to Farwell requests the latter to protect the collaterals to the extent of $4,000.00.

(Record, p. 182.)

They were brought to sale and purchased by the Bank for $400, the expenses amounting to $84 more, and the Bank appears to have asked Rough for payment of these amounts.

The answers of Beard show Respondents' interpretation of the original agreement. On the 8th February, 1883, he writes to Mr. Farwell, and says the charge of $400 is an error; "you have to hand over the property free, upon the "charges of $84 being paid."

(Record, p. 184, Sched. 104.)

Mr. Farwell, in a note on the back of this letter, admits the error. Again, on the 14th February, 1883, Beard writes to Mr. Farwell, and says: "If you will kindly refer to your letter, stipulating upon what terms you would transfer the property should it come into your hands, you will find that you were to perfect your rights to the Wood and Bone collaterals and hand them over in the same manner as you handed the cash over pd in on or the collaterals or Bills Receivable and wood withdrawn. You were to receive nothing further from these, and it would never do to leave $400 in your hands, to be subject to attachment from any Company creditor that might wish to make annoyance. It was not the agreement. Kindly therefore drop me a line stating that you will deliver up the property upon receiving the amount of the charges, and I will see that the amount is at once forwarded.

Yours,
S. W. BEARD.

(Record, p. 184, Sched. 105.)

And Messrs. Rough & McDougall write as follows:

B. AUSTIN, ESQ., MONTREAL, 17th March, 1883.
Manager E. T. Bank,
Coaticooke, Que.

Dear Sir,

With respect to the Cord Wood and Bone Charcoal brought to sale by you *on my behalf* on the 5th February last, and bid off by you for the nominal sum of four hundred dollars, it is well understood that no part of this price was paid to the Bank, and I have therefore no claim nor title with respect to it the said sum of $400. It is also well understood that upon payment of your charges in connection with said sale and commodities, I shall take possession of said cord wood and bone charcoal at my own risk as to quantity and condition, and without any warranty whatever from your Bank or from the warehouseman with respect thereto.

I am, dear sirs,
Yours truly,
ANDREW ROUGH,
JOHN McDOUGALL.

(Record, p. 186, Schedule 108.)

In other words, the Bank bid in the collaterals on behalf of Respondents, under the agreement preceding the letters of the 6th and 8th of January, 1883, exactly as the Bank bid in the real property for them at the Sheriff's sale. In the latter case also the Bank merely paid the expenses of the sale on behalf of Respondents. The balance of the adjudication price after payment of expenses was credited to Respondents.

45. The acceptance of these collaterals at the Respondents' own risk is exactly what was the intention of the parties with respect to all the assets which were the subject of the agreement.

The Respondents invoke the agreement in respect of the collaterals. They cannot repudiate it in respect of the realty.

46. If this pretended clause of warranty, upon which the case of the Respondents is almost entirely built up, stood in a deed of sale of real property with respect to the sale of which there was nothing to throw light on the intention of the parties, but the terms of the deed itself, they could not be construed as applying to antecedent acts unless such were specially mentioned; but standing in a deed which is a pure formal act of transfer of a property, in respect of which the parties have come to a clear understanding that it shall be deeded without warranty, there can be no question as to their meaning and effect.

47. Appellants contend accordingly that the deed of the 19th January was a mere formal transfer to the Respondents of such title as the Bank had to the real property mentioned, given and accepted in pursuance of an agreement excluded any warranty, and which agreement was entered into with respect to which the particular title which the Bank actually transferred.

The Court of Appeals, it is submitted was in error in holding it was a "sale" with warranty against acts prior to the Sheriff's sale, and the Court of first instance was right in saying it was a deed without warranty in the legal acceptance of the term.

V.

48. The judgment of the Court of Appeals, starting from the false conclusion that the deed contains a warranty, proceeds to apply the provisions of article 1512 of the Civil Code, which reads as follows: "If, *in the case of war-* "*ranty*, the causes of eviction were known to the buyer at the time of the sale, "and there be no special agreement, the buyer has a right to recover only the "price of the thing sold."

The Appellants avail themselves of the declaration of the Court, implied by the application of this article, that the causes of eviction *were* known to the buyers in the present case at the time of sale.

49. It will be seen that this article is only applicable in cases where there is: 1st, a warranty, and 2nd, no special agreement.

