Privy Council Appeal No. 25 *of* 1913.

Dame Susannah H. Swan, since deceased, and others - - *Appellants*

v.

The Eastern Townships Bank - - - - - *Respondent*

FROM

THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC. (APPEAL SIDE).

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 3RD AUGUST, 1922.

Present at the Hearing:

VISCOUNT HALDANE.
VISCOUNT CAVE.
LORD DUNEDIN.
MR. JUSTICE DUFF.

[*Delivered by* VISCOUNT HALDANE.]

It will be convenient, before dealing with the questions which remain in this long and complicated litigation, in the first place to state what their Lordships take the salient features in its history to be.

In the autumn of 1882 the respondent bank was a creditor of the Pioneer Beetroot Sugar Company, which carried on business in the Province of Quebec, for about $40,000. The real property of the company had been attached by another creditor, named Fairbanks, and was to be sold by the Sheriff on the 12th January, 1883. One John McDougall was a creditor and a shareholder of the company, and its vice-president and treasurer. Beard was the lessee of a factory belonging to it. Rough was the book-keeper of McDougall. These three, all now deceased are respectively represented as regards their interests, in this appeal by the appellants. McDougall and Beard wanted to purchase the real property already referred to of the company, and they made an arrangement, in order to secure this, with the bank. It was

recorded in two letters dated the 6th and 8th January, 1883, written by Mr. Farwell, the general manager of the bank. By the first of these letters the bank agreed that in case they should become the purchasers of the sugar company's property advertised to be sold at the sale on the 12th January, they would sell it to McDougall and Beard within ten days for certain amounts; by the second it was stipulated that the whole debt due from the company to the bank, with interest and costs was to be paid, and that they should convey without warranty. It was further provided that the agreement was to remain in force for ten days, subject to the acceptance by McDougall and Beard of its conditions. The respondent bank accordingly affected to purchase at the Sheriff's sale. On the 19th January of the same year the bank made a notarial conveyance of the property to Rough on behalf of the purchasers for the price of $49,439 and 70 cents, of which they acknowledged to have received from them $9,439 and 70 cents. As to the remaining $40,000, the purchasers hypothecated the property bought, in order to pay what remained due to the bank by instalments, the whole to become due if default was made in the payment of any instalment. Notwithstanding what had been said in the second letter, the bank in the deed granted warranty against their own acts. The conveyance was taken in the name of Rough, by arrangement with McDougall and Beard. The former was a mere *prête-nom* of the two latter, and these immediately entered into possession in virtue of the conveyance to him.

In May, 1884, the bank began an action against Rough, McDougall and Beard for the balance due to them under the transaction; and Rough, in September of the same year, began the action out of which this appeal arises, to set aside the conveyance of the 19th January, 1883. Rough's case was that he was troubled in his possession and in danger of eviction, by reason of the bank having committed irregularities in its acquisition of the property, and that another creditor of the sugar company, the Hochelaga Bank, in June, 1883, had taken proceedings to set aside the sale to the respondent bank, by reason of these irregularities. The defence of the bank to Rough's action was that they had bought the property at the sale on behalf of McDougall and Beard, that they had sold to them without warranty, and that the only grounds for impeaching the sale arose out of the very agreement with them under which it had acted. Judgment was ultimately given, in the Hochelaga Bank's petition in February, 1890, setting aside the Sheriff's sale at which the respondent bank had bought, because of gross irregularities in the action of that bank. In March, 1890, the Superior Court (Taschereau, J.) gave judgment in the two actions (which had been consolidated for trial) of the bank against Rough, and the cross-action for rescission. In the action of the bank Rough, McDougall and Beard were found liable for a balance due of $31,717.16. The action of Rough to set aside the transaction was dismissed. Among the grounds given for this was that any irregularities that had been

