McGILL LAW JOURNAL
REVUE DE DROIT DE McGILL
Montréal
Volume 31 1986 *No 4*

Enforcing Rights in Corporeal Moveables: Revendication and Its Surrogates

PART ONE*

R.A. Macdonald**

Focusing on remedies for vindicating rights in corporeal moveables, the author reviews how the action in revendication and its surrogates may be deployed today to protect these rights. In particular, the author examines how the changing conceptions of corporeal moveables have challenged some of the basic principles of the 1866 *Civil Code of Lower Canada* inducing courts to develop new applications for traditional remedies.

Portant son attention sur les recours concernant les droits mobiliers corporels, l'auteur discute de la façon dont l'action en revendication et ses substituts peuvent être utilisés pour protéger ces droits. L'auteur examine en particulier les retombées de l'évolution des conceptions de la notion de meubles corporels sur certains des principes de base du *Code civil du Bas-Canada* de 1866, en incitant, notamment, les tribunaux à développer de nouvelles applications des recours traditionnels.

*The continuation of this article will appear in volume 32 of the *McGill Law Journal.*

**Dean of the Faculty of Law, McGill University. This essay began as a Background Paper prepared in 1983 for the Ontario Law Reform Commission under the title "Remedies for Wrongful Interference with Corporeal Moveables in Quebec". That study of civil law remedies consisted of (i) an examination of actions such as revendication, specific performance, the action in restitution of an object and damages, (ii) a review of interlocutory remedies such as seizures before judgment, sequestration and injunctions, (iii) a survey of execution remedies such as oppositions to withdraw from seizure and oppositions for payment and (iv) an assessment of whether self-help recourses such as recapture were possible in the law of Quebec. When asked by the *McGill Law Journal* to permit its publication in a revised form, I began to reconsider the original Background Paper. In particular I was interested in two subsidiary themes which emerged from the original study: first, the extent to which codal premises about the law of property have been overtaken by practice during the past one hundred years; and second, the extent to which property theorists seem wedded to these premises and the conceptual distinctions they imply, notwithstanding their apparent rejection in practice. I have, consequently, transformed the study in order to set these other themes into sharper relief. It follows that the essay which now appears is only remotely the heir of the 1983 Background Paper, which still remains confidential to the Ontario Law Reform Commission.

Synopsis

* * *

I. Introduction

1. *Distinguishing Persons and Property* — Legal theorists generally acknowledge that the entire body of private law in any civil law jurisdiction today can be developed as a series of variations on one major theme — the distinction between persons and property.[1] The structure of the *Civil Code of Lower Canada* itself consecrates this distinction: Book One sets out the principles governing the attribution of legal personality, while Book Two elaborates the main rules concerning the scope and characteristics of rights in property.[2] The remainder of the *Code, inter alia*, explores differing mechanisms by which the right of ownership, or certain of its dismemberments, may be allocated and transferred among legally recognized persons.

At the time of Codification, persons and property could be (and were) distinguished primarily on the basis of observations about the physical world. Human beings comprised the set "persons"; corporeal things, including

---

[1]This distinction, which in its modern understanding grew out of the enlightenment, probably achieved its most explicit formulation in I. Kant, *Metaphysische Anfangsgründe der Rechtslehre*, which constituted the first part of the *Metaphysik der Sitten* (Königsberg: Friedrich Nicolovius, 1797). See, in particular, the section entitled "On the Mode of Having Something External as One's Property" in I. Kant, *The Metaphysical Elements of Justice*, trans. J. Ladd (Indianapolis: Bobbs-Merrill, 1965) at 51-67. For a modern rendition, see G. Marcel, *Être et Avoir* (Paris: Aubier-Montaigne, 1968). Kant's position alternatively reads as a subsumption of all property rights under interpersonal rights, a position once hotly debated in France: see M.F. Planiol, *Traité élémentaire de droit civil*, t. 1, 4th ed. (Paris: L.G.D.J., 1906) no. 2159. But his view is not relevant only to civil law. Both John Austin and Jeremy Bentham see the Kantian distinction as fundamental to the private law of England: see J. Austin, *Lectures on Jurisprudence*, vol. 1, 5th ed. (London: John Murray, 1911) Lecture 13, 357 at 357-58.

[2]The centrality of the distinction between persons and property, and the policy choices it posed, were not lost on the 1866 Codifiers: see the synopsis in T. McCord & A.D. Nicholls, eds, *The Civil Code of Lower Canada*, 3d ed. (Montreal: Dawson Bros, 1880) i at i-xiv. An especially helpful statement of the objectives of codification, as concerns persons and property, may be found at ii-iii of this synopsis:

> It is one of the characteristics of the olden legislation that it appears to have had in view Things before Persons. ... Hence the numerous distinctions of property and the different rules of law to which Persons were subject in respect of each kind of Thing. Hence too, the old rule "*Traditionibus non nudis pactis dominia rerum tranferuntur*," and similar maxims. ... On the other hand, in modern society ... [t]he tendency of the age is to make Things subservient to Persons ... .

land, comprised the set "property".[3] But this first approximation of the legal distinction between persons and property was not an accurate reflection of the civil law even in 1866. To begin with, the *Code* accorded full legal personality (and capacity) to a variety of non-anthropomorphous entities: business corporations, municipalities and churches.[4] It also limited and even denied legal capacity to broad categories of natural persons: minors, interdicted persons, insane persons, imbeciles, married women and those declared civilly dead.[5] Moreover, the concept of property itself was hardly congruent with the notion of corporeal things. On the one hand, certain corporeals, such as most navigable and floatable rivers and their banks, as well as consecrated vessels, could neither be prescribed nor fully owned in the private domain.[6] On the other hand, in its usual denotations, the term "property" apparently encompassed incorporeals, such as dismemberments of ownership, rights evidenced by non-negotiable instruments, debts, personal rights in relation to corporeals, and rights of action.[7] Nevertheless, within the limits imposed by nineteenth-century exegesis of the *Civil Code*, a basic division of persons and property on *phenomenal* rather than *noumenal* grounds could be sustained.[8]

2. *Metamorphosis of the Distinction* — In the century since Codification, however, this simple conceptual bifurcation has increasingly shown itself to

[3]Of course, the term "property" has two distinct meanings which often lead to confusion. In its narrow sense "property" refers only to ownership or its dismemberments (*jus in re* or *jus in re aliena*). Here the term refers to what are traditionally known as real rights. More generally the term may be used to describe all rights capable of economic exploitation. In this second sense "property" is synonymous with "patrimony", and includes *jus ad rem* as well as other rights *in personam*. Except where the context clearly requires otherwise, the terms "property" and "proprietary rights" will be used in their narrower meaning.

[4]Title Eleventh of Book First of the 1866 *Code*, in contrast to its analogue in the 1804 *Code Napoléon*, contains a remarkably elaborate exposition and classification of non-physical persons ("les personnes morales").

[5]Sometimes the *Code* imposed a legal incapacity or "incapacité d'exercice" (as in the case of married women). Legal personality was actually denied in the case of persons declared civilly dead by establishing an "incapacité de jouissance": see arts 32-38 *C.C.L.C.*, repealed 8 May 1906.

[6]See arts 399-404, 583-594 and 2212-2221 *C.C.L.C.*

[7]That is, even in 1866 the term "property" had begun its transition from a term relating to things to an expression equivalent to "patrimony".

[8]For an assessment of the phenomenal underpinnings of nineteenth-century property theory, see R. Savatier, *Les métamorphoses économiques et sociales du droit privé d'aujourd'hui*, vol. 3, 2d ed. (Paris: Dalloz, 1959) c. 16, no. 437ff. See also M.R. Cohen, "Property and Sovereignty" (1927) 13 Cornell L.Q. 8; and C.B. Macpherson, "The Meaning of Property" in C.B. Macpherson, ed., *Property: Mainstream and Critical Positions* (Toronto: University of Toronto Press, 1978) 1 at 6ff. for critical discussions of the misconception of property as things. But compare J. Waldron, "What is Private Property?" (1985) 5 Oxford J. Legal Stud. 313, who claims that property theory must grow out of an understanding of objects of everyday experience, *i.e.*, corporeal things.

be outmoded.[9] No doubt because of the moral centrality of personhood, and because the relationships contemplated by the law of persons have undergone radical transformation over the past one hundred years, substantial effort has been devoted to modifying codal rules relating to the definition and attribution of legal personality.[10] Hence, it is often thought that the primary direction of twentieth-century legal evolution has been the migration into the law of persons of matters previously regulated by the law of property.[11]

Such an observation would be only partially correct. Legislative quiescence should not be taken for an absence of social and legal transformation within the law of property.[12] Changing judicial interpretations of codal texts, changing deployment in practice of traditional contractual forms and devices, and changing economic conditions often accomplish greater legal change than legislative fiat. In other words, a failure of codal amendment is not itself proof of the obsolescence of the underlying assumptions from which

---

[9]For formal recognition of this process of codal aging in general, see P.-A. Crépeau, "Civil Code Revision in Quebec" (1974) 34 La L. Rev. 921 at 924, who discusses the "existence of a tremendous gap between the basic policies as they are enshrined in the Civil Code and the social realities which the Civil Code purports to regulate." See also J.-L. Baudouin, "Le Code civil québécois: Crise de croissance ou crise de vieillesse" (1966) 44 Can. Bar Rev. 391. But compare the comment on Quebec, Civil Code Revision Office, *Report on the Québec Civil Code: Draft Civil Code*, vol. 1 (Québec: Éditeur officiel, 1978) [hereinafter the *Draft Civil Code*] by R.A. Macdonald, "Civil Law — Quebec — New Draft Code in Perspective" (1980) 58 Can. Bar Rev. 185 at 192-93.

[10]Major developments include the abolition of civil death, the gradual equalization of the legal status of spouses, the liberalization of adoption and divorce, the suppression of many of the consequences of illegitimacy, the lowering of the age of majority and the recognition of a minor's independent and primary legal interest in his own affairs. Even the insertion of arts 981*a*ff. *C.C.L.C.* and modifications to arts 1871-1888 *C.C.L.C.* as they concern limited partnerships alter significantly the patrimonial consequences of the legal personality of trustees and special partners. There have also been important extra-codal initiatives relating to the types and capacities of "les personnes morales". These include the reform of the *Companies Act*, L.R.Q. c. 38 and the enactment of legislation relating to unincorporated associations, Crown corporations and producer-owned agricultural marketing boards.

[11]Some writers suggest that an even more elaborate migration, involving even objects in the natural environment, should take place. They argue, in essence, that to date the concept of person has been stultified because it is limited only to "Contemporary Normal Proximate Persons". See C.D. Stone, "*Should Trees Have Standing?* Revisited: How Far Will Law and Morals Reach: A Pluralist Perspective" (1985) 59 S. Cal. L. Rev. 1.

[12]The only major codal amendments to the law of property have been the insertion into Book Two of a chapter on co-ownership by declaration (condominiums) (art. 441*b*ff. *C.C.L.C.*), the addition of non-possessory pledges to the titles of Book Three relating to security on property, amendments to the law of privileges, including a reformulation of the rules relating to construction privileges, and the closer regulation of creditors attempting to realize upon their security by means of hypothecary action (art. 1202ff. *C.C.L.C.*) or giving in payment clause (art. 1040*a*ff. *C.C.L.C.*).

the present rules governing property rights issued. Despite the *Code*'s generally illiberal, hierarchical and confessional underpinnings,[13] it displays in its theory of contractual obligations several features more consistent with principles of market capitalism.[14] The legal distinctions and remedies called forth by nineteenth-century economic liberalism were, however, only emergent in Book Two of the 1866 Codification.[15] Not surprisingly, therefore, the eclipse of the *Code* is most evident in its theory of proprietary rights.[16]

In keeping with the twentieth century's preoccupation with persons, much modern political and social philosophy has considered the meaning of property only from the perspective of its titulary. Theorists have often conflated the concepts of property and private property, and have been primarily concerned with identifying the legal entities entitled to claim rights in property. In so doing they seek to establish, and justify, limitations upon the power of the state to interfere with those rights.[17] For this reason, theoretical reconceptualizations of the categories "persons" and "property" tend to emphasize boundary shifts rather than the changing internal dimensions of property rights themselves. Thus, most recent legal theory and law

[13]For a discussion, see M. Caron, "De la physionomie, de l'évolution et de l'avenir du Code civil" in J. Boucher & A. Morel, eds, *Livre du centenaire du Code civil: Le droit dans la vie familiale*, vol. 1 (Montréal: Presses de l'Université de Montréal, 1970) 3 at 10ff.

[14]Some of the more important features of this perspective are the suppression of lesion as a general ground of nullity of contracts (art. 1012 *C.C.L.C.*), the adoption of the principle of consensualism in contracts for the alienation of a thing certain (arts 1025 and 1472 *C.C.L.C.*), and the foreseeability limitation on contract damages (arts 1074-1075 *C.C.L.C.*).

[15]Such a conclusion derives as much from what the *Code* does not contain as from its actual provisions. Nevertheless, some articles explicitly reveal this orientation. The rules of accession, specification and confusion (arts 429-441 *C.C.L.C.*), for example, rest on an artisanal rather than on a commercial conception of manufacturing. Also, the preoccupation with immovables suggests an agrarian rather than an industrial economy.

[16]See M. Pourcelet, "L'évolution du droit de propriété depuis 1866" in J. Boucher & A. Morel, eds, *Livre du centenaire du Code civil: Le droit dans la vie économico-sociale*, vol. 2 (Montréal: Presses de l'Université de Montréal, 1970) 3. For a like assessment of the property rules of the *Code Napoléon*, see B. Terrat, "Du régime de la Propriété dans le Code civil" in *Le Code civil 1804-1904: Livre du centenaire*, vol. 1 (Paris: Société d'études législatives, 1904) 329.

[17]Typical of modern efforts in this direction have been J. Rawls, *A Theory of Justice* (Cambridge, Mass.: Belknap Press, 1971); R. Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974); and F.A. Hayek, *Law, Legislation and Liberty: Rule and Order*, vol. 1 (Chicago: University of Chicago Press, 1973); F.A. Hayek, *Law, Legislation and Liberty: The Mirage of Social Justice*, vol. 2 (Chicago: University of Chicago Press, 1976); F.A. Hayek, *Law, Legislation and Liberty: The Political Order of a Free People*, vol. 3 (Chicago: University of Chicago Press, 1979). But compare J. Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980); and M.J. Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982). Unfortunately, in each of these studies (whether libertarian or communitarian), the concept of property is merely asserted and a rather elementary interpretation of the prerogatives of ownership is offered.

reform in Quebec have been directed to redefining legal personality rather than elaborating a new theory of property.[18]

3. *Scope of This Study* — This study focuses upon a small part of the law of property — remedies for vindicating rights in corporeal moveables. In substance it reviews how the action in revendication and its surrogates, the personal actions in specific performance of a contract and in restitution of an object, the attachment in revendication, the opposition to withdraw from seizure, and self-help remedies such as non-judicial recapture may be deployed today to protect diverse rights in or upon corporeal moveables. More importantly, however, it illustrates how changing conceptions of the nature of, and the economic function of, corporeal moveables have challenged several of the basic principles enshrined in the 1866 *Code*, and have induced courts to develop new applications for traditional remedies. For this reason the study can also be seen as a preliminary inquiry into non-legislative law reform in codified jurisdictions.[19]

Such an inquiry also demands a review of doctrinal responses to legal change. However, in order to appreciate the threat that incremental judicial and practice-driven law reform poses for property theory in Quebec, it is necessary to review, at least summarily, both the fundamental property concepts reflected in the *Civil Code*, and the underlying remedial principles of the *Code of Civil Procedure*. After all, it is the inherited categories of the law of property which initially control discourse about the kinds of legally protected rights and prerogatives which may be claimed in respect of corporeal objects.[20] In addition, because the civil law is, in overall orientation,

---

[18]This trend is best illustrated in the final report of the *Draft Civil Code*, *supra*, note 9 at xxix-xxxii. Apart from proposing a new regime of security on moveable property the *Draft Civil Code* makes no attempt to accommodate developments in the field of mercantile law. For another reflection of this tendency, see *Codification: Valeurs et langage: Actes du Colloque international de droit civil comparé* (Québec: Service des Comités du Conseil de la langue française, 1985) in which four of six workshops were devoted to the law of persons, two of six to the law of obligations and none to the law of property. For pioneering attempts to restate a theory of private property for the late twentieth century elsewhere, see C.A. Reich, "The New Property" (1964) 73 Yale L.J. 733; M.P. Catala, "La transformation du patrimoine dans le droit civil moderne" (1966) 64 Rev. trim. dr. civ. 185; and C.B. Macpherson, "Liberal-Democracy and Property" in Macpherson, *supra*, note 8, 199.

[19]Two civil law theories of legal change which have strongly influenced the thesis of this essay are those of Karl Renner and Alan Watson: see K. Renner, *The Institutions of Private Law and Their Social Functions* (London: Routledge & Kegan Paul, 1949); A. Watson, *Society and Legal Change* (Edinburgh: Scottish Academic Press, 1977); and A. Watson, *Sources of Law, Legal Change, and Ambiguity* (Philadelphia: University of Pennsylvania Press, 1984).

[20]The influence of atavistic reflexes to supposedly fundamental dogmas as a means of disposing of "recalcitrant data" is well-known in the sciences. See M. Polanyi, *Personal Knowledge: Towards a Post-Critical Philosophy* (New York: Harper & Row, 1964); T.S. Kuhn, *The Structure of Scientific Revolutions*, 2d ed. (Chicago: University of Chicago Press, 1970); and K.R. Popper, *Conjectures and Refutations: The Growth of Scientific Knowledge*, 3d ed. (London: Routledge

a law of rights and not a law of remedies, these categories largely control the mechanisms for obtaining judicial vindication of property rights.[21]

A. Property Concepts of the Civil Code

4. *Classifying Objects of Property* — Any western legal system builds its concept of property on two main foundations: a taxonomy of objects of property and a theory of property rights. True to its orientation towards the physical world, the 1866 *Code* appears to consider the former more important than the latter.[22] Moreover, the codal property regime calls forth a series of distinctions relating primarily to the physical characteristics of various objects of property, rather than to their functional or economic attributes. While classical theory would differentiate objects of property along half-a-dozen main axes,[23] the *Civil Code of Lower Canada* promotes one of these to pre-eminence. This distinction, set out in article 374 *C.C.L.C.*, is that between moveable and immoveable property.[24] Given the era in which the *Code* was drafted (and the mission of the Codifiers simply to codify existing law), a corollary of this distinction was the theoretical and textual unimportance of the former: *res mobiles, res viles.*[25] Few rules of the *Code* are

---

& Kegan Paul, 1969). For an application of these insights to law see R.W. Gordon, "Historicism in Legal Scholarship" (1981) 90 Yale L.J. 1017; C. Atias, *Épistémologie juridique* (Paris: Presses universitaires de France, 1985); and J.-G. Belley, "La théorie générale des contrats. Pour sortir du dogmatisme" (1985) 26 C. de D. 1045.

[21]See, generally, J. Ghestin & G. Goubeaux, *Traité de droit civil: Introduction générale*, 2d ed. (Paris: L.G.D.J., 1983) nos 517-32 and nos 549-62; J.H. Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America*, 2d ed. (Stanford, Calif.: Stanford University Press, 1985) c. 16; A. Watson, *The Making of the Civil Law* (Cambridge, Mass.: Harvard University Press, 1981) c. 10. A particularly powerful statement of the relationship of legal right and judicial remedy may he found in H. Motulsky, "Le droit subjectif et l'action en justice" (1964) 9 Arch. phil. dr. 215.

[22]Modern theorists note, however, that the key concepts of the civil law are not derived from a theory about objects of property, but rather from a theory about property rights. See Ghestin & Goubeaux, *ibid.*, nos 194-208; C. Atias, *Droit civil: Les biens*, t. 1 (Paris: Librairies techniques, 1980) no. 36ff.; C. Larroumet, *Droit civil*, t. 2 (Paris: Economica, 1980) nos 11-27.

[23]These include distinctions between moveables and immoveables, corporeals and incorporeals, fungibles and non-fungibles, consumables and non-consumables, private domain and public domain, and *res communes* and *res nullius*. See H., L. & J. Mazeaud, *Leçons de droit civil*, t. 2, vol. 2, 6th ed. by F. Gianviti (Paris: Montchrestien, 1984) nos 1285-91; G. Marty & P. Raynaud, *Droit civil: Les biens*, 2d ed. by P. Raynaud (Paris: Sirey, 1980) nos 2-11; P. Martineau, *Les biens*, 5th ed. (Montréal: Thémis, 1979) at 1-27.

[24]The first article of Book Two, art. 374 *C.C.L.C.*, provides: "All property, incorporeal as well as corporeal, is moveable or immoveable."

[25]See W.M. Marler, *The Law of Real Property: Quebec*, rev. ed. by G.C. Marler (Toronto: Burroughs, 1932) nos 1-25. This theme can be seen, *inter alia*, in the rules relating to the sale of property of incapables (arts 97, 293 and 320 *C.C.L.C.*), gifts (art. 776 *C.C.L.C.*), prescription (arts 2251 and 2268 *C.C.L.C.*), and civil procedure (art. 572 *C.C.P.*). See also the different treatment of immoveables and moveables in the legal rules relating to the conflict of laws (art.

worked out by reference to, or even with a view to, particularities of the law of moveables.[26]

A further, but subsidiary, distinction adverted to in article 374 *C.C.L.C.* is between corporeal and incorporeal property. Once again, most of the rules of the *Code* relating to the allocation and transfer of property are developed on the basis of the more palpable category — corporeals.[27] The reason for this is not difficult to see. Because traditional theory collapses the distinction between the right of ownership and the thing owned it follows that only tangible things (corporeals) may be owned, and that ownership is the only corporeal right. Intangibles (rights of action, debts and claims) must be understood merely as various species of rights vesting in their titulary. Again, all lesser rights in (*jus in re aliena*), or in respect of (*jus ad rem*), tangible objects are held to be incorporeal and cannot be owned.[28]

Even though the legal regime of corporeal moveables constitutes only a minor part of the law of property in Quebec, it raises interesting problems of definition. These relate both to the concept of a moveable — notably when moveables are purportedly immobilized and when two or more moveables are united by accession or are confused — and to the concept of corporeal property — notably when negotiable instruments, rights of action, claims, personal rights relating to things, and dismemberments of ownership are in issue. These problems which are seemingly at the margin of definition are nevertheless not trivial. They reflect the pressure to dissociate more clearly rights in, or in respect of, property from objects of property; and their increased importance is just one symptom of the transformation of property in the late twentieth century.[29]

---

6 *C.C.L.C.*), hypothecation (art. 2022 *C.C.L.C.*), accession (arts 414-441*a* *C.C.L.C.*), succcssions (arts 725-734 *C.C.L.C.*), substitutions (art. 931ff. *C.C.L.C.*), powers of testamentary executors (art. 918 *C.C.L.C.*), powers of minors and tutors (arts 293, 297, 320 and 322 *C.C.L.C.*), matrimonial regimes (art. 449 *C.C.Q.*), lease (art. 1634ff. *C.C.L.C.*), dismemberments of property (arts 487 and 567 *C.C.L.C.*), registration (art. 2082ff. *C.C.L.C.*), and means for recovery of possession (arts 770-772 *C.C.P.*).

[26]The rules relating to usufruet, the right of use, substitutions, promise of sale, lease and registration, for example — while capable of application to moveables — are drafted primarily with immoveables in view. Property scholarship in Quebec is also dominated by works focusing on immoveables. See, *e.g.*, Marler, *ibid.*; and Martineau, *supra*, note 23.

[27]For example, the treatment of the obligation to give in Book Three seems to presuppose corporeal things. The only explicit regulation of transaetions relating to incorporeals as such is found in arts 1570-1578 *C.C.L.C.*

[28]Catala, *supra*, note 18, no. 20ff.; Martineau, *supra*, note 23 at 2-3; P.-B. Mignault, *Le droit civil canadien*, t. 2 (Montrêal: Théoret, 1896) at 395-96.

[29]For a recent examination of the relationship between characterization of object and classification of right see F. Hage-Chahine, "Essai d'une nouvelle classification des droits privés" [1982] Rev. trim. dr. civ. 705 at 706-9. While the theoretical usefulness of this new scheme is uncertain, it does have the merit of signalling the frequent confusion of object and right in civil law theory.

5. *Classifying Property Rights* — While the distinctions between moveables and immoveables and between corporeals and incorporeals typify how the civil law categorizes objects of property, other concepts constitute in fact the general theory of property rights.[30] Three of these bear directly on the availability of remedies for vindicating rights in corporeal moveables. Together they define and classify the types of legal relationship between person and object which are judicially enforceable in the civil law.[31]

A first basic concept derives from a notion which, paradoxically, does not appear in the *Civil Code* itself. The whole of a person's economic holdings or assets (patrimony)[32] is, in theory, divisible into rights bearing directly upon objects (real rights or *jus in re*) including dismemberments of ownership (*jus in re aliena*), and claims against a person (personal rights or *jus in persona*) including claims in respect of objects mediated by persons (*jus ad rem*).[33] In consequence, ultimate legal responsibility for ensuring the enjoyment of all rights relating to property rests in the owner.[34]

Second, the concept of property is built upon the idea that, at any one time, there must be one person, and only one person, who is the owner of

---

[30]See, generally, le Marquis de Vareilles-Sommières, "La définition et la notion juridique de la propriété" (1905) 4 Rev. trim. dr. civ. 443; Mazeaud, *supra*, note 23, nos 1292-1473; Marty & Raynaud, *supra*, note 23, nos 12-56; Mignault, *supra*, note 28 at 397-98; A. Montpetit & G. Taillefer, *Traité de droit civil du Québec*, t. 3 (Montréal: Wilson & Lafleur, 1945) at 15-18. For a *précis* of the concept of ownership in France, see M. Vanel, "Propriété" in *Encyclopédie juridique: Répertoire de droit civil*, 2d ed. (Paris: Dalloz, 1975) [hereinafter *Encyclopédie Dalloz*]; and for a study of possession, see R. Rodière, "Possession" in *Encyclopédie Dalloz*, *supra*.

[31]For a comparative study of civil law and common law property regimes, see L. Jansse, *La propriété, le régime des biens dans les civilisations occidentales* (1953); F.H. Lawson, *A Common Lawyer Looks at the Civil Law* (Ann Arbor, Mich.: University of Michigan Law School, 1953) at 108ff.

[32]On various classifieations of legal rights including the distinction between patrimonial and extrapatrimonial rights, see Ghestin & Goubeaux, *supra*, note 21, nos 194-224. For a detailed discussion of the concept of patrimony, see C. Aubry & C. Rau, *Droit civil français*, t. 6, 4th ed. (Paris: L.G.D.J., 1873) no. 573ff. who derived the idea from C.S. Zachariae, *Cours de droit civil français*, vol. 4 (Strasbourg: Lagier, 1844) no. 573ff. See also M.N. Mevorach, "Le patrimoine" (1936) 35 Rev. trim. dr. civ. 811.

[33]Nevertheless, the distinction between real and personal rights, and even the concept of real rights less than ownership, is difficult to apply with precision when it is intended to exhaust the categories of rights known to the civil law. See S. Ginossar, *Droit réel, propriété et créance; élaboration d'un système rationnel des droits patrimoniaux* (Paris: R. Pichon et R. Durand-Auzias, 1960); J. Dabin, "Une nouvelle définition du droit réel" (1962) 60 Rev. trim. dr. civ. 20; S. Ginossar, "Pour une meilleure définition du droit réel et du droit personnel" (1962) 60 Rev. trim. dr. civ. 573.

