Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Matthias Frederic Courtaux and others v. *William Hewetson, from Mauritius: delivered* 21*st July*, 1875.

Present:

Sir James W. Colvile.
Sir Barnes Peacock.
Sir Montague E. Smith.
Sir Robert P. Collier.

THE question raised by this Appeal is one of priority between the charge of the Appellants and that of the Respondent upon a sum of 47,000 dollars, the balance of the purchase money of an estate in the Island of Mauritius, known as the Riche Bois Domain.

The whole of this estate, which consisted of ten different parcels, had before the year 1858 become vested in and was held by certain persons in community; three-eighths belonging to Nicolas Courtaux and his wife, living together under the "régime de communauté des biens;" three-eighths to Jean Auguste Peyras and his wife, living together in the like community; and two-eighths to one Robert Brenan.

In August 1858 both Peyras and his wife were dead, and their three-eighths had passed to their heirs. On the 18th of December, 1858, Nicolas Courtaux purchased Brenan's two-eighths, and thereafter the estate belonged as to five-eighths to Courtaux, or to Courtaux and his wife, who for the purposes of this Appeal may be taken as one person in law; and as to three-eighths to the co-heirs of Peyras and the co-heirs of his wife in their respective proportions.

On the 20th of December, 1858, and apparently

before the completion of the purchase by Courtaux of Brenan's share, certainly before its inscription, proceedings with a view to a partition of the estate, or its proceeds, were commenced at the instance of one of the heirs of Madame Peyras; and on the 22nd of February, 1859, the Master, on the report of the person who had been appointed by the Court to determine whether the estate could or could not be conveniently divided in kind, and if not to make the valuation thereof, ordered that the sale by licitation of the estate Riche Bois should take place before him according to law.

The estate was accordingly put up for such sale, according to certain conditions of sale, on the 3rd of May in that year, and was knocked down to Mr. Edward Duvivier, the attorney having the carriage of the sale, for the sum of 230,000 dollars. He afterwards declared his principals to be Nicolas Courtaux and his wife, who were, therefore, duly adjudged to be the purchasers.

There seems to their Lordships to be no pretence for treating the transaction as a sale to Duvivier.

Under the 5th of the conditions of sale the purchaser was bound to pay the sale price according to the deed of partition which might be made between the co-licitants, pursuant to law; or, if necessary, according to the plan of distribution which should be made by the Master of such sale price, pursuant to law, upon the presentation of warrant for payment to be issued by the Master, in consequence of the final closure of such plan of distribution, or in obedience to any judgment of the Supreme Court of Mauritius, which might be made to share, and divide the said sale price. He was to pay interest upon the unpaid purchase money at the rate of 9 per cent. per annum from the day of sale until final payment. He might also be called upon to deposit one-sixth of the sale price and all the costs in the hands of the Master, subject to the provision that in case he should be one of the co-licitants, he should be entitled to deduct from the sum to be deposited his share in the said sum.

Several of the co-licitants being infants, it was necessary that the Master should make a plan for the distribution of the sale price. It appears, however, that no proceedings with that object were had for some years, and that in the meantime

Nicolas Courtaux and his wife were in possession of the estate, without paying into Court or otherwise any portion of the purchase-money.

In September 1866, the estate having been seized at the suit of some creditors of Nicolas Courtaux, was again put up for sale, and was purchased by the Respondent for the sum of 215,000 dollars. On this occasion, the purchase-money was paid into Court, to be apportioned by the Master amongst different claimants, including the co-licitants upon the first sale. It may be assumed to have been properly applied in the payment of preferential charges to the amount of 168,000 dollars, leaving only the balance of 47,000 dollars to satisfy the conflicting claims of the Appellants and the Respondent, and claims posterior to them.

The claims of the Appellants are in respect of debts incurred by Nicolas Courtaux and Jean Auguste Peyras jointly, or by one or other of them singly, before the sale by licitation in May 1859. The Appellants may be taken to have acquired by subrogation, to the extent of their respective charges, all the rights which either of their debtors, or his representatives, could have asserted against the fund. And in so far as they are creditors of Peyras, they are entitled to the benefit of any charge which he or his representatives had upon the estate in respect of his unpaid share of the purchase money due on the first sale.

The Respondent claims as the assignee of certain creditors of Nicolas Courtaux, whose debts were incurred after the sale by licitation to him and his wife.