50. The Appellants hope they have succeeded in showing that there was now arranty.

There was, moreover, a special agreement, the agreement under which the Respondents were to pay the claim of the Bank, and to receive in return all the claims of the Bank against the Company.

51. The Court of first instance with full knowledge of all the facts, correctly applied the principle contained in article 1510 of the Civil Code. (*Quoted Supra.*)

Under this latter article, where there is a deed of sale without warranty, the purchaser cannot reclaim the price or refuse to pay it when the causes of eviction were known to him at the time of the sale or where he had bought at his own risk. The corresponding article of the Code Napoleon is 1629. In the present case the Respondents are proved to have had full knowledge of all the causes of possible eviction, of which they complain, prior to the sale by the Sheriff and to the deed of the 19th of January, and the agreements between the parties shew that Respondents intended to buy at their own risk.

Even the judgment appealed from does not deny this. It holds:—

Considérant que la connaissance que les Appelants (present Respondent) auraient eue, lors du contrat, des causes d'éviction tombant dans les limites de la garantie des faits et promesses de l'Intimée, empêcherait bien que cette dernière ne fut tenue des dommages et intérêts des Appelants, faute de pouvoir faire cesser lé'viction et accomplir la promesse qu'elle leur a faite de leur faire avoir les dits immeubles, mais que cette connaissance ne la déchargerait pas de la restitution du prix dont elle serait tenue *conditione sine causa;* et qu'on devrait supposer que les Appelants ont exigé la dite garantie précisément à raison du danger dont l'existence leur était connue, et que ce serait un cas pour appliquer l'article 1512 du Code Civil, et non l'article 1510, qui ne saurait trouver d'application dans l'espèce.

The Court of first instance distinctly affirms their knowledge, and the facts of record bear this out.

52. There is nothing in the present Record to show any actual eviction. Respondents moved before the Court of Appeals to put of Record the Judgment in the case of the Hochelaga Bank, but this motion was refused.

As matter of fact Respondents are still in actual possession of the property.

53. The alleged causes of eviction are :—

1st. The action taken by the Bank of Hochelaga to set aside the Sheriff's sale,—and the grounds alleged in support thereof.

All these grounds, as already mentioned, existed anterior to the sale by the Sheriff and the agreement between the present parties, and were known to Respondents.

They are as follows :—

1st. Informalities in the Sheriff's notices of sale in the description of the properties.

This was not an act of the Bank Appellant in any sense. The Bank had nothing to do with the Fairbanks' judgment, its execution, or the Sheriff's notices of sale.

The Respondents made these proceedings theirs by adoption, in purchasing the judgment and continuing proceedings under the execution. Article 1587 of the Civil Code expressly reserves to a buyer at a Sheriff's sale who has been evicted his recourse against the prosecuting creditor by reason of informalities in the proceedings. Beard, as the prosecuting creditor, from the time he disinterested Fairbanks, on the 28th December, was responsible for these very informalities the Respondents now invoke. These notices were public, it was upon them the sale took place, the Respondents were each of them perfectly acquainted with the description of the property given therein, and also with the property itself. They further insert in the deed of transfer to them by the Bank, and accept the property with, precisely the same descriptions inserted in the deed as those given by the Sheriff.

2nd. Irregularity in the sale, inasmuch as the properties were brought to sale *en bloc* instead of in separate lots.

This was also due to no action on the part of the Bank.

The Respondents were anxious to obtain the whole property, and Beard was present at the sale There is absolutely no proof that the Bank took any action in the matter. On the contrary, Mr. Austin says he believes it was sold *en bloc* at the request of Mr. Hagar, the then President of the Company.

(Record, p 283, ll. 40–45.)

Mr. Austin's letter of the 6th January, 1883, to Mr. Farwell, which, it must be remembered, was written before the agreement between the Bank and Respondents was completed, shows that the Bank was anxious to avoid doing anything which might result in the sale being set aside as illegal. The

Respondents had full knowledge, moreover, of the fact that the sale was *en bloc* before they took their title.

3rd. The third ground of attack on the Sheriff's title, stated to be a cause of eviction, consists in an allegation of fraud and artifice practised by the Bank to prevent parties from bidding.

They go back to the judgment obtained against the Company by the Bank in February, 1882. They say this was taken secretly, that, the Company was then insolvent, that the registration conferred no privilege or hypothec for the amount of the judgment, and that this troubles them in their possession.