[34]Exceptionally, where an owner has dismembered his right by granting a *jus in re aliena* or has granted an accessory real right, the titulary of the dismemberment or accessory real right may also avail himself directly of a judicial recourse to vindicate that right.

a given object of property.[35] Hence, it is claimed, the civil law knows neither a theory of estates, nor more generally, the distinction between legal and equitable title for dividing the right of ownership.[36] Actions to protect property rights therefore focus on identifying the one individual who, at the relevant moment, is owner.[37]

Third, because the basic structure of property rights for moveables and immoveables is identical, it follows that moveables can be owned.[38] This permits, at least theoretically, distinctions to be drawn, on the one hand, between ownership and possession, and on the other hand, between possession and the right to physical control of corporeal moveables.[39] It also suggests the need for remedies vindicating both possession and ownership of moveables.[40]

These three principles have long formed the basis of property theory in the civil law. Nevertheless, the changing landscape of objects of property over the past one hundred years has changed the way in which patrimonial rights are deployed, and has highlighted certain limitations of the traditional concepts.[41] More detailed analysis of these concepts in a modern context ought, therefore, to reveal where the demands of current practice are most likely to have overtaken them.

1. Real Rights and Personal Rights in Corporeal Moveables

6. *Patrimony and Proprietary (Real) Rights* — In characterizing all patrimonial rights relating to corporeal moveables as real or personal rights, classical theory seeks to distinguish proprietary from non-proprietary rights.[42]

---

[35]This notion is reflected in the expression "absolutisme individuel": see Vareilles-Sommières, *supra*, note 30.

[36]See P. Landry, *De l'utilité sociale de la propriété individuelle* (1901); F. Laurent, L'apparence dans le problème des qualifications juridiques (thesis, Caën, 1931) [unpublished]; R. Jambu-Merlin, "Essai sur la rétroactivité dans les actes juridiques" (1948) 46 Rev. trim. dr. civ. 271.

[37]This point is developed in detail in M. Hourcade, "Le possessoire et le provisoire" S.1963.Chron.41.

[38]See Marty & Raynaud, *supra*, note 23, nos 407-18. This is not to say that the *Code* does not elaborate several technical differences in the regimes of immoveable and moveable property. See examples cited, *supra*, note 25.

[39]But other features of the law, including variants on the rule "en fait de meubles, possession vaut titre", undermine the distinction over a wide variety of cases. The *locus classicus* is R. Salcilles, *De la Possession des meubles; études de droit allemand et français* (thesis, Paris, 1907).

[40]For an early suggestion to this effect, see C.J. Appleton, *Essai sur le fondement de la protection possessoire* (thesis, Lyon, 1893). For a discussion of various actions to defend ownership and possession of immoveables, see Marty & Raynaud, *supra*, note 23, nos 204-30.

[41]See, for a general continental perspective, the study by A. Rouast, "L'évolution du droit de propriété en France" (1947) 2 Trav. Assoc. Henri Capitant 110. Unfortunately, no study of comparable scope exists in Quebec.

[42]This distinction remains fundamental notwithstanding that it may not be exhaustive of all

Yet no text of the *Civil Code of Lower Canada* expressly reflects this distinction and its general tenor does not even emerge from article 405 *C.C.L.C.*, which purports to set out the panoply of legally recognized property rights. Article 405 *C.C.L.C.* provides:

> A person may have on property either a right of ownership, or a simple right of enjoyment, or a servitude to exercise.

From this elaboration, one might well conclude that the law distinguishes only three types of real rights in property: ownership, simple rights of enjoyment, and real servitudes.[43] Yet this trifurcation is incomplete in that it does not advert to accessory real rights in property (for example, the hypothec and the pledge),[44] and because it does not mention other rights relating to corporeal property.[45] More particularly, quite apart from the various types of real rights set out in article 405 *C.C.L.C.* there is an unlimited variety of personal rights which may bear on corporeal moveables. These latter *jus ad rem* may be categorized according to the types of obligations elaborated in article 1058 *C.C.L.C.*, namely to give, to do, or not to do.

7. *Enumeration and Characteristics of Real Rights* — Classical theorists identify two main attributes of real rights: they may be claimed only upon things (corporeal property), and they are directly opposable to third parties.[46] Ownership is the primordial real right; but each of its dismemberments (*jus in re aliena*) is also a real right. A taxonomy of rights in, or in respect of,

---

patrimonial rights. For example, modern writers distinguish other specialized types of rights, such as certain rights of administration (those exercised by testamentary executors and trustees), intellectual rights (copyright, patent, trademark), contingent rights (rights of pre-emption and of option), future rights (rights of presumptive heirs to their intestate inheritance, or rights under an irrevocable donation *mortis causa*), and perhaps licences and permits. For a brief discussion of these various other classifications, see Ghestin & Goubeaux, *supra*, note 21, nos 213-22.

[43]Mignault discusses these rights, *supra*, note 28 at 389-94.

[44]See art. 2016 *C.C.L.C.*: "Hypothec is a real right upon immoveables . . . ."

[45]See Mazeaud, *supra*, note 23, nos 1285-87 for an enumeration of other rights in corporeal property.

[46]See Ghestin & Goubeaux, *supra*, note 21, no. 213. See also Mignault, *supra*, note 28 at 389; J.-L. Baudouin, *Les obligations*, 2d ed. (Cowansville, Que: Yvon Blais, 1983) nos 8-9. It should be noted that these two attributes are possessed by all real rights, but they are not in themselves sufficient to identify a real right. The right of retention and the right of seizin, for example, seem to share both, but are not real rights. See F. Frenette, *Le droit de retention* (Québec: Chambre des Notaires, 1979) nos 53-57.

Moreover, some authors, notably Mignault, *supra*, note 28 at 392, and Baudouin, *supra*, assert a third characteristic of real rights, namely, that the category of real rights is closed. Others, notably Marler, *supra*, note 25 at 67, suggest that new real rights may be established by statute and by juridical act.

corporeal moveable property, therefore, would comprise the following members. Codal real rights would include first, ownership (article 406 *C.C.L.C.*); second — as dismemberments or principal real rights — usufruct (article 443 *C.C.L.C.*) and use (paragraph 487(1) *C.C.L.C.*); and third — as an accessory real right — pledge (article 1966 *C.C.L.C.*).[47] Of course, additional real rights are implicit in the *Code*,[48] while still others have been created by statute,[49] and by juridical act (either contract or will).[50] All other persons claiming a legally recognized right in relation to corporeal moveable property are vested with only a personal right in relation to an object.[51]

It follows that in classical theory only a titulary of real rights is permitted to exercise his prerogative directly upon a corporeal moveable. He has an action which may be taken in his own name to vindicate his own right. That is, only real rights give rise to an action to defend possession.[52] A person who does not have an immediate legal relationship with an object, whether or not he actually has physical control, may not claim rights in a corporeal moveable which have an independent footing and cannot defend his right to enjoyment of that object (including its physical detention) directly.

---

[47]Emphyteusis (art. 567ff. *C.C.L.C.*), habitation (art. 487(2) *C.C.L.C.*) and hypothec (art. 2016 *C.C.L.C.*) are also real rights, but, in principle, may be created only upon immoveables. It is difficult to imagine real servitudes in moveables.

[48]These include, notably, the right of *superficies* and the right to cut wood. Of course, in classical theory neither of these rights can apply to moveables.

[49]See, *e.g.*, *Lands and Forests Act*, R.S.Q. c. T-9; *Mining Act*, R.S.Q. c. M-13; *Bank Act* (being part 1 of s. 2 of *Banks and Banking Law Revision Act, 1980*, S.C. 1980-81-82-83, c. 40) s. 178; and *Act Respecting Bills of Lading, Receipts and Transfers of Property in Stock*, R.S.Q. 1977, c. C-53, as am. *Act Respecting the Transfer of Property in Stock*, S.Q. 1982, c. 55.

[50]See *Matamajaw Salmon Club* v. *Duchaine* (1921), [1921] 2 A.C. 426 (P.C.); *Boucher* v. *R.* (1981), 22 R.P.R. 310 (F.C.T.D.), aff'd (1984), 33 R.P.R. 308 (F.C.A.D.). A complete theory of such rights is set out in M. Cantin Cumyn, "De l'existence et du régime juridique des droits réels de jouissance innomés: Essai sur l'énumération limitative des droits réels" (1986) 46 R. du B. 3. Professor Cantin Cumyn identifies fishing and hunting rights, rights of passage, rights to draw water and so on as examples of contractual real rights. She notes, however, that it is difficult to conceive of examples of purely contractual real rights in moveables.

[51]The other major types of relation between person and object regulated by the *Code*, each of which does not involve a real right, are those of depositary (art. 1794 *C.C.L.C.*), unpaid vendor (arts 1474 and 1998-2000 *C.C.L.C.*), mandatary (art. 1701 *C.C.L.C.*), testamentary executor (art. 918 *C.C.L.C.*), trustee (art. 981*b* *C.C.L.C.*), borrower for use (art. 1762 *C.C.L.C.*), lessee (art. 1600 *C.C.L.C.*), *negotiorum gestor* (art. 1043 *C.C.L.C.*), retention claimant (*e.g.*, arts 441, 1679 and 1916*a* *C.C.L.C.*), sequestrator (art. 747 *C.C.P.*), tutor (art. 249 *C.C.L.C.*), curator (art. 337 *C.C.L.C.*), adviser (art. 349 *C.C.L.C.*), and holder of an object paid under mistake of fact or law (art. 1047 *C.C.L.C.*). For a general listing see Quebec, Civil Code Revision Office, *Report on the Civil Code of Québec: Commentaries*, vol. 2, t. 1 (Québec: Éditeur officiel, 1978) at 372-75 [hereinafter *Commentaries*].

[52]An excellent analysis of this attribute of real rights is contained in J. Derruppé, *La nature juridique du droit du preneur à bail et la distinction des droits réels et des droits de créance* (Paris: Dalloz, 1952), who concludes, in order to explain the extensive prerogatives of the *preneur à bail*, that the right of the lessee is a real right.

Rather, he must assert his rights by means of a contractual or quasi-contractual claim against one or more individuals vested with a real right in that corporeal moveable.[53] For this reason, the law has encountered difficulties in giving adequate protection to a mere holder of a corporeal moveable.

8. *Enhancing the Reality of Personal Rights* — Because the functional prerogatives of property are vested either in the owner or in titularies of a limited number of dismemberments of ownership, the law systematically avoids an inefficient multiplication of plaintiffs in any action to recover corporeal moveables wrongfully held by a third party. Unfortunately, however, this remedial schema is not sufficiently supple to respond to the needs of modern commercial practice. Over the past fifty years, the relative economic importance of moveables has increased dramatically. Complex manufacturing processes typically involve a panoply of suppliers, financers and buyers each desiring to maintain some type of direct right in corporeal property. Moreover, to accommodate the differing tax treatment of ownership and use, several modified nominate contractual forms have developed — in particular, the deployment of leases and loan agreements — to achieve an efficient division of capital and rent. Not surprisingly, therefore, in order to facilitate the recovery of valuable and easily transportable objects, legislatures[54] and courts[55] have been asked to attribute a quality of reality to what were previously conceived of as purely personal rights.[56]

2. Ownership of Corporeal Moveables

9. *Attributes of Ownership* — From the time of its Romanist origins, the civil law concept of ownership has, by and large, maintained a coherent theoretical structure.[57] In Quebec, article 406 *C.C.L.C.* sets out the principal characteristics of ownership. It states:

> Ownership is the right of enjoying and of disposing of things in the most absolute manner, provided that no use be made of them which is prohibited by law or by regulations.

---

[53]This individual must then defend his enjoyment. See Mazeaud, *supra*, note 23, nos 1627-32.

[54]See, *e.g.*, the prerogatives now attributed to the lessee under a registered lease of an immoveable dwelling (art. 1657ff. *C.C.L.C.*) and under a financial lease (art. 1603 *C.C.L.C.*).

[55]See, with respect to the loan contract, *Kirouac* v. *Ruel* (1941), 70 B.R. 350 and, with respect to ordinary leases, *Discothèque & Golf Lafontaine Inc.* v. *Lussier* (1980), [1980] C.S. 166 [hereinafter *Lussier*].

[56]This attribution reflects, at the practical level, the argument raised in the "objectivist" critique of the distinction between real and personal rights. This critique views even indeterminate personal rights as direct rights in the property of a debtor. See R. Saleilles, *Étude sur la théorie générale de l'obligation; d'après le premier projet de Code civil pour l'empire allemand*, 3d ed. (Paris: Pichon, 1925).

[57]For an historical overview, see G. Lepointe, *Droit romain et ancien droit français (Biens)* (Paris: Dalloz, 1958).

From this definition and related codal texts,[58] commentators have elaborated a theory of ownership comprising three main attributes. Ownership is characterized as absolute, exclusive and perpetual.[59]

Over the past one thousand years, however, the consequences attaching to the second of these attributes, exclusivity, have, in effect, differentiated the civil law concept of ownership from concepts of ownership held in other legal traditions.[60] As an exclusive right ownership is said, first, to be universally opposable, and second, to be unitary (or individual).[61] Latterly, this notion has been seen to possess two features. While even the Roman law of property presupposed an intellectual unity of ownership, since the French Revolution, the civil law has also been grounded in a material unity of ownership.[62]

10. *Limits on Unitary Ownership* — Despite its general tendency towards a conception of exclusive and unitary ownership, the civil law has always been required to accommodate notions of joint (*i.e.*, materially separated) and plural (*i.e.*, intellectually separated) ownership.[63] In its material sense,

---

[58]See, notably, arts 405 and 407 *C.C.L.C.* concerning the right of ownership specifically, and arts 399 and 689 *C.C.L.C.* concerning all patrimonial rights.

[59]See Mignault, *supra*, note 28 at 464; Montpetit & Taillefer, *supra*, note 30 at 100; Vanel, *supra*, note 30, *passim*. For a recent restatement see Quebec, Civil Code Revision Office, Committee on the Law on Property, *Report on Property* (Montreal: n.p., 1975); but see F. Frenette, "Commentaires sur le rapport de l'O.R.C.C. sur les biens" (1976) 17 C. de D. 991. Mazeaud, *supra*, note 23, no. 1305, adopts a five-fold inventory in which ownership is seen as exclusive, individual, total, sovereign and perpetual. This is not, however, a *new* conception. The first two features are united in classical theory under the rubric "exclusive" while the second two comprise the rubric "absolute".

[60]That is, while the concept of absoluteness is the distinguishing characteristic of ownership within the civil law (by contrast with *jus in re aliena* or with *jus ad rem*), as between different legal traditions the distinctive feature of the civil law is its notion of "exclusivité individuelle" in ownership. See Jansse, *supra*, note 31; Marty & Raynaud, *supra*, note 23, nos 32-37; and Vanel, *ibid.*, no. 117.

[61]See Mazeaud, *supra*, note 23, nos 1307-31; Marty & Raynaud, *ibid.*, nos 57-61 and nos 234-51.

[62]On this second point, see Marty & Raynaud, *ibid.*, nos 32-37; and Vanel, *supra*, note 30, no. 117 where she states:

> Le code de 1804 était hostile à la propriété collective, il estimait qu'il y a là un danger politique, en raison de la puissance de groupements, et un danger économique, l'exploitation par un groupe d'individus paraissant plus négligente que celle assurée par un individu.

But compare X. Martin, "De l'insensibilité des rédacteurs du Code civil à l'altruisme" (1982) 59 Rev. hist. dr. français et étranger 589. The law of Quebec never displayed quite the same hostility to "la propriété collective" and several features of the 1866 *Code* derogate from the *Code Napoléon* in this respect: see, *e.g.*, art. 689(2) *C.C.L.C.*, and the retention of emphyteusis and fiduciary substitutions.

[63]Of course, exclusivity has never meant that an owner might not grant competing rights in his property (dismemberments of ownership or even personal rights) which may severely limit his enjoyment. See *supra*, no. 6ff. of this text. In principle, the only other limits on exclusivity arise from cases of necessity: see Vanel, *ibid.*, nos 127-30.

unitary ownership is limited by the possibility of undivided co-ownership. However, while the right of ownership as such remains perpetual, the state of undivided co-ownership,[64] especially insofar as moveables are concerned,[65] has been conceived as temporary.[66] Moreover, the material dimension to the theory of unitary ownership has, in the twentieth century, escaped frontal assault primarily because of evolutions in the law of persons. Limited partnerships, corporations and foundations materially fraction ownership in exactly the fashion feared by the French codifiers by permitting legal personality to be internally sub-divided.[67]

By contrast, in its intellectual sense, the concept of unitary ownership has revealed major limitations. As noted, regardless of whether competing claims in an object are notionally concurrent, or notionally successive, classical theory requires that they be understood as generating only one right of ownership at a time. Yet, in respect of concurrent rights[68] there are in Quebec

[64]The most common forms arise from forced indivision of immoveables (common walls, hedges and ditches under arts 510-531 *C.C.L.C.*) and from co-ownership of immoveables by declaration (arts 441*b*-442*p* *C.C.L.C.*), and the now-abolished "copropriété par étages" (art. 521 *C.C.L.C.*). Other forms of joint ownership may arise by law or as a result of a contractual undertaking. Rules relating to household furniture and to certain matrimonial regimes (arts 497 and 520 *C.C.Q.*), successions (arts 689-753 *C.C.L.C.*), the finding of treasure (art. 586 *C.C.L.C.*) and accession to moveables (arts 436, 437(2) and 439 *C.C.L.C.*) are examples of the former. Partnerships (arts 1897-1900 *C.C.L.C.*) reflect the latter.

[65]In effect, the matrimonial regimes of community of property and, to a lesser extent, partnership of acquests constitute the only meaningful exception to the principle as concerns moveables. But even this exception has been eroded now that spouses may, without proceeding to a separation from bed and board or a divorce, contractually modify or dissolve their matrimonial regime, or apply to have the court do so: see arts 470 and 521ff. *C.C.Q.*

[66]See art. 689 *C.C.L.C.* But compare F. Delhay, *La nature juridique de l'indivision* (Paris: L.G.D.J., 1968) and M. Deschamps, "Vers une approche renouvelée de l'indivision" (1984) 29 McGill L.J. 215. While co-ownership by declaration may seem to be an important exception, arts 441*b*, 441*c* and 441*e* *C.C.L.C.* clearly illustrate that it is in essence unitary ownership onto which legally undivided (but economically divisible) co-ownership of common areas is grafted.

[67]The techniques are various. In some partnerships a semi-distinct legal personality is created. Corporations and foundations have distinct patrimonies, but each share reflects a percentage right in the corporation (if not a right to an aliquot portion of the corporation's patrimony).

[68]Whether these rights are asserted in or on property, and no matter how significant, they are not rights of ownership. This is true regardless of their origin. Some real rights arise by law (*e.g.*, legal servitudes under art. 510ff. *C.C.L.C.* and judicial and legal hypothecs under arts 2024-2036 C.C.L.C.); some by contract (*e.g.*, when an owner creates a right of habitation, use, usufruct, emphyteusis, hypothec or pledge upon his property); and some by a relationship of fact (*e.g.*, the right of a possessor in good faith to claim the fruits produced during his possession under art. 411 *C.C.L.C.*).

Again, some personal rights arise by law (*e.g.*, the right to seize before judgment the vehicle which causes a person damage (art. 734(3) *C.C.P.*); or by instrument (*e.g.*, the panoply of personal rights created by contract or by other juridical act sueh as a will); or by a relationship of fact (*e.g.*, the *negotiorum gestor* under art. 1043 *C.C.L.C.*, retention claimants asserting rights against third party owners and holders of an object paid under mistake of fact or law under

certain indicia of plural ownership[69] and, on at least one occasion, a court seems even to have accepted the existence of a theory of estates in land in Quebec law.[70] There are similar reflections of plural ownership in various types of notionally successive (but functionally concurrent) ownership. Two such instances — substitutions and ownership affected with a modality — are suggested by the *Civil Code*.[71] Even though a donor or testator may, under article 929 *C.C.L.C.*, establish the potential for ownership in more than one person by means of a fiduciary substitution, the *Code* presupposes that, at any given time, there will be only one owner — either the institute or the substitute.[72] Likewise, traditional civil law theory denies the epithet "owner" to any person in physical possession of property whose title is

---

art. 1047 *C.C.L.C.*).

Even the right of emphyteusis in immoveables, under which the emphyteutic lessee acquires most of the economic utility of the immoveable, is not a concurrent, temporary right of ownership coexisting with that of the bare owner: see F. Frenette, *De l'emphytéose* (Montréal: Wilson & Lafleur, 1983) at 89ff.; J.-G. Cardinal, "La propriété immobilière, ses démembrements, ses modalités" (1965) 67 R. du N. 323.

[69]The classic example of a codal right sometimes called "fiduciary ownership" is the trust under art. 981*aff. C.C.L.C.*: see most recently *Crown Trust Co.* v. *Higher* (1975), [1977] 1 S.C.R. 418, 69 D.L.R. (3d) 404; *Royal Trust Co.* v. *Tucker* (1982), [1982] 1 S.C.R. 250, 40 N.R. 361; and the symposium "L'affaire 'Tucker' sous les feux du droit comparé" (1984) 15 R.D.U.S. 1. For a general review of various explanations of this device, see Y. Caron, "The Trust in Quebec" (1980) 25 McGill L.J. 421.

Examples of statutory rights sometimes characterized as "propriété *sui generis*" include the trust deed under s. 28 of the *Special Corporate Powers Act*, R.S.Q. c. P-16. See *Laliberté* v. *LaRue* (1930), [1931] S.C.R. 7, (*sub nom. Lafontaine Apts* v. *Larue*) [1931] 2 D.L.R. 12; and the observations by Y. Caron, The Trust for Bondholders in the Province of Quebec (thesis, Oxford University, 1964) [unpublished]. See also the documentary pledge under the *Act Respecting Bills of Lading, Receipts and Transfers of Property in Stock*, *supra*, note 49 and under s. 178 of the *Bank Act*, *supra*, note 49. See, finally, *Banque Canadienne Nationale* v. *Lefaivre* (1950), [1951] B.R. 83, 32 C.B.R. 1; and the discussion by R.A. Macdonald, "Security Under Section 178 of the Bank Act: A Civil Law Analysis" (1983) 43 R. du B. 1007 at 1009-28.

[70]*Matamajaw Salmon Club* v. *Duchaine*, *supra*, note 50. It should be noted, however, that this possible recognition appears only in the judgment of the Privy Council.

[71]Other *Code* devices giving rise to notionally successive ownership are promises of sale, the contractual institution (where the grantor appears to be "owner" for onerous alienations while the grantee appears to be "owner" for gratuitous alienations), and the provisional possession of heirs and legatees. In general, as with eases of possession *animo domini* prior to *usucapio*, one is confronted with the problem of apparent ownership.

[72]Thus, while both the institute and the substitute are deemed to take their right of ownership (or any of its dismemberments) directly from the grantor, they do so successively, not concurrently. Until the substitution opens, the institute alone has the status of owner, even though the substitute may take conservatory measures: see arts 944, 962 and 931 *C.C.L.C.* Once the substitution opens, the substitute becomes owner and is deemed to have taken directly from the grantor. For a detailed examination of the classieal position, see M. Cantin Cumyn, *Les droits des bénéficiaires d'un usufruit, d'une substitution et d'une fiducie* (Montréal: Wilson & Lafleur, 1980) nos 16-25 and 81-85.

deferred by a term[73] or suspended by a condition.[74] Until the term expires, or until the condition is realized, the only owner is the transferor, whose rights are actual.[75] Once again, the law has experienced difficulty in vesting a titulary of future or eventual rights with the means to safeguard his interest in a corporeal moveable.

11. *Towards Plural Ownership* — The notion of exclusivity is at the heart of the owner-focused structure of proprietary remedies, even if its correlative — unitary ownership — seems inadequate when applied to corporeal moveables.[76] To begin with, as a result of codal and statutory rights which are suggestive of plural ownership, courts have had to invent *sui generis* explanations for unorthodox proprietary rights. Also, the increasing recourse to forms of commercial transaction which use title to property as a security device has led to the contractual dissociation of legal ownership from possession of corporeal moveables. Hence, the law is under pressure to broaden its range of directly protected rights in corporeals to include future ownership rights emerging from present possession and to transform the remedial consequences attaching to these rights.[77]

3. Detention and Possession

12. *Legal Relationships and Relationships of Fact* — To follow article 405 *C.C.L.C.* in acknowledging dismemberments of ownership, or article 1058 *C.C.L.C.* in admitting personal rights in respect of property, does not, however, exhaust the relationships which may exist between person and object

[73]Arts 1089-1092 *C.C.L.C.* See Mazeaud, *supra*, note 23, no. 1394.

[74]Arts 1079-1088 *C.C.L.C.* set out the rules respecting conditional obligations. For their application to conditional ownership, see Mazeaud, *ibid.*, nos 1395-1401; Marty & Raynaud, *supra*, note 23, no. 46; and Vanel, *supra*, note 30, nos 140-41.

[75]However, the realization of the condition has a retroactive effect: see arts 1085 and 1088 *C.C.L.C.* The courts in Quebec have not always adopted a consistent view of conditional ownership. Compare the notes of Barclay J. in *Fréchette* v. *Carrière Lumber Co.* (1947), [1948] B.R. 185 at 187-94 with the judgment in *Montreal Trust* v. *Roadrunner Jeans* (1982), [1983] C.S. 245, 27 R.P.R. 216 and cases cited therein. See also Jambu-Merlin, *supra*, note 36. Both the *Civil Code* (*e.g.* arts 1086 and 1087 *C.C.L.C.*, which give conditional owners a right to take conservatory measures, but which also impose upon them the risk of loss or detioration not resulting from the fault of the prior owner) and the *Code of Civil Procedure* (*e.g.* arts 716, 717 and 734(5) *C.C.P.*, which give the conditional secured creditor a right to be collocated on the price of a judicial sale), suggest certain protections in the nature of ownership to merely conditional creditors, especially where immoveable property is in issue.

[76]Vanel, *supra*, note 30, nos 11-17.

[77]See, *e.g.*, *Studebaker Corp. of Canada* v. *Glackmeyer* (1928), 44 B.R. 216; and *Laurentide Finance Co.* v. *Paquette* (1966), [1966] R.P. 416 (Sup. Ct) for decisions protecting the rights of conditional purchasers.

in the civil law. Two other relationships — factual in character — have achieved legal recognition: detention and possession.[78]

Detention[79] may be characterized as the physical holding of corporeal property.[80] It is the basic (and irreducible minimum) factual connection between person and object. Possession, by contrast, arises when detention is coupled with an intention to exercise rights in the object as owner or other titulary of a real (by contrast with a personal) right. Article 2192 *C.C.L.C.* states:

> Possession is the detention or enjoyment of a thing or of a right, which a person holds or exercises himself, or which is held or exercised in his name by another.

In other words, possession comprises two elements: *corpus* and *animus*. The intentional element, *animus*, consists of the will of the holder to perform certain acts of physical control as a titulary of the real right to which these acts correspond. The material element, *corpus*, consists of these acts themselves.[81] One may conclude, therefore, that possession is a factual state from which a real right may be presumed, whereas detention is a factual state which reflects the negation of such a presumption.[82] All factual relationships with property, implying physical control, must involve either possession or

---

[78]Thus, the civil law contemplates that a person may have one of only four kinds of direct relationship with an object: two of these, ownership and a *jus in re aliena*, are juridical; and two, possession and detention, are factual: see Vanel, *supra*, note 30, nos 36-41. All relationships mediated by persons (personal rights) are not direct relationships and must be absorbed under the rubric of detention.

[79]Detention is also sometimes described as precarious possession. For an elaboration, see Rodière, *supra*, note 30, nos 1-3 and nos 93-96; Vanel, *ibid.*, nos 36-40; P.-B. Mignault, *Le droit civil canadien*, t. 9 (Montréal: Wilson & Lafleur, 1916) at 357.

[80]See Vanel, *ibid.*, no. 37 who makes reference to:

> le fait pour une personne d'exercer sur une chose corporelle un pouvoir matériel et une certaine maîtrise de fait qui se manifeste par des actes de garde, de conservation, de maniement, d'usage, de jouissance ou de transformation. Ce pouvoir peut être exercé sans intention de se comporter comme le titulaire du droit réel qui légitimerait ces actes, il y a alors détention ou possession précaire.