It follows from this statement that the claims of the Appellants would be preferable to that of the Respondent, unless it can be shown that, by force of the French law relating to "inscription," the Appellants have lost their priority, and their claims have become such as must now be postponed to that of the Respondent.

The three material Articles in the Civil Code relating to "inscription" are the 2,108th, the 2,109th, and the 2,148th. It may be necessary hereafter to consider more particularly their terms. At present it is sufficient to state their general effect. The object of the first is to preserve and record the privilege of an ordinary vendor, which it

does by providing that the transcription of the purchaser's instrument of title shall, in so far as it shows that the whole or part of the purchase money is unpaid, operate as an inscription of the vendor's privilege or lien; but that the Registrar (the "conservateur d'hypothèques") shall nevertheless make *ex officio* upon his register an inscription of the charge resulting from the conveyance in favour of the vendor, who may also, in order to secure such inscription, cause the conveyance to be transcribed, if it has not been transcribed at the instance of the purchaser. The object of the second of these Articles is to preserve the privilege of co-heirs, or of such other co-proprietors, as are within the meaning of the term "co-partageants." And the object of the last is to prescribe the mode of effecting the inscription by a creditor entitled to an ordinary hypothèque of such hypothèque.

The debts in respect of which the Respondent claims were all duly "inscribed" as hypothèques under this 2,148th Article, the earliest of such inscriptions being dated the 23rd of October, 1860, and he may be taken to have thus acquired a valid charge on the fund, which is entitled to priority over all other charges by way of mere hypothèque, that were not duly inscribed before that date.

The inscription upon which the appellants rely, is that of the 21st of April, 1860, which is set out at page 73 of the record. It purports on the face of it to be an inscription taken *ex officio* on behalf of all the co-licitants, including Nicolas Courtaux and his wife, and also Robert Brenan, either as actual co-proprietor, or as one who had inscribed his privilege as unpaid vendor against Nicolas Courtaux as the purchaser of his share; it refers to the Memorandum of adjudication made before the master on the 3rd of May, 1859 (which contains all the proceedings relating to the sale by licitation); it sets out the fifth of the conditions of sale; and it records a privilege apparently in favour of the whole body of co-licitants, treating them as unpaid vendors for the whole amount of the unpaid purchase money, viz., 230,000 dollars. Looking at the document itself, and to the evidence of the officer as taken before the Judges of the Supreme Court, and set out at page 16 of the Record, their Lordships have

no doubt that this inscription was, in fact, made by him *ex officio* as the legal consequence of the transcription of the Memorandum of adjudication (the "titlé" of the purchaser), and under the 2,108th Article of the Civil Code.

In this state of things the Respondent contends that the co-licitants, the estate having, on the sale of May 1859, been adjudged to two of them, had not the privilege of ordinary vendors, but at most that of "co-hèritiers," or "co-partageants," which, under the 2109th Article, they were bound to inscribe within sixty days; and further, that the inscription of the 21st of April, 1860, was but the record of a privilege which did not exist, and cannot avail for any other purpose.

On the other hand, it is insisted on behalf of the Appellants that the transaction of May 1859 is to be deemed a sale which gave to the co-licitants the ordinary privilege of unpaid vendors; but that even if this be not so, and the co-licitants are to be regarded only as "co-partageants" who failed to inscribe their privilege within the sixty days, they, nevertheless, under the 2113th Article of the Civil Code, retained the rights of creditors by *hypothèque*; and that the inscription of the 21st of April, 1860, must be taken to be equivalent to an inscription of such legal *hypothèque* at that date.

The master, on the last ground, but upon that only, decided that the creditors, heirs, and legatees of the co-licitants were entitled to rank in the distribution of the fund before the personal creditors of the purchasers, Nicholas Courtaux and wife. But the Supreme Court overruled his finding, holding that the inscription of the 21st of April, 1860, was of no effect.

The first question to be determined by their Lordships is, what was the true character of the transaction of May 1859. Was it a sale which gave to the co-licitants the privilege of ordinary vendors, or was it such a licitation as gave to them no higher privilege than that of "co-partageants," which they were bound to inscribe within sixty days, under Article 2,109 C. C.?

Before considering the Articles of the Code which are supposed to bear upon this subject, and in particular the scope and operation of the 883rd Article, their Lordships think it will be advisable shortly to

examine how far the principle for which the Respondent contends was adopted and enforced in the ancient jurisprudence of France, to which such frequent recourse is had by the modern commentators of the Code for the correct interpretation of its Articles.