All this, if true, cannot benefit the Respondents. That judgment is not under consideration in the present case. It may be true that when first instituted the Bank desired to avoid affecting injuriously the credit of a Company so largely indebted to it, and it took steps accordingly. But the claim of the Bank is undisputed and indisputable.

The judgment when obtained was openly and publicly registered against the Company's properties. It remained unchallenged and uncontested.

More—the Company and its officers actually made use of this much talked of judgment in the summer following (1882), to collect, by way of garnishee process, amounts due to the Company by farmers and others.

(Record, p. 364, ll. 6-15.)

McDougall is proved to have had full knowledge of the judgment and its registration. He told Mr. Doak before he signed the Deed of the 19th of January, that he was aware of the Bank's judgment and of its registration *immediately after it had been registered*, and took credit to himself for not having opposed it. Some of the creditors, he said, wanted to contest it, but he did not see any object in doing so, as the amount was due to the Bank.

(Record, pp. 247, ll. 33 et seq., and 248, ll. 1-10.)

In his position of Vice-President and Treasurer he could not have helped knowing the liability of the Company towards the Bank, and the use made of the judgment of the Bank to collect amounts due the Company. The claim was discussed at different meetings of the Directors. The Company never contested the judgment which the Bank obtained nor its registration, but on the contrary admitted the correctness of the claim in their statements of their affairs.

Moreover, the fact of the Bank having a judgment was distinctly referred to in Mr. Farwell's letter of the 8th of January, addressed to Messrs. Beard & McDougall, and the costs are referred to in the postscript.

Beard was handed a statement by the Bank at the time he was making his arrangements, which statement he produces, and in which the judgment is referred to and interest and costs are added.

(Record, p. 435, ll. 37-43, and Schedule No. 173, pp. 338 and 339.)

This statement shows the total amount of the Bank's claim.

The following short résumé of the meetings of the Directors of the Company will show how intimately acquainted with its affairs Mr. McDougall must have been.

He was elected a Director on the 27th January, 1882. As already stated, the financial statement submitted at that meeting, and audited, showed an indebtedness to the Bank for notes under discount upon which the Company was liable, of $43,473.39.

He constantly attended mettings of the Directors from the time of his election until the 13th January, 1883, the day following the Sheriff's sale, and on which day the last recorded meeting of Directors was held.

(Record, pp. 285.—286.)

The meetings of the 22nd June, of the 22nd November, of the 19th December, 1882, and of the 2nd and the 13th January, 1883, were held at Mr. McDougall's own office in Montreal.

At the meeting held on the 2nd May 1882 a resolution was adopted empowering the managing Director to settle all matters pending with the Bank appellant.

At the meeting of the 15th July, 1882, Mr. McDougall was authorized to insure the bulldings and property of the Company, to cover his claim against the Company.

At the meeting of the 7th August, 1882, Mr. McDougall was appointed vice-president and treasurer, which office he accepted, and at the same meeting an offer to lease the Company's properties for a year was accepted, upon the ground that the offer was made to save the Company from assignment.

At the meeting of the 11th August a resolution was carried, handing McDougall $10,000 of bonds of the Company as collateral security for his claim.

At the meeting of the 22nd November, 1882, it was resolved that as Messrs. Lomer & Beard (one of the Respondents) had failed to pay the premiums of insurance on the Company's property, and Mr. McDougall had done so, the President, Mr. Charles Hagar, be authorized to transfer these policies to McDougall.

At the meeting of the 2nd January, 1883, Mr. McDougall seconded a resolution to take an action to cancel the lease to Messrs. Lomer & Beard, on account of failure on their part to carry out its provisions.

At the meeting of the 13th January (the last) Mr. McDougall moved a resolution authorizing Mr. G. O. Doak, solicitor of Coaticook, to realize all he could from sales of moveable property belonging to the Company, and to pay any amounts due to employees so as to relieve the Directors from their liabilities in this respect.

McDougall urges the insolvency of the Company at the time of the registration of this judgment. Why did he not—knowing all the facts—raise this question and contest the judgment before he agreed to pay the Bank's claim? Simply because the very existence of this judgment enabled him to make the arrangment he did with the Bank, and instead of having to pay cash

at the Sheriff's sale for the property, to use the Bank as his medium, and the latter, being enabled to buy in the property under the claim, would "finance it" for Respondents.