committed were committed with the knowledge and on behalf of the defendants themselves. An appeal was brought to the Court of Queen's Bench of the province, and on the 23rd June, 1893, that Court reversed the judgment in vital points, on the ground that the bank had granted warranty in the conveyance against its own acts, that although it had entered into an agreement for resale to McDougall and Beard, it was acting in the purchase on its own account and not as their *prête-nom*, and that the allegation was really that the bank had themselves committed serious irregularities in obtaining the sale to which the warranty in the deed against their own acts extended. The Court of Queen's Bench therefore decreed that Rough, McDougall and Beard should be declared liable to pay to the bank the balance of the price, but that there should be a stay of execution until the bank should have put an end to the trouble about title and the danger of eviction, or had given security under Article 1535 of the Civil Code against these. The judgment went on to refer back the proceedings to the Court of First Instance to proceed *de novo* in accordance with these directions, and to do such justice as would accord with them, and in particular to take cognisance of the judgment of nullity which had been obtained by the Hochelaga Bank.

An appeal to the Queen in Council followed, but the judgment of the Court of Queen's Bench was affirmed. Lord Herschell, who delivered the judgment of the Judicial Committee, concurred in the view of the Queen's Bench that the purchase by the bank at the sale by the Sheriff was not one merely by a mandatory of McDougall and Rough, but was one of purchase by a principal, with an obligation to re-sell. He further held that the bank were parties to the irregularities which rendered the sale void, and that even on the footing of there having been no warranty by the bank it was clear that the purchase by the bank had to be a valid and effectual one, and not an unreal one with vice in it, as was the case. McDougall, Beard and Rough had applied to put in the judgment in favour of the Hochelaga Bank, but this application had been refused on technical grounds, although a stay of proceedings against them to recover the balance of price under the conveyance had been granted until the danger of eviction had been disposed of. The action brought by Rough against the bank had been remitted by the Queen's Bench to the Court of First Instance, to be proceeded with according to the rights and obligations of the parties as defined and established by the judgment of the Court of Appeal, but with the regular introduction in the cause of the decree of nullity obtained by the Hochelaga Bank. The Judicial Committee approved of this course in affirming the judgment of the Queen's Bench.

The judgment thus given was no doubt so far interlocutory only. But yet so great is the weight of the opinions expressed that even if their Lordships saw reason to question it, they would be reluctant to do so. But no such question arises inasmuch as their Lordships, for reasons to be stated later on, find themselves

in full agreement with the conclusions thus come to by the Judicial Committee in 1895.

From this point the litigation entered on a fresh phase. From the time of the sale in 1883 to 1896 McDougall had remained in possession of the property, and had even sold portions of it. In February, 1896, the bank, however, took steps to comply with what it interpreted the judgments of the Queen's Bench and the Privy Council to allow, and to remove the danger of eviction even at that stage, and although Rough's action had been for repudiation. A new curator of the property of the sugar company was appointed on their application. In May the property was seized at the instance of another creditor and was brought to sale by the Sheriff. The bank obtained an adjudication of the property, excepting two small lots which were bought by the appellants. Just before this, in May, 1896, the appellants, as the representatives of the original purchasers who had died, had applied in the action brought by Rough against the bank, alleging the judgment in favour of the Hochelaga Bank setting aside the sale, and claiming that further sums paid to the bank should be brought into the account to be taken. The appellants appear to have succeeded, on an *ex parte* application, in obtaining an immediate inscription of the action for trial. It was heard in the Superior Court by Curran, J. Taking the view that he had all necessary materials, he gave judgment on the 25th June, 1896 for the plaintiffs, set aside the sale by the bank to Rough, and ordered the bank to reimburse to the present appellants certain sums of money. Thereupon the bank filed a petition for a review, in the nature of a Requête Civile, praying that the judgment of Curran, J., might be revoked by the Court of First Instance itself, and the case fully tried. The reason assigned for the application was that the plaintiffs had proceeded, when they obtained the hearing before Curran, J., behind the back of the bank and their advisers, and *ex parte*, and that there had been surprise and haste, such that the bank had had no proper chance of presenting its case. Under the procedure in Quebec such an application is one which the Court of First Instance itself can entertain, without the necessity of procedure by way of appeal.

