1879
*Nov. 5.
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JOHN JESSE REEVES, (PLAINTIFF'S REPRESENTATIVE) ..... APPELLANT;

AND

CHARLES OVIDE PERRAULT, ASSIGNEE TO THE INSOLVENT ESTATE OF F. GERIKEN ..... RESPONDENT.

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

Hypothecary action—Delegation of payment in hypothec—Sale of property en bloc prior to acceptance of delegation—Personal liability under delegation—Ventilation.

On the 14th October, 1874, Mrs. *R.* sold to one *Q.* the south half of the cadastral lot No. 4679, in the city of *Montreal*, and on the same day Mrs. *C.* sold him the north half of the same lot. On the 17th October, 1874, *Q.* sold to *G.*, and to *L.* & *R.* three undivided fourths of the two properties *en bloc* for a sum, of $49,612.50, in deduction of which purchasers paid cash $22,246.87½, and covenanted to pay the balance for *Q.* to Mrs. *R.* Mrs. *R.* was not a party to this last deed, and did not then accept the delegated debtors. In June, 1876, Mrs. *R.* sued *G. et al.* hypothecarily for sums due to her on the deed of sale by herself to *Q.*, and thereupon *G.* abandoned (*delaissé en justice*) his undivided fourth of the said south half of lot No. 4679. On the 4th December, 1877, Mrs. *R.* accepted the delegation of payment made in her favor by *Q.*, in the deed of the 17th October, 1874, and afterwards brought the present action against *G.* for one-third part of the debt of $27,356.63, with interest due her in virtue of said delegation of payment. *G.* contended that the acceptance of the delegation of payment being subsequent to the hypothecary action and his *delaissement* was null and of no effect, and therefore he could not be sued for any portion of the money.

Held,—That, under these circumstances, *G.* was relieved from personal liability under the delegation of payment, but only to the extent of his interest in the south half of said lot No. 4679,

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

and remained liable for his interest in the remainder of the property, the amount to be estimated by a valuation (*ventilation*) of the south half of the lot proportionately to the price of the whole property.

APPEAL from a judgment of the Court of Queen's Bench for *Lower Canada* (appeal side), confirming the judgment of the Superior Court (*Montreal*), and dismissing the appellant's action (1).

This was an action brought by *Dame Marguerite E. V. Reeves* against *Frederick Geriken*, to recover $8,937, to wit: $6,841.40, as being the amount of three instalments of $2,280.46⅔ each, on the sum of $9,121.87½, balance due on a sale made by one *Joseph Quesnel* to *Frederick Geriken*, which balance the latter agreed to pay to *Mrs. Reeves* on account of a larger amount due her by *Quesnel*, and $1,915.59 for interest on the $9,121.87½, up to the 14th of October, 1877.

During the pendency of this suit *Dame M. E. V. Reeves* (plaintiff) died, and *F. Geriken* (defendant) became insolvent; and the present appellant, as *Dame M. E. V. Reeves'* universal legatee, was substituted as plaintiff, and the present respondent, as assignee of the insolvent estate of *Geriken*, was substituted as defendant.

The facts are fully stated in the judgment of the Court hereinafter given.

Mr. *Doutre*, Q.C., for appellant, contended:—

That the respondent could not, by surrendering his interest in the property in a former action (hypothecary) relieve himself of his personal obligation

The respondent became bound to the plaintiff (now appellant), by the acceptance of the delegation of payment from *Quesnel*, for the whole amount he agreed to pay, on the principle (1) that, in the absence of delegation, *Quesnel* could claim the whole from him; and the plaintiff, exercising the action of *Quesnel*, claims on the

(1) 2 Legal News 67.

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same ground; if *Quesnel* were plaintiff, the respondent would have no answer in law or equity to oppose, and the appellant, representing *Quesnel*, cannot be answered otherwise than *Quesnel* could.

In matter of hypothecs, every particle of land is hypothecated to the whole amount of the claim secured by such hypothec; the surrender of a portion left the remainder, to-wit: the portion sold by Mrs *Cadieux*, hypothecated for the whole purchase money due to plaintiff, and the personal liability still subsisting, combined with the hypothec, prevented respondent from obtaining a release by surrendering a portion.

