ADOLPH WEISS (PLAINTIFF).....APPELLANT;

AND

NATHAN L. SILVERMAN (DEFENDANT).....RESPONDENT.

AND

G. ZUDICK AND OTHERS (MIS-EN-CAUSE).

1918
*Nov. 25.

1919
*Feb. 4.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Lien — Builder — Renunciation — Registration — Delay — Procedure — Transferee as mis-en-cause—Appeal—Absence of notice—Res judicata—Articles 1023, 1031, 1571, 2013b, 2081, 2127 C.C.—Article 1213 C.P.Q.

S. supplied the materials and executed the work necessary for the plumbing and heating system included in the construction of a building. Within the delay during which he had a lien on the property without registration (article 2013b. C.C.), S. signed and delivered to B., with whom the owner of the property was negotiating a loan, a document by which he declared that he renounced *all legal privilege.* Later on, S. registered his claim against the property and afterwards transferred the greater part of it. W., a mortgage creditor, then took an action to set aside S.'s lien and, asking that the transfer be declared null and void, summoned G., the transferee, as *mis-en-cause.* In the trial court, G. appeared through counsel, but did not fyle any plea; and judgment was rendered, dismissing the action, upon the contestation produced by S. W. then appealed to the Court of King's Bench and to the Supreme Court without giving any notice to G.

Held, that the privilege of S. had ceased to exist at the date of its registration.

Per Idington J.:—S. having failed to enforce his privilege within the delay mentioned in article 2013b. C.C., his right was extinguished.

Per Anglin, Brodeur and Mignault JJ.:—The document signed by S. was an absolute and unqualified renunciation of his privilege and not a mere undertaking not to register it.

Per Anglin, Brodeur and Mignault JJ:—On this appeal, S. cannot set up a plea of *res judicata* to which the transferee may be entitled.

Per Anglin and Mignault JJ.:—The judgment of the trial court, so far as it affects the transferee, cannot be disturbed by the Supreme Court.

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*PRESENT:—Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault JJ.

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Per Brodeur and Mignault JJ.:—W., though not a party to the document signed by S., has a right to take advantage of it, because as creditor of the owner who failed to do it, W. can exercise the latter's right to have the registration declared illegal.

Per Brodeur J.:—A judgment pronouncing the extinction of a claim, if rendered before the notification of the transfer, can be opposed to the transferee.

Judgment of the Court of King's Bench, 24 R.L. N.S. 204, reversed.

APPEAL from the judgment of the Court of King's Bench, appeal side (1), affirming the judgment of the Superior Court, District of Montreal, and dismissing the action with costs. The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

Paul St. Germain K.C. and *Weinfield K.C.* for the appellant.

Busteed K.C. for the respondent.

THE CHIEF JUSTICE.—I concur in the result.

IDINGTON J.—The appellant sues as mortgagee of certain property to have it declared amongst other things that an alleged privilege created by a mechanic's lien registered by respondent against the mortgaged property had ceased to exist by reason of respondent's failure, within one year from the date of such registration, to take a suit to enforce same.

The alleged privilege was registered on the 26th of November, 1914.

On the 27th February, 1915, the owners made an abandonment of their property.

The respondent never filed his claim with the curator or took any steps of any kind either to enforce same or to have his right declared.

Art. 2013b C.C. provides as follows:—

(1) 24 R.L. N.S. 204.

The right of preference or privilege upon the immovable exists as follows:—

Without registration of the claim, in favour of the debt due the labourer, workman and the builder, during the whole time they are occupied at the work or while such work lasts, as the case may be; and with registration, provided it be registered within the thirty days following the date upon which the building has become ready for the purpose for which it is intended.

But such right of preference or privilege shall exist only for one year from the date of the registration, unless a suit be taken in the interval, or unless a longer delay for payment has been stipulated in the contract.