To the petition of the bank the appellants put in a demurrer. On the 4th March, 1897, Gill, J., allowed it, and dismissed the petition of the bank. On appeal to the Court of Queen's Bench his judgment was affirmed. But on appeal to the Supreme Court of Canada the judgment was reversed on the 21st November, 1898, and the demurrer was overruled, on the ground that although the question was on the face of it one of mere procedure, there had been in fact a miscarriage of justice which rendered it necessary that the judgment of Curran, J., should be reconsidered adequately.

In the end the action came on for trial in the Superior Court before Archibald, J., on the 29th April, 1911. That learned Judge. had before him the judgment given in favour of the Hochelaga Bank by Taschereau, J., on the 20th February, 1890. A motion had been made as long ago as the 15th November, 1892, in the

Court of Queen's Bench for the purposes of the appeal from the judgment in the action of Rough of Taschereau, J., delivered on the 10th March, 1890, and varied, as already stated, by the Queen's Bench on the 23rd June, 1893. This motion was for permission to introduce into the proceedings on the appeal the judgment in the Hochelaga Bank's case. It was ordered that this motion should come on with the hearing of the appeal on the merits. It appears from the judgment of the Queen's Bench that it treated as improper the proposal to take direct cognisance of the Hochelaga judgment, inasmuch as it had not been before the Court of First Instance. The motion was therefore refused, but with a direction that the judgment should be introduced properly on the new trial ordered. Archibald, J., when the case was tried in 1911, took the view that the Court of Queen's Bench must have thought that the bank might even at the stage before them, procure a title in such a way as that McDougall and the others would be compelled to pay the price. He thought, further, that the title from the bank to Rough had never been declared void by any judgment, inasmuch as the judgment of Curran, J., which declared it void, had been set aside in the proceedings on the Requête Civile. He held that McDougall and Beard having entered into possession, and the bank, by its subsequent purchase at the later Sheriff's sale in 1896, having removed every possible cause of trouble before the plaintiff had succeeded in obtaining a final judgment, they had made out a good title in time. He relied on Article 1488 of the Civil Code, which provides that a sale is valid if the vendor subsequently becomes proprietor of the thing sold. He therefore delivered judgment, dismissing the action, maintaining the Requête Civile and the bank's plea of *puis d'arrein continuance*, and setting aside the judgment of Curran, J.

The case went on appeal to the Court of Queen's Bench, where judgment was delivered on the 31st October, 1912. The judgment of Archibald, J., in the Superior Court was affirmed by a majority of three to two, the Chief Justice, Trenholme, J., and Carroll, J., being for affirming, and Gervais, J., and Lavergne, J., being for reversing. Carroll, J., delivered the judgment of the majority.

After setting out the history of the case he states the conflicting views of the parties. The appellants were contending that the meaning of the judgment of the Queen's Bench, as affirmed by the Privy Council, was that the proceedings were referred back to the Superior Court merely in order that the decree of nullity obtained by the Hochelaga Bank might be introduced to enable the Court to give formal judgment in accordance with it. The respondents, on the other hand, denied this and said that the Queen's Bench had shown by its judgment that it meant to maintain the contract of sale, and had therefore condemned the appellants to pay the price, subject to the respondents putting an end to the difficulty about title or giving security against eviction. The respondents had obtained a good title by getting a curator to the sugar company nominated, and the curator

had offered such a title. All this appeared in the proceedings on the Requête Civile and in the plea *puis d'arrein continuance.* Carroll, J., held that Archibald, J., was right in thinking that the title had been made good within Article 1488 of the Civil Code, and in time. For the action brought by Rough against the respondents had not been disposed of by a judgment, although a title had been offered more than once. Moreover, Rough and McDougall had been in possession since 1883, and had dealt with the property and lessened its value. As long as the sale was not annulled Carroll, J., thought that the action must fail if the vendor had become proprietor.