Admitting, by hypothesis, the principle invoked in the plea and in the judgment, the respondent was not impleaded in this action in respect to the land he surrendered. Art. 2013 C. C. and Art. 736 C. C. P. See also *Merlin* (1)

At the time the plaintiff brought her hypothecary action, she was not vested with the rights of *Quesnel*, either personal or hypothecary, unless she was vested by the mere registration of, *Quesnel's* sale to respondent, according to the doctrine held in *Pattenaude & Leriger* (2), which, after all, is immaterial. See also *Ryan* v. *Halpin* (3).

The only relief the respondent could claim from his surrender was that, through it, he had paid portion of his purchase money, such portion being determinable by means of a *ventilation;* but the respondent, not having pleaded any payment, there is no occasion for that enquiry.

Mr. *Pagnuelo*, Q.C., for the respondents, contended:

1st. That the amount claimed is the instalment and interest which the defendant had promised to pay *Quesnel*, represented by plaintiff, for the purchase of $\frac{1}{4}$ of the south portion of lot 4679.

(1) Vo. Ventilation. (2) 1 L. C. J. 106,
(3) 6 L. C. R. 61.

2nd. He has been evicted from this ¼ by a hypothecary creditor of *Quesnel*, with the knowledge and sanction of *Quesnel*, the vendor.

3rd. *Quesnel* was bound to repel this hypothecary action, or to indemnify the defendant; therefore, he is bound to return defendant the portion of the price which he has received cash from him at the time of the sale, and for the same reason he cannot claim the balance of the price; it would be absurd to make a man pay for a property from which he has been evicted for a cause whereof the vendor is responsible.

4th. The plaintiff, who claims to exercise the actions of *Quesnel*, is repelled by the same plea or exception of warranty.

5th. Moreover, there never was a delegation, even imperfect, in favor of plaintiff against defendant. She refused to accept defendant as her debtor, preferring to exercise her own hypothecary rights; this repudiation of the proffered delegation concludes her and liberates the debtor for ever.

6th. The plaintiff, even if she had any right under this delegation of payment without a formal acceptance thereof, has entered with defendant into a judicial contract, duly executed, which had the effect of depriving defendant of the land he bought, and this finally settles the question.

The learned counsel relied on the following authorities and cases in support of his proposition: *Duvergier*, De la Vente (1); *Seaver* v. *Nye* (2); *Dubuc* v. *Charron* (3); *Banque du Peuple* v. *Gingras* (4); Art. 554 C. C. P.; Arts. 2016, 2017, 2058, 2061, 2062, C. C.; *Troplong*, De la Vente (5); *Troplong*, Hypot heques (6); *Lauriere*, Cout. de Paris (7).

The judgment of the court was delivered by—

(1) 2 Vol. No. 24.
(2) 8 L. C. R. 221.
(3) 9 L. C. Jur. 79 & 106.
(4) 2 L. C. R. 243.
(5) 1 Vol. Nos. 487 et Seq.
(6) No. 827 et Seq.
(7) 1 Vol. pp. 779 & 780.

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TASCHEREAU, J.:—

The late dame *M. E. V. Reeves*, plaintiff in the court of first instance, alleged in her declaration that by deed of sale of 14th Oct., 1874, registered on the 20th of the same month, she sold to *J. A. Quesnel*, Sheriff of *Arthabaska*, a lot of land described at length, and designated as part of No. 4679, on the plan and book of reference made for the parish of *Montreal*, and composed of two pieces of land, the first of which containing 41 arpents and 13 perches, the second containing 28 arpents and 37 perches, the whole adjoining a lot of land, sold the same day, to the said *Quesnel*, by one dame *Cadieux*, also part of said cadastral lot No. 4679; that it was agreed in the said deed, that the said sale was made for the sum of $700 per superficial arpent, which, from the calculations made by the surveyor and accepted by the parties to the deed, amounted to a total sum of $48,650, in deduction of which the purchaser paid cash $12,162.50; and as to the balance, to wit $36,487.50, the said purchaser promised to pay it to the said plaintiff, in four annual and consecutive payments of $9,121.87½ each, the first of which would be due and payable on the 14th October, 1875, and every other, at the same date, at each consecutive year, with interest at 7 per cent, reckoning from the date of the said deed, said interest payable semi-annually; and for surety of the payment of the said balance, and of the interest to accrue, the said lands were declared hypothecated by privilege of *bailleur de fonds*, vendor; that the said purchaser had taken possession of the said lands from the date of the said deed; and that there was due and owing to the said plaintiff, on the principal of the said purchase money, $27,365 62½, and $7,662.36 for interest accrued on the said sum of $36,487.50, since the date of the said deed; that the two sums added together formed $35,027.48½, on which she had received only $732.89, to be