It will be seen, by reference to Pothier, "Traité de Vente," Partie vii, Articles 6 and 7, and other authorities, that the law of France differed from the Roman law in its view of the nature and effect of a partition. The Roman jurists considered it to be a species of exchange, involving, like an exchange between strangers, many of the consequences of a sale, and notably this, viz., that a creditor of one of the co-proprietors would retain upon the shares of all after division any charge by way of "hypothèque" that had been created by his debtor before the division.

The doctrine of the old French law was, on the other hand, that a partition had no relation either to the contract of exchange, or to the contract of sale; that it was not in the nature of a purchase-deed ("titre d'acquisition"), but had only the effect of determining and limiting to certain subjects the indefinite share which, before the partition, each co-heir or other co-proprietor had in the mass of the property divided. According to the distinction to be found in the writings of so many French jurists, and in the Code itself, the instrument of partition was "un acte déclaratif," not "un acte translatif de propriété."

Pothier also shows that the consequences of a partition differed in various other particulars, besides that relating to incumbrances which has been already mentioned, from those of a sale or exchange; as, for instance, in the warranties resulting from the respective contracts, and in the right of rescission. And although he mentions that it was ruled by the Custom of Orleans that the property divided was not, by reason of the partition, subject to feudal dues, he treats that exemption as a consequence of the established distinction between a partition and the other contracts; and not, as it was put in the argument, the result of a mere fiction of law, devised originally in order to evade such dues, and afterwards adopted as an established principle of French law.

It was, however, one thing, as Demoloube observes ("Traité des Successions," vol. iii, p. 291) to give this effect to a partition in kind, and another to give it to a licitation which has so many of the characteristics of a sale; and which, when strangers are admitted to bid, may always result in an ordinary sale.

Pothier, however, in the 7th Article above referred to, shows that this was so under the old law. After defining *licitation*, he says, "Lorsque c'est l'un des co-héritiers ou co-propriétaires entre lesquels la licitation se fait, qui est adjudicataire, la licitation, quoiqu'elle ait l'apparence d'un contrat de vente, n'est pas néanmoins contrat de vente. Cette licitation tient lieu de partage, et n'est autre chose, de même que le partage, qu'un acte dissolutif de communauté." And, after applying this to co-heirs, he proceeds: "Il en est de même des autres co-propriétaires. Lorsque plusieurs légataires, ou plusieurs acquéreurs, licitent entre eux un héritage qui leur a été légué en commun, ou qu'ils ont acquis en commun, celui d'entre eux qui s'en rend adjudicataire, est censé avoir été directement légataire ou acquéreur du total de l'héritage, à la charge seulement de faire raison à ses co-légataires ou co-acquéreurs de leur part dans le prix auquel l'héritage serait porté par la licitation qui en serait faite entre eux."

It is impossible to read these two chapters in Pothier without coming to the conclusion that, according to the old law of France, a partition was treated as a transaction perfectly distinct in its nature and consequences from a sale or exchange, and that a licitation had in order to a partition, if the property was purchased by a co-licitant, and not by a stranger, was treated as only a step towards a partition, and involved the same consequences.

When, therefore, the Code enjoins, as in Articles 1686 to 1688, that a subject which cannot be conveniently divided in kind among "co-propriétaires" shall be dealt with by licitation, a strong presumption arises that it was not intended, unless the intention were expressed, to change the old law of licitation, and still less to change the law as to some, but not as to all, classes of co-licitants.

The difficulty no doubt arises from the terms of the 883rd Article, and its place in the Civil Code.

These, if considered alone, might lead to the conclusion that both the article and the principle which it embodies were intended to be applied only to the co-heirs entitled to share in the succession of one naturally or civilly dead. That they have, however, a more general application, is shown by the 1476th and 1872nd Articles of the Code, which expressly extend their operation, the first to spouses living in community, the last to whatever classes may be comprehended in the term "associés."