McDougall himself, though he says he thinks the Company was never solvent, tried to get all the security he could for his own claim. He got a transfer of $10,000 of bonds, of the insurance policies, of the next Government subsidy, and everything else he could lay his hands on. He also stated he would have done the same thing as the Bank did had he had the chance.

(Record, p. 248, ll. 25-26.)

54. The objections raised to the judgment of the Bank Appellant and its registration against the Company are alleged by the Bank of Hochelaga in connection with this very bargain between the Appellant and Respondents.

It was to the latter's benefit, under their agreement, that any benefits arising therefrom enured.

They cannot, after having made an agreement with their eyes open as to all the facts, and having taken advantage of them, urge these facts against the performance of their obligations.

55. Much was attempted to be made in the Court below of certain correspondence between Messrs. Farwell & Austin, by which they congratulate themselves on having made good their claim against the Company. Such expressions were but natural.

They did not want to make a speculation out of the property. The Respondents did. But it is not proved that the Bank did anything which either injured the Respondents or prevented buyers from bidding.

Mr. Austin, in a letter to Mr Farwell of the 6th January, speaks of his intention to have a "scarecrow" present at the sale in the shape of the Collector of Customs who would announce that certain of the property would be subject to the claim of the Customs for duty. (Record p. 328.) An inference appears to be drawn that this was done.

The whole context of the same letter shows that the intention and wish of the writer was that nothing should be done which would be illegal, and absolutely nothing in this respect was done by the Bank, and there is no attempt even, to make proof of this. Mr. Farwell promptly replies that it would be well not to have the Government claim too prominent, unless Beard & McDougall "now understand it and are content therewith."

(Record, p. 302, ll. 39-40.)

Mr. Austin in his examination denies in the most positive terms that anything was done on behalf of the Bank in this connection. The Collector of Customs in any action which he took acted on his own motion, and his subsequent action in attaching this machinery corroborates the evidence.

(Record, p. 280, ll. 25 et seq ; p. 281, ll. 1-20.)

The irresponsible expressions by a subordinate official of his intentions cannot be considered as proof of any action which would bind or affect the Bank's rights.

The taking and registration of the judgment was well known at the time of the sale, and is even mentioned in Mr. Farwell's letter stipulating non-warranty.

VI.

56. The only other cause of trouble alleged by Respondents is this same claim of the Customs.

As already stated, they did not advance it until five years after the Government had asserted its claim.

The duties in question were alleged to be due upon certain machinery which the Company had imported from Germany, a considerable time prior to the Sheriff's sale. The claim, of course, only affects this machinery, which was only a part of that belonging to the Company, and had been recently imported.

As there was a dispute between the Company (of which McDougall was Vice-President and Treasurer) and the Government, as to whether the duties were payable or not, the building in which the machinery was placed was constituted a bonded warehouse, and the usual notices to that effect were affixed to the building and on the main street of the town.

(Record, p. 281, ll. 1-6; p. 248, ll. 28 et seq.)

Williams the collector of Customs announced the fact of the Government's claim at the Sheriff's sale.

(Record, p. 278, ll. 15 et seq.)

Beard was present and spoke of the matter to Mr. Doak.

(Record, p. 246, ll. 11-30.)

We have already seen that before McDougall signed the deed of the 19th January, he was aware of the Government claim, and wished the Bank to warrant him against it, which Mr. Farwell refused to do.

In October, 1883, the Government made a seizure of this machinery. Rough and Mr. McDougall protested the Government against it in their own name, giving instructions to Mr. Doak for that purpose.

(Record, p. 250, ll. 43 et seq.; and p. 251, l. 1.)

This protest appears of Record, pp. 229 and 230, Schedule 117.

This seizure has moreover apparently never been further pressed, and Respondents are still in possession of the property.

57. The obvious reason for the Respondents advancing this claim was the decision of the Judicial Committee of the Privy Council *in re* Prevost and La Compagnie de Fives Lilles.

L. R., 10 App. Cas. 643.

The present case is easily distinguishable.