[81]Rodière, *supra*, note 30, nos 11-17. The civil law has always attached important consequences to this characterization: a possessor in good faith may claim fruits (art. 411 *C.C.L.C.*); a possessor may set up acquisitive prescription (art. 2193 *C.C.L.C.*); a possessor with insufficient title may grant hypothecs (art. 2043 *C.C.L.C.*). All these possibilities are denied to those with mere detention: see arts 2203-2207 *C.C.L.C.*

[82]Moreover, art. 2194 *C.C.L.C.* provides that physical control of an object gives rise to a presumption of possession, not detention: "A person is always presumed to possess for himself and as proprietor, if it be not proved that his possession was begun for another." See also Rodière, *ibid.*, nos 45-63.

detention,[83] and the distinction between them is particularly important because the *Civil Code* provides, under certain conditions, for an elision of possession and ownership of corporeal moveables.[84]

13. *Protecting Relationships of Fact* — The question of how far the rights of an owner of a corporeal moveable not in possession should be protected against those of a holder or those of a possessor vexes every legal system.[85]

---

[83]Under art. 2268(1) *C.C.L.C.*, actual possession creates a presumption of lawful title. However, if physical control commences under acknowledgement of another's title, it is presumed to continue as such. For example, absent an interversion of title under art. 2208 *C.C.L.C.*, lessees, depositaries, carriers, mandataries, *negotiorum gestores*, borrowers for use, tutors, curators and buyers under suspensive condition can only have detention: they will always be holding corporeal property explicitly under the acknowledgment of another's ownership (*i.e.*, they will be "possessing" for another).

By contrast, the position of the usufructuary, user or (on the analysis suggested here) pledgee is more complex. Insofar as the real right being asserted is concerned they will be holding *animo domini*; however, *vis-à-vis* the rights held by the bare owner their possession will be precarious.

A final situation involves finders and thieves, both of whom can assert no antecedent title to goods. A finder may either have detention, holding for the true owner as, for example, a *negotiorum gestor*, or he may be a possessor (in good or bad faith) holding on his own account. The thief, while prevented from prescribing by arts 2197, 2198 and 2268(6) *C.C.L.C.* is nevertheless a possessor *animo domini*. See, generally, Marty & Raynaud, *supra*, note 23, nos 414-17.

[84]Mignault, *supra*, note 79 at 368. See P. Ortscheidt, "Prescription et possession: Art. 2279-2280" in *Juris-classeur civil* (Paris: Éditions techniques, 1984). This elision, or at least the apprehension of this elision, is reflected in several codal provisions. These include the general prohibition of non-possessory security over moveables (arts 2022 and 1966 *C.C.L.C.*), the permission of the *don manuel* of moveables (art. 776 *C.C.L.C.*), the seller in possession *nemo dat* exception respecting moveables (arts 1026-1027 *C.C.L.C.*), the fact that only moveables can be acquired by accession (compare arts 417-419 with arts 429-441*a* *C.C.L.C.*), that the good faith prescription period for acquiring moveables is quite short (art. 2268(2) *C.C.L.C.*), that an owner's right to revendicate moveables may be extinguished even prior to the expiration of the period for acquisitive prescription (art. 2268(3)-2268(5) *C.C.L.C.*) and that there is no separate action for recognizing possessory and proprietary claims in moveables (arts 770-772 *C.C.P.*).

[85]In the civil law this question historically has been worked out by reference to the true owner's right to revendicate his goods from the possessor. In early Roman law, until prescription was acquired, a dispossessed owner could always revendicate his moveable property: *nemo plus juris in alium transferre potest quam ipse habet*. Later, under Justinian's Code an abbreviated prescription of three years was open to good faith acquirers of lost or stolen objects. See W.W. Buckland & A.D. McNair, *Roman Law and Common Law*, 2d ed. (Cambridge: Cambridge University Press, 1952) at 62ff.

By contrast, germanic law followed the rule exemplified by "les meubles n'ont pas de suite". Later this rule was modified to prohibit revendication only where an owner voluntarily surrendered possession of the object. If he transferred physical control, as in a contract of deposit, pledge, loan or conditional sale, he could not claim restitution of his property against a third party who acquired it from the depositary, pledgee, borrower or purchaser. Where, however, the moveables were lost or stolen the owner could revendicate against even good-faith third-party acquirers. See G. Baudry-Lacantinerie & A. Tissier, *Traité théorique et pratique de droit*

In modern French law the question is regulated primarily by paragraph 2279(1) *C.N.* which provides, "en fait de meubles, possession vaut titre".[86] In France, therefore, moveables may not be freely revendicated from third parties by an owner out of possession.[87] The rule of paragraph 2279(1) *C.N.* is both a rule of law: the acquirer of a moveable *a non domino* becomes owner solely on the basis of his possession as against the true owner who voluntarily has given up possession to a defalcating third party; and a rule of evidence: any possessor of a moveable may invoke his possession as a presumption of ownership in defence to an action in revendication.[88]

The corresponding provision in the law of Quebec is article 2268 *C.C.L.C.* Paragraph 2268(1) *C.C.L.C.* states in part that "[a]ctual possession of a corporeal moveable, by a person as proprietor, creates a presumption of lawful title." The rule of paragraph 2268(1) *C.C.L.C.* is dissimilar to that

---

civil: De la prescription, 2d ed. (Paris: Librairie de la société du recueil général des lois et des arrêts, 1899) at 537ff.

In early French law, the rule "les meubles n'ont pas de suite" became transformed into a rule "les meubles n'ont pas de suite par hypothèque". In other words, the Roman law influence transformed the rule of germanic law into a limitation on a creditor's rights but not a limitation on an owner's rights. Over the centuries, however, and by the time of Pothier, this rule had beeu jurisprudentially limited. In the mid-eighteenth century under the pressures of a growing commercial economy, this developmeut was confirmed when the Châtelet de Paris announced the presumption "la possession fait présumer le titre; elle vaut titre". Hence, good faith possession of moveables by an acquirer vested him with title. Revendication was permitted only against aequirers in bad faith, and exceptionally, for a period of three years, against a good faith purchaser of lost or stolen objects. For a lengthy discussion of this issue in French law, see E. Jobbé-Duval, *Étude historique sur la revendication des meubles en droit français* (Paris: Larose, 1880); Saleilles, *supra*, note 39; B. Bouloc, "Revendication" in *Encyclopédie Dalloz*, *supra*, note 30, nos 103-8; and Mignault, *ibid.* at 549-56.

[86]This principle is also reflected in art. 2219 *C.N.*, prohibiting the hypothecation of moveables, and art. 2280 *C.N.* whieh limits revendication of even lost or stolen objects. See, on art. 2280 *C.N.*, T.J. Dorhout Mees, "La revendication de meubles perdus ou volés contre le possesseur de bonne foi" in *Mêlanges offerts à Renê Savatier* (Paris: Dalloz, 1965) 265. While all corporeal moveables are in principle covered by this rule, nevertheless, universalities, registered moveables (except automobiles), public property, and registered pledged equipment are exempt. By contrast, real rights in corporeal moveables, even though juridically incorporeal, are included: Marty & Raynaud, *supra*, note 23, no. 405. Moreover, in order to invoke the rule of art. 2279 *C.N.* the claimant must have possession (not mere detention) and must be in good faith. These conditions are present or presumed in almost all cases involving third parties, with the result that the possessor in fact acquires an immediate title which cannot be contested by the true owner: Ortscheidt, *supra*, note 84, nos 13-88.

[87]Where, however, the conflict is between a holder and his author, the real owner may establish the precarity of the holder's title; if he does so successfully, the action in revendication is permitted. See Bouloc, *supra*, note 85, nos 139-46; and Ortscheidt, *ibid.*, nos 222-54.

[88]This dual meaning was first elaborated by Saleilles, *supra*, note 39, who demonstrated that the first branch of this rule could not be understood as a form of instautaneous prescription. He asserted that the acquirer's title was a codal form of acquisition of ownership by law (acquisition *lege*).

of paragraph 2279(1) *C.N.* in two respects: first, paragraph 2268(1) *C.C.L.C.* applies only to *corporeal* moveables;[89] second, the article creates only a rule of evidence (a presumption), and does not state a rule of law which provides for an "acquisition *lege*" for possessors.[90] Thus, unlike in France, even when an owner voluntarily places his corporeal property in the hands of another who then wrongfully transfers it to a third party, until prescription is acquired, the third party's possession will not automatically defeat the owner's claim. The right of ownership in Quebec is not extinguished by the mere fact of another's possession; only his right to revendicate from certain good faith purchasers is extinguished.[91]

14. *Dissociating Ownership and Possession of Corporeal Moveables* — The elision of ownership and possession of corporeal moveables has always been less complete in Quebec than in France.[92] Moreover, the post-War economy in Canada has developed largely through a dissociation of title and physical control over corporeal moveables. The deployment of leases, the creation of registrable non-possessory rights in moveables, and the use of title reservation security mechanisms, have substantially increased the number of occasions where both owners out of possession and persons with physical control but no proprietary claim will be seeking vindication of their rights. Courts are being faced with demands to give greater protection to ownership in corporeal moveables independently of physical control. "Actual possession" seems to have called forth a judicially-protected status independent of its presumption of lawful title, with the result that plaintiffs who are mere

---

[89]Thus, persons asserting incorporeal rights, such as claims, those holding juridical universalities, such as successions, or intellectual property may not invoke the presumption. By contrast, negotiable instruments under art. 1573 *C.C.L.C.* are included as corporeals: see *Chamandy* v. *Leblanc* (1977), [1977] C.S. 176.

[90]For an elaboration of several aspects of art. 2268 *C.C.L.C.* in the context of sale and pledge, see Y. Caron, "La vente et le nantissement de la chose mobilière d'autrui: Deuxième partie" (1977) 23 McGill L.J. 380 at 420. The presumption of art. 2268(1) *C.C.L.C.* is, nevertheless, difficult to rebut. This results from art. 2194 *C.C.L.C.* Hence, arts 2194 and 2268(1) *C.C.L.C.* may be combined to produce the following compound presumption: A person who has physical control of a corporeal moveable is presumed to be a possessor; a possessor of a corporeal moveable is presumed to be possessing as proprietor; and possession as proprietor creates a presumption of lawful title. Of course, it is always open to an owner to prove a defect of possession under art. 2193 *C.C.L.C.*

[91]In France, once good faith possession is established, revendication is impossible regardless of the proof the owner may make of the origin of the third party's title. See Ortscheidt, *supra*, note 84, nos 66-68.

[92]This may have resulted from the influence of common law rules relating to conversion of chattels: see E.L.G. Tyler & N.E. Palmer, eds, *Crossley Vaines' Personal Property*, 5th ed. (London: Butterworths, 1973), or from a clearer perception of the needs of commerce. But the Lower Canada, Commissioners to Codify the Laws of Lower Canada in Civil Matters, *Reports 1-7* (Québec: George & Desbarats, 1865) makes no mention of either justification.

holders often seek to assert the action in revendication as a possessory recourse.[93]

4. The Dematerialization of Corporeal Property

15. *Redefining Rights in Corporeal Objects* — For almost two millennia the civil law of property was not confronted with major challenges to its fundamental structure. But modern developments have overtaken many of its axioms and conceptual distinctions. Originally, the theory of corporeal moveable property was erected from rather straightforward equations of physical object and legal right. Yet the variety of such moveables (and the complexity of physical transformation and manufacture implied in the expression "consumer durables") today belies the possibility of any simple congruence between one person, one object and one owner. In addition, the legal and factual permutations relating to the exploitation of corporeal moveables comprise a frontal assault on the rudimentary distinction between capital and rent upon which the structure of rights in corporeal moveables has been built.

Many commentators have characterized these developments as an aspect of the "dematerialization" of the right of ownership.[94] Because this dematerialization strikes at three of the central concepts of the civil law of property — the crisp distinction between real and personal rights, the notion of unitary ownership, and the functional elision of possession and ownership of corporeal moveables — it seems to call for a reorganization of the categories under which the utilities of tangible objects may be classified.[95] It also seems to herald the need for updating the conditions under which various judicial remedies for vindicating rights in (or in relation to) corporeal moveables may be claimed.

---

[93]This development, on a case-by-case basis, is a reflection of the "personalist" critique of the distinction between proprietary and non-proprietary rights. See J. Noirel, "Le droit civil contemporain et les situations de fait" (1959) 57 Rev. trim. dr. civ. 456.

[94]For a discussion of this dematerialization, see L. Josserand, "Configuration du droit de propriété dans l'ordre juridique nouveau" in *Mélanges juridiques en l'honneur de M. le professeur Naojiro Sugiyama* (Tokio: Maison franco-japonaise, 1940) 95; and T.C. Grey, "The Disintegration of Property" in J.R. Pennock & J.W. Chapman, eds, *Nomos: Property*, vol. 22 (New York: New York University Press, 1980) 69. See also Marty & Raynaud, *supra*, note 23, no. 2ff.

[95]The general philosophical point is argued in Waldron, *supra*, note 8.

B. Remedial Principles of the Code of Civil Procedure

16. *From Rights to Remedies* — The basic premise of the civil law, that one proceeds from rights to remedies,[96] is faithfully reflected in the interrelation of Quebec's two codes.[97] The 1965 *Code of Civil Procedure*, a modern document reflecting twentieth-century preoccupations, does not set out a panoply of independent, situation-determined recourses. For example, rather than enumerating several specific remedies such as the common law actions of trespass, conversion and detinue, each tying a particular fact pattern to a specific legal consequence, the *Code* sets out only a few general actions or proceedings which may be shaped for deployment in a diversity of contexts.

Moreover, the entire *Code of Civil Procedure* is grounded in two fundamental ideas, confirmed by articles 2 and 20 which reflect this orientation. These articles provide respectively for a priority of substance over form,[98] and for proceeding by analogy.[99] In other words, restrictions on the availability of a particular remedy usually are not to be found in the law of civil procedure once the court has determined to recognize a new or unorthodox right derived (or extrapolated) from the *Civil Code*.[100]

17. *The Titulary of the Judicial Action* — An important consequence of the principle that remedies are derived from substantive rights is a certain depersonalization of judicial recourses. Of course, the *Code* does elaborate in

---

[96]See G. Ripert & J. Boulanger, *Traité de droit civil d'après le traité de Planiol*, vol. 1 (Paris: L.G.D.J., 1956) no. 65: "La *procédure civile* n'est qu'un chapitre détaché du droit civil qui règle la manière de faire valoir et de défendre les droits devant la justice."

[97]The report of the Codifiers of the new *Code of Civil Procedure*, tabled on 5 February 1964, confirms the fundamental principle of civil law theory that rights precede remedies.

[98]See, *e.g.*, the comments of Pigeon J. on art. 2 *C.C.P.* in *Montana* v. *Développements du Saguenay Ltée* (1975), [1977] 1 S.C.R. 32, 5 N.R. 123; *Hamel* v. *Brunelle* (1975), [1977] 1 S.C.R. 147, (*sub nom. Hamel* v. *Burnelle*) 8 N.R. 481; *Duquet* v. *Town of Ste-Agathe-des-Monts* (1976), [1977] 2 S.C.R. 1132, 13 N.R. 160; and *Vachon* v. *A.-G. Quebec* (1978), [1979] 1 S.C.R. 555, 25 N.R. 399. This current of interpretation, far from being novel, is simply a reaffirmation of a basic civilian juridical idea: see also R. Savoie, chroniques régulières: "Rigorisme ou laxisme" (1973) 33 R. du B. 305.

[99]Art. 20 *C.C.P.* explicitly overrides any "forms of action" theory of pleading. This article, which provides for "innominate" or "*sui generis*" proceedings, has, however, been invoked with less success as the courts of Quebec have shown some reticence in permitting its invocation. They have, for example, required proof that no other procedure was available or appropriate (see *Paquin* v. *Lefebvre-Paquin* (1978), [1978] C.S. 1182) and that the right alleged was unequivocally stated by some text of law (see *Ville de St-Georges* v. *Ville de St-Georges-Ouest* (1977), [1978] R.P. 325 (C.A.)).

[100]Two recent examples of such an approach in matters relating to this study are *Lussier*, *supra*, note 55, where a sub-lessor was permitted to revendicate notwithstanding the absence of any codal text; and *Omniglass Ltd* v. *Groupe Cayouette Superseal Inc.* (8 January 1985), Montreal 500-09-001210-855 (C.A.), where the court permitted a third party to move to annul a seizure before judgment, even though no such right expressly appears in the *Code*.

articles 55-65 *C.C.P.* several formal limitations on all actions. These technical requirements — interest, quality and capacity — define, in broad terms, the set of plaintiffs who may bring any given proceeding.[101] But they do not in any meaningful way impose additional restrictions on the categories of potential plaintiffs in actions to vindicate rights in corporeal moveables. In other words, even though the *Code* sanctions the principle which prohibits pleading the rights of a third party with an exception to dismiss under paragraphs 165(2) and (3), it defers to substantive law for the content of this principle in any given case.[102] It follows, therefore, that any person with a given legal right typically will have both the interest and quality to exercise it before the courts.[103]

The depersonalization of remedies in Quebec is far more pronounced than in legal systems deriving from "forms of action" pleading. In fact, in the law of corporeal moveables the courts rarely have entertained motions for a non-suit on the grounds that another person's right was being raised.[104] Nevertheless, it is possible to imagine instances where this plea ought, in principle, to be successful. For example, a wrongfully-holding defendant could resist a claim for restitution of an object by a promisee purchaser who never had received possession of the object. The defendant would claim, in such a case, that only the true owner or other possessor (*e.g.*, usufructuary) has an existing substantive right to recover physical control of the object and that the promisee purchaser was improperly raising the true owner's right to possession.[105]

More difficult problems arise when a defendant raises the special plea of *jus tertii*. This will occur when he acknowledges that, in principle, the

---

[101]Their interrelationship is not always well understood. For a discussion, see R. Savoie, "De l'intérêt et de la qualité comme conditions de recevabilité de la demande en justice" (1972) 32 R. du B. 532.

[102]See *Jeunes canadiens pour une civilisation chrétienne* v. *Fondation du Théâtre du Nouveau-Monde* (1979), [1979] C.A. 491 at 493:

> Le *Code de procédure civile* ne définit pas la notion d'intérêt suffisant; il s'agit là d'une question de droit substantif qui n'appartient pas à la procédure. À moins d'une disposition législative d'exception, en droit privé c'est aux dispositions du droit civil, telles qu'interprétées par les arrêts de nos Tribunaux faisant jurisprudence, qu'il faut s'en rapporter.

[103]The only exceptions that come readily to mind are those involving legal representatives such as testamentary executors and tutors or curators to minors and other incapables: see *Gênéreux* v. *Gênéreux* (1971), [1971] R.P. 328 (Sup. Ct).

[104]For rare examples of such a plea actually being raised (in each case unsuccessfully): see *Prescotte* v. *Goyette* (1945), [1946] C.S. 147; *Montpetit* v. *Liboiron* (1954), [1954] B.R. 301; and *Sous-ministre du Revenu du Québec* v. *Formulations Epoxide Beaudry Inc.* (6 July 1984), Terrebonne 700-05-002009-821 (Sup. Ct).

[105]Similarly, where a defendant in revendication attempts to assert a defence available only to his author in title, the courts will strike the plea upon motion by the plaintiff: see *General Motors Acceptance Corp. of Canada* v. *Boucher* (1979), [1979] C.A. 250 [hereinafter *Boucher*].

plaintiff has sufficient title to sue but that, in the particular case, another person has a better right to recover possession. For example, a wrongful holder might plead against a revendicating owner-plaintiff that a possessory right vested in a third party (*e.g.*, a usufructuary) protects his wrongful detention against all but the titulary of the possessory right. However, while it is true that the owner in this example may have no right to immediate possession (the *usus*) against a usufructuary not in breach of contract, the wrongful holder cannot himself plead this third party right as a defence. That is, even though the owner-plaintiff is pleading and the holder-defendant is acknowledging the same third party right of possession (*jus tertii*), the owner may nevertheless reclaim possession as a result of the Roman law principle of absolutism of ownership.[106] Owners and titularies of superior dismembered fractions of ownership may recover further dismembered property rights (including the "droit de jouissance") not actually vested in them at the time of suit.[107] Effectively, the civil law permits the plea of *jus tertii* to be raised by defendants only in cases where a revendicating plaintiff is attempting to assert a right to possession which he has neither directly nor by reversion.[108] A plaintiff is not prevented from asserting rights which he holds subsidiarily merely because another potential plaintiff has a more proximate claim.[109]

18. *Categories of Judicial Remedy* — The implications of a law of civil procedure which displays scepticism towards overly refined procedural distinctions and which places rights before remedies are striking. Three, in particular, relate to the protection of rights in, or in respect of, corporeal moveable property. First, there has not heretofore been great pressure to develop separate recourses for vindicating ownership as opposed to possession (or even detention) of corporeal moveables.[110] Second, interlocutory

[106]See B. Nicholas, *An Introduction to Roman Law* (Oxford: Clarendon Press, 1962) at 107-15 and 155-57; W.W. Buckland, *A Text-Book of Roman Law from Augustus to Justinian*, 2d ed. (Cambridge: Cambridge University Press, 1932) at 199ff.

[107]Of course, in a competition between bare owner and usufructuary, or between a usufructuary and his user, the person with the *usus* (that is, the most immediate right to possession) will prevail. See *Kimber* v. *Judah* (1885), 2 M.L.R. 86 (Ct Rev.).

[108]By contrast, the concept of *jus tertii* in the common law has major importance in restricting proprietary remedies: see P.S. Atiyah, "A Re-Examination of the *Jus Tertii* in Conversion" (1955) 18 Mod. L. Rev. 97; and A. Jolly, "The Jus Tertii and the Third Man" (1955) 18 Mod. L. Rev. 371.

[109]Almost all issues involving an alleged *jus tertii* in the law of corporeal moveables, therefore, arise where a person with only a personal right (or even a future right), who is wrongfully deprived of physical control, attempts directly to recover the object.

[110]See Bouloc, *supra*, note 85, nos 1-6. Compare the existence, in relation to immoveables, of the possessory (art. 770 *C.C.P.*) and the petitory (arts 771 and 772 *C.C.P.*) actions, to which are analogized the action to interrupt prescription in hypothecary matters (arts 2057, 2062, 2251 and 2257 *C.C.L.C.*). See also J.J. Anctil, "Le possessoire et le pétitoire" (1974) 5 R.D.U.S. 26.

proceedings by which physical control of moveables may be adjudicated pending trial take on an added significance.[111] Third, the exceptions to assert rights wrongfully interfered with in execution proceedings are crucial to preventing the "title-washing" effects of a judicial sale.[112] That is, whether an action is real or personal is often less important than whether it permits interlocutory measures or execution oppositions to be taken. Nevertheless, the characterization of a remedy as proprietary or personal, *in specie* or by way of damages, and interlocutory or final does have a major bearing in determining who are the appropriate parties (plaintiff and defendant) to any judicial proceeding.

1. Actions for Vindicating Rights in Corporeal Moveables

19. *Wrongful Interference with Corporeal Moveables* — While the expression "wrongful interference" is not a term of art in the civil law, it captures the reality of all disputes over corporeal moveable property. Essentially, a wrongful interference with rights in a corporeal moveable will involve either a denial or a diminution of a plaintiff's right. The former would occur, for example, were a thief or finder to deny the title of an owner or possessor or were the titulary of a real right less than ownership (or even a personal right) to exceed the terms of his contract. The latter could occur where a non-owner lawfully in possession wastes or dilapidates an object or where a total stranger wilfully or negligently damages an object.

From a practical perspective, the individual suffering the harm will assert his rights either by asking to have the interference terminated or by seeking damages for the interference, or both. Typically, to have a disturbance terminated a party will seek specific recovery of a corporeal moveable, although he may also be content with a prohibitive injunction. Damages, whether for physical degradation or for loss of enjoyment, are recoverable under the normal regimes of contractual and delictual liability (article 1070ff. *C.C.L.C.*), and may be sought concurrently with an action in specific recovery or a prohibitive injunction.

20. *The Action in Damages and Prohibitive Injunctions* — The action in damages — for the total loss of an object whenever property cannot be recovered, or for loss of enjoyment owing to the need for repair, or for simple diminished utility — is a personal action. Yet, because a claim in

[111]For the position in France, see G. Légier, "Saisie-revendication" in *Encyclopédie Dalloz: Procédure civile*, 2d ed. (Paris: Dalloz, 1980) nos 1-3.

[112]See R.A. Macdonald, "Privileges and Other Preferences Upon Movcable Property in Quebec: Their Impact Upon the Rights and Recourses of Execution Creditors" in M.A. Springman & E. Gertner, eds, *Debtor-Creditor Law: Practice and Doctrine* (Toronto: Butterworths, 1985) 255 at 274-85.

damages may be joined to an action in specific recovery of a corporeal moveable, this remedy serves a similar function to revendication, which is a real action. Similarly the prohibitive injunction, in cases where a plaintiff wishes to have a disturbance ended (regardless of who may be in possession), is also a personal action which frequently is pleaded in lieu of a real action.

In both these situations, classical theory would deny a direct action to individuals who are not vested with real rights in the object.[113] A person who is a mere holder of a corporeal moveable derives his rights from the owner or titulary of some other real right. Since the titulary of a real right has the duty to ensure the peaceful enjoyment of the person to whom he has given a personal right, he also has the exclusive right to vindicate that enjoyment as against third parties. Such vindication would include seeking a prohibitive injunction and claiming for damages suffered personally as owner or other titulary of a real right of enjoyment. It would also include the right to claim damages to cover any liability in respect of a co-contractant holder's loss of enjoyment in those cases where the owner or titulary of a real right is liable to the holder.[114]

Despite the general principle, however, in many cases where a holder may be personally responsible to the owner for physical degradation or loss, courts have displayed a more pragmatic attitude.[115] By exception, they have permitted the holder to sue in his own name, and this not only for his loss of enjoyment but also for the damage suffered by the owner (or other titulary of a real right) to whom he is responsible,[116] even if such a person is not impleaded.[117] In this latter class of cases the courts appear to have inflated the merely personal (or even future) right into a type of real right.[118]

21. *Specific Recovery of Corporeal Moveables* — The civil law also provides for three actions tending not to the recovery of damages *per se*, but rather

[113]See the discussion of this point as concerns personal rights in *Kirouac* v. *Ruel, supra*, note 55; and as concerns future rights in *Studebaker Corp. of Canada* v. *Glackmeyer, supra*, note 77.

[114]See, *e.g.*, arts 1604, 1608-1610 *C.C.L.C.* as concerns lease.

[115]As in the case of promise of sale, lease (art. 1621 *C.C.L.C.*), loan (art. 1768 *C.C.L.C.*) and deposit (art. 1805 *C.C.L.C.*). See *Tremblay* v. *Tremblay* (1949), [1949] B.R. 539; *Fabi* v. *Webster Motors Ltd* (1945), [1945] C.S. 130; *Spiegel* v. *Tatem* (1936), 60 B.R. 275; *Delorme* v. *Anocencio* (1957), [1960] R.L. (N.S.) 202 (Sup. Ct).

[116]*Saint-Pierre* v. *Lambert* (1936), 42 Q.P.R. 393 (Sup. Ct); *Massicotte* v. *Pellerin* (1946), [1946] C.S. 327; *Brissette* v. *Grégoire* (1944), [1944] B.R. 281; *Goyette* v. *Vézina* (1944), [1944] C.S. 406; *Letourneau* v. *Laliberté* (1957), [1957] C.S. 428; *Perreault* v. *Therrien* (1936), 74 C.S. 481.

[117]*Montpetit* v. *Liboiron, supra*, note 104.