imputed on the interest; that by another deed of sale passed on the same day, dame *Domitilde Meunier*, wife separated as to property of *Manassès Cadieux* and by him duly authorized, sold to the said *J. A. Quesnel*, present and accepting, a lot of land contiguous to the lots above mentioned, composed of two pieces, being all the north-east part of said lot 4679 of the cadastral plan and book of reference of the parish of *Montreal*, containing altogether 41 arpents and 49 perches; that the deed last mentioned had been registered on the 20th October, 1874; that by a deed passed on the 17th October, 1874, the said *J. A Quesnel* sold to the defendant (respondent), to the Hon. *T. Robitaille* and to the Hon. M. *Laframboise*, the three undivided fourths of the two immoveables above described, acquired by him, one from the said *Domitilde Cadieux* and the other from the plaintiff, forming, the said two immoveables, the total extent of the cadastral lot No. 4679; that the said sale, from *J. A. Quesnel* to the defendants, *Robitaille* and *Laframboise*, had been made for the sum of $49,612.50, in deduction whereof *Quesnel* acknowledged having received from the purchasers the sum of $22,246.87½; that it had been covenanted, in the said last mentioned deed, that, as to the balance of the purchase money, to wit, $27,365.62½ the said defendant and his co-purchasers, *Laframboise* and *Robitaille*, would pay it or would cause it to be paid, each for a third part to the acquittal and discharge of the said *Quesnel*, to the said plaintiff or representatives, as follows, to wit: in four annual and consecutive payments of $6,841 each, the first of which would become due and payable on the 14th October, 1875, and so on, at each of the three consecutive years then following; that these payments put together were the same as those mentioned in the deed of the 14th October, 1874, by the plaintiff to the said *Quesnel*; that it had moreover been covenanted in the

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said deed, from *Quesnel* to the defendants, *Robitaille* and *Laframboise*, that the said balance of $7,365.62½ would produce interest at 7 per cent. per annum, to be reckoned from the 14th October, 1874, which interest the said purchasers bound themselves each for a third to pay or cause to be paid to the plaintiff, every six months, to the acquittal of said *Quesnel*; that on the 14th October, 1877, there were due and payable three of the said payments and that the defendant was indebted in one-third of the said three payments, to wit: $6,841.40; that no interest had been paid on the said sum, since the 14th October, 1874, and that the said interest amounted, on the 14th October, 1877, to $1,915.59, the two sums forming together that of $8,757; that, at *Montreal*, the 4th day of December, 1877, by deed before *l'Archevêque*, notary public, the plaintiff had accepted the delegation of payment made in her favor, by the said *Quesnel*, in the deed of the 17th October, 1874, and had declared to be willing to constitute the said defendants, *Laframboise* and *Robitaille* her personal debtors, according to the terms of the said delegation; that on the 15th December, 1877, that acceptation had been served upon the said *Quesnel*, and on the 19th December, 1877, upon the defendant, by notarial deeds; that under these circumstances, the plaintiff was entitled to claim from the defendant the said sum of $8,957 which the defendant refused to pay, wherefore she prayed for judgment, for principal, interest and costs.