I am of the opinion that such failures, as I have just now referred to, terminated his right, if any ever existed, to enforce any such alleged privilege unless, which is not pretended, a longer delay had been stipulated for in the contract. .

The express and imperative language of this article, which gives or enables the creation of the privilege, specifies the conditions of its existence, and limits its duration, cannot be overcome or defeated by references to the articles dealing with the powers and duties of a curator or the possibility of a successful issue to a suit so brought. The necessity for the prompt assertion (beyond mere registration) of such a claim is well illustrated in many phases of this litigation.

If, as is faintly suggested, the law does not permit of such a suit, then so much the worse for respondent's claim; for the doing so is one of the limitations imposed upon him as the boundary of his right to assert such a privilege, which is the creature of a statute.

But I see no insuperable obstacle in the way of bringing a suit. I need not labour with that. I submit that a sufficient answer is to be found in the unchallenged existence of this very suit by a mortgagee and the right to bring it even after all the property has been sold; upon which fact stress is laid as an argument against the respondent's right to do something akin thereto.

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I may remark in passing that the considerant in the judgment appealed from which relies upon the sale of the property as an answer to this point is surely founded in error, for though there was an abortive sale by or for the curator within the year, there was no real sale until September, 1916.

The principle involved in the case of *La Banque d'Hochelaga* v. *Stevenson* (1), is applicable to the decision of this case, and I intend to abide by it. In that case it was expressly held that the privilege is limited to one year from the date of registration.

The claim therein was as this put forward in one aspect on behalf of an assignee of the builder and alternatively rested on the right given the supplier of material. It was held to have been barred in the first way of putting it by reason of failure to proceed within the year and in the alternative claim as invalid by reason of failure to give notice to the proprietors within the prescribed period for doing so.

I think the appeal should be allowed with costs throughout.

Since writing the foregoing, my brother Brodeur has called attention to the peculiarity of the assignees of some part of the claim in question not being parties to this appeal. I have considered the matter and agree that the rights of such assignees as not before us should be protected and agree in the mode of doing so suggested by the judgment of my brother Mignault.

ANGLIN J.—The plaintiff who holds a hypothec upon the property in question sues to set aside a privilege claimed by the defendant Silverman as a builder in which the *mis-en-cause* Brucker, Gurney-Massey, Limited, and J. Watterson & Company,

(1) [1900] A.C. 600.

Limited, are interested as transferees of it in part. The basis of the plaintiff's claim is an express renunciation by Silverman of his privilege under art. 2081 C.C., par. 4, made prior to any of the transfers.

The original renunciation was lost, and the plaintiff at the trial proved a copy of it by parol evidence. The learned trial judge dismissed his action on the ground that such evidence was inadmissible. The Court of Appeal held that the case fell within art. 1233 C.C., par. 6, and that parol proof of the renunciation was, therefore, admissible; and neither this point nor the sufficiency of the parol proof adduced is now contested on behalf of the respondent.

The Court of Appeal, however, maintained the judgment dismissing the action on other grounds, the lamented Chief Justice Archambeault taking the view that the renunciation operated merely as a contract between Silverman and the other renouncing lienholders who joined in it and one Bulkis, at whose instance it was obtained by the debtor-owners, that the liens would not be registered, of which only Bulkis could take advantage (art. 1023 C.C.). The learned Chief Justice based this conclusion upon his view that the lien or privilege did not exist when the document in the form of a renunciation was executed because it had not then been registered. I am, with profound respect, unable to accept this view because art. 2013b C.C. declares in explicit terms that the lien exists without registration during the construction of the building and for 30 days after its completion. Art. 2081 C.C. declares that by a remission, express or tacit, the privilege becomes extinct. The instrument executed by Silverman was a remission or renunciation and no mere undertaking with Bulkis not to register. As Carroll J. points out it was a unilateral—not a

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bilateral-contract, and therefore not within art. 1023 C.C. If the lien had been registered when the renunciation was executed the learned Chief Justice would apparently have considered it thereby extinguished. If the lien subsisted when the renunciation was executed although not yet registered, as I think it undoubtedly did, I can see no reason why the renunciation should not have the same effect.