[118]See especially the notes of Barclay J. in *Fréchette* v. *Carrière Lumber Co., supra*, note 75. See also *Lebrun* v. *Charron* (1959), [1960] C.S. 363; and *Pelletier* v. *Simard* (1958), [1962] R.L. (N.S.) 417 (Mag. Ct).

to the specific recovery of corporeal moveables. These are the action in revendication (a real action), the personal action for specific performance of a contractual obligation, and the personal action in restitution of an object (effectively a delictual recourse enforced through a mandatory injunction). While the specific attributes of these actions will be discussed in detail later, their interrelationship and practical deployment demands brief analysis here.

For reasons relating to the availability of interlocutory relief and to questions of proof, a dispossessed plaintiff normally will seek first to revendicate.[119] Where, however, an action in revendication is not available, litigants attempting to recover corporeal moveables must do so by way of a less direct route. For example, if the dispossession arises from an overholding or a wrongful holding consequent upon a contract with a non-owner or a non-titulary of a real right, the plaintiff asserting a personal right must, in theory, frame his action in specific performance of that contract.[120] Sometimes, where the action in revendication lies, and the wrongful dispossession arises from a breach of contract, the plaintiff will even prefer to bring an action in specific performance. This preference for a personal action usually will occur where the contract is more easily proved than is the right of ownership or other real right.[121] However, should the defendant be a bankrupt, recovery against the trustee will depend on asserting a real right regardless of the relative ease of proof.[122]

Where the action in revendication does not lie and the wrongful holding of the defendant has no contractual basis, the dispossessed plaintiff must frame his action in delict, with supplementary conclusions by way of restitution of the object.[123] The very concept of pleading in delict to recover

---

[119]See Bouloc, *supra*, note 85; and Ortscheidt, *supra*, note 84.

[120]For example, a sub-lessor seeking to recover property from a sub-lessee or a buyer whose title is suspended by a condition seeking to recover from a borrower will demand specific performance of the contract of lease or loan.

[121]A. Weill, F. Terré & P. Simler, *Droit civil: Les biens*, 3d ed. (Paris: Dalloz, 1985) no. 435 [hereinafter Weill]. A lessor who brings an action against an overholding lessee, *e.g.*, need only prove the contract, not his ownership. But compare Ortscheidt, *supra*, note 84, no. 100, who states, citing judgments on the action in revendication by the Cour de cassation:

> L'action en revendication est largement ouverte. Notamment il n'est pas nécessaire que le demandeur établisse son droit de propriété; il suffit qu'il prouve par tous moyens que *la chose était entre ses mains* au moment de la perte ou du vol . . . .

[122]See the *Bankruptcy Act*, R.S.C. 1970, c. B-3, s. 59. Normally, a creditor who produces a claim in bankruptcy will allege both the contract and the proprietary interest. For the position in France, see Marty & Raynaud, *supra*, note 28, no. 402ff.

[123]In cases of a theft of leased property, or a finding of property misplaced by a borrower, or a depositary of a pledgee of property from a buyer whose title is suspended by a condition, *e.g.*, the lessee, borrower or buyer, as the case may be, has neither an action in revendication (*stricto sensu*) nor an action in specific performance of a contract.

physical control of an object has a curious ring. Yet juridically, the conclusions by way of restitution of the object are nothing other than a demand for specific performance of a delictual obligation to repair a harm done. It is, of course, inconceivable that a person vested with an action in revendication would attempt to recover his property in delict since the proof he would be obliged to make would be identical in both cases.[124] That is, unlike the situation which arises in respect of specific performance in contract, where only the contract need be proved, in delict the plaintiff must establish some pre-existing right to physical control of the object as well as the precariousness of the defendant's title.[125]

22. *Distinguishing Personal and Real Actions* — These observations suggest that courts have not been rigorous in applying the distinction between real and personal actions. No general theory of the availability or interrelationship of actions in damages and in specific recovery has been developed. Nor have jurists been preoccupied with defining certain actions solely by reference to the legal title of the plaintiff. In practice these recourses are deployed, much like the common law proprietary tort remedies of trespass, conversion and detinue, to recognize factual claims upon moveables.[126] The right to immediate physical control of an object (whether possession or detention) seems sufficient to sustain all manner of judicial action. In other words, a concern to achieve effective vindication of any claim relating to corporeal moveables often overrides conceptual bars to particular actions, and seems to have promoted the law of judicial remedies to a status above that governing substantive rights.

2. Interlocutory Recourses and Oppositions to Seizure

23. *Judicial Recourses Other Than Actions* — Any modern system of civil procedure must provide for a variety of special judicial recourses sustaining the general actions it permits. For example, because of the delay usually associated with ordinary judicial actions, interlocutory remedies fulfil a key role in protecting rights in corporeal moveables. The capacity to freeze particular assets pending a determination of entitlement thereto is especially important when valuable and portable corporeals are in issue. Moreover,

[124]Moreover, by framing an action in delict the plaintiff would be renouncing the benefit of art. 734(1) *C.C.P.* Finally, should another creditor seize in execution in the interim, the plaintiff would have to prove his right to revendicate in order to bring an opposition to withdraw under art. 597 *C.C.P.*

[125]For this reason, courts have rarely spoken of a delictual action in specific performance, but have preferred to use the term "revendicate": see *Fréchette* v. *Carrière Lumber Co.*, *supra*, note 75; *Saint-Pierre* v. *Lambert*, *supra*, note 116; *Lussier*, *supra*, note 55.

[126]For the role of trespass, conversion and detinue in the common law, see J.G. Fleming, *The Law of Torts*, 6th ed. (Sydney: Law Book, 1983) at 47.

should property be seized by error before judgment or in execution, the rightful owner needs an effective recourse to prevent the judicial sale of his property. Together, interlocutory recourses and execution oppositions complement actions in specific recovery of corporeal moveables by ensuring the integrity and efficacy of the underlying judicial action.[127]

24. *Seizures Before Judgment and the Attachment in Revendication* — The *Code of Civil Procedure* explicitly promotes the seizure before judgment to pre-eminence as an interlocutory proceeding in real actions or personal actions directed to the specific recovery of property.[128] Of the various subcategories of seizures before judgment, the attachment in revendication has become the principal recourse for asserting a real right in corporeal moveables.[129] In certain cases falling outside the conditions for such a seizure, notably when specific performance of a contract or damages are being claimed, other seizures before judgment under articles 733 and 734 *C.C.P.* may be taken.

In most seizures before judgment, physical control of the seized property is either given to a guardian or remains in the hands of the defendant.[130] As a result, one of the primary goals of the action in revendication — immediate specific recovery of a corporeal moveable — typically is frustrated.[131] Moreover, since the guardian is a legal depositary, the attachment in revendication also prevents the continued economic exploitation of seized property.[132] It follows that where a secured creditor seeks to realize quickly upon his security, or where a commercial enterprise (such as a car-leasing company) depends on inventory turnover, this defect deprives the attachment in revendication of most of its procedural utility.[133]

25. *Judicial Sequestration and Mandatory Injunctions* — The limited effectiveness of the attachment in revendication has led to increased deployment

---

[127]J. Vincent & S. Guinchard, *Procédure civile*, 20th ed. (Paris: Dalloz, 1981) nos 38-47; J. Vincent, *Voies d'exécution et procédures de distribution*, 14th ed. (Paris: Dalloz, 1981) no. 1.

[128]For a brief discussion, see Y. Lauzon, "Les saisies avant jugement" (1974) 76 R. du N. 537.

[129]Légier, *supra*, note 111, nos 4-35; Vincent, *supra*, note 127, no. 88*bis*.

[130]See arts 737 and 739 *C.C.P.* If the defendant recovers possession under art. 739 *C.C.P.* he is not considered to be a guardian of the property and may use it: see *Quenneville* v. *Samson* (1967), [1969] C.S. 62.

[131]*Banque Canadienne Nationale* v. *Audet* (1977), [1977] C.S. 1123; Légier, *supra*, note 111, nos 1-3.

[132]Art. 583 *C.C.P.* For elaboration, see *Locas* v. *Brisebois* (1968), [1969] B.R. 946; and *Décary Square Inc.* v. *Burban* (1980), [1980] C.P. 392. However, where the defendant is left in possession he is not considered to be a guardian *stricto sensu* and may use the goods. See *Cie de construction Belcourt* v. *Bronzage 3 Soleils Inc.* (18 December 1985), Quebec 200-09-000699-857 (C.A.).

[133]For a similar conclusion, albeit in a slightly different context, see M. Cordeau, "La prise de possession par le fiduciaire en vertu d'un acte de fiducie" (1983) 24 C. de D. 531.

of other provisional measures. Two — judicial sequestration and the mandatory injunction — have been used in an attempt to give immediate effect to actions in specific recovery. This is especially the case where the plaintiff's claim has only a contractual foundation.[134] Sequestration, like the attachment in revendication, does not put the property in the hands of the revendicating plaintiff. It does, however, permit assets to be commercially exploited and, in all cases, removes them from the defendant's control.[135] In other words, judicial sequestration serves to postpone the entitlement to claim physical control of property pending litigation, without at the same time wasting the assets.

By contrast, the mandatory injunction may, in theory, be used to order the physical transfer of property to a revendicating plaintiff. Nevertheless, while mandatory injunctions have been used to this effect, especially as a part of a final order,[136] doubts remain as to whether they may be deployed at an interlocutory stage to achieve, by anticipation, the objective of the action itself.[137] In any event, even if the court were to grant the injunction, should the defendant refuse to hand over the property, the plaintiff's ultimate recourse is not forced execution of the order, but only a contempt citation. Physical control of the property would still remain with the defendant.

26. *The Inefficiency of Interlocutory Recourses* — Where a plaintiff seeks interlocutory relief in connection with the defendant's wrongful interference with a corporeal moveable, he normally will have two objectives in mind: first, the immediate termination of the interference and second, the immediate recovery of his property so that he may then derive its economic benefits. All three codal provisional measures achieve the first objective. None really attains the second. The attachment in revendication freezes the property in the hands of a guardian or leaves it in the hands of the defendant. Judicial sequestration permits exploitation of the property, but only by the sequestrator and subject to very restrictive conditions.[138] Mandatory injunctions are of uncertain legality when used as an alternative to the seizure before judgment. A felt need of the civil law in this field, therefore, is for a pre-emptory remedy, such as the common law remedy of replevin under

---

[134]Of course, the ordinary seizure under art. 733 *C.C.P.* is also available in these cases.

[135]*Nadeau* v. *Bond* (1979), [1979] R.P. 299 (Sup. Ct).

[136]See *Commonwealth Plywood Ltd* v. *Conseil Central des Laurentides (C.S.N.)* (1978), [1978] C.S. 194.

[137]*Sasseville* v. *Boivin* (7 October 1980), Roberval (Alma) 155-05-000192-802 (Sup. Ct). See also Cordeau, *supra*, note 133 at 566.

[138]See L. Sarna, "Aspects of the Law of Judicial Sequestration in Quebec" (1977) 23 McGill L.J. 508.

which a revendicating plaintiff may acquire immediate detention and use of a corporeal moveable.[139]

27. *Oppositions to Seizures* — Where a wrongful interference with a corporeal moveable results not from private action but from legal process (*e.g.*, a seizure in execution) the law provides for a special proprietary recourse, the opposition to withdraw from seizure under article 597 *C.C.P.*[140] Article 597 *C.C.P.* states that the opposition to withdraw is open only to those third parties who are vested with a right to revendicate. Thus, there ought to be a congruence between plaintiffs in revendication and those who may bring an opposition under article 597 *C.C.P.* Yet, in view of the major practical role played by personal actions in specific recovery of corporeal moveables and in view of the short delay between notice and sale of seized property,[141] courts have sometimes permitted those with only a personal, or even eventual, right to bring the opposition.[142] Moreover, since the opposition is designed to lift a seizure in execution, there is some doubt that a secured creditor with an accessory real right, who *ex hypothesi* has a right to revendicate but not a right to use, should be entitled to assert the opposition.[143]

Quite apart from formal oppositions to seizures in execution, the law also provides remedies to dispossessed owners seeking to recover property wrongfully seized before judgment, or seized in the exercise of a right of private realization. Thus courts have permitted third parties to invoke article 738 *C.C.P.* to raise a seizure before judgment under the same conditions as a seizure in execution.[144] Again, where goods have been seized under private agreement (*e.g.*, under a security agreement or a trust deed), courts have sometimes permitted the third party to bring an ordinary opposition[145] and

---

[139]See Fleming, *supra*, note 126 at 68 on the writ of replevin. It is interesting that the new *Act Respecting the Transfer of Property in Stock*, *supra*, note 49, s. 30 gives the transferee (a secured creditor) a right to obtain a judicial order compelling his debtor to hand over the secured collateral. This contrasts with other secured financing devices such as the commercial pledge or the trust deed, where an attachment in revendication is required to compel a recalcitrant debtor to hand over secured collateral.

[140]In the case of an ordinary seizure in execution, where the opposition to withdraw is tardy, the proprietary interest is carried forward into an opposition for payment under art. 604 *C.C.P.* See Y. Lauzon, *Droit judiciaire privé: Exécutions des jugements* (Montréal: Thémis, 1983) at 66-73.

[141]See art. 594 *C.C.P.*

[142]See, *e.g.*, *Lussier*, *supra*, note 55.

[143]See the cases cited in R.A. Macdonald, "Exploiting the Pledge As a Security Device" (1985) 15 R.D.U.S. 551 at 611-14.

[144]See *Théberge-Brochu* v. *Morin* (1980), [1980] C.A. 193 by implication.

[145]*Keymar Equipment Ltd* v. *Thomcor Holdings Ltd* (1983), [1983] C.S. 326 [hereinafter *Keymar Equipment*].

sometimes required that he proceed by prohibitive interim injunction coupled with an action in revendication.[146]

28. *The Scope of Oppositions* — Since a system of adversarial adjudication vests carriage of an action in a private plaintiff, the vindication of property rights wrongfully interfered with tends to be plaintiff-driven. But a legal system must also provide for effective means of protecting rights in response to judicial process brought by others who wrongfully (and usually inadvertently) assert a competing interest in the property. Where the interference occurs in a third party execution one might anticipate an absolute congruence between the recourse in revendication and the opposition. Yet, probably because of the urgency of execution proceedings and because of uncertainty about the scope of revendication as a purely proprietary recourse, courts appear reticent to reach such a conclusion.

3. Specific Recovery Otherwise Than By Action

29. *Non-Judicial Surrogates to Revendication* — Closely allied with direct actions for specific recovery are two other recourses which are non-judicial surrogates to revendication. One serves the same purpose as the action in revendication; its availability, therefore, is subject to the same limitations as the action in revendication itself. The other is the analogue of specific performance of a contract, and rests on an identical juridical footing. Both, however, are varieties of recapture, a self-help remedy.[147]

These surrogates to revendication are not well known. While the oft-repeated principle *nul ne peut se faire justice*[148] lies at the foundation of remedies for breach of an obligation to do or not to do, the law permits parties in many situations touching an obligation to give to avail themselves of a self-help recourse to vindicate a right in relation to a corporeal moveable.[149] Thus, passive measures such as the right of retention, the *exceptio non adimpleti contractus* in sale, and the right of dissolution *de plano* under

[146]*St-Louis Automobiles Ltée* v. *Banque Nationale du Canada* (1981), 42 C.B.R. (N.S.) 275, 22 C. de D. 901 (Que. Sup. Ct); *Banque Nationale du Canada* v. *St-Louis Automobiles Ltée* (1981), 42 C.B.R. (N.S.) 280 (Que. C.A.).

[147]While recapture is a term derived from the common law, the term or its equivalent appears twice in Book Four of the *Civil Code.* See arts 2452 and 2677 *C.C.L.C.* It will, consequently, be used as a *bona fide* civil law term of art in this study.

[148]See Ghestin & Goubeaux, *supra,* note 21, no. 519ff.

[149]See J. Béguin, "Rapport sur l'adage 'Nul ne peut se faire justice à soi-même' en droit français" (1966) 18 Trav. Assoc. Henri Capitant 41, for a complete listing of exceptions to the general principle.

article 1544 *C.C.L.C.* do not presuppose judicial intervention to support a right flowing from detention of an object.

What is more, in many cases where the action in revendication lies, positive private action to recover physical control of a corporeal moveable will be tolerated.[150] This is particularly true where an owner is asserting a contractual right against a wrongful holder.[151] Courts seem less willing to permit contractual recapture by a non-owner secured creditor,[152] although the point is still open.[153] *A fortiori* it is doubtful that a right of contractual recapture could be exercised by a creditor who has no right to revendicate.[154] In addition, while courts seem prepared to permit an owner to recapture from a co-contractant, they have not settled the question of whether he may do so from a finder, a thief or some other third party.[155] It follows that even though private recapture is a surrogate to revendication, doubts remain about whether its availability is not more narrowly circumscribed.

30. *Specific Recovery at the Margins of Revendication* — Judicial actions are by far the most visible coercive mechanism for enforcing legal rights. Moreover, for the sake of public peace most legal systems are designed to encourage recourse to the courts as a dispute settlement mechanism.[156] Yet, no system of judicial remedies, no matter how efficient, can ever suppress the urge to ownership reflected in the Latin maxim: *ubi rem meam invenio, ibi vindicatio.* Private justice to enforce a claim for monetary compensation may well be undesirable. But judicial process to recover corporeal moveables is often otiose. Far from being at the margins of revendication, peaceful self-help functionally is at its core.

---

[150]The only example explicitly set out in the first three Books of the *Civil Code of Lower Canada* relates to the recovery of a swarm of bees. See art. 428(3) *C.C.L.C.*

[151]*Omer Barré Ltd* v. *Gravel* (1940), 78 C.S. 262. But this right is now limited, in certain cases, by the *Consumer Protection Act*, R.S.Q. c. P-40.1, s. 136(b) [hereinafter *CPA*]. But see *Boucher, supra*, note 105 for a narrow interpretation of the *CPA*.

[152]See the judgments of the Quebec Superior Court and Court of Appeal in *St-Louis Automobiles Ltée* v. *Banque Nationale du Canada, supra*, note 146.

[153]See *Banque Canadienne Nationale* v. *Manufacture Roland Couture Inc.* (26 August 1982), Québec 200-09-000505-823 (C.A.) at 2. See also M. Paquet, "Pouvoir de prise de possession informelle dans le cas des garanties des alinéas 178(1) a) et b) de la Loi sur les banques: Existence ou inexistence" (1984) 44 R. du B. 333. See also *Re Boutique André Bibeau* (1983), 49 C.B.R. (N.S.) 56 (Sup. Ct).

[154]For example, a promisee-purchaser seeking to recapture from an overholding borrower of the promisee-seller.

[155]Compare *Cadorette* v. *Paris* (1949), [1950] B.R. 125; and *Cloutier* v. *Tanguay* (1935), 42 R.L. 161 (Sup. Ct).

[156]See C.A. Branston, "The Forcible Reception of Chattels" (1912) 28 L.Q. Rev. 262.

4. Remedies Controlling Rights

31. *Reconciling Practice and Theory* — In principle, the remedies elaborated by the *Code of Civil Procedure* are sufficient to permit effective vindication of all rights in and upon corporeal moveables. By contrast, however, with immoveables, which neither waste rapidly nor are easily displaced, most moveables are genuine objects of commercial transactions. In a modern economy a legal regime, which is expensive to set in motion and whose interlocutory remedies do no more than freeze assets pending trial, is archaic. Most often the immediate use-value of a corporeal moveable is not significantly less than its capital value. This use-value, moreover, is not adequately calibrated by the intensity of abstract property notions which overemphasize the distinction between rights in, and rights in respect of, corporeal moveables.

If the panoply of judicial remedies is insufficient to its task, then commercial and legal practice soon fill the gap created by the omission. Perceived problems with both the scope of revendication and the efficiency of interlocutory recourses have generated new recourses and have redefined old remedies. In Quebec, this has occurred with respect to contractual recapture and in the domain of actions for the specific recovery of corporeal moveables. One might even conclude that remedies in the broadest sense have been the engines which drive amendment to substantive legal rights.[157]

C. Recognizing and Vindicating the New Property

32. *The Congruence of Substance and Procedure* — In an ideal (if unattainable) legal system, the law governing judicial remedies in a code of civil procedure should be congruent with the substantive law of the civil code. And both should reflect a coherence of theory and practice. Yet this is not the case today in Quebec as concerns the vindication of rights in corporeal moveables.

The chasm between theory and practice (the law in books and the law in action) may be bridged in one of four ways. First, one may simply dismiss recalcitrant data (judicial decisions) as wrong. Second, one may attempt to amend the conceptual structure of substantive legal rights. Third, one may extend the scope of substantive rights by fiction. Fourth, one may retool

[157]This point has been recently made in France. See Motulsky, *supra*, note 21; and B. Boccara, "La procédure dans le désordre: Le désert du contradictoire" J.C.P. 1981.I.3004. Moreover, a 1975 amendment to art. 2283 *C.N.* in France now provides that possessory actions "sont ouvertes dans des conditions prévues par le Code de procédure à ceux qui possèdent ou détiennent paisiblement." See Mazeaud, *supra*, note 23, nos 1456-67; and Vincent & Guinchard, *supra*, note 127, nos 54-72.

the remedial apparatus of the law.[158] One would expect either of the first two approaches to be taken in codified legal systems, systems which by definition appear to be more formally rational.[159] Yet atavisms in legal scholarship pertaining to the theory of property[160] have often promoted the third to pre-eminence, and compelled courts to adapt existing remedies to new purposes. That is, the law of procedure seems to have shown greater responsiveness and malleability than the law of rights.

Because this study focuses on the enforcement of rights in corporeal moveables, primary attention will be devoted to the action in revendication and its three surrogates — the attachment in revendication, the opposition to withdraw from seizure, and recapture at law. Nevertheless, other personal recourses, such as the action in specific performance or in restitution of an object, as well as injunctions and damages, will be treated insofar as they complement one of these real actions and other recourses. The following table sets out synoptically the interrelationship of these remedies.

Remedies for Vindicating Rights in Corporeal Moveables

	Specific Recovery of Property	Monetary Compensation	Cessation of Trouble
Actions	Revendication Specific Performance of a Contract Action in Restitution (mandatory injunction)	Article 1053 *C.C.L.C.* Article 1070 *C.C.L.C.* Article 1053 *C.C.L.C.*	Prohibitive Injunction
Interlocutory Relief	Seizure Before Judgment under article 734 *C.C.P.* Sequestration Mandatory Interlocutory Injunctions	Seizure Before Judgment under articles 733 and 734 *C.C.P.*	Interlocutory Prohibitive Injunction
Other Judicial Recourses	Opposition to Withdraw from Seizure	Opposition for Payment	
Self-Help Recourses	Recapture at Law Recapture Founded on Contract		Mise en demeure

[158]For a discussion of these alternatives, see "Introduction" in L.L. Fuller, *Legal Fictions* (Stanford, Calif.: Stanford University Press, 1967).

[159]The attributes of formally rational legal systems, and the characterization of codified civilian systems as tending to formal rationality, are explored in M. Rheinstein, ed., *Max Weber on Law in Economy and Society*, trans. E. Shils (Cambridge, Mass.: Harvard University Press, 1954) at 61ff.

[160]For an assessment of atavisms in legal scholarship, see the work of C. Atias, "La controverse doctrinale dans le mouvement du droit privé" (1982-83) 16 Rev. rech. juridiquc-droit Prospectif 427; "Emergence de la norme juridique" (1984) 3 Cahiers du C.R.E.A. 105; and "Progrès du droit et progrès de la science de droit" [1983] Rev. trim. dr. civ. 692.

33. *Legal Change in Substance and Procedure* — To set out the basic concepts of the civil law of property, and to show how modern uses of corporeal moveables have challenged these concepts, is no great accomplishment. All law evolves. Similarly, the greater flexibility of remedies in a *Code of Civil Procedure*, enacted a century after a *Civil Code* which defines the substantive rights these remedies protect, simply shows that legislative reform tends to be oriented towards the resolution of problems of practice and not towards theoretical perfection.

But the interplay of right and remedy also suggests how new forms of property achieve legal recognition. Practice calls forth new legal institutions and new innominate contracts. The rights they create prove to be insufficiently protected if the preconditions for invoking existing remedies are rigorously applied. Remedies soon are stretched to give additional protection to these rights. Theorists then attempt to reconceptualize rights on the basis of the kind of legal protection they are afforded. When courts and legislatures explicitly adopt the proposed doctrinal reconceptualization, new property rights, if not a new system of property itself, are consecrated. This dialectic of right and remedy in the recognition and vindication of rights in corporeal moveables constitutes the major sub-theme of this study.

II. The Action in Revendication

34. *Priority of the Action in Revendication* — While the civil law knows a variety of actions and other recourses for enforcing rights in corporeal moveables, it implicitly recognizes the action in revendication as the primary means by which a wrongfully dispossessed plaintiff may regain physical control of an object from a third party.[161] Ownership being the ultimate property right, it is not surprising that a remedy designed originally to vindicate ownership should be at the foundation of other judicial recourses. Nevertheless, owing in part to the origins of revendication as a purely petitory remedy and in part to the rule of paragraph 2268(1) *C.C.L.C.*, there is significant uncertainty in Quebec about the scope of the action.[162] This uncertainty relates not only to the underlying nature of the action but also to the categories of plaintiff who may bring the action, to the conditions under which the action is lost and to the appropriate party defendants to

[161]See Mazeaud, *supra*, note 23, nos 1627-30; Marty & Raynaud, *supra*, note 23, nos 388-99; Bouloc, *supra*, note 85, nos 1-6.

[162]A similar uncertainty exists in France. Compare, *e.g.*, Ortscheidt, *supra*, note 84, no. 100 with Bouloc, *supra*, note 85, nos 176-78; and Mazeaud, *ibid.*, no. 1629 with Marty & Raynaud, *ibid.*, no. 390ff.

the action. It follows that a first step in assessing the effectiveness of revendication as a remedy for vindicating rights in corporeal moveables is to develop a general theory of the action.

A. Elements of a Theory of the Action

1. Codal Texts in Quebec

35. *Absence of Legislative Definition of the Action* — Surprisingly, in view of the role which revendication is called upon to play, there is no explicit mention of the action and its purposes either in the *Code of Civil Procedure* or in the *Civil Code.* The term "revendicate" does, however, appear several times in each *Code.*[163] From these usages several features of the action may be deduced.

36. *Code of Civil Procedure* — The *Code of Civil Procedure* does not elaborate a general theory of petitory and possessory real actions in respect of moveables.[164] Twice, however, reference is made to collateral or special proceedings which are contingent upon the existence of a "right to revendicate". First, article 597 *C.C.P.*, which is found in the sub-section "Opposition to Seizure in Execution", provides:

> The opposition may also be taken by a third party who has a *right to revendicate* any part of the property seized. [emphasis added]

Second, paragraph 734(1) *C.C.P.*, which is found in the chapter "Seizure before Judgment", states:

> The plaintiff may also seize before judgment:
> (1) the moveable property which he has a *right to revendicate* as owner, pledgee, depositary, usufructuary, institute, substitute or unpaid vendor;
>
> ... [emphasis added]

Because paragraph 734(1) *C.C.P.* qualifies the term "revendicate" for the purposes of entitlement to a seizure before judgment (that is, for the purposes of the attachment in revendication) while article 597 *C.C.P.* does not in any way limit the term, the *Code of Civil Procedure* therefore appears to leave open who may exercise the action and under what conditions. One

---

[163]For a complete listing of its appearances in the *Civil Code*, see *The Key Words in Context (KWIC) of the Civil Code of Lower Canada (at April 1 1984)* (Quebec Research Centre of Private & Comparative Law, 1985) at 747 under "revendicate", "revendicated" and "revendication". For a similar list of French language usage see *Liste KWIC du Code civil du Bas Canada (au 1er avril 1984)* (Centre de Recherche en droit privé & comparé du Québec, 1985) at 785.