To that action the respondent pleaded that on 1st June, 1876, the plaintiff impleaded the said *Laframboise*, *Robitaille* and *Geriken*, by action under No. 2298, declaring on the deed of sale by herself to *Quesnel* of the 14th October, 1874, alleging that the latter owed her $9,121.86½ for the payment falling due on the 14th October, 1875, with $3,831.18 for interest, at 7 per cent, on the sum of $36,487.50, from the date of the said deed, until the 14th

April, 1876, with interest at 6 per cent. on the sum of $2,554.12½ from the 2nd December, 1875, date of the institution of an action against *Quesnel*, and with interest, from the date of said action, on $1,377.06, balance of the said interest until final payment; that these sums added together formed $12,953.05; that the said plaintiff further alleged in the said action that the three defendants were in possession, as proprietors, of three undivided fourths of the immoveable described in the said deed of sale, and she prayed hypothecarily against the said three defendants that the three undivided fourths of the said immoveable be declared hypothecated for the said sums, principal, interest and costs and that they be condemned to abandon the said three undivided fourths or to pay; that in conformity with the option offered by the plaintiff to the said defendants, the said *Geriken* had, on the 10th November, 1876, abandoned (*délaissé en justice*) his undivided fourth of the property described in the declaration in this cause and in the deed of the 14th October, 1874, according to law, and that he had moreover, the same day, signified his abandonment to the plaintiff; that subsequently, the 28th December, 1877, judgment was rendered, by which the immoveable described in this cause and in the said deed of the 14th October, 1874, was declared hypothecated in favor of the plaintiff, for the said sum of $12,953.05, composed as above, with hypothecary condemnation against the said *Laframboise*, *Robitaille* and *Geriken*; that it follows from the foregoing that the pretended acceptation of delegation by the plaintiff was null and of no effect, and that the defendant *Geriken* could not be held in any manner to pay, either to the plaintiff or to *Quesnel*, any part of the purchase money which he had promised to pay for the property so abandoned by him, and of which he had suffered eviction by the act of the plaintiff and he prayed

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for the dismissal of the action. This was followed by a general issue.

The plaintiff answered generally, denying all the facts alleged in the plea and reiterating the affirmations of her declaration.

The evidence consists of the documents alleged in the declaration and the plea. Upon this evidence the Superior Court, sitting at *Montreal*, dismissed the plaintiff's action. On appeal, the Court of Queen's Bench confirmed the said judgment, and the plaintiff has thereupon brought the case to this court.

I may here immediately remark that the case of *Lacombe* v. *Fletcher* (1), though it has not been cited by the parties, has not escaped my attention. It was there held by the Court of Appeal that the purchaser of an immoveable property, who has accepted an assignment of the price of sale, cannot set up, in answer to the claim of the assignee, a *délaissement* (not a demand *en délaissement* as the heading of the report states) made by him, so long as he has not been judicially dispossessed. In the present case, as in that one, the defendant merely alleges a *délaissement*, without showing that any proceedings have been taken upon it. By art. 1521 C. C. this would seem sufficient See also *Dorwin* v. *Hutchins* (2). But without entering into the consideration of this question of law, as the parties have not raised it themselves, I may say that I think there is a distinction to be made of the present case from *Lacombe* v. *Fletcher*. There the plaintiff in the hypothecary action, on whose demand the defendant had abandoned the property, and the plaintiff in the personal action against the same defendant, were two different persons. Whilst here, the plaintiff in the hypothecary action and the plaintiff in the personal action are one and the same person. Now here, when the defendant pleaded his abandonment of

(1) 11 L. C. R. 38. (2) 12 L. C. R. 68.

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the property, if the plaintiff, on whose demand this abandonment has been made in the hypothecary action, intended to renounce this abandonment, or not to proceed on it, she should have pleaded it by a special answer to the defendants' plea. She did not do so, but merely filed a general answer to the plea. Now, she cannot be presumed to have renounced her rights on the hypothecary action, and the judgment she obtained thereon. I then take it that the abandonment made by the defendant is complete and must be taken as such, in the consideration of the present case, and so it seems to have been treated in the two courts below.

Another point which has not been noticed by the parties, has presented itself to my mind.

By art. 1180 C. C. the debtor consenting to be delegated cannot oppose to his new creditor the exceptions which he might have set up against the party delegating him, although at the time of the delegation he were ignorant of such exceptions.

It may be that this only applies to a perfect delegation, and when novation has taken place and the first debtor discharged, though *Demolombe* (1) is of opinion that this rule applies even when the first debtor has not been discharged, as is the case here. See on the question *Duranton* (2), *Laurent* (3), and authorities there cited. It is possible also that as Mrs. *Reeves* did not accept the delegation, but accepted it only later by a separate deed, this may render this rule inapplicable to this case. I presume that she must have thought so, since she did not avail herself of it in answer to the defendant's plea. However, as the question has not been raised, nor argued, either before us or in the court below, I do not give any opinion on it.