Mr. Justice Carroll, on the other hand, was of the opinion that although the renunciation when executed extinguished the defendant's lien for the benefit not merely of Bulkis, but of all the defendant's creditors, yet because after signing it the defendant registered a claim of lien and thereafter executed what purported to be transfers of partial interests therein to the three *mis-en-cause* above mentioned, which they registered without notice of the renunciation, the plaintiff was thereby precluded from setting up the renunciation which had not been registered as against the registered transferees. But, with deference, if the renunciation or remission extinguished the privilege (art. 2081 C.C.), subsequent registration could not revive it. If it were non-existent the attempted transfers of it were nullities and their registration was equally ineffectual. Art. 2127 C.C., cited by the learned judge, deals with conveyances or transfers, not with renunciations or remissions. It is the unregistered transfer of a privilege which is avoided in favour of a subsequent transfer duly registered.

I see no reason why the appeal should not be allowed as against the respondent and his interest. If the *mis-en-cause* have rights under the judgment of the Superior Court, the respondent Silverman cannot derive any advantage from them.

But although the view I have taken as to the

nature and effect of the document signed by Silverman *et al.* is adverse to any claim of the *mis-en-cause* apart from the judgment dismissing this action, the appellant has failed to convince me that it is possible for us to adjudicate against them in their absence and deprive them of the benefit of the judgments pronounced below. After I had dealt with the merits of the appeal, I had the advantage of seeing the opinions of my learned brothers Brodeur and Mignault, who differ in their views as to the consequences of the appellant's failure to give notice to the *mis-en-cause* of his appeal to the Court of King's Bench and likewise of his appeal to this court. My brother Mignault points out the gravity of the difficulty thus raised. My brother Brodeur's view is that, in the absence of any proof that Silverman's transferees notified the debtors of the transfers in their favour, we should hold them void as against the curator, to whom the debtors' estate has been transferred (arts. 1571 and 2127 C.C.), and therefore as against the appellant as a creditor (art. 1031 C.C.). But are we on this ground, any more than upon the ground that the registration of their void transfers was ineffectual, entitled as against the *mis-en-cause* in their absence to deprive them of whatever rights they may have under the judgments of the provincial courts? I fear not. I, of course, agree that Silverman cannot set up the plea of *res judicata* to the benefit of which the *mis-en-cause* may be entitled. But I incline to accept the view of my brother Mignault that since notice was not given to the *mis-en-cause* of this appeal the judgments of the provincial courts so far as they effect them cannot now be disturbed.

Under all the circumstances, however, I would reserve to the appellant the right, notwithstanding his appeals to the Court of King's Bench and to this

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court, to appeal against the judgment of the Superior Court in favour of the *mis-en-cause*, if, after the lapse of time that has occurred he can obtain any necessary leave to do so, or to take such other steps as he may be advised to protect his interests against their claims.

The respondent should pay the appellant's costs of this litigation throughout.

BRODEUR J.—This is an action by Weiss, a mortgage creditor, to have declared illegal the registration of a builder's privilege by Silverman on the property covered by his mortgage.

The ground invoked by the plaintiff was that Silverman, the creditor of the privilege, had abandoned it by an agreement *sous seing privé*.

The defendant Silverman denied having ever signed such an agreement.

At the trial it was proved that the document in question had existed but that it had been mislaid or destroyed. However, a copy of it had been made by a person in whose custody the document had been for a while and that copy has been filed in this case.

The Superior Court dismissed the action on the ground that the plaintiff had not produced the original writing, and had not obtained an admission from the defendant that would constitute a *commencement de preuve par écrit*.