In that case a sugar factory was sold at Sheriff's sale. Before the sale commenced, the Appellant, Prevost, asked the Sheriff if there were any charges against the property. The Sheriff answered that there were not. The property was adjudged to Prevost for $76,000. On the following day, the Attorney General of Canada, on behalf of the Crown, asserted a claim for customs duties against the machinery, which formed part of the immoveable sold, amounting to about twenty thousand dollars, and the purchaser refused to pay the adjudication price unless the Sheriff could give him the property free from this charge and from all encumbrances; and it was finally held by the Judicial Council, that whether the claim of the Crown was well founded or not, the seizing and detaining of the machinery was in virtue of a warrant *ex facie* regular, and effectually prevented the seller from giving possession, and consequently relieved the purchaser from his obligation to pay the price, and that there was nothing either in the Civil Code of Lower Canada or in the Code of Civil Procedure which cast upon the purchaser, in these circumstances, the obligation to pay the price and thereafter get possession from a third party as he may.

It was pointed out in that case that under article 1491 and following of the Civil Code, the principal obligations of the seller, arising out of the contract of sale, are, first, delivery, and secondly, the warranty of the thing sold, and that the obligation of the seller to give delivery is not satisfied until he puts the buyer in actual possession of the thing or consents to such possession being taken by him, and all hindrances thereto are removed.

In Prevost & La Compagnie de Fives-lille, there was no valid delivery of the property; the purchaser was never put in possession. There was no "due performance" of the contract of sale. Moreover, the sale by the Sheriff is a contract with warranty. Then the Judicial Committee proceeded to lay down the principle in that case that "if the Appellant had bought a mere title there would have been more room for the Respondents' contention, but the thing exposed to sale by the Sheriff and purchased by the Appellant was a sugar factory, and the obligation of the seller was to give him actual possession of the factory." P. 651.

In the present case it is submitted, in the first place, that the sale was practically a sale from the Sheriff to the Respondents, the Bank merely acting as the go-between and agent of the Respondents. But even if the Bank could be regarded, from any point of view, as a principal, then this case falls within the rule laid down by The Judicial Committee that the Respondents "had bought a mere title," viz., such title as the Bank might acquire at the Sheriff's sale then proceeding virtually at the instance of the Respondents. The Respondents were in no way deceived. They were aware of the formalities and conditions under which the property was brought to sale. They abstained from bidding themselves because they had an arrangement that the Bank would bid in the property.

Prevost was not aware of the existence of the Customs claim. On the contrary, he was informed by the Sheriff that there were no charges against the property. Had he been aware of the existence of such claim, he might have bid with reference to it or abstained from bidding altogether. But he was not aware of it.

In this case Beard & McDougall were thoroughly aware of the existence of the alleged customs claim. They had full knowledge of it,—McDougall as an officer and director of the Company, and Beard from having heard it announced at the time of the sale and otherwise.

But this case is further distinguishable from that under consideration in this circumstance, that the existence of the Customs claim, whether well founded or not, did not prevent the Bank from getting delivery and possession of the property, and shortly afterwards a formal deed. All the obligations of a vendor to the Respondents, if the Bank should be regarded as a principal, in so far as delivery was concerned, were fulfilled by the Bank. The Respondents, with full knowledge, accepted such delivery, and agreed to the payment of the price stipulated, notwithstanding that the Customs claim was announced at the sale, and was afterwards considered in connection with the formal passing of the deed, at which time the Manager of the Bank refused absolutely to guarantee the purchasers against the Customs claim, and stated that the Bank only transferred what the Bank had acquired.

The Respondents, therefore, took possession of the property and took delivery of the title, the precise title they stipulated for, without protest or remonstrance and without any warranty whatever. The present case is also distinguishable from that of Prevost and La Compagnie de Fives-lille in this: That there was warranty in that case, whereas warranty is expressly excluded in this.

Respondents have made no evidence as to the value or character of the machinery seized in the present case.

58. The Appellants contend accordingly:

1st. That all of alleged causes of eviction were well known to the Respondents at the time they made their agreement with Appellant,

2nd. That none of these alleged causes are attributable to any act of the Bank, apart from the agreement with Respondents, invoked by the creditors who attacked the sale.

VI.

59. The judgment appealed from holds that, in the event of the Respondents being dispossessed of the realty, and having to pay the amount of the Bank's claim, there would be a failure of consideration;— that it would amount to a "*conditione sine causâ.*"

(Judgment Record, p. 509, l. 43.)