I then take it that the defendant can oppose to the

(1) 5 Des contrats Nos. 324 to 328.

(2) 12 Vol. No. 333, 334.

(3) 18 Vol. No. 319

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plaintiff's demand all the exceptions he could have opposed to *Quesnel*, in whose rights she stands in this case.

Now if *Quesnel* himself was suing the defendant for his share of the price of the sale made by him *Quesnel* to this defendant and *Laframboise* and *Robitaille*, the defendant could plead in answer to *Quesnel's* demand that he has been evicted of the property sold to him. For the abandonment (*délaissement*) of the property made by the defendant is, in law, an eviction:

> C'est pourquoi les demandes en revendication, les demandes en action hypothecaire qui sont données contre quelqu'un, sont appellées, dans le language du Palais, des évictions (1).

The defendant, when sued in an hypothecary action by *Reeves*, could have, in the same suit, sued *Quesnel en garantie*, but his failure to do so does not free *Quesnel* from his obligations as warrantor, as it is not pretended that he had any ground of defence to the hypothecary action, (2). It is clear also that *Quesnel*, as the defendant's warrantor, could now be sued by the defendant in a direct action (3).

Now, *celui qui a l'action a l'exception*, and the defendant has the right to invoke against *Quesnel's* demand (and against *Reeves*, his *locum tenens*), those obligations of *Quesnel*, as such warrantor (4), resulting from the eviction from this property which he, the defendant, has had to submit to (5). Just as he would under article 1535 C. C., (if, instead of having actually been evicted, he had only cause to fear being disturbed by *Reeves'* hypothecary action,) be entitled to delay the payment of the price of sale to *Quesnel*, until he,

(1) Pothier, Vente No. 82, see also, Idem loc. cit. Nos. 83, 86.
(2) Article 1520 C.C.
(3) Article 1508 C. C.; Pothier vente, No. 108.; Bourgon, 1 Vol. p. 483.
(4) Pothier vente, No. 165;
(5) *O'Sullivan* v. *Murphy* 7 L. C. R. 424.

Quesnel, caused such disturbance to cease, or gave security.

I may here remark that the opinion seems to have been expressed in the courts below, and it has been repeated at the argument here, that *Geriken* has a ground of exception against the plaintiff's demand, on the fact that he was sued hypothecarily, and had to abandon the property for *Laframboise* and *Robitaille's* share of the price of sale, as well as for his own share.

This is an error resulting, I am sure, from the fact that it has been overlooked that in *Quesnel's* sale to *Geriken*, *Laframboise* and *Robitaille*, though each of the purchasers is personally charged with one-third of the balance of the price of sale, yet, all they bought, that is to say, the three-fourths of the property, was mortgaged for the whole of the balance due—that is to say, *Geriken* does not only mortgage his fourth of the property for his share of the price, *Robitaille* his share of the property for his share of the price, and *Laframboise* his share of the property for his share of the price, but the whole of their shares together are mortgaged for the whole of the balance due. So that each share of the property is mortgaged, not only for what is due by the holder of that share, but also for what is due by the holders of the other two shares. The deed is clear on this:

> And as security for the payment of the said sum or balance of the price of sale, the undivided three-fourths of the above described land and dependence, now sold, remain specially affected and hypothecated by privilege of vendor expressly reserved.

So that though, personally, *Geriken*, *Laframboise* and *Robitaille* owe each only one-third of the balance of the price of sale, yet each of them mortgaged his share of the property for the two-thirds due by the two others as well as for his own. Of course, not being personally responsible for *Laframboise* and *Robitaille's* two shares,