The Court of Appeal, relying on par. 6 of art. 1233 of the Civil Code, decided, on the contrary, that proof could have been made by testimony, since the proof in writing, while being in possession of a third party, had been lost and could not be produced. They dismissed, however, the plaintiff's action on another ground, viz., that the renunciation signed by the defendant Silverman

n'était qu'un engagement de la part de l'intimé de ne pas faire inscrire de privilège sur la propriété et ne peut avoir d'effet qu'entre les parties et * * * que l'appelant n'a pas été partie à la dite promesse de l'Intimé et n'a pas titre pour s'en prévaloir.

On this appeal we are not concerned with the question of admissibility of evidence, since the respondent, in that respect, accepts the decision of the Court of King's Bench; but we have to construe the remission in question and find out if the appellant could invoke it.

The renunciation reads as follows:—

(Renonciation de privilège contre la propriété de G. Zudick et autres, 19 octobre 1914.)

Nous, soussignés, entrepreneurs d'ouvrages et fournisseurs de matériaux pour les constructions que MM. Joseph Shpretzer, Gershon Zudick, Henry Shapiro fait actuellement ériger aux Nos * * * de la rue Outremont sur le lot portant le numéro officiel 35, 386, 387, 388, 389, 390 & 391, Paroisse de Montréal, déclarons renoncer chacun pour nous *à tout privilège légal* que nous pouvons avoir comme tels sur ces immeubles et consentons qu'ils n'en soient jamais affectés ni à ce jour, ni à l'avenir.

That document was signed by several contractors and suppliers of materials, amongst whom was the defendant respondent, Silverman.

It would appear rather extraordinary that Silverman contended all along that he had not signed such a document, since the copy brought in evidence shews his name appearing amongst those who signed. It was contended at bar by his counsel that the document being written in a language with which he was not familiar, that might explain the stand he took before the Superior Court in his plea and in his evidence.

I may have my doubts as to the good faith of the defendant; but it is not necessary to express any views as to that, since the case does not turn upon that. We have simply to deal with the agreement as it has evidently been written and signed.

Silverman, by that document, undertook to renounce any legal privilege which he could claim on

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the immovable property belonging to the persons for whom he worked, and he agreed that that property would never be burdened for the past or for the future with such a privilege.

It was a very sweeping engagement which he took; no reservation with regard to person or time.

It was not simply a promise that his privilege would not be registered; but he stated formally in the writing he signed that he abandoned his privilege.

By art. 2081 of the Civil Code a privilege becomes extinct by remission. The creditor of the privilege who gives up his right is in the same position as a creditor of an obligation. If the latter releases his debtor from his obligation it becomes extinct (art. 1138 C.C.).

At the time Silverman signed his release he had a right of preference as builder upon the additional value given to the immovable by his work done (arts. 2013, 2013b C.C.). He was within the delay during which his privilege existed without registration. His right was born and in existence; and he could undoubtedly release that right.

That is what he has done by the writing of which we have a copy. But it is contended that this document was signed in favour of a certain Bulkis, to whose agent it had been handed.

It is in evidence that the document was signed on the occasion of a loan which the owners of the property were negotiating with that man. But no stipulation is made in the document to the effect that Bulkis's mortgage or claim would have priority over Silverman's privilege. The document was in general terms; it was handed to the debtors themselves and constituted, as far as the evidence shews, a release on the part of the

creditor of the privilege in favour of his debtors, since he was asked by the latter to sign such a release.

It is contended, however, that the appellant cannot take advantage of that instrument if we apply the rule *res inter alios acta*.

By art. 1023 of the Civil Code, contracts have effect only between the contracting parties. They cannot affect third persons, except in certain cases; and amongst those are the right of the creditors to exercise actions of their debtors, when to their prejudice they neglect to do so (art. 1031 C.C.).

In this case the owners of the property on which the privilege has been registered should have taken the necessary proceedings to set aside that privilege and strike out its registration; but as they have failed to do so, Weiss, as one of their creditors, can proceed to exercise that right. I am, therefore, of opinion that Silverman, having given a release of his privilege, is now without any right to claim that such a privilege now exists; and, as far as he is concerned, the appeal should be allowed.