It was argued that the expression of these two classes implies the exclusion of all other co-propriétaires. The argument would be of weight if the whole French law were to be taken to be expressed in the Code, and if we were bound to apply the English rules of construction to what is so expressed. But it is impossible to read the voluminous commentaries on the Code, which have proceeded from authors of the highest authority, without seeing that this is not the view taken of their law by French jurists. M. Demolombe, in commenting upon the 883rd Article ("Successions," vol. iii, p. 332) argues from the very Articles above-mentioned that it was not the intention of those who framed the Code to depart from the old law relating to partition, and licitation as a step to partition, and in favour of the conclusion at which he finally arrives, viz., that the rule of declarative partition recognized by the 883rd Article in the case of the partition of a succession, is applicable to the partition "de toute universalité, qu'elle que soit la cause de l'indivision," and even to the partition "des choses singulières, et individuellement considerées."

This conclusion is supported by other authorities, as, for instance, by the 22nd note on Article 883 in Sirey's Supplement, which says, "La fiction de l'Article 883 n'est pas exclusivement applicable au cas de partage ou licitation entre co-héritiers; elle est également applicable au cas de partage ou licitation entre simples communistes," and refers to various decisions in support of that proposition.

It was, however, argued by the learned counsel for the Appellants that even if Article 883 be taken to be applicable to classes of "communistes," other than those to whom it is expressly made applicable by the Code, it must be taken to be applicable to such only as hold their undivided property "d'un

titre commun;" and that the co-proprietors of the Riche Bois domain did not fall within that category.

This argument, which seems to admit that Article 883 C. C. is *primâ facie* applicable to all whose property can be the subject of licitation under Articles 1686 to 1688 C. C.: imports an exception to the rule which is not expressed by the Code.

The authority chiefly relied upon in support of the argument was the case decided at Douai, on the 2nd of May, 1848, and reported in Dalloz Jur. 1849, Partie II, p. 184.

The facts of that case were the following:—The widow Cailleux and her children were undivided proprietors of the domain of Mouriez, which in 1814 was sold to one Pannier.

One of Madame Cailleux's children, Etienne, had several daughters, who, as the representatives of their deceased mother, had acquired a charge by way of *hypothèque* on his share.

Another of her children was a Madame Le François, who was not a party to the sale, but whose ratification of it the other vendors undertook to procure. But for this circumstance it would have been impossible to argue that the transaction of 1814 was anything but a sale to Pannier, a stranger.

In 1831 Etienne, as the heir of Madame Le François, ratified on her part the transaction of 1814, and this completed the title of Pannier to the whole estate.

In 1848 the daughters of "Etienne" sought to recover their debt, which had been duly inscribed as a charge on their father's share in the estate, and as a step thereto sued Pannier for a partition or licitation of the property under Article 2205, Civil Code.

Pannier made several defences. He contended, first, that the transaction of 1814 was in its nature and effect a partition and not a sale; that he was, therefore, entitled to the benefit of Article 883; and that the creditors of Etienne could not follow the estate in his hands; secondly, that even if the transaction of 1814 was in its nature a sale, yet inasmuch as it was not ratified by the heir of Madame Le François until 1831, there existed indivision between him and her from 1814 to 1831, and that consequently the ratification had the effect

of a partition between communists, giving him, if he had it not before, the benefit of Article 883; and thirdly, that the action under Article 2,205 would not lie; that Article applying only to a case of indivision between co-heirs, and not to that of indivision between proprietors holding by different titles; and the proper remedy of the Plaintiffs, if they had any rights against him, being by seizure, and not by a demand for partition.

The Courts rejected the first defence on the following ground:—" Attendu que pour qu'il y ait lieu à l'application de l'Article 883 entre associés, comme entre co-héritiers, et *même entre communistes*, il faut que les associés ou communistes tiennent leur droits d'un titre ou d'une origine commune existant antérieurement à l'acquisition que fait l'un d'eux de la part indivise de son co-propriétaire, que ce n'est que dans ce cas que la fiction créée par l'Article 883 doit avoir effet." And they applied this principle by showing that Pannier, before the transaction of 1814, had no right in the property, either as co-heir, as partner (associé), or communist, but was only a third party purchasing; and that his contract could not be said to cause a state of indivision to cease, inasmuch as no such state existed between him and his vendors.

The decision on the second defence was, that the ratification of 1831 must also be treated as a sale; that the portion of the estate which Pannier already held he held as vendee, and not by the same title as the heir of Madame Le François. And the Judgment added this further reason, " Attendu, en outre, qu'il est de principe que l'acquisition faite par un tiers déjà acquéreur de plusieurs parts, de la dernière part d'un immeuble, quoique faisant cesser, l'indivision n'est pas considérée comme un acte équivalent à partage, et ne doit pas par conséquent recevoir l'application de l'Article 883."