This is also an error,—and again ignores completely the real agreement between the parties.

This agreement involved the subrogation of the Respondents in all the claims, privileges, and hypothecs held by the Bank against the Sugar Company. It included the collaterals and the notes of third parties held by the Bank.

Even if evicted from the property, the Respondents would still be the proprietors of the entire claim of the Bank against the Company, which

amounted to $54,697.33. The correctness and exigibility of this claim has never been disputed, and has been expressly admitted by Respondents to whom it was submitted before they took the transfer. The Company, by its own statement of affairs, on the 31st December, 1881, enter bills under discount with the Bank of $43,473. (Record, p. 306.) And also admit a further amount of $2,562 for overdrawn account and for checks outstanding. P. 305.

The statements appear at pages 338 and 339 of the Record.

The Bank credited Respondents with all collections on its collaterals; thus they credit, on the date of the statement, 6th to 12th January, 1883, as proceeds of cash collaterals, $5,257.

And the arrangement was entered into by Respondents on this basis.

As further security for the balance of the claim, amounting to about $49,500, the Bank held:—

1st. The Sleeper mortgage, $11,208.00.

The Adams' mortgage, 3,300.00.

These mortgages are mentioned in the balance-sheet of the Company itself, at page 305 of the Record, for slightly larger amounts, the difference probably arising from accrued interest unpaid. See also evidence of Mr. Austin, p. 375, ll. 37–43.

2nd. Their registered judgment against the property of the Company for say $23,700.

(Record, p. 339.)

3rd. Their claims against third parties liable on notes given to the Company and discounted with the Bank, of which the Bank subsequently collected and credited to Respondents the notes of one Ellerhausen, amounting to $5,300.

(Record, p. 187, sched. 109.)

4th. A quantity of bone black or crushed bone, set down in the statement as value $3,400, but estimated by the Respondents themselves as worth $4,000, and of cordwood value $500. So that even in the event of paying the Bank's claim and of the Sheriff's sale being set aside, the Respondents have got very good value for their money. With their privileged claims they are masters of the situation as against the Company's properties, and can acquire a legal title under their mortgages if their present title is invalid. Compared to the enormous profit they were figuring on making by turning over the property, their risk was small indeed.

Respondents understood they were to get all these securities on payment of the Bank's claim, and they insisted on their rights, as Appellants have shown by reference to the letters and evidence quoted above.

60. A thorough appreciation of the facts leads to the conclusion that the Respondents intended, by the agreement which they entered into with the Bank, that they should be subrogated in all its rights to the property, and that the judgment of the Court of first instance was correct in holding that the Bank

simply acquired the real property at the Sheriff's sale on behalf of the Respondents, and that the latter pledged themselves, in return for being subrogated in all the Bank's rights, to pay the Bank's claim and the adjudication price.

VII.

61. The subsequent dealings with the property by the Respondents bear out this contention.

The judgment of the Superior Court (Record, p. 17, lines 40 et seq.) holds that after the commencement of the action to set aside the Sheriff's sale, to which Rough was made a party, and after the pretended seizure by the Government, which occurred on the 6th of October, 1883, Rough, McDougall and Beard continued to exploit the said immoveable and to sell part of the machinery without making any complaint of the pretended trouble, and that they even made payments on account of the price of sale since the commencement of the Appellant's action against them.

The judgment holds also that upon the said sale of effects, tools, machinery and other objects detached from the factory, the Defendants have realized more than $10,000, which they have appropriated.

There is no doubt of the correctness of this holding, and Appellants contend that this fact must be taken as indicating that the Respondents acquiesce in the possession. In fact, they are no longer in a position by their own acts to put the Appellants in the same position with regard to the property and other assets which they acquired as they would have been in before the sale.

62. In February, 1883, as already mentioned, the Bank sold, under the provisions of the Banking Act, the collaterals which were hypothecated to them by the Company, and upon which the Bank had an undoubted lien. It did this for the account of the Respondents, from whom they had authority to bid this property up to the extent of $4,000. The property was bid in for $400, and handed over to Mr. McDougall, the Respondents being merely charged with the expenses of the sale.

(Record, pp. 278–9, and Letters, Schedules 101, 102, 103, 104 and 105; and Record, pp. 182, 183 and 184.)