Weiss, however, by his action not only asks that Silverman's privilege be set aside but that the transfer which he made to third parties of a part of the sum covered by it, viz., Gurney-Massey & Company, Max Brucker and J. Watterson & Company be declared illegal, null and void in so far as the property in question or the proceeds of sale thereof are concerned and that those transfers be radiated.

The plaintiff Weiss has summoned those third parties as *mis-en-cause*. They filed appearances but did not file any plea. They were given notice of inscription when the case was heard on the merits. The plaintiff's action having been dismissed, inscription in appeal was then made by Weiss; but he did not

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give notice thereof to those third parties, and the judgment of the Superior Court having been confirmed no notice of appeal to the Supreme Court was given to them and the defendant Silverman was the only one served with those notices of appeal.

It is contended by the respondent that the renunciation made by the transferor Silverman cannot affect the rights of the registered transferees; and he invokes art. 2127 of the Civil Code, according to which where there are successive transfers by the same person of the same privileged claim the rights of the transferees are governed not by priority of transfer but by priority of registration.

I am unable to agree with the respondent's contention. If the issue was between different transferees of Silverman, art. 2127 C.C. would apply. If Silverman had transferred that privilege to A., who had not registered his deed, and later on to B., who had his deed registered in due time, of course the latter would have a better claim than A. That is the case provided for in art. 2127 C.C. But this is not the present case. It is not a matter of dispute between transferees and transferees. It is the case of a privilege that has been abandoned by the creditor and which has been extinguished. The registration which Silverman made in order to revive that privilege was of no effect and he could not transfer to the *mis-en-cause* greater rights than he possessed. Aubry & Rau, vol. 3, 4ème, éd., p. 287.

Our registration laws protect in a certain measure the creditors of registered rights. For example, the real rights subject to registration take effect from the moment of their registration against creditors whose rights have been registered subsequently (art. 2083 C.C.).

There is a preference which results from the prior registration of the deed of a conveyance of an immovable between purchasers who derive their respective titles from the same person (arts. 2089, 2098 C.C.). In those cases the ordinary principles applied to obligations and contracts do not avail (art. 1472-1480-1025-1027 C.C.).

But in this case the registration of the privilege was made on a property, of which Zudick and his associates were open owners, without their consent and likely without their knowledge. Silverman, in registering that privilege which he had abandoned, could not give to his transferees any rights which he did not possess himself (art. 2088 C.C.).

The Court of King's Bench, in a case of *Longpré* v. *Valade* (1), decided that:—

> L'enregistrement d'un acte résilié entre les parties ne peut faire revivre cet acte lors même que l'acte de résiliation n'aurait pas été enregistré.

In a case of *Stuart* v. *Bowman* (2), it was decided also that:—

> L'enregistrement ne valide pas un titre nul à l'encontre des droits du véritable propriétaire.

We may say in conclusion on that question of registration that the cessionnaires had no more rights on Zudick's property than Silverman himself. His renunciation of his privilege has extinguished it and it could not be revived by registration.

The respondent, in a supplementary factum, now urges that the conclusions of the action concerning the transfers and their registration could not be granted because no notice of appeal was given to the transferees *mis-en-cause*, and that there is *res judicata* as to that part of those conclusions.

(1) 1 Dor. Q.B. 15. (2) 3 L.C.R. 309.

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That contention is a forcible one, but the respondent is not the proper party to raise it. It should be raised by the *mis-en-cause* themselves. They are the only persons entitled to raise the issue of *res judicata*.

Besides, the evidence of record does not shew that the alleged transfers were duly made and served upon the debtors. In law the transferees have no possession available against third persons until signification of the deed of transfer and of the certificate of registration has been made to the debtors (arts. 1575-2127 C.C.).