Upon the third point the Court held that the creditors were entitled under the 2205th Article, to call upon Pannier to ascertain by partition or licitation their father's share, on which their charge existed. It is not necessary to consider how far this ruling was consistent with what had been laid down as to the two other points. But one passage in the Judgment of the Court supports what has been said above as to the latitude with which the

articles of the Civil Code are interpreted and applied by the French Courts and jurists. It is, "Attendu que l'Article 2,205 du Code Civil est aussi applicable au communiste que l'est l'Article 883 du même Code, aucune article de ce Code n'ayant de dispositions spéciales sur la question qu'il s'agit."

The "res decisa" in the case just stated, certainly does not govern the present. It was merely that the state of indivision must exist between the acquirer and those from whom he acquires the property before the date of the acquisition; and further that the ratification was but the completion of the former transaction of sale, not a new transaction in the nature of partition.

The domain of Riche Bois, though consisting of different parcels, had before 1866 been consolidated as one subject. It has, throughout the proceedings, been treated as one subject held in certain undivided shares by the communistes or co-proprietors, and as such to be the proper subject of partition by licitation. The parties were ascertained, their shares were defined, and they held the whole subject according to their shares in a state of community or indivision. It does not appear to their Lordships that there is any authority for holding that the licitation was in itself improper, or that it did not involve the ordinary consequences of a licitation with a view to a partition and the cesser of the indivision, because the different parcels of which the subject was composed, were originally acquired by the co-proprietors under titles that cannot be traced to one common origin.

Another class of cases cited, as, for example, the two in Dalloz, Jur. 1845 pp. 376 and 377, only show that even amongst co-heirs, and, *à fortiori*, amongst other co-proprietors, there may be cessions intended to take effect as sales, and not as partitions, and that when this intention is clearly shown, the Court will give effect to such transactions as sales, involving all the consequences of a sale. One, and the principal criterion, for determining whether a particular act is to be treated as a sale or as a partition, seems to be this, viz.—is its object to cause the state of indivision to cease? In the present case all the proceedings were taken with that object, and that object alone.

Upon the whole, then, their Lordships are of

opinion that the preponderance of the French authorities is in favour of the conclusion to which both the Master and the Judges of the Supreme Court of Mauritius have come in this case, viz.: that the representatives of Auguste Peyras and wife and other co-licitants, were within the principle of Article 883 of the Civil Code, and consequently were not vendors but co-partageants, having only the privilege which they were bound under Article 2109 to inscribe within sixty days.

From this it necessarily follows that the privilege was lost by the omission to inscribe it within the time prescribed; that, to use the phrase of M. Pont, it has "degenerated" into an hypothèque, and the only remaining question is, whether the inscription of the 21st April, 1860, was tantamount to an inscription of an hypothèque under Article 2148, Civil Code.

In order to try this question, it may be well to restate shortly the relative positions of the Appellants and the Respondent. After the sale by licitation the Appellants might have inscribed such debts as they could claim against M. Courtaux personally as charges upon the whole estate in his hands. They might also have inscribed such as they could claim against the estate of Peyras as charges upon what might be coming to that estate. They seem to have made directly no such inscriptions, certainly none before those of the creditors of Courtaux who are represented by the Respondent. Considered then as creditors of Courtaux, they have clearly lost their priority over the Respondent. They can only assert priority over him in respect of the fund in question by showing that the representatives of Peyras have duly inscribed a legal *hypothèque* upon it for their share of the proceeds of the first sale, to the benefit of which they, standing by subrogation in their debtors' shoes, are entitled.

The *ex officio* inscription of the 21st of April, 1860, would give notice to all who might search the Register of Inscriptions that the whole sale price remained unpaid, and remained in the hands of the purchaser. As mere notice to affect the consciences of persons about to advance money to Nicolas Courtaux this might have been sufficient; for they could hardly fail to infer that the particular share, for which each co-partageant would have a privilege if he had duly inscribed it within sixty

days, and for which he still had a right of *hypothèque*, was due to him.