63. The statements filed by Rough (Record, pp. 204 to 227) show that Respondents were continually selling portions of the property from which they had realized up to 1888, (date of trial), $5,179, in addition to rentals of $150 more. These amounts were collected at Coaticooke.

In addition, there was collected by McDougall at Montreal, up to September, 1888, as the result of sales of other portions of the property, the sum of $4,994, making an aggregate, as the Court of first instance held, of over $10,000. They continued selling the machinery, bricks and everything else that was saleable, including a large quantity of moveable effects, which had no connection whatever with the title to the property, and they had no consent or understanding with the Bank that they should do so without prejudice to the rights which they now seek to exercise to set aside the sale.

64. As supporting the learned Judge's holding, in the Superior Court, that Respondents have made payments on account and without protest since the institution of the trouble complained of, the Appellants refer to the letters of the 5th of September, 1883, from Rough to Austin (Schedule 110, p. 187), by which Respondents paid $2,500, proceeds of the price of sale of two boilers, to be applied in reduction of the Bank's claim, on the 9th November, 1883 (Schedule 111, p. 188); of the 9th June, 1884, from Rough to Austin (Schedule 112, p. 189); and of the 11th July, 1884, from Rough to Austin (Schedule 113, p. 190). By the last two letters Rough authorizes the Bank to draw upon him for $103 and $240, respectively. The action of the Bank of Hochelaga was instituted in June, 1883, the year previously. The action of the Bank against the Respondents was instituted on the 10th of May, 1884, and served on the 13th. As a matter of fact, the Respondents are still in the possession of the property, and are collecting its revenues and exploiting it as far as possible.

65. The action of the Respondents themselves has made it impossible to put the parties in the same position as before the sale was entered into, and bears out the interpretation which the Appellant puts upon the agreement, that it was one by which the Respondents were to acquire the rights of the Bank in and to all their claims against the Company, and was not merely an isolated transaction of purchase of the real property with warranty of their title.

It will also be noticed that Rough, on his own account, notarially protested against the claim of the Government for Customs' duties on the 25th of October, 1883. (Record, p. 229.) By this protest he alleges that he was the owner of the property in question and of the machinery which had been seized.

66. The judgment of the Court of Queen's Bench ignores these acts of possession on the part of the Respondents and their treatment of the property, but holds that the Respondents were put in default by the action instituted by Rough to annul the sale. This action was instituted only on the 5th of September, 1884, and was not served until the 22nd of the same month. By this action Rough makes no reference to the claim of the Customs until the time of his amendment four years later.

(Record, pp. 532-533.)

67. With respect to the action of Rough, though the Appellants have endeavored to deal with the whole case in the foregoing statement, it should be remarked that there is no proof of record of any eviction. He remains in actual possession. He has promised to pay at certain fixed periods, but has failed to do so, notwithstanding his occupation of the property and the sales he has made from it. He knew the troubles he complains of when he took his title. The authorities above quoted directly apply.

68. The Appellants respectfully contend accordingly, that the judgment of the Court of Appeals should be set aside in the case of the Eastern Townships Bank against the Respondents, in so far as the judgment requires security to be furnished by the Bank as a condition of the payment of the amount due

by Respondents to the Bank, and that in the case of Rough against the Bank, the action should be dismissed, and the judgment of the Superior Court in both cases restored, for the following reasons :—

1. Because the Respondents McDougall and Beard, desiring to purchase the property of the Sugar Company advertised to be sold at Sheriff's sale on 12th January, 1883, proposed that the Bank should acquire the title to it at that sale, and should afterwards transfer that title to Respondents.

2. Because as a result of this proposal and the negotiations that followed, it was finally agreed that if the Bank should buy the property at that particular sale, the Respondents should have the right to take the title so acquired for the amount of the Bank's claim, and the amount which the Bank might have to pay to acquire the property at the sale by the Sheriff.

3. Because it was distinctly stipulated by the Bank, that if it should acquire the property at the Sheriff's sale, it would transfer (deed) to Respondents, "without any warranty," and Respondents expressly agreed to this stipulation.

4. Because, in consideration of the payment of its said claim, the Bank agreed to transfer its title to all collaterals held by it to secure the claim, as well as the title so acquired to the realty.