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Geriken, when sued hypothecarily for these two shares, could abandon the property, as he did, and free himself from any further liability *quoad* these two shares (1). But he cannot oppose this abandonment *quoad* these two shares to *Quesnel*. It is obvious, that if he mortgaged his property in favour of *Quesnel* as security for *Robitaille's* and *Laframboise's* shares, he cannot invoke against him, *Quesnel*, as a ground of exception to the demand of the price of sale, that he has been sued on that mortgage. I do not lose sight of the fact that the hypothecary action against *Geriken* was based on *Reeves'* sale to *Quesnel*, and that it is only in *Quesnel's* sale to *Geriken* and others that this joint mortgage for the whole sum on each share of the property is created. But, as an answer to *Quesnel*, this, it seems to me, is of no importance. But it is not only for *Robitaille* and *Laframboise's* shares, as well as for his own, that *Geriken* has been sued hypothecarily, and has abandoned this property, but he was so sued, and made such abandonment, for *Quesnel's* share as well. Now for this share of *Quesnel* he was guaranteed by *Quesnel* against all trouble and eviction. As I have remarked previously, even if he had not been sued hypothecarily, and had not thereupon abandoned the property, if *Quesnel* sued him for the price of sale, *Geriken* could plead fear of trouble under art. 1535 C. C. and delay his payment till *Quesnel* paid his share of the price, or got in some manner a discharge of the mortgage for his share, or gave security to the amount thereof.

It seems clear, also, that if *Reeves* had accepted the delegation in her favour by the deed itself which has created it, and then had sued *Geriken* for his share of

(1) Troplong, prescription, No. 816; Loyseau, Du Déguer. liv. 4, ch. 3, No. 16, p. 121; Persil, 2 Vol. Priv. Hyp. 218; Pont, 2 Priv. & Hyp. No. 1179; Laurent, 31 Vol. No. 286.

the price of sale, as she does in the present case, then *Geriken* would also, against her demand, have been entitled to plead, under the provisions of art. 1535, his fears of being troubled for *Quesnel's* mortgage, for his own share of the price. Why could he not now plead against her demand the eviction he has had to submit to, as he could plead it against *Quesnel* himself?

But the direct question raised here is whether *Reeves*, having sued *Geriken* hypothecarily, can now sue him personally for his share of the price of the sale made by *Quesnel* to him and to others, on the acceptance of the delegation therein, which acceptance she has made since her hypothecary action and the abandonment thereon by *Geriken*.

In *France*, an abandonment may be made without a demand of it being made by a mortgagee, and the authors treat extensively the question whether an abandonment can be made voluntarily and be forced upon the mortagees when the price of sale is still due by the holder of the property. But that is not the question here. *Reeves* herself has demanded from *Geriken* the abandonment of this property and he has abandoned it only upon her own summons to him to do so. Of course, if it was only for his share of the price of sale that he had been sued, there would be no question that *Geriken* could never rid himself of his obligations under the contract of sale, but he has been sued hypothecarily and has abandoned for *Quesnel's* share of the price as well as for his own. Now, the authorities seems to me clear against *Reeves'* right, under such circumstances, of now asking against *Geriken* a personal condemnation for his share of the price of sale. *Troplong* (1), has no doubt on this. *Pont* (2) agrees with *Troplong*,

(1) Prescription, Nos. 797, 813, 823.

(2) Priv. v. Hypo., suite de Marcadé, Nos. 1135 & 1180 and authorities there cited.

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and says that the jurisprudence has settled the point according to *Troplong's* views. After speaking of the personal action of the party to whom the delegation has been made against the party delegated, he adds :

> Seulement, les créanciers devront soigneusement éviter, dans ces divers cas de mettre en avant l'action hypothécaire, s'ils tiennent à conserver l'action personnelle qu'ils ont contre le tiers détenteur ; s'ils concluaient tout d'abord au délaissement, ou s'ils procédaient aux poursuites par la sommation de payer ou de délaisser ils seraient censés renoncer par cela même à l'action personnelle, et desormais, ils seraient non recevables à l'exercer. C'est la remarque de M. *Troplong* ; elle a été confirmée par la jurisprudence (1).

In a case of *Hulot* v. *Arjambault*, decided by the Court of Appeal, *Orleans*, on the 28th May, 1851, it was specially held that if in such a case a personal creditor sues hypothecarily, he loses his personal action.

I would refer also to the cases of *Duplessis* v. *Poulet* and *Vernor* v. *Roy*, decided in the same court in 1847 and 1849. These three decisions are to be found in *Devilleneuve* and *Carette* (2).