The question, however, is not whether there was what a Court of Equity in this country would account notice; it is one of priority according to the provisions of positive law. If the law, in order to enforce the principle of publicity, has said that he who is first to inscribe his charge shall defeat, or obtain a preference over, a prior creditor of whose claim he may be aware, we cannot deprive him of the legal fruits of his greater diligence. That the French law is as above stated, seems to result from the letter of Articles 2,113 and 2,114 C. C.; and is positively laid down by M. Troplong, "Traité des Priviléges et Hypothèque," Tome II, p. 346, and other authorities. The only question, then, to be determined in such a case is whether the prior creditor, in this instance the representatives of Peyras, has done that which, in law, is tantamount to a prior inscription.

The objections taken to the inscription of the 21st of April, 1860, as a valid inscription of the hypothèque of the heirs of Peyras are—

1st. That it was made not at the instance of the creditors, or of any person on their behalf, but by the Conservator of Mortgages, acting *ex officio* under the provisions of Article 2,108 C. C.

2nd. That it does not, either literally or substantially satisfy the conditions of an inscription of an hypothèque under Article 2,148, or comply with the essential formalities required by that Article.

Upon the first point there is some conflict of authority. The case decided by the Court of Poitiers, 1st July, 1831, 31 Dalloz, Partie ii, p. 189, would, if it stood alone, be conclusive against the Appellants. In that case the deed of sale contained a special stipulation, whereby the purchaser gave to the vendors an hypothèque upon property other than that which was the subject of the sale. The Conservator, having transcribed the deed, thought it was his duty to inscribe both the privilege for the unpaid purchase money and the conventional hypothèque. But the Court held that this inscription, though valid as to the privilege, was of no effect as to the hypothèque, which the creditor was bound to have inscribed at the instance of himself, or of some person on his behalf, under Article 2,148.

The Appellants, however, rely on the decision of the Cour de Cassation of the 13th July, 1841 (41 Dalloz, Partie i, p. 295, and 41 Sirey, Partie i, p. 731), in the "Affaire Chagot," which, being the authority principally relied upon by the Master, deserves particular attention.

In that case, "la famille Chagot" sold to Manley and Wilson the gérants of a trading firm known as "La Societé Charenton," ten thirty-second parts of certain factories for 1,000,000 francs. By a subsidiary arrangement the old Company of Charenton was dissolved, and a new Company formed under the same name, into which "la famille Chagot" brought as partners the remaining twenty-two thirty-second shares of the factories, receiving the equivalent for these twenty-two thirty-two shares in the shape of shares in the new Joint Stock Company of which Manley, Wilson, and another became gérants. It was further specially provided that, in order to secure the payment of the 1,000,000, the price of the ten thirty-second shares, the Chagots should have not merely the vendor's privilege on these shares, but an "hypothèque" on the entirety of the factories.

The conservator having transcribed the deeds, inscribed *ex officio* both the privilege and the "hypothèque."

The Report says expressly of this inscription: "En même temps que le conservateur prénoit une inscription d'office pour la conservation du privilége, il en prit une autre également d'office pour la conservation de l'hypothèque. Cette inscription avec élection de domicile chez l'avoué de la famille mentionnait en outre de quel acte elle étoit prise, au profit de qui, et sur quels biens."

The Company was unsuccessful, its property was seised and sold; and the rights of the parties in the proceeds of the sale became the subject of adjudication.

"La famille Chagot" appears to have claimed a vendor's privilege for the 1,000,000 upon the whole property; but failing that, a vendor's privilege upon ten thirty-second parts of the fund, and an "hypothèque" on the whole.

The Court of First Instance allowed the first claim, but this was set right, on appeal by the Court of Dijon, whose decision was afterwards

affirmed by the Cour de Cassation; and it was finally held that the family had the privilege only in respect of the ten-thirty-second parts, but a valid hypothèque on the whole property; and that the inscription of the latter, though made by the conservator *ex officio,* was good.

It is desirable to see what was the "ratio decidendi." One of the "considérants" of the Court of Dijon is to this effect: "Considérant que l'on voit que l'inscription critiquée est prise pour un droit d'hypothèque, &c., &c.; qu'ainsi cette inscription relatant non pas un privilége mais une hypothèque spéciale, et contenant suffisamment toutes les conditions de la loi, doit être déclarée valable."

The Judgment of the Cour de Cassation has this statement: "Attendu que l'inscription du 25 Septembre, 1826, prise pour un droit d'hypothèque avec élection de domicile non chez le conservateur, mais chez l'avoué des créanciers sur la totalité des immeubles de Creuzot avec désignation que ces immeubles ont été hypothéqués à la créance inscrite, a eu évidemment pour but de conserver dans l'intérêt de la famille Chagot l'hypothèque qui lui avait été constituée dans l'Acte du 11 et 12 Juin, 1826, pour sûreté du paiement du million qui lui était dû par l'ancienne Société de Charenton."