Gervais, J., delivered a dissenting judgment, in the result of which Lavergne, J., concurred. Gervais, J., held that by Quebec law a sale of the property of another might well be valid, and that the argument of the appellants for the application of a contrary principle could not succeed. Nor did he think that the subsequent ratification was insufficient by reason of two parcels of land comprised in the sale of January, 1883, not having been included in the second sale ; for the reason of this was the action of the appellants themselves. Nor was a point made by the appellants material, that at the suit of the Crown the factory buildings had been seized for non-payment of duties, for this difficulty had been got rid of by arrangement with the Government. But he did think that where a plaintiff has taken proceedings to have a deed of sale declared void, he must be taken to have avoided what was until his demand only voidable. A void obligation had no existence at all. No doubt there was authority for the other view, and the Supreme Court of Canada had given some countenance to it ; but it was in his opinion inconsistent with what had been finally decided in the present case by the Judicial Committee of the Privy Council when it affirmed the judgment of the Court of Queen's Bench. Nor did the fact that the appellants had entered into and remained in possession make any difference. Both parties had asserted titles of ownership, and while it might be right on a proper application to direct an account of profits received by the appellants, objection to the rescission based on their action could not be competently taken in view of the course the parties had adopted. He also held, apart from this, that the offer to the appellants of the adjudication of the 17th July, 1896, was not a sufficient offer of a complete new title or a ratification of that purporting to have been conferred by the conveyance from the respondents of January, 1883. The respondents had obtained no registered title by the transaction of 1896, and there was doubt about their right against the Sheriff. But the most important difficulty, in the view of the learned Judge, in the way of the respondents was the judgment of the Judicial Committee ; for when the judgment there was read along with the order of the Queen's Bench which it affirmed, it appeared that its meaning was that if the judgment of nullity obtained by the Hochelaga Bank was introduced into the proceedings the deed of sale of 1883 must be deemed to be wholly gone.

Their Lordships, having stated the sequence of events in this litigation, now proceed to the construction which in their opinion must be placed on certain phases of that sequence. They agree with the view taken by Gervais, J., that the combined effect of the judgments of the Court of Queen's Bench in 1893 and of the Privy Council in 1895 really disposed of the litigation in favour of the appellants. By the first of these judgments it is quite true that the appellants were condemned to pay to the respondents the balance remaining due under the deed of 1883, but the declaration to this effect is immediately cut down by a stay put on its operation until the danger of eviction was removed by the respondents or security given under the Code. That this was in the view of the Court no unimportant qualification is indicated by the costs of the proceedings having been ordered to be paid by the respondents. A new trial was ordered to take place with the judgment of nullity obtained by the Hochelaga Bank introduced in order to be considered by the Judge at the new trial in its full effect. If it is asked why the question was dealt with in this somewhat hypothetical fashion, the answer is plain. The motion for the introduction into the proceedings of the Hochelaga Bank's judgment had not been before the trial Judge because it had been made only in the Court of Appeal, and the latter Court did not think it in accordance with the rules of procedure to deal with it for the first time on an appeal. A new trial was therefore required in order to give effect to this judgment. The circumstance, however, that the Court found itself precluded from treating the Hochelaga judgment as formally before it, did not prevent that Court from laying down that if the judgment resulted in the total setting aside of the sale in 1883 to the respondents it would make an end of the case against the appellants, both in the respondents' action and in that of Rough. The Judges could not treat what they knew of but what had not been yet proved to have taken effect as more than a menace of eviction, and it was to a mere menace that they temporarily confined this form of their judgment.

When the cases came before the Judicial Committee of the Privy Council the intimation of opinion was not less definite. In the judgment delivered by Lord Herschell the suggestion was rejected that the respondents in purchasing acted as mandatory for McDougall and Beard. The correspondence of 1883 was held to negative this. But not the less their Lordships held that the respondent bank were not strangers to the act which rendered the sale by the Sheriff invalid, and that the warranty in the deed of conveyance against the sellers' own acts had not been complied with. Even if there had been no warranty their Lordships were of opinion that the respondent bank could not maintain its case.