The case of *Geoffroy* v. *Duplessis*, decided by the Cour de Cassation on July 1st, 1850, (3) may be also cited as being on questions relating to this one. There the surrender of the property was annulled, because the price of sale was more than sufficient to pay the mortgagees. There can be no such question raised on the present case. The sum due by *Geriken* was not sufficient to pay *Quesnel's* debt. If he had paid his share, he would have had to pay *Quesnel's* share besides, pay two shares, the half of the price, instead of one share, the fourth of the price. He could not, by paying his share of the price of sale, free the property from the mortgage lying upon it for *Quesnel's* share of this price. He could then

(1) See also 7 Taulier, 383, 385, and 7 Bolleux, 363, 580, 581, and note 2 ; 3 Aubry et Rau, 446 & 447 ; 31 Laurent, Nos. 280 à 284, 291 and 292.

(2) Vol. 30, (1851) pp. 521 et seq., part 2.

(3) Dalloz, Dic. de jurisp. 1850, p. 117, and the notes to it.

surrender the property and thereby free himself from his own personal obligations at the same time as from the mortgage upon the property for *Quesnel's* share. *Reeves* cannot complain of it, since she herself gave him the option to surrender the property, and *Quesnel* (or *Reeves* in his name) cannot complain of it either, since he has lost his right of action against the defendant for the price of sale, by not fulfilling his share of the contract of sale, that is to say, his obligation of warranty towards the defendant against all trouble and hypothecs. *Laurent* says (1):

Il reste une hypothèse sur laquelle il ne reste aucun doute. Le prix ne suffit pas pour désintéresser les créanciers; ceux-ci agissent hypothècairement; c'est leur droit et leur intérêt. L'acquéreur délaisse, comme il en a le droit. Dans ce cas le vendeur ne peut pas intervenir pour s'opposer au délaissement et pour en demander la nullité. En effet, le vendeur n'a d'autre action contre l'acquéreur que l'action personnelle pour le contraindre à payer son prix; mais il exercerait vainement cette action; dans l'espèce, la poursuite ne désintéresserait pas les créanciers, puisque le paiement du prix ne dégagerait pas l'immeuble de toutes les charges hypothécaires qui le grèvent; de sorte que l'acquéreur, tout en payant, resterait exposé à l'action hypothécaire des créanciers qui ne seraient pas désintéressés: Or, dès qu'il est tenu hypothécairement et poursuivi comme tiers détenteur, il a le droit de délaisser. Ce sont les termes de l'arrêt que nous venons d'analyser (No. 282). La doctrine est d'accord avec la jurisprudence.

The case of *Dubuc* v. *Charron* (2), decided by Mr. Justice *Badgley*, at *Montreal*, in 1865, is precisely in point, and maintains the same doctrine. The case of *La Société Permanente de Construction* v. *Larose* (3), in the Court of Review, *Montreal*, 1871, though not exactly on facts similar to those in the present case, virtually decides the point in the same sense as *Dubuc* v. *Charron*. There the purchaser had specially stipulated that he would have the right to surrender the

(1) 31 Vol. No. 283.
(2) 9 L. C. Jur. 79.
(3) 17 L. C. Jur. 87.

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property, but the court in its *considérants* says that this was a right which he had by the operation of the law. Then there is the case of *La Société de Construction de Montreal* v. *Désaultels* (1), decided in April last by the Court of Review, at *Montreal*, where it was held that hypothecary creditors, whom a purchaser had obliged himself to pay by his deed of purchase, forfeit their rights to a personal action against him, by suing him hypothecarily. I refer also specially to 20 *Duranton* Nos. 252 to 257.

It appears to me there can be no doubt upon this question of law.

Another possible point of view in this case is this: *Reeves* accepted the delegation only after *Geriken* had surrendered the property on the hypothecary action. Till then, *Quesnel* was alone *Geriken's* creditor (2). He could till then have revoked that delegation (3), and even without doing so, and notwithstanding the delegation, he could sue *Geriken* for the price of sale if any was due (4).