Its reason for affirming the power of the conservator to make the inscription was thus expressed: "Seeing that although Article 2,108 of the Civil Code makes it the duty of the conservator to inscribe the privilege resulting from the transcription of the contract, the Code nowhere forbids him to inscribe, without having been required to do so, a conventional mortgage in the interest of another; and that Article 2,148 of the Civil Code admits that this may be done by any third person, and does not require him to have a mandate." It also proceeded in part on the ratification by the creditor.

It is obvious that if this decision is to be taken as overruling, or even of higher authority than that of the Court of Poitiers, it falls far short of what is required to support the Appellants' contention. In both cases the conservator had avowedly and designedly inscribed a right of *hypothèque* as such. In the latter case he had made his intention more manifest by expressly conforming to one of the

formalities prescribed by Article 2,148 of the Civil Code, viz., the election of domicile by the creditor.

In the case before us there is no pretence for saying that he intended to inscribe the *hypothèque* of the heirs of Peyras for the share of Peyras. He inscribed the supposed privilege of all the coprietors of the domain of Riche Bois as vendors for the whole sale price. It is not a question whether his *ex officio* inscription of an unquestioned *hypothèque* with all the essential formalities of registration is valid, but whether what he did with one purpose can avail for another; whether what he did *ex officio* for A, B, and C as vendors, can operate as the inscription of B's right of *hypothèque* for his particular share.

Another case relied upon by the Appellants was that decided on the 4th of January, 1854, by the Court of Agen. This arose upon a donation by an instrument, whereby the donor reserved for his own benefit certain charges on the property given. The Conservator, after transcribing the Deed of Gift, inscribed the charges. A question was raised whether the donor had the privilege of a vendor. It was decided that he had not; but that, inasmuch as the inscription complied with the substantial formalities of Article 2148, it might avail as an inscription of those charges as hypothèques. It was held there that the election of domicile is not an essential formality. This decision is in direct conflict with that of the Court of Nismes, decided in the following November (Nouvelle Sirey 1855, Partie ii, p. 512). In that case the question also arose on a donation. There is, moreover, a manifest distinction between both these cases and the present, inasmuch as in both the person of the creditor and the amount of the charge were the same, whether the inscription were that of a vendor's privilege or merely of a right of hypothèque. The most that can be said of the former is that it follows that of the Cour de Cassation, which affirmed the power of the Conservator to act without a mandate.

M. Pont, in his "Traité des Priviléges et Hypothèques," tom. i, sec. 270, p. 285, and again, tom. ii, sec. 933, p. 342, after commenting on the decisions which are in conflict with that of the Court of Poitiers, comes to the conclusion that if they are taken to establish that the Conservator of Mort-

gages, acting as a friend of the creditor and without mandate, may of his own mere motion inscribe an hypothèque in order to preserve the rights of that creditor, they may be supported; but that if they are to be taken to affirm that the Conservator of Mortgages has, *virtute officii*, the right to act *ex officio*, and inscribe hypothèques irrespectively of any requisition, the doctrine is one which ought to be rejected. In this state of the authorities, it can hardly be said that the power of the Conservator to inscribe a right of hypothèque *ex officio* is clearly established.

It is clear, however, that all the decisions in favour of his power assume that the inscription must satisfy the essential conditions of an inscription under Article 2,148; and this brings us to the consideration of the second point.

As to this, it must be admitted that the observance of some of the formalities prescribed by Art. 2,148, is not essential to the validity of an inscription. It seems to be clear that the presentation to the Conservator of the two "Borderaux," or notes specified in the Article, is one of these, nor does it appear to be essential that the inscription should contain precisely all the particulars which the Article says are to be specified in those notes when presented. But on the question as to what may be safely omitted, there is a considerable conflict of authority. M. Pont, tom. ii, Art. 956, says: "La doctrine et la jurisprudence présentant là-dessus un pêle mêle de décisions au milieu desquelles l'esprit le plus attentif chercherait en vain un système arrêté, ou une règle précise." M. Troplong, tom. iii, sec. 669, p. 68, says: "Quant à la jurisprudence, elle est pleine d'incertitudes."