[164]Compare arts 770-772 *C.C.P.* as concerns immoveables. See also Anctil, *supra*, note 110 at 27.

might well infer, at least for procedural purposes, (i) that the right to revendicate as such is given to owners, pledgees, depositaries, usufructuaries, institutes, substitutes and unpaid vendors, and (ii) that other persons may also be vested with this right.[165]

37. *Civil Code: General* — The *Civil Code* also is silent as to the underlying theory of the action. Once again, however, several articles make reference to situations giving rise to a right of revendication. Of these, article 2268 *C.C.L.C.* seems to offer the most general statement of the scope of the action, even if it does so by defining situations where the right to revendicate is lost. Paragraphs (3), (4) and (5) of article 2268 *C.C.L.C.* provide:

> (3) This prescription is not, however, necessary to prevent *revendication*, if the thing have been bought in good faith in a fair or market, or at a public sale, or from a trader dealing in similar articles, nor in commercial matters generally; saving the exception contained in the following paragraph.
> (4) Nevertheless, so long as prescription has not been acquired, the thing lost or stolen may be *revendicated*, although it have been bought in good faith in the cases of the preceding paragraph; but the *revendication* in such cases can only take place upon reimbursing the purchaser for the price which he has paid.
> (5) If the thing have been sold under the authority of law, it cannot, in any case, be *revendicated*. [emphasis added]

These paragraphs imply that the action in revendication is open only to owners,[166] even though paragraph 2268(1) *C.C.L.C.* is consistent with a broader interpretation. Paragraph (1) states, referring generally to persons seeking to recover a corporeal moveable, "[a]ny party claiming such moveable must prove, besides his own right ... ". In other words, from the text

---

[165]In other words, one may infer that the attachment in revendication under art. 734(1) *C.C.P.* is not necessarily coextensive with the right to revendicate. It would follow that the oppositions under art. 597 *C.C.P.* might well be taken by a wider class of person. See Lauzon, *supra*, note 140 at 67-72.

[166]The similarity of these paragraphs to arts 1488-1490 *C.C.L.C.* respecting the sale of a thing belonging to another suggests that their primary thrust is to limit the vindication of ownership. This inference arises because art. 1487 *C.C.L.C.* states: "The sale of a thing which does not belong to the seller is null, subject to the exceptions declared in the three next following articles." It is to be noted, however, that arts 1488-1490 *C.C.L.C.* are contained in the Title, "Of Sale" and employ the expression "reclaim" rather than "revendicate". They provide:

> 1488. The sale is valid if it be a commercial matter, or if the seller afterwards become *owner* of the thing. [emphasis added]
> 1489. If a thing lost or stolen be bought in good faith in a fair or market, or at a public sale, or from a trader dealing in similar articles, the *owner* cannot *reclaim* it, without reimbursing to the purchaser the price he has paid for it. [emphasis added]
> 1490. If the thing lost or stolen be sold under the authority of the law, it cannot be *reclaimed*. [emphasis added]

For an exhaustive study see Caron, *supra*, note 90. It should also be noted that the French language version of arts 1489-1490 *C.C.L.C.* employs the terms "revendication" and "revendiquée".

of article 2268 *C.C.L.C.* alone it is unclear whether the action may be taken by non-owners.[167]

38. *Civil Code: Particular Examples* — In a number of other articles, the *Civil Code* makes direct reference to particular cases where revendication is permitted. Like article 2268 *C.C.L.C.* and articles 597 and 734(1) *C.C.P.*, none of these directly addresses the scope and purposes of the action. Nevertheless, some do suggest limitations on the categories of plaintiff who may revendicate.

Often the *Code* states that the substantive right to revendicate is limited to persons claiming as owners. For example, such a restriction is found in article 2005*a* *C.C.L.C.*, which states:

> The same rule applies to the *owner* of a thing which has been stolen, who would not have lost his right to *revendicate* it, had it not been judicially sold. [emphasis added]

Yet, other articles of the *Code* are less explicit as to the status which must be claimed by a revendicating plaintiff. Thus paragraph 777(5) *C.C.L.C.* provides:

> If without reservation of usufruct or of precarious possession, the thing given remains unclaimed in the hands of the donor until his death, it may be *revendicated* from his heirs, provided the deed has been registered during the lifetime of the donor. [emphasis added]

A similar formulation may be found in article 1535 *C.C.L.C.*, which states:

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

Finally, paragraph 2246(1) *C.C.L.C.* provides:

> Any person in possession as proprietor of a thing or a right, preserves, by reason of such possession, his right to set up by plea against any demand in *revendication* of such thing or right, all such grounds of nullity ... as tend to defeat the action, although his right to do so by direct action may have been prescribed. [emphasis added]

In each of these cases the most plausible circumstances giving rise to revendication are those involving a dispossessed owner. But this need not be the case in practice. To begin with both articles 777 and 1535 *C.C.L.C.* suggest that the titulary of any real right (*jus in re*) can revendicate. Moreover, the

[167]See, however, the old cases of *Franey* v. *Costello* (1882), 12 R.L. 300 (Circ. Ct); *Moisan* v. *Roche* (1877), 4 Q.L.R. 47 (Q.B.); and *Gilbert* v. *Coindet* (1877), 4 Q.L.R. 50 (Q.B.) which disposed of this question by holding that a non-owner could revendicate under art. 2268 *C.C.L.C.*

coupling of the term "right" with the term "thing" in article 2246 *C.C.L.C.* intimates that even incorporeal rights — necessarily only personal rights — may be revendicated.[168]

Further uncertainty arises because other articles explicitly state that the action in revendication may be exercised by non-owners, including titularies of personal rights. For example, article 1801 *C.C.L.C.* states:

> If the deposit has been made with a person incapable of contracting, the party making it has a right to *revendicate* ... so long as it remains in the hands of the former, and afterwards a right to demand the value of the thing in so far as it has been profitable to the depositary. [emphasis added]

No limitations on the quality of the depositor are implied by article 1801 *C.C.L.C.*, and article 1808 *C.C.L.C.* contemplates that the depositor need not be the owner of the property deposited.[169] Again, paragraph 1543(1) *C.C.L.C.* provides:

> In the sale of moveable things the right of dissolution by reason of non-payment of the price can only be exercised while the thing sold remains in the possession of the buyer, without prejudice to the seller's right of *revendication* as provided in the title of *Privileges and Hypothecs*.... [emphasis added]

This right of unpaid sellers to revendicate is elaborated in articles 1998-2000 *C.C.L.C.* Article 1998 *C.C.L.C.* states:

> The unpaid vendor of a thing has two privileged rights:
> 1. *A right to revendicate*;
> 2. A right of preference upon its price; In the case of insolvent traders these rights must be exercised within thirty days after the delivery.
> [emphasis added]

While the *Code* sets out several recourses available to a seller who has not been paid, by definition the unpaid vendor referred to in article 1998 *C.C.L.C.* is a non-owner. He is a seller who has transferred both title and possession, retaining in principle only a personal claim for the price against his buyer.[170]

---

[168]This article is poorly drafted in that it speaks (at the same time) of possession as proprietor and of a right as the object of the possession. Presumably, the article is simply intended to codify the maxim *quae temporalia sunt ad agendum, perpetua sunt ad excipiendum.* See Mignault, *supra*, note 79 at 476ff.

[169]Art. 1808 *C.C.L.C.* states: "The depositary cannot exact from the depositor proof that he is owner of the thing deposited".

[170]See *Mercure* v. *Philippe Beaubien et Cie* (1965), [1966] B.R. 413 for a discussion of the seller's rights in cases where ownership does not pass to the buyer. See also *Re Beatrice Pines Ltd* (1967), [1968] C.S. 351.

A special case of the unpaid vendor's right to revendicate is set out in paragraph 2013*e*(6) *C.C.L.C.*, which provides:

> The supplier of materials is also entitled, in case of the insolvency of the proprietor or builder, or in case of failure to make payment at the periods agreed upon, to *revendicate* the materials he has supplied, but which have not yet been incorporated into the building. [emphasis added]

Once again, the supplier of materials is, *ex hypothesi*, not an owner.

It follows from this review of codal articles that the term "revendicate" is not always used as a term of art. Indeed, in several instances, the *Code* appears to use the word as no more than a shorthand expression for "regain physical control".

39. *Cognate Terms in the Civil Code* — The above examples illustrate that a simple catalogue of instances where the term "revendicate" appears in the *Civil Code* is not particularly helpful in establishing the exact scope of the action in revendication. To complicate matters, when the list of plaintiffs who may seize before judgment under paragraph 734(1) *C.C.P.* on the basis of their right to revendicate (*i.e.*, the owner, pledgee, depositary, usufructuary, institute, substitute, unpaid vendor) is cross-referenced with the articles of the *Civil Code* governing the substantive rights of such individuals, it becomes apparent that a variety of synonyms for "revendicate" are regularly employed. These synonyms include, among others, the terms "recover",[171] "restitution",[172] "reclaim",[173] "obtain delivery",[174] "claim possession",[175] "restore",[176] "take back",[177] and "give back".[178] Whatever the case in doctrinal literature, it is clear that codal usages are frequently inexact.

40. *Ambiguities in Codal Texts* — Three questions about the scope of revendication emerge from this review of usages in the two *Codes*. First, does paragraph 734(1) *C.C.P.* establish a *numerus clausus* not only for the special

---

[171]See art. 1598 *C.C.L.C.* on an owner's right to revendicate if evicted in an exchange.

[172]See art. 1975(1) *C.C.L.C.* on the pledgor's right to revendicate from his pledgee.

[173]See arts 1489-1490 and 1966*a* *C.C.L.C.* as concern a true owner's right to revendicate from the buyer or pledgee of a thing belonging to another. See also art. 777 *C.C.L.C.* for the use of the term "claim" in relation to donors and art. 428 *C.C.L.C.* in respect of owners of swarms of bees.

[174]See art. 1979*c* *C.C.L.C.* on agricultural pledge and art. 1979 *C.C.L.C.* on commercial pledge, which describe the pledgee's right to obtain possession from the pledgor in default.

[175]See art. 918 *C.C.L.C.* on testamentary executors, art. 981*b* *C.C.L.C.* on trustees, and art. 2268(1) *C.C.L.C.* in general. The French language version of these articles, by contrast, employs the term "revendiquer".

[176]See art. 1810 *C.C.L.C.* on deposit, arts 1051-1052 *C.C.L.C.* on reception of a thing not due, and art. 1774 *C.C.L.C.* on loan for use.

[177]See art. 1773 *C.C.L.C.* on loan for use.

[178]See art. 441 *C.C.L.C.* on the workman's right of retention.

attachment in revendication proceeding, but also for the action in revendication itself? In other words, is it possible to generate a theory of plaintiffs in revendication by further extrapolation from paragraph 734(1)*C.C.P.*, or must one conclude that other holders of corporeal moveables not listed in the article have only personal remedies such as the action in specific performance founded on contract?

A second question flows from conflicting usages in the *Code of Civil Procedure* and the *Civil Code.* Do certain titularies of personal rights listed in paragraph 734(1) *C.C.P.*, or to whom the *Civil Code* applies the term "revendicate", actually not have an action in revendication *per se*, but rather an action merely in specific performance? That is, does paragraph 734(1) *C.C.P.* misuse the word "revendicate" to describe certain categories of plaintiffs vested only with personal actions to recover corporeal moveables?

Third, is the usage of the *Civil Code* to be taken as inexact, so that cognate terms should also be understood as authorizing a recourse in revendication wherever they appear? For example, do other instances of the words "reclaim" (*e.g.*, articles 428 and 1489 *C.C.L.C.*) and "restitution" (*e.g.*, articles 440 and 1190 *C.C.L.C.*) suggest the availability of revendication?

Since it is the *Codes* themselves which generate these ambiguities, it is necessary to refer to general principles of the civil law, as elaborated in the cases and in doctrinal sources, in order to develop a theory of the action. In this exercise, one may begin profitably with a review of the theory of the action in revendication in France.

2. The Theory of the Action in France

41. *Doctrinal Perspectives* — Surprisingly, the current theory of the action in France is not settled.[179] In fact, most analyses of the right of revendication focus more on the impact of articles 2279 and 2280 *C.N.* as instances where entitlement to bring the action is lost than on defining its availability or on elaborating its surrogates.[180] A good example of this tendency is the article

[179]The most valuable doctrinal sources are Mazeaud, *supra*, note 23, no. 1627ff.; Marty & Raynaud, *supra*, note 23, no. 217ff.; J. Carbonnier, *Droit civil*, vol. 3, 10th ed. (Paris: Presses universitaires de France, 1980) no. 68ff.; C. Aubry & C. Rau, *Droit civil français*, vol. 2, 7th ed. by P. Esmein (Paris: Librairies techniques, 1961) no. 94ff.; Weill, *supra*, note 121, no. 506ff.; Jobbé-Duval, *supra*, note 85; Saleilles, *supra*, note 39. Three helpful encyclopaedic sources are Bouloc, *supra*, note 85; Légier, *supra*, note 111; and Ortscheidt, *supra*, note 84.

[180]For example, Mazeaud, *ibid.*, devotes pages 250-59 to the former topic, and only pages 318-20 to the latter. Marty & Raynaud, *ibid.*, devote most of pages 488-510 to the former, and do not really discuss the latter at all. Bouloc, *ibid.*, discusses the action in revendication *per se* in 8 paragraphs of an article of 225 paragraphs. Ortscheidt, *ibid.*, considers the latter question in about 10 paragraphs of his 254-paragraph study. However, Légier, *ibid.*, devotes about half his essay to this question.

on revendication in the *Enclyclopédie Dalloz*, which summarizes the position under the *Code Napoléon* as follows:

> 1. Le droit de propriété, comme tout autre droit, est protégé par une action en justice qui permet au propriétaire de faire reconnaître et sanctionner son droit: c'est l'action en revendication (*rei vindicato*, réclamation de la chose). La revendication se fonde donc sur l'existence du droit de propriété et elle a pour but l'obtention de la possession. Pour triompher, le demandeur à l'action devra établir son droit de propriété. ...
> 2. La revendication est une action réelle et une action pétitoire, en principe imprescriptible, et relèvant de la compétence judiciaire.
> 3. Tout d'abord, la revendication est une action *réelle* obéissant aux règles générales des actions en justice. Elle se distingue, ainsi, de toutes les actions en restitution qui se fondent sur une obligation pesant sur le défendeur (louage, prêt, mandat, etc. ...). Ces dernières sont des actions personnelles puisque le demandeur fait valoir un droit de créance en prouvant le contrat en vertu duquel le co-contractant s'est engagé à restituer la chose. En revanche, par la revendication, le demandeur affirme son droit de propriété à l'encontre d'un possesseur: il s'agit d'une *action réelle.*
> 4. La revendication est également une action *pétitoire.* À la différence de certains droits étrangers qui connaissent une "action en revendication de la possession" ... notre droit distingue, en matière immobilière, les actions possessoires qui portent sur le fait de la possession, et les actions pétitoires qui touchent au fond du droit, à l'existence même du droit de propriété. En matière mobilière, il est vrai, aucune action possessoire n'a été prévue. On peut cependant remarquer que l'action en revendication est accordée non seulement à celui qui avait une action *animo domini*, mais encore au créancier gagiste ou au dépositaire, qui, en cette qualité, a la responsabilité de la garde du meuble. Si bien que c'est, en fait, une sorte d'action possessoire mobilière qui est accordée au créancier-gagiste d'un meuble. En réalité, l'action en revendication, *stricto sensu*, tout en permettant de recouvrir la possession, implique la nécessité pour le demandeur de prouver son droit de propriété à l'encontre d'une personne se prévalant sur le même bien d'un droit réel rival, alors que l'action en revendication de possession requiert seulement l'existence d'une possession antérieure.[181]

42. *Evolution of the Action* — It would appear, therefore, that the action in revendication originally was conceived as both a real and petitory action designed to vindicate the right of ownership indirectly by ordering physical recovery of property. However, the absence of a separate possessory action for moveables induced first the pre-Revolution parliaments and then the courts to broaden the scope of the action in two respects.[182] Initially, the action was extended to titularies of other real rights in corporeal moveables. Later, the action was given even to some titularies of purely personal rights.

By the time of the 1804 Codification it was accepted that titularies of real rights of enjoyment could protect their rights through the action in

---

[181]Bouloc, *supra*, note 85 at 1 [references omitted].

[182]See the discussion in M. Planiol & G. Ripert, *Traité pratique de droit civil français*, t. 3, 2d ed. by M. Picard (Paris: L.G.D.J., 1952) no. 351ff.

revendication. Soon afterwards the action was made available to all titularies of real rights giving rise to possession, such as pledgees. That is, even though the pledgee does not have a right of enjoyment of the pledged object, his real right to possession was deemed sufficient to sustain revendication.[183]

The 1804 Codification also permitted titularies of personal rights to bring an action in revendication in two situations. These were where, under paragraph 2102(4) *C.N.*, an unpaid vendor reclaims an object from his buyer, and where, under paragraph 2102(1) *C.N.*, a landlord claims possession of moveables subject to his privilege. Unfortunately, there is no intellectual coherence to these exceptions. The former situation, admittedly, is normally one where a once and future owner seeks immediate physical control of an object in order to facilitate a recourse in resolution of a sale.[184] But the landlord never is owner, and never will become owner. The most one can say is that the lessee's moveables situated in the leased property are impressed with some sort of tacit pledge to secure payment of rent due.[185]

Since Codification, French courts have also been active in broadening the scope of the remedy. To begin with, by analogy to the right of the landlord to reclaim moveables removed from leased premises, they extended the right of revendication to other creditors who could claim an execution privilege or other preference founded on the idea of a pledge.[186] Then, without codal support, the courts permitted revendication by depositaries on the basis of their legal obligation of care, preservation and return.[187]

By virtue of these developments, all French authors today assert that, in practice, the action is no longer simply a petitory action deployed to vindicate ownership or even a real right. For some, it functions (in certain well-defined cases) as the equivalent of the "action en réintégrande" which is available to certain holders of an immoveable;[188] for others it is truly an omnibus action "ouverte à toute personne qui était en possession et avait la responsabilité de la garde de la chose."[189]

---

[183]See Weill, *supra*, note 121, no. 428.

[184]This right to revendicate probably survived because, in Roman law and French law prior to the 1804 Codification, title did not pass to the buyer in a cash sale until the purchase price was paid. See P.-B. Mignault, *Le droit civil canadien*, t. 7 (Montréal: Wilson & Lafleur, 1906) at 143ff.

[185]See M. Planiol & G. Ripert, *Traité pratique de droit civil français*, t. 12, 2d ed. by E. Becqué (Paris: L.G.D.J., 1953) no. 241.

[186]See Mazeaud, *supra*, note 23, nos 1556-58 for an attempt to synthesize this extension. The most obvious example in modern Quebec law is the right of retention.

[187]See Cass. civ., 5 janvier 1872, D.P. 1872.I.161.

[188]Bouloc, *supra*, note 85, no. 4. See Marty & Raynaud, *supra*, note 23, no. 216 on the "réintégrande" or possessory action.

[189]Légier, *supra*, note 111, no. 35.

43. *Absence of Doctrinal Synthesis* — While French authors have been able to discern the basic patterns and rationales for extensions to the Romanist view of the action, to date none has attempted a synthesis of the purposes and scope of revendication.[190] The same is true of the provisional recourse known as the attachment in revendication ("saisie-revendication").[191] This absence of synthesis is most evident in the lack of consensus about the categories of plaintiffs who may bring the action.[192]

French authors today commonly catalogue plaintiffs in revendication simply by list, and only rudimentary functional typologies have been offered. Some authors sub-divide plaintiffs into three groups: owners and titularies of principal real rights; persons, such as pledgees and depositaries, who have responsibility for the care and preservation of an object; and privileged creditors such as landlords and unpaid vendors who are revendicating possession.[193] Others categorize potential plaintiffs into four groups: owners and titularies of principal real rights having a right to follow; pledge creditors and those with a privilege founded on the idea of a pledge; unpaid vendors; and persons with only a personal right but having an obligation of care and preservation.[194]

At bottom, this lack of synthesis results from two features of the law of corporeal moveables unique to France. The proliferation of statutory property rights protected by particular remedies has removed much pressure to adapt the action in revendication to modern developments;[195] and the severe restrictions on the ordinary right to revendicate established by articles 2279 and 2280 *C.N.* minimize the occasions when a successful action may be brought, thereby minimizing practical interest in the remedy.[196] It follows that French sources are of only limited assistance in developing a general theory of the action in modern-day Quebec.

---

[190]The descriptive summary by Bouloc, *supra*, note 85, nos 1-6 is typical.

[191]See Légier, *supra*, note 111, no. 4: "la saisie-revendication doit être admise dans les cas où l'exercice d'un droit de suite est autorisé en matière mobilière."

[192]Compare Ortscheidt, *supra*, note 84, no. 100: "[l]'action en revendication est largement ouverte. Notamment il n'est pas nécessaire que le demandeur établisse son droit de propriété; il suffit qu'il prouve par tous moyens que *la chose était entre ses mains* au moment de la perte ou vol" with Mazeaud, *supra*, note 23, no. 1627: "[l]'action qui sanctionne le droit de propriété, est *l'action en revendication* (*rei vindicatio*, réclamation de la chose). Pour triompher, *le demandeur à l'action en revendication doit établir son droit de propriété*".

[193]See Bouloc, *supra*, note 85, nos 176-78; Vincent, *supra*, note 127, no. 88*bis*.

[194]See Légier, *supra*, note 111, nos 4-35.

[195]See, *e.g.*, Bouloc, supra, note 85, nos 185-226.

[196]See Marty & Raynaud, *supra*, note 21, nos 403-5.

3. The Theory of the Action in Quebec

44. *Nature and Purposes of the Action* — As in France, the action in revendication has not been subject to systematic doctrinal study in Quebec.[197] Yet despite the absence of doctrine, the courts have never been in doubt as to its general purpose: the primary goal of the action in revendication is the recovery of possession of a corporeal moveable.[198] As Rinfret J. stated in *Service Finance Corp.* v. *Decca Radar Canada (1967) Ltd*:

> La revendication a pour but l'obtention de la possession d'un objet, d'un bien.[199]

In other words, courts have without exception acknowledged revendication as a *real action* and have consistently required that it be directed towards the recovery of a corporeal object.[200]

45. *Parameters of the Action* — By contrast, it remains uncertain whether the action in Quebec is essentially petitory. Courts have not attempted an overall taxonomy of the situations in which the action in revendication may be brought. Three times in recent years, however, they have taken tentative steps towards elaborating a general theory. First, in *Perreault* v. *Poirier* the Quebec Court of Appeal suggested the possibility of an action in revendication of possession in the following terms:

> l'énumération à l'art. 946 [today article 734 *C.C.P.*] n'est pas limitative car, pour un, le droit de revendiquer par le possesseur légal, plus particulièrement contre le voleur, est reconnu dans notre droit.[201]

---

[197]Aspects of revendication have, however, been examined closely in the context of other studies. See, notably, Caron, *supra*, note 90 at 413-19; O.S. Tyndale, "Stoppage in Transitu" (1923) 1 R. du D. 117; J.-A.-E. Dion, "Saisie-revendication" (1943) 3 R. du B. 389; Lauzon, *supra*, note 140, c. 5. Moreover, brief mention of the action may be found in treatises and course manuals: see Martineau, *supra*, note 23 at 71-72; P. Martineau, *La prescription* (Montréal: Presses de l'Université de Montréal, 1977) at 145-80; Mignault, *supra*, note 28 at 397-98; and Mignault, *supra*, note 79 at 357ff.

[198]In one case the court permitted the action where it could do no more than declare ownership of a corporeal moveable. See *Hamelin* v. *Vulcan Steel Architectural Construction, Ltd* (1950), [1950] B.R. 766, where the court seemed to suggest that in cases where actual recovery was impossible, the action could also be used simply to establish the right of ownership. See the notes of Bissonnette J., *supra* at 770-72 and Gagné J., *supra* at 774.

[199](1971), [1971] C.A. 664 at 665.

[200]At its margins the question whether certain types of intangibles are corporeal has been hotly debated. For a discussion of whether documents of title or other negotiable instruments are corporeal objects see, most recently, *Chamandy* v. *Leblanc*, *supra*, note 89; and *Morgan, Ostiguy & Hudon Ltée* v. *Sun Life Assurance Co. of Canada* (1975), [1975] C.A. 473.

[201](1958), [1959] B.R. 447 at 456-57, rev'd on other grounds (*sub nom. Perrault* v. *Poirier*) (1959), [1959] S.C.R. 843.

Then, in *Holly M. Ward Lumber Co.* v. *Amcam Woodcraft Ltd*, deciding an opposition to a seizure in execution by a bank holding a section 88 [now section 178 of the *Bank Act*] security, the Superior Court observed:

> Ce n'est pas seulement le propriétaire absolu qui peut revendiquer une chose, mais, en règle générale, celui qui a droit à sa possession. L'article 734.1 C.P. sanctionne ce principe.[202]

Finally, in *Discotheque & Golf Lafontaine Inc* v. *Lussier*, when faced with an opposition to seizure in execution of a sub-lessee's goods brought by a simple lessee, the Superior Court concluded:

> Il ne fait pas de doute que le propriétaire a droit de revendiquer.
>
> ...
>
> [E]n matière mobilière du moins le droit de revendiquer n'est pas limité au seul propriétaire ni même au seul détenteur de droits réels.
>
> ...
>
> [On] doit donc conclure que le droit de revendication d'effets mobiliers n'est pas limité aux seuls cas expressément mentionnés aux codes et qu'il a été expressément reconnu dans le cas du dépositaire qui ne possède aucun droit réel dans la chose.[203]

In these three cases the courts rejected a view of revendication as a purely petitory remedy, even if they did not at the same time elaborate in detail which titularies of personal or other rights could bring the action.

46. *Developing a Theory of the Action in Quebec* — While it is common in France to treat the entitlement to revendicate, as well as the related procedure, in a merely cursory fashion, these two issues are both important and complex in Quebec. To begin with, the occasions for ordinary revendication are multiplied because paragraphs 2268(3) and (4) *C.C.L.C.* do not automatically impede the revendication of corporeal moveables.[204] Moreover, commercial law statutes such as the *Bank Act*, the *Bills of Exchange Act*, the *Special Corporate Powers Act* and the *Act Respecting Bills of Lading, Receipts and Transfers of Property in Stock*,[205] which create special property regimes and statutory real rights, do not, as in France, also create special remedies. The ordinary procedural recourses of the civil law are thus applied in aid of unorthodox substantive rights.[206] Finally, the two *Codes* are products of two different centuries. While the *Code of Civil Procedure* tailors

---

[202](1977), [1977] C.S. 237 at 237 [hereinafter *Holly M. Ward Lumber*].

[203]*Lussier*, *supra*, note 55 at 167-68.

[204]Compare Caron, *supra*, note 90 with Ortscheidt, *supra*, note 84.

[205]*Bank Act*, *supra*, note 49; *Bills of Exchange Act*, R.S.C. 1970, c. B-5; *Special Corporate Powers Act*, *supra*, note 69; *Act Respecting Bills of Lading, Receipts and Transfers of Property in Stock*, *supra*, note 49.

[206]For this reason expressions such as "ownership *sui generis*" tend to proliferate. See *Holly M. Ward Lumber*, *supra*, note 202.

remedies to twentieth-century notions of property in corporeal moveables, the substantive rights elaborated in the *Civil Code* are those of an earlier era.[207]

The next part of this text will consider, in consequence, the extent to which revendication in Quebec is both a petitory and possessory action. It reviews, successively, which classes of plaintiffs may bring the action, when the action is lost, and who is the appropriate defendant in an action in revendication. In considering who is the appropriate defendant, various incidental proceedings and consequential cross-claims likely to arise in practice will also be examined. The chapter concludes with an attempt to develop a general theory of the action.