There has been, since one of those transfers was made, an abandonment of property by the debtor and a curator has been appointed. In the case of the two other transfers, they have been made since the *cession de biens* has taken place. It may be that those transfers have been regularly served upon the debtor, but the evidence does not shew it. Some further facts and arguments could be brought up by the transferees on subsequent proceedings which could affect the rights of the plaintiff. But taking the record as it is, the pleadings as they have been made, I think that the plaintiff should succeed and obtain all his conclusions.

I may quote on that point the following authorities which shew that the judgment which has decided that a claim has been extinguished may be opposed to the transferee if that judgment has been rendered before the notification of the transfer. Aubry & Rau, vol. 8, p. 373; Demolombe, vol. 30, no. 351; Lacoste, Chose jugée, no. 485; Dalloz, 1855, I-281; Dalloz, 1858-1-236.

In the present case it does not appear that the transfers have been served upon the debtors. The *mis-en-cause* had registered their transfers, but the necessary notice has not been made and they have no possession available against the debtors or their *ayant cause*.

I come to the conclusion that the appeal should be allowed as to all the rights and interests of the respondent Silverman in question in this action, without prejudice to the rights of the transferees, the *mis-en-cause*, if any, under the judgment of the Superior Court, and to whatever rights against them the appellant may have, if any. Costs throughout to the appellant against the respondent Silverman.

MIGNAULT J.—With no little hesitation I have come to the conclusion that as against the respondent Silverman, the appellant can rely on the unconditional renunciation to privilege made by Silverman on the 19th October, 1914. It is true that this renunciation was obtained by J. A. Parent, notary, acting for one G. Bulkis, who on the same day made a loan of $11,000 to Gershon Zudick, Joseph Shpretzer and Henry Shapiro, the owners of the building on which Silverman had acquired a builder's privilege. But this renunciation is absolute and unqualified. The document signed by Silverman says:—

Nous, soussignés, entrepreneurs d'ouvrages et fournisseurs de matériaux pour les constructions que M. Joseph Shpretzer, Gershon Zudick, Henry Shapiro, fait actuellement ériger aux Nos * * * de la rue Outremont sur le lot portant le numéro officiel 35, 386, 387, 388, 389, 390 et 391, Paroisse de Montréal, déclarons renoncer chacun pour nous à tout privilège légal que nous pouvons avoir comme tels sur ces immeubles et consentons qu'ils n'en soient jamais affectés ni à ce jour, ni à l'avenir.

I would further add that, even construing this document as it was construed by the Court of King's Bench, this was a deliberate renunciation in favour of Bulkis, a hypothecary creditor, and Bulkis could not avail himself of this renunciation without the appellant, an anterior hypothecary creditor, getting the full benefit of it. Bulkis was examined as a witness but seemed singularly indifferent to the fact that he had

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lent $11,000 on the property and that he had a vital interest in having the builders and furnishers of materials renounce their privilege. Notwithstanding this he says that he got a paper from the notary containing some signatures, but never read it and finally lost it. This is one of the peculiarities of this rather remarkable case. I feel convinced, however, that, unless Bulkis has been promised security otherwise, he would act according to his interests, and then the appellant would have the full benefit of Silverman's renunciation.

On 26th November, 1914, a little more than a month after signing this renunciation, the respondent Silverman registered a claim against the property for $7,375. Of this amount he transferred, on 5th February, 1915, the sum of $2,571 to one Max Brucker, and, on 9th April, 1915, he also transferred $2,429.77 to Gurney-Massey & Co. Ltd., and $1,688.45 to J. Watterson & Co. Ltd., so that he is now creditor only for the sum of $665.78. The appellant alleges that these transfers were registered, but does not pretend that the transferees did not comply with the requirements of art. 2127 C.C. as to the signification of the transfers.