5. That all the possible defects in the title to the property which the Bank might acquire at the sale by the Sheriff, and all the dangers of eviction alleged by Respondents, were well known to Respondents McDougall & Beard at the time of their agreement with the Bank, and prior to their acceptance from the Bank of this title.

6. Because the said property was brought to sale in execution of a judgment owned and controlled by Respondents, and the Respondents had full knowledge of all proceedings had thereunder, and were content and satisfied to accept the title resulting from such proceedings without any warranty of such title on the part of the Bank.

7. Because Respondents themselves, having made their agreement (or "arrangement") with the Bank, forced on the Sheriff's sale, and resisted an application to stop it, in order that the Bank might become the purchaser and transfer its title so to be acquired to them.

8. Because, relying upon their agreement with the Bank, the Respondents McDougall & Beard refrained from bidding at the sale by the Sheriff, and the Bank bid upon and purchased the property and paid the adjudication price, and the Respondents immediately demanded that Appellants should "get" the deed from the Sheriff, so that the title thus obtained might be transferred to them upon the terms and conditions hereinbefore mentioned, and which they formally accepted.

9. Because the Bank never entered into possession of the property, but forthwith, and as soon as the necessary deeds could be prepared in pursuance of the agreement between the parties, transferred the property at the demand of MacDougall & Beard, who wished to conceal the fact that they were the actual purchasers, to their *prête-nom* Rough: and the deed of transfer discloses distinctly that the title of the Bank is the title acquired at the Sheriff's sale, and the descriptions of the property are in the precise language used in the Sheriff's deed and notices of sale.

10. Because Respondents, immediately after the Sheriff sale, entered into possession of the property, and have since remained in possession of it, have exploited it so far as possible, and have from time to time, and during the progress of the present litigation, sold large portions of it realizing therefrom up wards of $10,000 which they have retained.

11. Because the Respondents under the agreement above mentioned asserted their rights to the moveable assets of the Company pledged to the Bank; took possession of the same without warranty and at their own risk, and without other consideration than the payment of the expenses incurred by the Bank to acquire a title:—and they have sold and disposed of the same.

12. Because the Respondents even assumed the payment of the adjudication price paid by the Bank to the Sheriff, and it results from the agreement and all the acts of the Respondents prior to, at, and subsequent to the Sheriff's sale, that the Bank in reality purchased the property on behalf of Respondents and as their agents in that respect.

13. Because all amounts received by the Bank from collaterals and notes of third parties discounted by the Company with the Bank have been applied in reduction of the claim of the Bank against Respondents with their knowledge and consent, and the Respondents have paid to the Bank sums on account, and acknowledged their indebtedness, before and since the institution of the present action.

14. Because the formal deed of transfer of the 19th January 1883, from the Bank to Rough cannot be dissociated from the acts of the parties and the agreements existing between them, and so construed and considered amounts to nothing more than a formal deed of transfer of the title acquired at the Sheriff's sale without any warranty.

15. Because the Respondents agreed to pay the amount of the Bank's claim, with full knowledge of the causes which they allege as troubling their possession, and which might affect the title which they agreed to accept, and the Bank has complied with its obligation in making delivery of such title as it acquired to the realty and to the moveable assets and collaterals of the Company.

16. Because there is error in the judgment of the Court of Appeals, and specially;—in assuming that the Bank forced the property to sale;—that the Respondents did not wish the sale to take place;—in ignoring the express terms of the agreement between the parties, and the acts and deeds of the parties preceding, accompanying and following the transfer of the realty;—in assuming that the Bank purchased the property on its own account and not on behalf of Respondents;—and in assuming that the sale to the Respondents was made with warranty of title.

17. Because there is no error in the judgment rendered by the Honorable Mr. Justice Taschereau, in the Superior Court (Record page 528 et seq.), and said judgment should be restored.

DONALD MACMASTER.
ALBERT W. ATWATER.

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,
(Respondent in Court of Queen's Bench, and Plaintiff)
APPELLANT,

AND

ANDREW ROUGH *et al.*,
(Appellants in Court of Queen's Bench, and Defendants)
RESPONDENTS,

AND

THE EASTERN TOWNSHIPS BANK,
(Respondent in Court of Queen's Bench, and Defendant)
APPELLANT,

AND

ANDREW ROUGH,
(Appellant in Court of Queen's Bench, and Plaintiff)
RESPONDENT.

APPELLANT'S CASE.

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