B. Who May Bring the Action in Revendication?

47. *Categories of Potential Plaintiffs* — Because neither the *Civil Code* nor the *Code of Civil Procedure* lists in one place all those who may exercise the action in revendication, a first step towards developing a catalogue of potential plaintiffs is to generate a typology of the relationships between person and object recognized by the civil law. The typology which follows is grounded in the traditional classifications of rights considered in the introduction to this study. It begins by identifying various categories of plaintiffs on the basis of formal criteria inherent to the law of property. But it also rests, secondarily, on more functional criteria derived from modern commercial practice and the demands it places on traditional approaches. Not surprisingly, it is the incorporation of these other criteria that most clearly reveals the true nature of the action as it is deployed today.

A first group of potential plaintiffs in revendication may be identified on the basis of whether the claimant is asserting an existing real right (*jus in re*) in a corporeal moveable. If revendication is narrowly petitory, only titularies of real rights may avail themselves of the action. However, because not all real rights have identical characteristics, for purposes of analysis, this category has been sub-divided into four. First, the position of ordinary owners will be examined. Then, the status of titularies of dismemberments of ownership or principal real rights — usufructuaries, users and titularies of statutory or contractual real rights — will be considered. Next to be reviewed is the situation of titularies of accessory real rights. Here, the rights of pledgees, documentary pledgees, special pledgees, maritime mortgagees,

[207]This is most apparent in the fact that the depositary appears on the list of those entitled to seize before judgment under art. 734(1) *C.C.P.* Art. 866 of the 1867 *Code*, by contrast, did not provide that the attachment in revendication could be taken by a depositary. In other words, the 1965 *Code of Civil Procedure* reflects developments in the cases subsequent to the 1866 Codification, even where the *Civil Code* has not itself been amended.

trustees for bondholders, banks holding security under section 178 of the *Bank Act*, transferees of property-in-stock and titularies of statutory or contractual accessory real rights are assessed. Finally, this section examines those special cases where several of the prerogatives of ownership are allocated to an administrator or representative such that it is difficult to state where true ownership lies. This group of titularies of "real rights of administration" includes both "quasi-owners" such as trustees, trust beneficiaries, mercantile agents, factors and consignees and statutory transferees such as trustees in bankruptcy and company liquidators.[208]

The second major group of potential plaintiffs comprises those having only a personal right in connection with an object (*jus ad rem*). Once again, distinct sub-categories may be posited. First, there are those who have a contractual obligation of care and return of an object, but who also are not vested with a real right. This category could conceivably comprise installment and conditional buyers in possession and heirs having provisional possession but, given the potential reality of the rights these holders can assert, their situation will be treated separately in a review of the position of titularies of future and eventual rights. This first category includes those who may, by the terms of the contract or other deed, use the object in their custody (namely lessees, borrowers for use, income beneficiaries of a trust in possession, non-owner spouses and owner-debtors of property under seizure).

A further sub-category comprises those plaintiffs vested with an identifiable claim upon the object as security, and at least a semblance of a right to follow, but with no real right in the object being revendicated. This category may be further sub-divided into plaintiffs with physical control such as retention claimants and sellers asserting the *exceptio non adimpleti contractus*, and plaintiffs not actually in physical control such as unpaid vendors, lessors of immoveables and creditors of tithes.

Finally, there are those who may not use the object to their benefit (namely depositaries, carriers, innkeepers, mandataries, guardians of seized goods, sequestrators, trustees and testamentary executors) and those persons upon whom the law imposes an obligation of surveillance, administration and representation (namely tutors, curators and advisers) or to whom the law gives a representative action (namely certain plaintiffs in a Paulian or in an oblique aetion).

---

[208]The term "real right of administration" is, admittedly, unorthodox. It is used here to describe a category of titulary about which no doctrinal consensus exists. It captures, nonetheless, the essence of the relationship between person and object in each of these cases. Similarly, the expression "quasi-owner" is used to avoid prejudging the question whether any of the persons listed is vested with a right of ownership.

A third group of potential plaintiffs is that comprising persons vested with only a potential or eventual real right grounded in contract. This group may be sub-divided into two. First, one may consider the situation of those in physical control of the object: conditional buyers in possession, buyers under a term in possession, promisees of sale in possession, heirs in provisional possession, and buyers under protected sales. Second, one may evaluate the claims of potential titularies of real rights typically out of possession: substitutes, heirs and legatees named by contract of marriage, capital beneficiaries of trusts, future heirs and legatees, prepaying buyers, unpaid sellers who have delivered and, in certain, cases, donors.

A last group of potential plaintiff is made up of those who have actual physical control of another person's property without any pre-existing legal relationship sustaining this physical control. This group can be divided into two: there are those with possession such as finders, thieves and purchasers of a thing belonging to another; and, there are those who are merely holders such as *negotiorum gestores*, recipients of an object not due who have become aware of the error, and creditors who have inadvertently seized the property of another.

It is apparent that the second through fourth groups of potential plaintiffs involve particular examples of the types of new property discussed in the introduction to this study. That is, they reflect those situations in which modern practice puts pressure on the classical concept of revendication as a solely petitory recourse. In the analysis which follows, the right of all plaintiffs in each group to revendicate will be examined in the abstract. No reference will be made at this time either to when the right may be lost or to how competing claims between potential plaintiffs will be resolved. In other words, this present review will serve to set the outer limits of the action in revendication by examining exclusively the rights of the plaintiff.

A table of potential plaintiffs in revendication organized along the lines just reviewed appears in an Appendix.

1. Titularies of Existing and Actual Real Rights

48. *Revendication as a Petitory Action* — Since its Romanist origins, the action in revendication has always been open to, and has been focused on, owners.[209] Nevertheless, there has been a consensus in Quebec for at least a century that any titulary of a real right giving rise to possession of a corporeal moveable could bring the action.[210] The situation of titularies of

[209]Saleilles, *supra*, note 39; Jobbé-Duval, *supra*, note 85.

[210]See authors cited *supra*, note 197. A similar consensus exists in France. See Baudry-Lacantinerie & Tissier, *supra*, note 85 at 539ff.

real rights not having an immediate right to physical control has, however, been less certain. Hence, it is necessary to review separately each of the hypotheses involving an existing and actual real right.

a. Owners

49. *Revendication of* Dominium — The ordinary owner of a corporeal moveable may, in principle, revendicate his property from whomever has wrongful possession of it.[211] Such wrongful possession may be that of strangers such as finders and thieves, or of legal officers such as sheriffs and bailiffs, or even of overholding or wrongfully-holding co-contractants.[212] Thus, in *Paré* v. *Beaurivage*[213] the court held that an owner of a boat could reclaim it even from an individual who, having found it floating on the St Lawrence, expended considerable sums repairing it. Similarly, in *Hydro-Québec* v. *Charbonneau*[214] a wife, donee by marriage contract of an automobile, was permitted to bring an opposition to withdraw the vehicle from the seizure of her husband's property, on the basis that she could exercise an action in revendication as owner. Again, in *Sybertz* v. *Atlas Window Manufacturing Ltd*[215] the court was prepared to permit an action in revendication by a pledgor against a pledgee abusing the pledge since, under article 1972 *C.C.L.C.* the pledgor remains owner of pledged property. Finally, in *O'Cain* v. *Domina*[216] the conditional seller was permitted to revendicate abandoned property from the judicial curator on the basis that abandonment by the conditional buyer could not prejudice the seller's title.

The principal difficulties which arise in respect of an owner's entitlement to revendicate are related to the more general problems of determining who, at any given moment, is owner, and of deciding who, at that time, has the best right to immediate possession of the object. Six issues merit special attention: first, the characterization of the rights of holders of documents of title and negotiable instruments; second, the locus of title in contracts translative of ownership — sale, exchange, gift, loan for consumption; third,

---

[211]Similarly, where the owner has assigned his rights or where a third party is subrogated into his rights, that third party may also revendicate under the same conditions as the owner: see *Wawanesa Mutual Ins. Co.* v. *Plante* (1967), [1967] C.S. 540.

[212]For various hypotheses, see *Ottawa Beach Motor Co.* v. *Barré* (1928), 45 B.R. 157; *Laforest et Frères Inc.* v. *Dagenais* (1960), [1961] C.S. 415; *Larivière* v. *Cruickshank* (1960), [1961] B.R. 137; *Cassils* v. *Crawford* (1876), 21 L.C. Jurist 1 (Q.B.).

[213](1970), [1971] C.S. 258.

[214](1968), [1968] R.P. 296 (Prov. Ct). But compare *Beauchamp* v. *Verreault* (1966), [1967] R.P. 39 (Prov. Ct) where such an opposition was dismissed on the basis that the donation was *mortis causa* and therefore the husband was still owner.

[215](1970), [1970] R.P. 64 (Sup. Ct). On the facts, however, the plaintiff's attachment in revendication was quashed on the grounds that the affidavit in support was insufficient.

[216](1907), 8 Q.P.R. 172 (Ct Rev.).

the locus of title in matters relating to successions; fourth, the conditions under which ownership may be acquired by prescription; fifth, the circumstances under which an existing right of ownership may be extinguished through accession, prescription or operation of law; and sixth, the situation where an owner has conceded a real right of enjoyment to a co-contractant such as a usufructuary. Because the fourth issue is correlative to the fifth, and because the fifth and sixth hypotheses arise in respect of any plaintiff's right to revendicate, they will be considered in detail separately in the next two sections of this study. Problems relating to the characterization of the rights of endorsees of documents of title and to the transfer of title in contracts and in successions are, however, fundamental to defining even the ordinary owner's right to revendicate.[217]

50. *Documents of Title and Negotiable Instruments* — Apart from the ordinary regimes for passing ownership and possession of corporeal moveables elaborated by the *Civil Code*, paragraph 1979(2) *C.C.L.C.* refers to a special statutory device which can be deployed for transferring ownership. Under *An Act Respecting Bills of Lading, Receipts and Transfers of Property in Stock Act*[218] a bill of lading or warehouse receipt may be endorsed to a third party as collateral security.[219] If, however, the endorsement of a bill or a receipt (or for that matter any negotiable document of title) occurs in the context of a sale (or other contract translative of ownership), the endorsee becomes owner of the underlying goods and the endorsement constitutes delivery.[220] Thereafter, the endorsee may revendicate from the custodian of the goods under the same conditions as the prior owner (the endorser). It follows that endorsement of a document of title in a contract translative of ownership does not vest the endorsee with a special type of property right in the underlying goods; it is no more than a modality for transferring ownership and giving possession.

Of course, the document itself is a species of assignable instrument under the *Bills of Exchange Act*.[221] Moreover, the rights represented by many

[217]Of course, these three problems also would affect the transfer of any real right in property (*e.g.*, usufruct, pledge, *etc.*).

The situation of several potential plaintiffs sometimes characterized as owners *sui generis* (*e.g.*, as in trusts, trust deed security, security under s. 178 of the *Bank Act*) will be dealt with below. Similarly, factors, consignees and mercantile agents will be treated as having a species of non-ownership real right. Finally, the special nature of the fiduciary substitution requires separate treatment, even though at all times either the institute or the substitute is a true owner.

[218]*Supra*, note 49.

[219]See R. Demers, "La Loi sur les connaissements, les reçus et les cessions de biens en stock: Quelques problèmes substantiels" (1985) 26 C. de D. 493 at 503-14. See also R.J. Wood, "The Pledge of Documents of Title in Ontario" (1984) 9 Can. Bus. L.J. 81.

[220]This is the standard mode of sale in FOB and FAS contracts. See *Bivansa Inc.* v. *House of Bradley Inc.* (1977), [1977] R.L. 373 (Sup. Ct).

[221]*Supra*, note 205.

cheques, bills, notes and other negotiable instruments (including bills of lading and warehouse receipts) as well as bank notes are deemed under the civil law to be corporeal.[222] Hence, not only may the piece of paper be revendicated as such, but the underlying incorporeal rights or corporeal property it represents is controlled by the holder of the instrument.[223]

Where the *Bills of Exchange Act* explicitly regulates the rights evidenced by a bill or note in a fashion different than that of the civil law, the status of any plaintiff to revendicate will be governed by that *Act*.[224] By contrast, where the *Code* or a provincial statute deems claims and other incorporeal rights to be corporeal, the objects they represent or the claims they evidence are capable of revendication by the endorsee or holder of the document. Concomitantly, the value reflected in the instruments themselves, as corporeal property, is subject to acquisitive prescription or the rules of article 2268 *C.C.L.C.*[225]

51. *Contracts Translative of Ownership: The Sale of Moveables* — According to article 1472ff. *C.C.L.C.* sale is a consensual contract: title passes to the buyer immediately even in cases where the seller retains physical custody of the goods sold.[226] From the moment title passes, the seller loses any right he may have had (as owner) to revendicate the property from his buyer or from any other person.[227] In parallel fashion, the buyer may from this moment, in principle, claim possession and revendicate the property from the seller and from any third party into whose hands it may pass.[228]

There are, however, several contractual and legal variations which modify the rule of consensualism as applied to the sale of corporeal moveables. For example, where fungibles are sold, title does not pass until they have been identified and the purchaser has been notified.[229] Again, in the contract

---

[222]See art. 1573 *C.C.L.C.*; *Chamandy* v. *Leblanc*, *supra*, note 89.

[223]*Rênê T. Leclerc Inc.* v. *Perreault* (1969), [1970] C.A. 141 at 145.

[224]J.D. Falconbridge, *Banking and Bills of Exchange*, 6th ed. (Toronto: Canada Law Book, 1956) at 435ff.

[225]*Morgan, Ostiguy & Hudon Ltée* v. *Sun Life Assurance Co. of Canada*, *supra*, note 200 at 475.

[226]See H. Brun, "Les origines du consensualisme en matière de transfert de propriété et des mitigations apportées au principe par le droit civil québécois" (1967-68) 9 C. de D. 273.

[227]It will be seen that he has such rights in certain cases as an unpaid vendor (arts 1998-2000 *C.C.L.C.*) or even as a person with an obligation of care and delivery (arts 1498-1500 *C.C.L.C.*).

[228]See *Granger Frères Ltée* v. *Marbo Plastic Co.* (1957), [1958] C.S. 333. This principle is subject to the exceptions of art. 1027 *C.C.L.C.* and of the seller's right to refuse delivery under arts 1496-1498 *C.C.L.C.*

[229]Arts 1026 and 1474 *C.C.L.C.* See *Nault* v. *Canadian Consumer Co.* (1981), 1 S.C.R. 553, 38 N.R. 205; and *Simard* v. *Quebec Veneer Industries Co.* (1943), [1945] R.L. (N.S.) 203 (Sup. Ct). See also G.E. Le Dain, "The Transfer of Property and Risk in the Sale of Fungibles" (1954-55) 1 McGill L.J. 237.

of enterprise, barring a contractual stipulation to the contrary, title does not pass where the workman supplies materials until actual delivery.[230] In both these cases, the seller in possession retains title notwithstanding article 1472 *C.C.L.C.*

Other variations permit a seller to revendicate as owner even in cases where he may have delivered physical control of the goods to his buyer. Two hypotheses merit special consideration. These are, first, where a seller retains title to the goods after delivery in a sale upon trial under article 1475 *C.C.L.C.* or by means of a suspensive condition, a promise of sale, a sale with a term, or an installment sale[231] and, second, where the sale is dissolved under articles 1543 and 1544 *C.C.L.C.* or by virtue of a contractual term.

52. *Sales Under Suspensive Condition, Promises of Sale, Sales with a Term and Consumer Installment Sales* — Where a seller stipulates in the contract of sale that title to the property sold shall not pass until full payment of the purchase price (or until some specified condition is realized) he may revendicate as owner not only from his buyer but also from any third party who may acquire or otherwise gain possession of the goods.[232] Thus, in *Accessories d'Autos Laurentien Ltée* v. *Churchill Constructors*[233] the installment seller of automobile parts was able to revendicate these from a third party who had purchased them from the installment buyer.[234] In addition to these individualized contractual reservations of title, article 1475 *C.C.L.C.* provides that the sale of objects on trial is presumed to be a sale under suspensive condition, with title remaining in the seller. Hence, the seller upon trial may also revendicate from a wrongfully-holding buyer or third party.[235]

---

[230]See art. 1684 *C.C.L.C.* See also *Duchesneau* v. *Roy* (1976), [1976] C.S. 387, rev'd (1979), [1979] C.A. 206; *Gravel* v. *Deziel* (1964), [1965] C.S. 257.

[231]See *Rubenstein* v. *Couture* (1964), [1965] C.S. 158. See also M. Pourcelet, *La vente*, 4th ed. (Montréal: Thémis, 1980) at 84-94.

[232]Art. 1473 *C.C.L.C.* refers back to the general rules on obligations. For present purposes it is not necessary to determine the true characterization of an installment sale, that is, a conditional sale where the condition attaches to one of the fundamental elements of the contract. Many argue that such sales are merely promises of sale with delivery: see M. Tancelin, *Les obligations*, 2d ed. (Montréal: Wilson & Lafleur/Sorej, 1984) at 163ff.

[233](1973), [1973] R.P. 216 (Sup. Ct). See also *Joyal* v. *Murphy Automobile Inc.* (1955), [1956] C.S. 311; *Gagné* v. *Daigle* (1918), 54 C.S. 239; *Moisset Ltée* v. *Castonguay* (1939), 68 B.R. 128; *Rocheleau Auto* v. *Guay* (1963), [1963] B.R. 770; *Laurentide Finance Co.* v. *Paquette* (1966), [1966] R.P. 416 (Sup. Ct); *Sauvé* v. *Guildhall Insurance Co.* (1961), [1961] B.R. 733.

[234]Nevertheless, in order for the seller to be able to revendicate he must be able to identify his goods. See *Re Murray Bay Sports Enr.* (13 June 1979), Quebec 200-09-000036-779 (C.A.). Nevertheless, it may be that where identical fungibles are mixed it is sufficient to show that all were delivered by the same seller. See *Alcools de commerce Inc.* v. *Corp. de produits chimiques de Valleyfield* (1985), [1985] C.A. 686, Turgeon J. dissenting on another point [hereinafter *Alcools de commerce*].

[235]A similar result follows in promises of sale, even when accompanied by delivery. Notwithstanding article 1478 *C.C.L.C.* the parties may stipulate that title will pass only at a future

Notwithstanding the general rules of the *Civil Code*, under the *Consumer Protection Act*[236] a special regime is established for consumer installment contracts. First, in all cases where title is reserved (*e.g.*, conditional sales, promises of sale, sales with a term for transfer of title), section 136ff. subject the seller's right to revendicate from the buyer to judicial scrutiny.[237] Since the seller remains owner, however, he could continue to revendicate from wrongfully-holding third parties.[238] Second, any installment sale which does not meet the requirements of the *Act* is deemed to be an ordinary sale with a term for payment. In other words, the vendor is deemed no longer to be owner and title to the goods passes immediately to the buyer.[239] It follows, in such cases, that the seller loses his right to revendicate as owner not only as against his buyer but also, presumably, against third parties.[240]

53. *Dissolution or Resolution of a Sale* — A seller may also become entitled to revendicate as owner when he exercises his right under article 1543 *C.C.L.C.* to dissolve the sale for non-payment of the purchase price,[241] or under article

---

date. See, generally, Pourcelet, *supra*, note 231 at 17-40; T. Rousseau-Houle, "Les récents développements dans le droit de la vente et du louage de choses au Québec" (1985) 15 R.D.U.S. 307 at 313-44. Closely analogous to conditional sales under suspensive condition are sales where the transfer of property is deferred by a term. Until the arrival of the term, the seller remains owner and his position is the same as that of a conditional seller who retains title. See Mazeaud, *supra*, note 23, nos 1393-94.

[236]See *supra*, note 151.

[237]See also *ibid.*, ss 14 and 105-10.

[238]See *Boucher*, *supra*, note 105; see also *Piché* v. *Laurentide Finance Co.* (1982), [1983] C.A. 301.

[239]*CPA*, *supra*, note 151, s. 135. Sales with a term are governed by arts 1089-1092 *C.C.L.C.* Since s. 135 is identical in thrust to former arts 1561*a*-1561*e* *C.C.L.C.* the cases on this point should still be relevant. See, *e.g.*, *Commercial Acceptance Corp. Ltd* v. *Stolzberg* (1968), [1969] R.P. 37 (Prov. Ct); *Faubert* v. *Lamarre Frères Inc.* (1968),[1969] R.P. 187 (Prov. Ct); *Cie Légaré* v. *St-Amant* (1961), [1962] C.S. 29; *Syndicat de St-Henri Inc.* v. *Barklay* (1956), [1957] R.L. 35 (Sup. Ct).

[240]He would also lose his ordinary right to revendicate (both as against his buyer and as against third parties) as an unpaid seller since he would have given a term. See art. 1999 *C.C.L.C.* The seller could, however, revendicate from his buyer, but *ex hypothesi* not from third parties who contraet with his buyer, as owner if he were to seek dissolution of the sale under art. 1543 *C.C.L.C.* In such cases he would have to follow the procedure set out in s. 139ff. of the *CPA*, *ibid.*

[241]If the debtor goes bankrupt the recourse must be exercised within 30 days of delivery: see art. 1543(2) *C.C.L.C.* This right is also independent of the right of revendication given to unpaid sellers who have passed title, and it is not limited by the terms of arts 1998-2000 *C.C.L.C.* See *Mercure* v. *Philippe Beaubien et Cie*, *supra*, note 170; *Re Beatrice Pines Ltd*, *supra*, note 170; *Canadian Javelin Ltd* v. *Atlas Steel Corp.* (1973), [1973] C.S. 779; *F. & W. Sichelschmidt* v. *H. Nickel Industries* (1975), [1976] C.S. 142.

1544 *C.C.L.C.* for his buyer's failure to take delivery of goods sold,[242] or by virtue of a contractual resolutory condition for his buyer's breach of contract,[243] or by virtue of a legal right of resolution.[244] Once the sale is dissolved, resolved or annulled the seller retroactively reacquires ownership and may revendicate as an owner.[245]

There are, however, certain restrictions on the seller's right to dissolve a sale. Article 1543 *C.C.L.C.* requires that the goods still be in the possession of the buyer in order for dissolution on the basis of a failure to pay the price to be possible.[246] While this requirement has been interpreted to mean simply *de facto* possession, the better position would seem to be that, absent bankruptcy, it is juridical dispossession under any condition which extinguishes the right to seek dissolution.[247]

Thus, the seller could seek dissolution of the sale and revendicate the goods not only from his buyer, but also from a thief, a finder, his buyer's lessee or installment purchaser, and so on.[248] Under article 1544 *C.C.L.C.* dissolution occurs *plano jure* where the buyer has not paid the price and refuses to take delivery. The only circumstance in which such revendication

---

[242]Under art. 1544 *C.C.L.C.* the revendication will always be against a third party since *ex hypothesi* the buyer has not taken delivery. Prior to dissolution, the seller would attempt to revendicate as a retention claimant asserting the *exceptio non adimpleti contractus.* See *Interprovincial Lumber Co.* v. *Matapedia Co.* (1972), [1973] C.A. 140.

[243]See Baudouin, *supra,* note 46, nos 798-800.

[244]Art. 1065 *C.C.L.C.* The seller also would reacquire ownership when the sale is annulled for a defect of form or substance. See *Ackroyd Bros (Canada) Ltd* v. *Brackon Products Inc.* (1948), [1948] C.S. 407; *Enterprises Maurice Canada Ltée* v. *Cossette et Frères Ltée* (1980), [1980] C.S. 895. See also Baudouin, *ibid.,* nos 206-29.

[245]*Thibault* v. *Perron-Lanthier* (1968), [1969] B.R. 138; *Levasseur* v. *St-Onge* (1979), [1979] C.A. 587; *Jocami Inc.* v. *Joly* (1982), [1982] C.S. 637.

[246]See Légier, *supra,* note 111, no. 8; Pourcelet, *supra,* note 231 at 168-69; T. Rousseau-Houle, *Précis du droit de la vente et du louage* (Québec: Presses de l'Université Laval, 1978) at 150-51; Y. Goldstein, "A Bird's Eye View of Conflicting Claims" [1981] Meredith Mem. Lect. 88 at 96-97; K.S. Atlas, "The Vendor of Moveables in Quebec: His Protection and Privileges" (1982) 42 R. du B. 597 at 599 and 605-07.

[247]Thus, if the property remains in the hands of the purchaser but is sold, say under an ordinary contract of sale, then the rules of the *Civil Code* respecting protected sales apply and the original seller does not lose his right to seek dissolution but may be deprived of a right to revendicate. There are particular problems in respect of trustees in bankruptcy and s. 178 security under the *Bank Act.* See *Bock et Têtreau Ltée* v. *Fonderie L'Islet Ltée* (1970), [1971] C.S. 379; and *Knitrama Fabrics* v. *K. & A. Textiles* (1984), [1984] C.S. 1202, currently on appeal to Que. C.A. Most recently the Court of Appeal has decided that a notice of taking of possession by a trustee for bondholders extinguishes a seller's right of resolution. See also *Alcools de commerce, supra,* note 234.

[248]In certain implausible cases the seller could revendicate as unpaid seller, but could not dissolve the sale in order to revendicate as owner. For example, a buyer who gives the property to a third party extinguishes the right of dissolution but not the right of revendication as unpaid seller. See arts 1543 and 1999(3) *C.C.L.C.*

could occur would be where a third party wrongfully takes the goods from the seller.[249]

The restrictions on the legal right of dissolution established by articles 1543 and 1544 *C.C.L.C.* apply only to dissolution for non-payment of the purchase price and for failure to take delivery. A seller may also exercise a legal right of resolution under article 1065 *C.C.L.C.* or may contractually stipulate for a right of resolution under article 1079ff. *C.C.L.C.*, so long as the condition attaches to a future and uncertain event other than payment or delivery.[250] In both these situations, the seller would be claiming as owner, and could revendicate as such, subject in certain cases to rights acquired by third parties in the interim.[251] Of course, the *Consumer Protection Act* also imposes special limits on the right to dissolve or resolve consumer sales and thereby also limits the seller-owner's right to revendicate in several circumstances.[252]

54. *Exchanges, Loans for Consumption and Donations* Inter Vivos — Where an owner purports to transfer ownership of a corporeal moveable by exchange, by loan for consumption[253] or by gift *inter vivos*, the same general principles as those governing sale will apply.[254] Nevertheless, certain rules relating to transfer of title are modified slightly in gift contracts. For example, articles 779 and 782ff. *C.C.L.C.* restrict the types of conditions which may be enforced in gifts *inter vivos*. Most of these limitations, however, do not affect the nature of the donor's or donee's title as owner and consequently they do not require special consideration.[255]

On the other hand, some provisions relating to gifts alter the basic regime of contracts translative of ownership. Thus, rules requiring either a notarial deed or the physical transfer of property to the donee mean that

---

[249]Compare *Gauthier* v. *Provencher* (1966), [1966] R.L. 572 (Prov. Ct).

[250]See *Re Beatrice Pines Ltd, supra*, note 170. See also Rousseau-Houle, *supra*, note 235.

[251]These would normally be acquired under arts 1488ff. and 2268ff. *C.C.L.C.*

[252]See CPA, *supra*, note 151, s. 14. Presumably until dissolution the seller also could not revendicate as against third parties.

[253]See art. 1778 *C.C.L.C.* See also *Bissonnette* v. *Bouchard* (1949), [1949] C.S. 259. The most usual cases of loan for consumption involve the loan for money, including the placement of money in a bank account. See *Vanier* v. *Kent* (1902), 11 B.R. 373.

[254]See arts 1596 and 1599 *C.C.L.C.*; and *CPA*, *supra*, note 151, s. 14 as concerns exchange. For loans for consumption see arts 1776, 1778 and 1781 *C.C.L.C.* For gifts *inter vivos*, see art. 795 *C.C.L.C.* In other words, exchanges, loans for consumption and gifts may be subjected to the same modalities as sale.