In February, 1915, Zudick, Shpretzer and Shapiro made an abandonment of their property for the benefit of their creditors and the property in question was sold at the instance of the curator, and after collocating several privileged claims, there remained in the hands of the prothonotary the sum of $30,388.13, which was insufficient to pay the hypothecs and the builders' privileges so that the prothonotary reported that a "ventilation" would be necessary to determine the value of the improvements.

On the 15th February, 1917, the appellant took this

action against Silverman, and made the above mentioned transferees parties to his action as *mis-en-cause*. He asks that the privilege be declared null and void, and also that the transfers be annulled in so far as the said property or the proceeds of sale thereof are concerned, that the prothonotary be ordered not to collocate the respondent and his transferees as privileged creditors, and that the transfers be radiated, cancelled and struck from the certificate of search.

The respondent Silverman contested the action, denying that he had signed the renunciation. The transferees appeared by attorney, but did not plead to the action, and were foreclosed. The judgment was rendered in the Superior Court on the inscription of the plaintiff against Silverman and on his inscription *ex parte* against the transferees.

Silverman having, as a witness, denied that he had signed the renunciation, the Superior Court refused to allow the plaintiff to make secondary proof of the renunciation and also decided adversely to the contentions of the plaintiff who pretended that the privilege was null for want of compliance with the necessary formalities. The action was dismissed with costs.

The plaintiff appealed to the Court of King's Bench, and the latter court, while deciding that the renunciation was legally proved, came to the conclusion that, as regards the appellant, it was *res inter alios acta* (art. 1023 C.C.). Mr. Justice Carroll was of the opinion that the appellant could avail himself of the renunciation, but that it could not affect the transferees, who were protected by art. 2127 C.C., and could not lose their rights by reason of a renunciation which had received no publicity.

I agree that the renunciation of the respondent Silverman was legally proved. Undoubtedly Silver-

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man, notwithstanding his denial, signed it, and his counsel very properly abandoned, at the hearing before this court, the plea that his client had not signed the document. I have also come to the conclusion, as stated above, that the appellant can claim the benefit of the renunciation as regards Silverman. Whether he can set it up against the transferees is, however, another question.

After the argument, an examination of the record in the court below disclosed the fact that although the transferees had been made parties to the suit in the Superior Court and had appeared by counsel, the appellant had not given them notice of his inscription in appeal to the Court of King's Bench (art. 1213 C.C.P.), nor did he give them notice of his petition for leave to appeal to this court, so that the transferees were not parties to the appeal, and the question might arise whether they were not protected by the judgment of the Superior Court which dismissed the appellant's action, not only with regard to Silverman, but also with respect to the transferees of the greater part of the claim he had registered against the property.

The attention of the solicitors of the appellant and of the respondent Silverman was called to this fact, and they were given the opportunity of filing supplementary factums if they desired. They have done so.

The respondent Silverman, in his supplementary factum, submits that the judgment of the Superior Court is now *res judicata* and, therefore, conclusive in favour of the transferees. He has, however, no right to make this plea on behalf of the latter.

The appellant, on the other hand, has filed a supplementary factum in which he takes several grounds, which I will briefly summarize.

1. The appellant claims that by appearing by

counsel in the Superior Court, and failing to plead to the action, the transferees tacitly shewed that they intended to submit themselves to justice and to acquiesce in the final judgment to be rendered upon the issues between the appellant and the respondent.

2. The appellant submits that the inscription in appeal against Silverman alone is effective against the transferees, the privilege claimed by Silverman and his transferees being indivisible.

3. He also contends that the transferees were duly represented on the appeal by the respondent Silverman, inasmuch as they had taken the transfers as a pledge and were subrogated in Silverman's rights, so that Silverman, being the warrantor of the transfers he had made to them, could plead in their name.