Reeves could never, against her will, be bound to accept this delegation. The question whether the registration of the deed constituting the delegation was a sufficient acceptance of the delegation cannot be raised here, because she never intended to avail herself of the delegation till she accepted it by the deed of December 4th, 1877. On the contrary, she virtually refused the offer of this delegation by proceeding hypothecarily. It may be that, under certain circumstances, registration of a deed containing a delegation may be invoked by the party to whom the delegation is made, as an acceptance or equivalent to an acceptance of it, but it cannot be contended that such registration oper-

(1) 2 Legal News 147.
(2) 7 Toullier No. 286.
(3) Art. 1029 C. C.
(4) *Mallette* v. *Hudon*, 21 L. C. Jur. 199.

ates a forced acceptance of the delegation, and imposes it against his will on the creditor. Here it is only by the deed of December 4th, 1877, that *Reeves* accepted this delegation. But at this date *Geriken* owed nothing. The contract between him and *Quesnel* had been resiliated. Upon being evicted from the property for a mortgage against which his vendor was obliged to guarantee him, he ceased to be bound by his obligations under this contract. Had he paid his purchase price before being evicted he could have recovered it back from his vendor (2); not having yet paid it, he can, on the same grounds, resist his vendor's demand for it He was entirely relieved from this price of sale. So that, when *Reeves* accepted the delegation, she was too late; *Geriken* had been freed from his obligations.

But now, as to a question of fact, I have so far supposed that *Geriken* has been evicted from the whole of the property he bought from *Quesnel*. But is that so? Certainly not. He bought from *Quesnel* the whole of lot 4679, but he has been evicted from the south part of that lot only, from the part sold to *Quesnel* by *Reeves*. This appears by his own plea. He alleges that he has been evicted from the part of the property described in *Reeve's* deed to *Quesnel*, of the 14th of October, 1874. Indeed, *Reeves* had no hypothec by her own deed of sale on the other part of the lot, which *Geriken* bought on the same day from Mrs. *Cadieux*, and then, of course, had no hypothecary action against *Geriken*, as holder of the *Cadieux* lot, in virtue of his own deed to *Quesnel*. *Geriken* has, then, been evicted from a part only of the property sold to him by *Quesnel*. He thus can claim to be relieved from the payment of the value of that part only, as he holds the other part, and Mrs. *Reeves'* acceptance of the delegation is valid for the part for which the sale stands good. The value of this part,

(1) Art. 1511 & 1513 C. C.

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for which he has not to pay, is, according to Art. 1518 C. C., to be estimated proportionately upon the price he had agreed to pay for the whole property. So that a relative valuation of this south part of the lot has to be made before the amount to be deducted from the price of sale, and from the three instalments thereof claimed in the present case, can be ascertained (1).

The defendant has contended before us that he has paid *Quesnel* in cash for the *Cadieux* lot; that is to say, for one-fourth his share of it. He wants us to find in the sale from *Quesnel* to him and his co-purchasers, that the balance due thereon is due for the *Reeves* lot only. But this is hardly covered by his plea, and then that may have been the intention of the parties to that deed, but that is not what they did. The sale is purely and simply of the three-fourths of the whole of the lot 4679 for one sum *en bloc*, and for that sum the purchasers have mortgaged, not only this *Reeves'* lot, but also the *Cadieux* lot, so that *Reeves* now, as *cessionaire* of *Quesnel*, has a mortgage on the *Cadieux* lot. The deed expressly says that the balance due is due for the sale of the three-fourths of the two lots. The mortgage is stipulated for the said price of sale, that is, for the price agreed upon for the said three-fourths of the two lots, not for the price of the *Reeves* lot only.

For these reasons I am of opinion that the appeal should be allowed with costs, and that the plaintiff should have judgment for part of the three instalments due to her; the amount to be established by the valuation to be made of the part of the property abandoned by the defendant proportionately to the price agreed to as the price of the whole of it. Perhaps the parties may agree as to that valuation, and as to the amount for which judgment should be entered.

(1) Pothier Vente No. 142.

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GWYNNE, J. :—

I concur in the judgment of my brother Taschereau. I think the plaintiff is entitled to recover the difference, if any there be, between the value of the one-fourth part from which *Geriken* was evicted and the amount claimed.

Appeal allowed with costs.

Solicitors for appellant: *Doutre, Branchaud & McCord.*

Solicitors for respondent: *Duhamel, Pagnuelo & Rainville.*