[255]See arts 811(2) and 816(2) *C.C.L.C.* Moreover art. 811(3) *C.C.L.C.* incorporates the general rules relating to the nullity of all contracts. See, generally, G. Brière, *Les liberalités: Donations, testaments, substitutions et fiducie*, 8th ed. (Ottawa: Éditions de l'Université d'Ottawa, 1982) at 90-93.

gifts are not, strictly speaking, consensual contracts. While, with the exception of the *don manuel*, delivery is not necessary, the consent of the parties is insufficient to transfer title. A notarized deed of gift and of acceptance is an essential formality.[256] Moreover, rules relating to resolution for breach of contract or to revocation for ingratitude do not always produce retroactive effect, with the result that the donor frequently is prevented from reacquiring title.[257] Again, the rules relating to gifts of future property and *donationes mortis causa* in contracts of marriage depart from the general principle requiring donor divestment. Article 823 *C.C.L.C.* provides that gifts of present property in contemplation of death are, in principle, irrevocable.[258] Yet the same article states that until death the donor remains owner of the property given.[259] Hence, even though it appears that the donor has divested himself of a part of his right of ownership, it is clear that only the donor has the right to revendicate as owner.[260]

55. *Successions* — For obvious reasons, the right of a deceased owner to revendicate his corporeal property is not problematic. From the moment of death, the initiative in proceedings in revendication will be taken by the *ab intestate* heir, legatee, executor or trustee, as the case may be.[261] Most often this revendication will be as owner,[262] although it may also be as legal

[256]Some appear to claim that, as between donor and donee, consent alone is sufficient to transfer title: see Brière, *ibid.* at 122-23. This cannot be the case. Rather art. 777(2) *C.C.L.C.* means that consent *as expressed in a notarized deed* is sufficient, without the need for delivery.

[257]See art. 816(1) *C.C.L.C.* But compare arts 811-815 *C.C.L.C.* on the revocation of gifts for ingratitude.

[258]But see art. 824 *C.C.L.C.*

[259]The same rule applies to gifts of future property by marriage contract whether *mortis causa* or *inter vivos*: see *Beauchamp* v. *Verreault*, *supra*, note 214. It does not, however, affect gifts *inter vivos* of present property in marriage contracts. In such cases the donee immediately acquires ownership: see *Hydro-Québec* v. *Charbonneau*, *supra*, note 214.

[260]In other words, the donee of a *donatio mortis causa* and of future property by contract of marriage has only a species of future or eventual right in the objects given. Where the donor provides for an immediate gift stipulating, however, his death as a term, the gift may be made by notarial deed outside a marriage contract: see *St-Jean* v. *Berthiaume* (1973), [1973] C.A. 1029; and the comment by R. Comtois, "La remise de dette conditionnelle au décès est-elle une donation à cause de mort?" (1975) 78 R. du N. 97. Once again, the donor remains owner until the term is over: see *Poirier* v. *Poirier* (1975), [1975] C.S. 465.

[261]See arts 607, 891, 918 and 981*b* *C.C.L.C.*

[262]The expression "owner" is meant to encompass also non-owners who have immediate rights of enjoyment in the deceased's property. It does not include the Crown, which is owner, but which does not have seizin. See arts 607 and 639 *C.C.L.C.*; and A. Mayrand, *Les successions ab intestat* (Montréal: Presses de L'Université de Montréal, 1971) nos 45-64; J.C. Smyth, "Seizin in the Quebec Law of Successions" (1956-57) 3 McGill L.J. 171. See also *Jean* v. *Gagnon* (1944), [1944] S.C.R. 175, [1944] 3 D.L.R. 277. Prior to being put in possession the Crown cannot revendicate as owner, but must protect its rights through the public curator acting as the provisional administrator of the succession: see Mayrand, *supra*, nos 198-203.

depositary[263] or as a provisional administrator.[264] In all cases, the *Succession Duty Act*[265] postpones effective pursuit of judicial remedies until an authorization to dispose has been obtained.[266] Finally, where the defendant is not a third party, but a person who (wrongly) claims to be an heir, the recourse to recover a corporeal moveable need not be in revendication *per se*, but may also be framed as the action for recovery of an inheritance.[267] This action differs from the action in revendication in that it is directed to the recovery of all property — moveable or immoveable, corporeal or incorporeal — of the succession, in that it is not necessary for the plaintiff to establish any title to property other than his status as heir and in that it is prescribed by thirty years.

The *Civil Code* provides, however, for two situations where an owner presumed dead may acquire or reacquire ownership of property transferred to his heirs or legatees. These occur when he reappears either following a declaratory judgment of death or following an extended absence. In the former case, article 73 *C.C.L.C.* provides that the person declared dead recovers his property in its actual condition as well as the price of what has been sold. In other words, even though the reappearance automatically reinvests him with ownership, the declaratory judgment of death is not annulled retroactively. A similar result is produced when, under articles 100 and 101 *C.C.L.C.*, an absentee rcappears after provisional possession has been declared absolute.

In both cases, the person judicially declared dead or the absentee reputed dead reacquires ownership of his property without judicial process from the moment of the return. He may thus revendicate it from his presumptive heirs who have been given possession and, subject to general limitations on revendication, from wrongfully-holding third parties. Of course, by virtue of article 71 *C.C.L.C.*, until a declaratory judgment is given, or by virtue of article 98 *C.C.L.C.*, until thirty years absence or one hundred years since

---

[263]As in the case of testamentary executors and trustees. See arts 918 and 981*b* *C.C.L.C.*; and *Banque Canadienne Nationale* v. *Coulombe* (1965), [1966] B.R. 780; R. Comtois, Case Comment (1966) 69 R. du N. 241.

[264]As in the case where the public curator is named to a vacant succession: see arts 684-688 *C.C.L.C.*; the *Public Curatorship Act*, L.R.Q. c. C-80; and Mayrand, *supra*, note 262, nos 292-300.

[265]R.S.Q. c. D-13.2, s. 55.

[266]Compare *Charron-Picard* v. *Tardif* (1960), [1961] S.C.R. 269 with *Bilodeau* v. *Bilodeau* (1974), [1974] C.S. 159 and *Gagnon* v. *Gagnon-Beaulieu* (8 July 1982), Hauterive (Baie-Comeau) 655-05-000082-80 (Sup. Ct).

[267]See Mayrand, *supra*, note 262, no. 234. For illustrations of this action, see *Houde* v. *Marchand* (1912), 21 B.R. 184 at 189; and *Lamontagne* v. *Boivin* (1965), [1966] B.R. 295. See also art. 106 *C.C.L.C.* for the only codal reference to this action.

birth have elapsed, the person presumed dead or the absentee remains owner of his property.[268]

56. *Scope of Revendication of Ownership* — From the above analysis it follows that, in addition to and independently of any right to seek specific performance of a contract to deliver or to return corporeal moveable property, an owner who establishes actual title may, in principle, exercise an action in revendication against all wrongful holders of his property.[269] The action may be brought against those with whom the owner has dealt contractually (where the owner has a right to possession under the contract), against third parties who may have acquired the goods from the co-contractant (again where the owner has a contractual right to possession), or against any other third party who has wrongful possession or detention of the goods. In other words, apart from restrictions on the right to revendicate from a co-contractant set out in special statutes such as the *Consumer Protection Act*, and subject to the rights of good faith purchasers under paragraphs 2268(3), (4) and (5) *C.C.L.C.*, proof of one's status as owner is sufficient to ground a successful action in revendication.[270]

b. Titularies of Principal Real Rights

57. *Codal Principal Real Rights* — Because revendication is an action with petitory characteristics, courts have long held that it is equally available to titularies of real rights of enjoyment.[271] The status of titularies of principal real rights in corporeal moveables to revendicate is based on the fact that a real right of enjoyment at once comprises a right to follow[272] and is a right which is capable of possession.[273] In Quebec, while no article of the

[268]See P. Azard & A.F. Bisson, *Droit civil québécois*, t. 1 (Ottawa: Éditions de l'Université d'Ottawa, 1971) nos 56 and 56*bis*. Of course, during the absence the administrators of the property of the absentee and his heirs in provisional possession may exercise powers as administrators: see arts 91 and 96 *C.C.L.C.*

[269]It is to be remembered that where a person loses his rights in a corporeal moveable by virtue of a change of nature (*i.e.* immobilization by nature), an accession or confusion, or by virtue of prescription, he will not be an owner. On the other hand, the various means by which ownership may be acquired should be recalled: prehension, accession, occupation, prescription, succession, will, contract and statutory transfer. Finally, it should be remembered that the rules relating to the transfer of ownership in corporeal moveables apply with only minor modifications to the transfer of other real rights.

[270]For the situation involving a competing recourse in revendication by a person with a real right to possession less than ownership, *e.g.*, a usufruct, see *Kimber* v. *Judah*, *supra*, note 107. See also Mazeaud, *supra*, note 23, no. 1667.

[271]Compare art. 771 *C.C.P.* in respect of immoveables: "The owner of an immoveable or *immoveable real right* may, by petitory action, have his right of ownership recognized." [emphasis added]

[272]See Légier, *supra*, note 111, no. 8.

[273]Marty & Raynaud, *supra*, note 23, nos 408, 74 and 13. See also art. 443 *C.C.L.C.*

Civil Code explicitly assigns the action to all titularies of principal real rights in moveables, paragraph 734(1) *C.C.P.* confirms that at least usufructuaries may revendicate.

The *Civil Code* regulates explicitly only two principal real rights less than ownership which may be claimed in corporeal moveables: usufruct and the right of use.[274] Articles 487-489 *C.C.L.C.* analogize the right of use to that of usufruct and most authors see the right of use as a diminished usufruct.[275] It would follow, therefore, that even though paragraph 734(1) *C.C.P.* mentions only usufructuaries, the right of use ought also to give its titulary a right to revendicate. Both dismemberments presuppose a right to physical control and use of property which has an independent footing.[276]

Apart from usufruct and use, which are regulated in detail, the *Code* adverts to at least one other real right of enjoyment: the right of *superficies*.[277] Presumably, if the courts were to recognize the possibility of a right of *superficies* in moveables, the titulary of a superficial right could revendicate the object upon which his right bears.[278]

58. *Statutory and Contractual Principal Real Rights* — The titulary of any statutory or contractual real right of enjoyment in a corporeal moveable also ought to be vested with a right to revendicate. Thus, where special legislation creates principal real rights in corporeal moveables without at the same time providing for nominate remedies to enforce these rights, the action should be available. Again, to the extent that principal real rights in

---

[274]Art. 446 *C.C.L.C.* contemplates usufruct of immoveables and moveables and art. 487 *C.C.L.C.* suggests the same for a right of use. Emphyteusis may be claimed only on immoveables: see art. 567 *C.C.L.C.*

[275]See, *e.g.*, M. Cantin Cumyn, *De l'usufruit, de l'usage et de l'habitation* (Québec: SOQUIJ, 1985) no. 142 and sources cited therein.

[276]See *Kimber* v. *Judah*, *supra*, note 107. See also *ibid.*, nos 10 and 37-53; and Cantin Cumyn, *supra*, note 72, nos 8-14.

[277]See J.-G. Cardinal, *Le droit de superficie* (Montréal: Wilson & Lafleur, 1957); and Cantin Cumyn, *supra*, note 50, who argues convincingly for the characterization of the right of *superficies* as a right of ownership in the construction coupled with a real right less than ownership in the soil.

[278]It would appear, however, that all writers see the right of *superficies* as only applicable to immoveables. That is, they consider it to be no more than a vertical subdivision of a given parcel of land. See Cardinal, *ibid.*, no. 27; art. 415 *C.C.L.C.* and former art. 521 *C.C.L.C.*

Nevertheless, if the right is understood more generally as being grounded in an owner's renunciation of the right of accession, then it could be seen to lie over moveables. Hypothetically, the owner of an aircraft engine might have a superficial right in the wing owned by someone else. If such were the case, the engine owner ought to be able to revendieate from wrongfully-holding third parties both the engine (as owner) and the wing (as the titulary of a superficial right).

corporeal moveables may be created by contract,[279] the titulary of such a contractual right should also be permitted to revendicate.

It is not easy to conceive of examples of either statutory or contractual principal real rights of enjoyment in corporeal moveables.[280] Today, the most plausible example of a contractual real right of enjoyment would be the financial lease under article 1603 *C.C.L.C.* and paragraphs 173(1)(j) and 193(1)(b) of the *Bank Act*.[281] While this contract may also be characterized as the use of ownership as security (with the lessee obtaining only a personal right as against the lessor), the rights of enjoyment exercised by financial lessees are so extensive and so intimately connected to the property leased that they could conceivably be considered as comprising a real right.[282] To date, however, no court has pronounced on the status of a financial lessee to revendicate from a wrongfully-holding third party.[283]

59. *Scope of Revendication by Titularies of Principal Real Rights* — At least insofar as third parties are concerned, the regime of revendication available

---

[279]On the possibility of such contractual real rights generally, see *Matamajaw Salmon Club* v. *Duchaine*, *supra*, note 50; and, most recently, *Boucher* v. *R.*, *supra*, note 50, both of which, however, concerned rights in immoveables. For a detailed discussion of this point, see Cantin Cumyn, *supra*, note 50. If courts were to conclude that the notion of a superficial right could only apply to immoveables, then the example raised in note 278 could be considered as involving a contractual real right of enjoyment.

[280]The only example of such a statutory right might be that created by the *Cultural Property Act*, R.S.Q. c. B-4, ss 17, 19, 22 and 31, which seems to vest something like a real right in the government. These sections permit the Minister to control the physical displacement, the alienation, the acquisition and the use of such property.

However, by contrast with the right of usufruct or use, this right is not a real right of enjoyment since the owner, usufructuary or user (and not the Minister) remains in possession. On the other hand, the Minister is vested with a right of pre-emption in certain cases, and, in France, such rights have been held to constitute real rights. See C. St-Alary-Houin, *Le droit de préemption* (Paris: L.G.D.J., 1979) at 231ff. In any event, s. 19 of the *Act* explicitly permits the Minister to revendicate lost or stolen cultural property.

[281]See R. Demers, *Le financement de l'entreprise: Aspects juridiques* (Sherbrooke: Éditions de la Revue de droit de l'Université de Sherbrooke, 1985) at 287-311.

[282]For an analysis of the financial lease as a real right see R.A. Macdonald, "Is the Hypothec on Moveables a 'Security Interest'?" (1986) 11 Can. Bus. L.J. [forthcoming]. If one were to see the financial lease as a contractual principal real right, its closest analogue in terms of the relationship of lessor and lessee probably would be emphyteusis. It is not without interest that the terms "lessor" and "lessee" are used to describe the parties to an emphyteutic lease. See arts 567-582 *C.C.L.C.*

[283]Since art. 1603 *C.C.L.C.* excludes all the rules "Of the Lease of Things" from the financial lease, presumably courts will seek characterization analogies elsewhere in the *Code*. In any event, they have already held that an improperly constituted financial lease falls under the ordinary rules of the *Code*: *Equilease Ltée* v. *Bouffard* (1978), [1979] C.S. 191. But they have also held that true financial leases are such as to give the lessee and not the lessor a right to insurance monies upon loss: *IAC Ltée* v. *Wolfe* (1979), [1979] C.P. 361 at 365-66.

to titularies of principal real rights is similar to that of owners. Usufructuaries, users or other titularies may revendicate both as against wrongfully-holding co-contractants (for example, lessees, depositaries and borrowers), and as against third parties. They may also revendicate as against the bare owner or any other individual who wrongfully holds an object upon which they have an immediate right to possession.[284] In other words, because dismemberments are *jus in re*, they afford their titulary the status to assert his right not only against wrongful holders who deny his possession, but also against wrongful holders who are denying someone else's possession or detention of the object upon which his right bears.

c. Titularies of Accessory Real Rights

60. *Accessory Real Rights* — The right to revendicate has also been open, historically, to titularies of accessory real rights in corporeal moveables, even though such rights give rise neither to a true right of enjoyment nor to a complete right to follow. As evidenced by the prohibition on hypothecs over moveables, excepting maritime mortages,[285] the 1866 *Code* envisioned that ordinary accessory real rights in moveables would be possessory.[286] Nevertheless, in recent years a number of documentary and non-possessory security devices over moveables have been added to the *Code*. Because the relationship of owner and secured creditor varies according to who has physical control of the secured collateral, it is necessary to examine separately the right of revendication given to titularies of possessory and non-possessory accessory real rights.

i. Titularies of Possessory Accessory Real Rights

61. *Codal Possessory Security: Pledge* — The ordinary pledge has always been the basic security device over corporeal moveables. In classical theory it is seen as an accessory real right giving rise to an action in revendication.[287]

---

[284]For a brief discussion of competing recourses in revendication by titularies of real rights, see Mignault, *supra*, note 28 at 542-44.

[285]Art. 2022 *C.C.L.C.*

[286]In this sense "possessory" means that the titulary has a right to physical control of the object of his security, opposable to all third parties. See M. Dagot, *Les sûretés* (Paris: Presses universitaires de France, 1981) at 127-28. While some authors (see, *e.g.*, Mignault, *supra*, note 28 at 392) apparently see other traditional devices — the lessor's privilege, the unpaid vendor's privilege, the privilege for tithes — as accessory real rights (each, moreover, being non-possessory), each of these lacks an essential indicium of a true real right — namely the right to follow. That is, none gives its titulary a right which can be asserted if the debtor disposes of the property over which it lies. The special case of the right of retention is discussed *infra*, no. 62.

[287]Mignault, *ibid.*, considers the pledge to be accessory real right. See also Macdonald, *supra*, note 143. That is, even though art. 1972 *C.C.L.C.* states that the object remains in the creditor's hands as a deposit, all agree that the pledgee has a *jus in re aliena*.

Paragraph 734(1) *C.C.P.* confirms that the pledgee in Quebec has a right to revendicate. The conditions for exercising this right do, however, vary depending on the status of the pledgee's claim to possession.

According to article 1970 *C.C.L.C.* possession by the creditor is the essence of pledge. If the pledgee voluntarily surrenders the object to his debtor, the pledge is extinguished and he is no longer entitled to revendicate.[288] Should the pledgee be involuntarily dispossessed, however, the pledge subsists and the pledgee may revendicate the property.[289] Similarly, the fraudulent return of the pledged property to the pledgor by a person to whom physical control has been given by the pledgee does not extinguish the right to revendicate.

The pledgee may also claim in revendication according to the terms of his contract as against third parties to whom he has given physical custody (namely warehousemen holding for him).[290] Where the pledgor wrongfully regains physical control of the object, the pledgee may either revendicate or claim specific performance of the contract of pledge.[291] In all cases, however, revendication is founded on the pledgee's right to actual and immediate physical control of the object pledged, and as long as the pledge subsists, he may revendicate.[292]

62. *Documentary Pledges* — Both paragraphs 1971(2) and 1979(2) *C.C.L.C.* contemplate the negotiation of documents of title as collateral security by simple endorsement and transfer.[293] As applied to contracts of pledge this endorsement produces the same effect as a simple putting into possession. That is, both the document itself and the underlying assets are deemed by

---

[288]*Traders Finance Corp.* v. *Landry* (1957), [1958] B.R. 120. Unless the return is temporary or accidental, in which case the pledge subsists and revendication is possible: *Grobstein* v. *A. Hollander and Son Ltd* (1962), [1963] B.R. 440.

[289]See P.-B. Mignault, *Le droit civil canadien*, t. 8 (Montréal: Wilson & Lafleur, 1908) at 403.

[290]See *Pétroles Irving Inc.* v. *Machinerie B.D.M. Inc.* (1984), [1984] C.S. 511, currently on appeal to Que. C.A.

[291]See *Wilson* v. *Doyon* (1963), [1964] C.S. 93.

[292]Thus, even should the pledgor pledge the thing of another under art. 1966*a C.C.L.C.*, and even should the true owner regain possession of his object following involuntary or fraudulent dispossession of the pledgee, the pledgee can successfully revendicate. See *Atlas Thrift Plan Corp.* v. *Lussier* (1955), [1955] R.P. 181 (Sup. Ct); and Caron, *supra*, note 90 at 406-9 and 413-19. Where, however, the pledge of the thing belonging to another is not valid under arts 1488, 1489 or 2268 *C.C.L.C.* the true owner may resist the pledgee's revendication. See *Productions Michel Desrochers Inc.* v. *Bourbeau* (1983), [1983] C.S. 522.

[293]See G.E. Le Dain, "Security Upon Moveable Property in the Province of Quebec" (1956) 2 McGill L.J. 77 at 95-103.

statute to be the juridical object of the pledge.[294] The standard form of documentary pledge will arise under the provincial *Act Respecting Bills of Lading, Receipts and Transfers of Property in Stock*[295] or the federal *Bank Act*.[296]

The most important feature of the documentary pledge is that the pledgee himself only takes actual possession of the document of title while the goods themselves remain in the physical custody of the issuer of the document (namely the shipper, warehouseman, *etc.*).[297] In other words, the pledge may be constituted, transferred, substituted and discharged without the need for multiple physical displacements of the pledged collateral. However, the disjunction of juridical and material possession does not mean that the device ceases to be a possessory security. It follows that the endorsee of the document of title may revendicate under exactly the same conditions as the ordinary possessory pledgee, not only the document of title itself, but also the underlying assets represented by that document.[298]

63. *The Right of Retention* — Some French authors consider that the right of retention constitutes an incomplete possessory real right ("un droit réel inachevé").[299] That is, because the right is opposable to the true owner, it has a character of reality notwithstanding that, in France, it gives no execution preference.[300] Nevertheless, the majority of commentators consider the right of retention to be a personal right.[301] For this reason, even though it shares almost identical prerogatives with the pledge it will be considered below as a personal right of detention giving rise to an execution privilege.[302]

---

[294]Some authors see the documentary pledge as a simple case of the pledged items being held by a third party. See P. Ciotola, *Droit des sûretés* (Montréal: Thémis, 1984) at 66. This view is wrong, for there is no original contractual link between warehouseman and pledgee. Others see this as a vesting of ownership, since the endorsement confers upon the endorsee all the rights and title of the endorsor. See, *e.g.*, *Ross* v. *Thompson* (1883), 9 Q.L.R. 365 (Sup. Ct); *Young* v. *Demers* (1895), 4 B.R. 364. However, where the underlying contract is one of pledge, the endorsee's rights are those of the titulary of an accessory real right.

[295]*Supra*, note 49, ss 1-6.

[296]*Supra*, note 49, s. 186; see also the *Bills of Lading Act*, R.S.C. 1970, c. B-6, s. 2.

[297]See Wood, *supra*, note 219 for a thorough historical analysis.

[298]For a full elaboration, see Macdonald, *supra*, note 143 at 580-81 and 619-22.

[299]Mazeaud, *supra*, note 23, no. 1410.

[300]Dagot, *supra*, note 286 at 75-77.

[301]See N. Catala-Franjou, "De la nature juridique du droit de rétention" (1967) 65 Rev. trim. dr. civ. 9, no. 6; Frenette, *supra*, note 46, nos 55-57; S. Binette, Le droit de rétention en droit civil (L.L.M. thesis, Université Laval, 1974) at 29-38 [unpublished]. On the other hand, courts seem more willing to see the right of retention as a real right. See *De Senneville* v. *Baillargeon* (1910), 37 C.S. 215 at 229; *Lepine* v. *Brunet* (1951), [1953] R.L. (N.S.) 47 at 51 (Sup. Ct); *Elliot Krever and Assoc. Ltd* v. *Montreal Casting Repairs Ltd* (1968), [1969] C.S. 6 at 8.

[302]In all events, commentators universally accept that the titulary of a right of retention may revendicate under similar circumstances as the ordinary pledgee. See Frenette, *ibid.*, nos 39-52.

64. *Scope of Revendication of Possessory Accessory Real Rights* — As real rights, the pledge and documentary pledge give rise to a right to revendicate both against wrongfully-holding co-contractants (for example, mandataries, carriers, depositaries and repairers) and against wrongfully-holding third parties. Thus, the documentary pledgee may revendicate the property from an overholding warehouseman or carrier who issued the receipt or bill of lading which has been endorsed to him, even though the issuer is not his co-contractant. The pledgee's right to claim the goods from the pledgor (or third party true owner) who regains possession is more problematic. Nevertheless, as long as the pledge itself subsists, the fact that it is the pledgor (or true owner) who is in possession is immaterial.[303] Revendication of the object of the pledge will always be possible.[304]

ii. Titularies of Non-Possessory Accessory Real Rights

65. *Codal Non-Possessory Security: Special Pledges* — In addition to simple pledge, the *Civil Code* also sets out two other contracts which have pledge-like characteristics: agricultural and forest pledge, and commercial pledge.[305] In these special pledges the creditor is not required to take physical possession of the pledge *corpus* in order to perfect the contract. The drawing up and registration of a pledge contract is deemed to replace creditor possession.[306] Thus, these non-possessory pledges add a further dimension to the pledgee's right of revendication: revendication from the pledgor. Paragraphs 1979*c*(1) and 1979*i*(1) *C.C.L.C.* give the special pledgee a right to claim possession from the pledgor upon default. This additional right is not simply a personal action in specific performance. Because it is founded on the contract of pledge it is also an action in revendication *per se.*

The true characterization of the special pledgee's right to claim possession from the pledgor becomes important in determining whether the right

[303]In other words, because the pledge is a real right and because art. 1966*a C.C.L.C.* permits the pledge of a thing belonging to another, the true owner who gains possession while the pledge subsists cannot, on the basis of his ownership alone, resist the pledgee's revendication. See, by extension, *Canadian Bank of Commerce* v. *Stevenson* (1892), 1 B.R. 37 on documentary pledges; *Re Bertrand* (1966), [1967] C.S. 596 on commercial pledges.

[304]See Macdonald, *supra,* note 143 at 595-96; and *Grobstein* v. *A. Hollander and Son Ltd, supra,* note 288.

[305]A third non-possessory pledge — acquacultural pledge — will soon be possible. See *Acquaculture Credit Act,* S.Q. 1984, c. 21, s. 58ff, not yet proclaimed in force.

[306]See A. Cossette, "Considérations sur le droit de propriété et son évolution" (1967) 70 R. du N. 277; Y. Desjardins, "Du nantissement commercial à l'hypothèque mobilière" (1968) 71 R. du N. 87; Macdonald, *supra,* note 143 at 583-84; and *Re Greenfield Park Lumber & Builders Supplies Ltd* (1977), [1977] C.S. 504. Registration is an essential formality for the constitution of the pledge, in default of which the pledge is void. See *Re Hospitalité Tours Ltée* (28 January 1982), Quebec 200-11-000624-810 (Sup. Ct).

is sufficient to sustain an action in revendication against third parties who obtain the goods from the pledgor. While there are no cases directly on this point, on several occasions courts have had to deal with the pledgee's rights when the object of the pledge has been seized by another creditor. They have concluded that both an agricultural pledgee,[307] and a commercial pledgee[308] in possession have a right to oppose a seizure taken by a third party. Occasionally they have granted this right to special pledgees even prior to their taking possession from the pledgor.[309] This second result is thought to be justified on the basis that registration replaces pledgee possession, and because an ordinary pledgee in possession is permitted to resist a seizure by a third party.[310] Nevertheless, the majority of cases do not seem to consider the special pledgee out of possession to have a perfected real right in the same sense as the ordinary pledgee.[311]

Of course, the special pledgee may always revendicate when the objects of his pledge are wrongfully in the hands of a third party, whether by virtue of a contract with the pledgor, or as a result of loss or theft.[312] It follows,

---

[307]*Re Drouin* (1972), [1972] C.A. 843.

[308]*Sous-ministre du revenu du Québec* v. *Monette* (27 November 1982), Beauharnois 760-02-000181-821 (Prov. Ct).

[309]See *Commission de la santé et de la sécurité du travail* v. *L. Monette & Fils Inc.* (24 February 1983), Iberville 755-05-000264-828 (Sup. Ct) and cases cited therein; see also *B. Fabian Inc.* v. *Restaurant le Carafon du vin Ltée* (1980), [1980] C.S. 768.