I think the first ground urged by the appellant is not a sufficient answer to the objection that the transferees should have been made parties to the appeal taken by the appellant. Granting that the transferees, who had appeared in the Superior Court, but did not plead to the action, tacitly shewed that they intended to submit themselves to justice and to acquiesce in the final judgment—and I do not consider that this was an acquiescence in any judgment that might be rendered in another court upon the issues between the appellant and Silverman—I am of the opinion that they were entitled to notice of any inscription for proof and hearing in the Superior Court (art. 418 C.C.P.), as well as of any inscription in appeal from the judgment. They received notice of the inscription in the Superior Court but not of the inscription in appeal. Most certainly the appellant could, after the first judgment, abandon the conclusions he had taken against the transferees and limit the appeal to the respondent Silverman, and how could he more effectively shew his intention to do

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so than by giving notice of appeal to Silverman alone?

The second answer of the appellant is on its face more serious, and he undoubtedly cites in his supplementary factum very weighty authorities to shew that in the case of an indivisible obligation, legal proceedings or appeals taken by or against one of several creditors or debtors are effective as to the latter.

But on due consideration, I have come to the conclusion that, in view of the circumstances of this case, the answer of the appellant does not dispose of the objection.

In the first place, the appellant did not, before the Superior Court, conduct his action against Silverman as representing in any way his transferees, but he made the latter parties to his action, thereby separating their case from that of Silverman, and giving them the opportunity of contesting the action separately. The fact that they did not make a separate defence does not alter their status in the action, and they were undoubtedly entitled to be heard on an appeal from the judgment, which judgment dismissed the appellant's action, not only as to his demand against Silverman, but also as to the conclusions taken by him against the transferees.

In the second place, I am of the opinion that the appellant misapplies the rules concerning indivisible obligations.

There is no doubt that a privilege is indivisible, but all the authors hold that this indivisibility, as well as the indivisibility of the contract of hypothec, is not of the essence of the contract, but exists by virtue of the will of the parties. It is without effect on the obligation itself, of which the privilege or hypothec is merely the accessory, and if the claim guaranteed by the privilege or hypothec be divisible, as this claim is

divisible, it is not made indivisible because an indivisible security has been given. So, in my opinion, Silverman cannot in any way represent his transferees.

Moreover, the indivisibility of the privilege or of the hypothec exists in favour of the creditor and cannot be turned against him.

See Guillouard, Privilèges et Hypothèques, vol. 2, nos. 637 and 638; Laurent, vol. 30, nos. 175, 177, 178; Baudry-Lacantinerie, Privilèges et Hypothèques, vol. 2, no. 900; Paul Pont, Privilèges et Hypothèques, vol. 1, nos. 331 *et seq.*; Cassation, 9th November, 1847, Dalloz, 48, 1. 49.

The third answer of the appellant seems to me clearly unfounded. There is no proceeding here of the nature of an action in warranty. And assuming that Silverman is obliged to warrant the transfers he has made, this mere fact would not, in my opinion, permit the appellant, after impleading the transferees in the first court, to entirely ignore them in his appeal to a higher court.

I think, therefore, under the very special circumstances of this case, that effect should be given to Silverman's renunciation merely in so far as his interest is concerned, to wit, the sum of $665.78. There would be a very serious question whether the unregistered renunciation could be opposed to the registered transferees. It is, however, not necessary to decide this question inasmuch as the transferees are no longer parties to these proceedings. It is also unnecessary to decide the objections made by the appellant as to Silverman's privilege, for the renunciation puts an end to it in so far as his interest is concerned, and as regards the transferees, the latter are not before this court, so I would not feel justified, even were I of the opinion that the appellant's objections are well taken—and I

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express no opinion on this point—in passing upon the validity of any privilege belonging to the transferees.

I would allow the appeal in so far as the interest of the respondent Silverman in this claim is concerned, without prejudice to any rights the transferees may have acquired under the judgment of the Superior Court, and to whatever rights against them the appellant may have, if any.

The appellant should have his costs throughout against the respondent Silverman.

Appeal allowed with costs.

Solicitors for the appellant: *Weinfield, Sperber, Ledieu & Fortier.*

Solicitor for the respondent: *J. Cohen.*