M. Troplong considers that (secs. 665 and 668 bis) the only three things which the Inscription must express are the description of the immovable which is subject to the hypothèque, the person of the debtor, and the amount of the debt for which the hypothèque is claimed. He treats the description of the creditor, and the date of exigibility of the debt as non-essential; though there are certainly many cases, including one before the Cour de Cassation, in which the last was deemed essential.

M. Pont (tom. ii, secs. 962 et seq., p. 363),

appears generally to adopt the conclusions of M. Troplong; treating the description of the creditor as a very useful provision, but one made in the interest of him, rather than in that of subsequent creditors; and consequently, that its omission does not invalidate the inscription as against him. This modern doctrine of the commentators seems to be inconsistent with earlier decisions of the Courts, including the Cour de Cassation.

In the case decided at Agen on the 4th of January, 1854, being one of those principally relied upon by the Appellants, the Court, dealing with this question of essential and non-essential formalities, says, "Attendu que les unes, comme le nom du débiteur, la désignation du chiffre de la somme, objet de l'hypothèque celle de l'immeuble grevé étaient tellement inhérentes à la substance de ce droit, constituaient en si haut degré pour les tiers intéressés comme pour l'inscrivant lui-même les éléments d'une manifestation indispensable, que leur omission devait frapper de nullité l'inscription qui la contiendraient, mais qu'à l'égard des autres formalités," &c., &c.

It is to be observed, however, that these questions touching essential and non-essential formalities have arisen in cases in which there has been an actual attempt on the part of a creditor, or of some person acting, or presumed to act, on his behalf, to inscribe his particular debt. Here the question is whether an inscription made *alio intuitu* by a public officer can be taken to be a sufficient inscription by or on behalf of the creditor. In such a case it seems to be the more necessary that the inscription should show on whose behalf the public officer was acting as *negotiorum gestor*. Accepting, however, the law as laid down by MM. Troplong and Pont, and in the case last cited to be applicable to this case, can it be said that the inscription of the 21st of April, 1860, expresses what it is essential that an inscription by the representatives of Peyras of their hypothèque should express? It in fact shows only that the whole purchase money remained due from Nicolas Courtaux to those who might be found entitled to it, and claims for the whole class the privilege of vendors. The representatives of Peyras, if they had inscribed either

under Article 1809, or Article 1848, could have claimed only a privilege or hypothèque, as the case might be, for their proportion of the purchase money, and were bound to specify the amount for which they claimed an hypothèque, "le montant de la créance." A third party who searched the register in order to know whether he could safely advance money to M. Courtaux, would learn only that all the co-licitants claimed a vendor's privilege for the whole sum, which, if he knew the law, he would know they could not effectually assert. It would not give him the assurance which the law requires that the representatives of Peyras claimed an hypothèque for a definite sum, part only of the purchase money, which they had perfected by inscription.

Their Lordships have considered this question with reference to the 2,148th Article. The case of De Beaurepaire, Sirey 1840, Partie II, p. 686, seems to assume that if the representatives of Peyras had duly inscribed their privilege as co-partageants under the 2,109th Article, though after the expiration of the sixty days, that inscription, if it complied with the substantial requisites of Article 2,148, would avail, as a sufficient inscription of an hypothèque. If such an inscription had been made in this case, it would probably have contained all the particulars of an inscription under Article 2,148 which are now deemed essential, and in particular "le montant de la dette." But no such inscription was made in fact. And it is to be observed that in respect of such an inscription the difficulty of presuming an authority in the Conservator to make it *ex officio* is greater than it is in respect of one made under Article 2,148. The words of the 2,109th Article are, "par l'inscription faite *à sa diligence;*" the words of the 2,148th Section are, "soit par lui même, *soit par un tiers;*" and the decisions in favour of the Conservator's power to inscribe an hypothèque without a mandate proceed very much upon the latitude of the expression, "soit par un tiers."

Upon the whole, then, their Lordships, after anxiously considering the arguments of counsel and the authorities cited, have come to the conclusion that the Judgment of the High Court of Mauritius in refusing to give to the inscription of the 21st of April, 1860, the character and effect of an inscrip-

tion of the hypothèque to which the representatives of Peyras were entitled, cannot be successfully impeached. And they must, accordingly, advise Her Majesty to affirm that Judgment, and to dismiss this Appeal with costs.

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