For it was clear

"that the basis of the whole transaction was to be a purchase by the bank from the Sheriff, and this must mean a valid and effectual purchase and not a mere apparent or pretended one. The circumstances show that the bank did not really become the purchasers, not by reason of any defect in

the prior title, but because of a vice in the sale itself, which prevented its being a sale. It was only in the event of their becoming the purchasers that the terms and conditions of the letters of January, 1883, became applicable, and their Lordships think that the bank never did, within the true meaning of these documents, become the purchasers."

Their Lordships on the present occasion have gone through the evidence afresh, with the Hochelaga judgment now formally before them, and they find themselves in full agreement with the view taken by the Judicial Committee in 1895. It follows that as soon as Rough began his action to set aside the sale the transaction of January, 1883, became, not voidable merely, but void—that is to say, a nullity.

The question that remains is whether the respondents, under these circumstances, can derive any assistance from the provisions of the Civil Code.

By the Roman law and the old French law, as in other well-known systems, an agreement to sell did not transfer the property so sold. It simply imposed on the seller an obligation to confer on the buyer peaceable possession in the capacity of proprietor. But the Code Napoleon altered this, and introduced the principle that the agreement normally passes the property without more. The Province of Quebec has adopted the substance of this principle. By Article 1487 of the Civil Code the sale of a thing not belonging to the seller is declared null, subject to certain exceptions; but by Article 1488 the sale is declared valid if the seller afterwards becomes owner of the thing sold.

It appears to their Lordships that these articles do not render absolutely void every sale where the seller does not at the time of sale own the things he sells. If the contract were to transfer specific property at once the articles may well have that effect; but if the contract were one to transfer in the future, not a specific thing but some quantity of a general description of article, a contract of the executory character which the Roman law recognised may in such cases be valid. It is therefore necessary to exercise much caution before coming to a conclusion that when the expression "nullity" is used in the Civil Code of Quebec it can be assumed to mean what it would import if used in English law. It may really signify nullity arising only out of a demand or rescission legitimately made. Their Lordships consider the importance of arriving at a reliable conclusion as to the Quebec jurisprudence on the meaning of the two articles so great that, excepting in a case where there have been full arguments before the Courts there on the point, they are reluctant to express themselves upon it. It may be that nullity, as the word is used in the two articles, means neither a mere title to avoid what is only voidable nor the mere non-existence of the contract.

But on this difficult question, on which the Judges in the Courts below have differed, it is not necessary for their Lordships, to pronounce. For reasons which they have already given fully they think that the real agreement made in January, 1883, by

the respondent bank was, as said by Lord Herschell in 1895, to make a valid and effectual purchase from the Sheriff as a preliminary basis for their transaction with McDougall and Rough. It was only a subject of title that was to be really and effectually so acquired by the bank that formed the subject of the sale to McDougall and Rough. Such a purchase was never made, not because of any defect in prior title but because of vice in the sale itself, which prevented it from being a sale at all. There was therefore no agreement capable of having the articles in question of the Civil Code applied with a view to ascertaining whether defects in title could be cured. Once the facts were established the agreement turned out to have had no binding effect of any kind.

The result is that their Lordships think that the judgment of Curran, J., of the 25th June, 1896, was right, and that this should be restored and the judgment maintaining the petition in revocation reversed. The appellants are entitled to have their costs here and in the Courts below except the costs allowed to the respondents by the judgment of the Supreme Court of Canada of the 21st November, 1898.

They will humbly advise His Majesty in accordance with this judgment.

In the Privy Council.

DAME SUSANNAH H. SWAN, SINCE DECEASED, AND OTHERS

v.

THE EASTERN TOWNSHIPS BANK

DELIVERED BY VISCOUNT HALDANE.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane W.C.

1922.