[310]See, for an analysis of competing theories, L. Payette, "Opposition à fin de distraire — Nantissement commercial — Droit de rétention" (1979) 39 R. du B. 1032. In this commentary, Payette criticizes the decision in *R.* v. *Restaurant & Bar La Seigneurie de Sept-Îles Inc.* (1977), [1977] 2 F.C. 267, [1977] C.T.C. 96, 77 D.T.C. 5129 (T.D.) where the right of the pledgee out of possession to oppose the seizure was held, following art. 1977 *C.C.L.C.*, to be dependent on whether the seizing creditor was of higher or lower rank.

[311]See *Sous-ministre du revenu du Québec* v. *Fountainhead Fun Center Ltd* (1981), 40 C.B.R. (N.S.), [1981] R.D.F.Q. 105 (Sup. Ct) [hereinafter *Fountainhead Fun Center*]; and *Sous-ministre du revenu du Québec* v. *Restaurant chez Gisèle Forget Ltée* (1984), [1984] C.S. 44 and cases cited therein. See also *Jean-Talon Auto Parts Ltée* v. *Funaro Station Service Inc.* (29 November 1984), Montreal 500-02-015943-843 (Prov. Ct) [hereinafter *Funaro*]; and *Sous-ministre du revenu du Québec* v. *Transport Sirois Ltée* (22 November 1982), Beauharnois 760-02-000181-821 (Prov. Ct). In the *Funaro* case, however, the court permitted the opposition by a pledgee out of possession on the basis that the debtor had already agreed to hand over the goods at the time they were seized. It is also to be noted that these decisions refusing the pledgee's opposition may be correct and that those cases permitting the ordinary pledgee in possession to oppose a seizure are in error. This issue will be examined below in the review of oppositions to seizure.

[312]The agricultural and commercial pledges may also be set up against the true owner of the goods pledged by a non-owner under the same conditions as for an ordinary pledgee, even if that owner obtains possession of the goods. See *Bo-Less Inc.* v. *Boily* (27 December 1979), Quebec 200-03-000192-770 (C.A.); and especially *Re Bourcier Super Marché Lefort Inc.* (23 May 1984), Montreal 500-11-001426-838 (Sup. Ct); and L. Payette, "Nantissement commerciale — chose d'autrui" (1980) 40 R. du B. 677. Moreover, they will subsist if the objects become immobilized by destination (art. 1979*h C.C.L.C.*) but not if immobilized by nature. See *Société du crédit agricole* v. *Lambert* (12 March 1984), Quebec 200-05-000262-845 (Sup. Ct).

therefore, that apart from the case of oppositions to a seizure (where courts have hesitated to assimilate the special pledge with the ordinary pledge), the non-possessory special pledge vests its titulary with identical prerogatives in revendication to those of the ordinary pledgee.

66. *Maritime Mortgages* — Article 2022 *C.C.L.C.* states that moveable property is not subject to hypothecation, except as provided in the titles "*Of Merchant Shipping*" and "*Bottomry and Respondentia*". Since Confederation, this exception relates to the maritime mortgages set out in what is now the *Canada Shipping Act*[313] and to the extent not superseded by that *Act*, by article 2375ff. *C.C.L.C.* While the maritime mortgage transaction is in form a mortgage, by virtue of former article 2377*a C.C.L.C.* it has been held in Quebec not to give the mortgagee a species of ownership of the ship which has been mortgaged, but rather to constitute a type of "super" hypothec or an innominate accessory real right.[314] In any event, since the hypothec is itself a non-possessory accessory real right, it will, as such, give rise to a right of revendication. For example, in *Service Finance Corporation* v. *Decca Radar Canada (1967) Ltd*[315] the court permitted the maritime mortgagee to bring an opposition to withdraw from seizure on the basis of his security. Presumably, therefore, the mortgagee could revendicate the object of his security under roughly the same conditions as those applicable to the special pledgee of the *Civil Code.*

67. *Statutory Non-Possessory Security* — Apart from the possessory and non-possessory accessory real rights adverted to in the *Civil Code*, the law of Quebec knows a variety of non-possessory security devices created by statute. The three most important of these are specialized commercial financing instruments in which the right to revendicate from wrongfully-holding parties is not explicitly set out, but is implied from the nature of the creditor's powers. Thus, a bank holding section 178 security may revendicate property subject to its claim, even though the *Bank Act* is, over a wide range of cases, silent on the point.[316] Similarly, the right to revendicate of the transferee of property-in-stock under Division III of the *Act Respecting Bills of Lading, Receipts and Transfers of Property in Stock* must be inferred from section

[313]R.S.C. 1970, c. S-9.

[314]See *Re Robert & Lamarche* (1900), 18 C.S. 101, where the court held that a judicial sale would not purge the "maritime mortgage" as it would an ordinary hypothec.

[315]*Supra*, note 199.

[316]See *supra*, note 49, ss 178(1)(a) and (b) and 178(3). S. 178(3) only governs relationships between the debtor and the bank. For a full analysis, see Macdonald, *supra*, note 69 at 1040-42.

30 of that *Act*.[317] Nevertheless, courts have consistently held that the section 178 transaction permits the creditor to revendicate from any wrongfully-holding party, be this a debtor in default or any other person.[318] Under the *Special Corporate Powers Act*[319] a slightly different secured financing regime is contemplated. Even though most trust deeds contain a clause, valid under section 30, by which the debtor "cedes and transfers" his assets to the trustee, courts refuse to consider the trustee as owner and are now holding that he acquires, at best, an accessory real right.[320] If such is the case, the trustee for bondholders ought to be able to revendicate from a third party wrongfully interfering with property subject to his guarantee. But since his rights in the property are only those of a privileged creditor, who has, nonetheless, a right to dispose consensually, courts and commentators have been reluctant to accord the trustee a right to follow; hence, it is uncertain whether he may revendicate prior to the security becoming enforceable.[321] The best position would seem to be to treat section 30 as vesting the trustee with rights analogous to those of the special pledgee, except that prior to his debtor's default he is deemed to renounce the right to revendicate against all ordinary course purchasers.[322]

---

[317]*Supra*, note 49. S. 30 speaks only to the case where the transferee seeks possession from his debtor following default. See R.A. Macdonald, "Inventory Financing in Quebec After Bill 97" (1984) 9 Can. Bus. L.J. 153. See also J. Auger, "Les sûretés mobilières sans dépossession sur des biens en stock en vertu de la Loi sur les banques et du droit québécois" (1983) 14 R.D.U.S. 221; and Y. Renaud, *La cession de biens en stock* (n.p.: Judico, 1985).

[318]See, as concerns s. 178 security, *Holly M. Ward Lumber*, *supra*, note 202 for an opposition to seizure; *Banque de Commerce Canadienne Impériale* v. *Knitrama Fabrics Inc.* (1983), [1983] C.A. 565, [1983] R.D.J. 417 for a contestation of a seizure before judgment; *A.G. Canada* v. *Mandigo* (1964), [1965] B.R. 259, 46 D.L.R. (2d) 563; and *Sawyer Tanning Co.* v. *Leather Group Ltd* (1977), [1977] C.S. 1150 for revendication from a third party acquirer. Given the basic similarity of the transfer of property-in-stock device to s. 178 of the *Bank Act*, an identical judicial posture can be expected.

[319]*Supra*, note 49, ss 27-30.

[320]*General Trust of Canada* v. *Roland Chalifoux Ltée* (1962), [1962] S.C.R. 456; *Re Serabec Ltée* (1985), [1985] C.A. 212.

[321]Compare *Darveau* v. *D'Amours* (1931), 69 C.S. 407, rev'd in part (1931), 52 B.R. 449, rev'd (1933), [1933] S.C.R. 503 with *Fabrication Prêcision Inc.* v. *Mobilart Inc.* (1975), [1976] C.S. 128. See L. Payette, "La charge flottante" [1976-77] Meredith Mem. Lect. 43; Demers, *supra*, note 281 at 102-3. In other words, because the trustee's rights are normally extinguished by ordinary course sales, courts appear to be holding that prior to crystallization upon default, the trustee has no *jus in re aliena*. That is, the trustee is seen as having only the rights of an ordinary privileged creditor prior to default. See Auger, *supra*, note 317 at 320. See also *Affiliated Factors Corp.* v. *Rosco Metal Products Ltd* (1970), 18 C.B.R. (N.S.) 58 (Que. Sup. Ct). Of course, should non-ordinary course sales, theft, fraud or loss of the object constitute a default, the trustee may at that point take possession and revendicate. See *Alcools de commerce*, *supra*, note 234.

[322]For a subtle analysis of the law on this point, see Payette, *ibid.*, nos 26-31, who seems to accept that the trustee might have a right to follow in non-ordinary-course dispositions. He cites *Lord* v. *Robin* (1925), 39 B.R. 426, *Darveau* v. *D'Amours*, *ibid.* and *Affiliated Factors Corp.*

Interestingly, in each of the above cases the rights of the creditor have at one time been mischaracterized as a species of ownership *sui generis*.[323] Analytically, however, each is a non-possessory security device which could sustain an action in revendication as such.[324] Consequently, in each case the secured creditor may revendicate from his debtor in default or from any third parties wrongfully holding the collateral.[325] As for the power of the secured creditor to raise a seizure, the result is not identical. Courts seem to have assimilated the position of the trustee not in possession to that of the non-possessory pledgee not yet in possession.[326] Transferees and banks, by contrast, seem to be able to oppose a seizure by another creditor even prior to their taking possession ou the basis that their right to private disposition of the secured collateral is absolute.[327]

The character of other statutory security devices, notably those guaranteeing claims of administrative agencies or the Crown, are somewhat less certain. Should any of the prerogatives granted under *An Act Respecting the Ministère du Revenu*[328] be seen as a true legal hypothec over moveables, then a regime of revendication similar to that given to banks, transferees of property-in-stock and maritime mortagees should be applicable. There are, however, good arguments for analyzing the Minister's claim over corporeal moveables as a simple execution privilege and not as a real right.[329] If such is the case, the fiscal claim would not give rise, on this basis, either

---

v. *Rosco Metal Products Ltd, ibid.* A failure to distinguish between the exercise of a right upon default and the creditor's right to moniter often leads to a mischaracterization of the trustee's rights as being merely those of a privileged creditor who has no real right.

[323]See the discussion in *Laliberté* v. *LaRue, supra,* note 69, as concerns trust deeds; *Banque Canadienne Nationale* v. *Lefaivre, supra,* note 69 as concerns s. 178 security; and Renaud, *supra,* note 317 at 20-26.

[324]See Macdonald, *supra,* note 69 at 1013ff.; Payette, *supra,* note 321 at 76ff.

[325]In practice this usually means a third party who is not an ordinary course purchaser, since invariably security agreements permit the debtor to dispose of his inventory. But see *Intersplice Inc.* v. *Industries Unik Ltée* (8 June 1984), Montreal 500-05-010718-821 (Sup. Ct).

[326]See M. Cordeau, "La réalization des garanties consenties par acte de fiducie" in Barreau du Québec, *Formation Permanente,* cours 63 (Cowansville, Qué.: Yvon Blais, 1982) 3. Compare *Fountainhead Fun Center, supra,* note 311 and *Sous-ministre du revenu du Québec* v. *Total Rental Equipment Inc.* (1979), [1979] C.S. 840 [hereinafter *Total Rental Equipment*] with *Doyle, Dane, Bernback, Advertising Ltd* v. *Réserve Expertise (1978) Ltée* (1980), [1980] C.S. 772. See also K.S. Atlas, "The Race to the Swiftest: Entitlement to the Possession of the Property of a Bankrupt" (1985) 56 C.B.R. (N.S.) 217 for a discussion of *Re Dominion Lock Co.* (1985), 56 C.B.R. (N.S.) 148 (Que. Sup. Ct).

[327]See *Holly M. Ward Lumber, supra,* note 202; *Keymar Equipment, supra,* note 145. This question will be discussed in detail upon a review of oppositions to seizure.

[328]R.S.Q. c. M-31, s. 12.

[329]See L. Payette, "Charge flottante: Privilège de la Couronne et saisie entre les mains du fiduciaire" (1980) 40 R. du B. 337.

to an action to revendicate from wrongfully-holding third parties the property over which it lies, or to an opposition to withdraw from seizure.[330] Other statutory securities either provide simply for an execution preference or for a legal hypothec (or "lien") similar to that of the *Act Respecting the Ministère du Revenu.* Consequently, they also cannot be seen as establishing non-possessory accessory real rights.

68. *Contractual Non-Possessory Security* — To the extent that it is possible to create contractual non-possessory accessory real rights other than modified pledges, hypothecs or the statutory non-possessory security devices already noted, then, subject to any limitations arising from the contract, the secured creditor should be able to revendicate in the same fashion as the titulary of an ordinary non-possessory security, as the case may be. Nevertheless, in view of the basic policy of articles 1980 and 1981 *C.C.L.C.* the case for recognizing completely new types of contractual accessory real rights is not persuasive.[331] In all events, Quebec courts to date have neither recognized nor enforced purely contractual security devices.[332]

69. *The Privilege of Lessors, Unpaid Vendors and Tithe Creditors* — Some authors consider that privileges upon identifiable assets of a debtor constitute accessory real rights.[333] These rights of the tithe creditor, of the unpaid vendor and of the lessor of immoveables, would necessarily be non-possessory. Yet there is nothing in any of these privileges which suggests that the creditor has a right in the object of his privilege. In fact, in each case the privilege necessarily falls should a third party acquire the property.[334]

---

[330]See *Fountainhead Fun Center, supra,* note 311; and *Sous-ministre du revenu du Québec* v. *Formulations Epoxyde Beaudry Inc.* (6 July 1984), Terrebonne 700-05-002009-821 (Sup. Ct); as well as the analysis in Macdonald, *supra,* note 69 at 1087-89. But see *Total Rental Equipment, supra,* note 326, where the court permitted the Crown to assert its seizure against a trustee for bondholders in possession. If such is the case then the Minister of Revenue would indeed have a real right and not a simple execution privilege. The *Total Rental Equipment* decision has been severely criticized by commentators: see Payette, *ibid.*; Demers, *supra,* note 281 at 102-3; M. Cordeau, "La prise de possession par le fiduciaire en vertu d'un acte de fiducie" (1983) 24 C. du D. 531 at 570-72.

[331]See Macdonald, *supra,* note 112 at 256-58 and 285-95. See also Cantin Cumyn, *supra,* note 50.

[332]By contrast, they have permitted and enforced contractual modifications to existing security devices. The right to take possession without a court order when security is given under s. 178(1)(a) and (b) of the *Bank Act* is one such instance. See Paquet, *supra,* note 153. Finally, courts have permitted various quasi-security devices, such as the double sale, the sale-leaseback and the pre-article 1603 *C.C.L.C.* financial lease, under which ownership is deployed as a security. See *Canadian Dominion Leasing Corp.* v. *Laboratoire Choisy Ltée* (1970), [1970] C.A. 1021. These title security devices are not, however, analytically accessory real rights.

[333]Mignault, *supra,* note 28 at 392.

[334]See, as concerns unpaid vendors, art. 1999 *C.C.L.C.*; as concerns lessors of immoveables, art. 1640 *C.C.L.C.*; and as concerns tithe creditors, *Gaudin* v. *Ethier* (1884), 1 M.L.R. (Q.B.).

For this reason, revendication on the basis of a right to follow is impossible, and the privileges cannot be considered to give rise to real rights.

70. *Scope of Revendication of Non-Possessory Accessory Real Rights* — Given the particular purposes of all accessory real rights, the non-possessory security holder ought to have a right to revendicate similar to that of the ordinary pledgee. That is, once the creditor has a right to possession of the collateral, he may revendicate from wrongfully-holding third parties or from his debtor. As for revendication from the debtor in possession, the creditor may assert either a contractual right to possession or may revendicate and seize whenever default occurs.[335]

The position regarding third parties is more subtle. Prior to a right to immediate possession actually arising consequent upon his debtor's default, the creditor may revendicate from third parties only when the continued existence of his security is threatened by that wrongful possession. Such a threat would occur notably in the case of finders and thieves. Of course, in most cases the debtor's inaction would trigger an insecurity clause in the contract of loan or would bring article 1092 *C.C.L.C.* into play, with the consequence that the security would become enforceable. In each of these situations, the bank, the transferee and the trustee for bondholders would be in an identical position to that of the non-possessory special pledgee.

d. Titularies of "Real Rights of Administration"

71. *The Proliferation of Non-Conforming Legal Devices* — No legal system functions for long as a static conceptual system. Either through legislative fiat or practice-driven judicial interpretation, new devices are engrafted onto existing law.[336] Often these are first accommodated by their characterization as a *sui generis* type of existing institution. Ultimately, most of these transplants are assimilated into the conceptual structure of the host legal system.[337] Some, however, never do follow this evolutionary pattern.

Perhaps the first conceptual non-conformity in the civil law of property, dating from Roman times, was the fiduciary substitution.[338] But because this institution did not require a readjustment to the theory of the prerogatives of ownership *per se* it has not generally raised significant conceptual

[335]For an assessment of various default rights, see Macdonald, *supra*, note 143 at 610-14 and 619-22.

[336]See Watson, *Society and Legal Change*, *supra*, note 19, c. 8-12.

[337]See A. Watson, *Legal Transplants: An Approach to Comparative Law* (Edinburgh: Scottish Academic Press, 1974).

[338]See C.F. Thévenot de Saules, *Traité des substitutions fidéicommissaires, contenant toutes les connaissances essentielles selon le droit romain et le droit français* (Paris: Chez Moutard, 1778).

problems.[339] By contrast, several nineteenth- and twentieth-century innovations do not easily fit the framework of property rights elaborated by the *Code*, even though some of these are incorporated into it. The most striking of these incorporated anomalies are the trust and the concept of mercantile agency. Of the anomalies resting outside the *Code*, the schema of statutory transfers to trustees in bankruptcy and company liquidators is most problematic.

To date civil-law theorists have not attempted in any systematic way to account for these anomalies. The trust has been more or less characterized as a *sui generis* institution and the other concepts have been relegated to the authors of business- or commercial-law doctrine. In consequence, it has not been necessary to characterize the nature of the administration of the property of another in general (or specific types of administration in particular) as constituting either powers or rights and, if rights, either real rights or personal rights. Here it is suggested that certain types of administration can best be conceived as vesting a real right in their titulary.

72. *Ownership of Trust Property* — The felt need to locate in one individual the right of ownership of trust property has induced great debate in Quebec as to the nature of the institution.[340] Some commentators[341] and at least one court[342] have attributed ownership to the beneficiary of the trust, whether the beneficiary is merely an income beneficiary or whether he also has a right to the capital. A second current of opinion considers the trustee to be owner, but holding "un droit de propriété limité" or ownership *sui generis*.[343] A third accords ownership to neither trustee nor beneficiary but to the settlor or his heirs as the case may be, vesting the trustee with a real right of

---

[339]That is, while courts have often struggled to determine whether a substitution has been created, once they have found in the affirmative they have had less difficulty in stating and enforcing the rights of institutes and substitutes: Cantin Cumyn, *supra*, note 72, nos 16-25. The situation of substitutes prior to the opening of a substitution is now the only conceptual anomaly connected with the substitution.

[340]In this section only the trust provisions of arts 981*a*-981*n* *C.C.L.C.* will be considered. The fiduciary legatee of art. 964 *C.C.L.C.* (See *Masson* v. *Masson* (1912), 47 S.C.R. 42) and the legatee for charitable purposes of art. 869 *C.C.L.C.* (see *Valois* v. *de Boucherville* (1929), [1929] S.C.R. 234) will not be considered here as they are more easily understood as examples of the administration of the property of another.

[341]J.É. Billette, *Traité théorique et pratique de droit civil canadien: Donations et testaments*, t. 1 (Montréal: n.p., 1933) no. 264; R.-H. Mankiewicz, "La fiducie québecoise et le trust de Common Law: Étude d'interprétation comparative" (1952) 12 R. du B. 16 at 32ff.; P.-B. Mignault, *Le droit civil canadien*, t. 5 (Montréal: Théoret, 1901) at 156. It is to be noted that Mignault later changed his position.

[342]See *Chester* v. *Galt* (1881), 12 R.L. 54 (Sup. Ct).

[343]See, most recently, *Tucker* v. *Royal Trust Co.*, *supra*, note 69. See also *Curran* v. *Davis* (1933), [1933] S.C.R. 283; *Reford* v. *Natural Trust Co.* (1967), [1968] B.R. 689; P.-B. Mignault, "À propos de fiducie" (1933) 12 R. du D. 73; P.E. Graham, "Some Peculiarities of Trusts in Quebec" (1962) 22 R. du B. 137. For a critique of this approach, see M. Cantin Cumyn, "La propriété fidnciaire: Mythe ou realité" (1984) 15 R.D.U.S. 7.

administration only.[344] Finally, a fourth conception describes the trust either as an *institution* or characterizes the trust *corpus* as a "patrimoine d'affectation".[345] This last conception of the trust seems to be gaining support among commentators.[346]

If the trust is an autonomous institution, it remains to determine who may exercise the action in revendication. Even if one concludes that the trustee is neither owner nor titulary of any other real right in relation to the trust *corpus*, by virtue of article 981*b* *C.C.L.C.* he may revendicate as a legal depositary.[347] The position of trust beneficiaries under such an analysis is infinitely more complex. To begin with, it seems necessary to distinguish income and capital beneficiaries. The income beneficiary has been permitted to proceed against the trustee personally to preserve the trust[348] and, according to some, may bring conservatory actions,[349] even though he is not vested with a real right.[350] Nevertheless, unless the income beneficiary has a degree of use and detention of the trust *corpus*, it is unlikely that his rights as beneficiary could constitute either a *jus in re* or a *jus ad rem*.[351] Whether they give rise to a right of revendication then depends on the status of titularies of such rights in possession to revendicate.[352] As for capital beneficiaries, the majority opinion is that they acquire ownership of the trust *corpus* only at the expiry of the trust.[353] During the trust they only

---

[344]See D.N. Mettarlin, "The Quebec Trust and the Civil Law" (1975) 21 McGill L.J. 175 at 218ff.

[345]See M. Faribault, *Traité théorique et pratique de la fiducie ou trust du droit civil dans la province de Québec* (Montréal: Wilson & Lafleur, 1936) no. 73ff.; Cantin Cumyn, *supra*, note 72, nos 98-101. See also *No. 199* v. *Minister of National Revenue* (1954), 11 Tax A.B.C. 353, 54 D.T.C. 488. On the concept of a "patrimoine d'affectation", see P. Charbonneau, "Les patrimoines d'affection: Vers un nouveau paradigme en droit québécois du patrimoine" (1983) 85 R. du N. 491.

[346]See Caron, *supra*, note 69, especially J.E.C. Brierley, "Editor's Post Scriptum" at 440. See also Cantin Cumyn, *supra*, note 335.

[347]See P. Lepaulle, "An Outsider's View Point of the Nature of Trusts" (1928) 14 Cornell L.Q. 52 at 61.

[348]Most notably, he may have the trustee removed for fraudulent dealing with trust property. See *Ware* v. *Houghton* (1976), [1976] C.S. 585; *Hand* v. *Auclair* (1970), [1970] C.A. 253.

[349]Faribault, *supra*, note 345, no. 313; Mankiewicz, *supra*, note 341, no. 60ff. This position has not yet found favour with the courts. See *Noel* v. *Noel* (1960), [1960] B.R. 689; *Dubreuil-Goyette* v. *Sherbrooke Trust Inc.* (1976), [1976] C.A. 571.

[350]*Guaranty Trust Co. of New York* v. *R.* (1948), [1948] S.C.R. 183.

[351]L. Rigaud, "A propos d'une renaissance du 'jus ad rem' et d'un essai de classification nouvelle des droits patrimoniaux" [1963] Rev. dr. int. et comp. 557.

[352]That is, there appears to be nothing in the concept of the trust itself upon which all income beneficiaries could found a right of revendication.

[353]Mignault, *supra*, note 343; *Chester* v. *Galt*, *supra*, note 342; Cantin Cumyn, *supra*, note 50.

have a future or eventual right not dissimilar to that of a substitute. Consequently, like substitutes, capital beneficiaries ought to be able to take conservatory actions to protect their rights, but unlike the substitute, they do not have the right, should the revenue beneficiary renounce, to demand the capital by anticipation.[354] Whether this latter limitation excludes the right to revendicate has not yet been judicially decided.[355]

If the view of modern commentators (although not the Supreme Court[356]), that the trust should not be defined in terms of owning and transferring property but in terms of its administration, were to prevail then it would seem that the status of each party to revendicate under his own title cannot be determined solely by locating the right of ownership of trust property or by describing each as trustee, income beneficiary or capital beneficiary. In other words, even if, for some, the trust cannot be made to fit the classical conception of ownership (and the trustee seen as titulary of a real right of administration), the prerogatives of parties to a trust arrangement can be analysed on generally applicable civil law principles.[357] These principles then will determine whether revendication is possible, and by whom.

73. *Mercantile Agents* — The *Code* is both lacomic and ambiguous in its treatment of the rights of brokers, consignees, factors and commercial agents. Article 1736 *C.C.L.C.* states that the factor or commission-merchant is an agent who buys or sells goods for another, either in his own name or in the name of his principal.[358] Further, article 1740 *C.C.L.C.* provides that "[a]ny agent entrusted with the possession of goods, or of the documents of title thereto, is deemed the owner thereof for the following purposes ... ".[359]

---

[354]See art. 956(2) *C.C.L.C.*; and see *Baril* v. *Trust Général du Canada* (1975), [1975] C.S. 892.

[355]In principle, if the revendication were conservatory (that is, if the beneficiary were not acting so as to take possession of the *corpus* for his own use), it ought to be permitted.

[356]*Royal Trust Co.* v. *Tucker*, *supra*, note 69. It is to be noted that in the English version of this case the expression "droit de propriété *sui generis*" is rendered as a "*sui generis* right of property". If *Royal Trust Co.* v. *Tucker* is read in this way then it is open to consider the ownership of the trust as remaining with the donor and his heirs or the testator and his heirs, with the trustee exercising a real right of administration.

[357]On such an analysis, the settlor will be a donor or the heir of a testator, as the case may be; the trustee will be a species of depositary; the income beneficiary in possession will have a *jus ad rem*; and the capital beneficiary will have a future real right.

[358]See, generally, N. L'Heureux, *Précis de droit commercial du Québec*, 2d ed. (Québec: Presses de l'Université Laval, 1975). A broker, under art. 1737 *C.C.L.C.*, is subject to the general rules of mandate and in all cases and for all purposes is the representative (as mandatary) of his mandator. See also A. Perrault, *Traité de droit commercial*, t. 2 (Montréal: Albert Lévesque, 1936) nos 889 and 891. See *Paquette* v. *Boisvert* (1957), [1958] B.R. 150. Art. 1738ff. *C.C.L.C.* thus applies only to factors and commission-merchants.

[359]See also Y. Renaud & J. Smith, *Droit québécois des corporations commerciales*, t. 2 (Montreal: Judico, 1974) at 1053-58 for a brief review of the law relating to documents of title as it relates to questions of possession.

Thus, the factor or commercial agent, by contrast with a broker, has not only a power to represent the owner as mandatary under article 1737 *C.C.L.C.*, he is also deemed to be owner for the purpose of the sale, pledge, carriage, warehousing or repair of the goods.

These provisions raise three main questions concerning the right of revendication: first, when is a mercantile agent a true factor? Second, when a mercantile agent buys in his own name under article 1736 *C.C.L.C.* does his principal automatically acquire a right to revendicate as owner? And third, does the deemed ownership of article 1740 *C.C.L.C.* extinguish the principal's or consignor's right to revendicate as owner, vesting it solely in the factor? As concerns the first point, it would appear that the *sine qua non* of a factoring relationship is possession, either *in specie* or by way of documents of title, by the factor.[360] While there is no authority directly on the second point, it would seem that the principal could revendicate as owner, even though the agent who buys in his own name could also do so.[361] On the third point, assuming a true consignment agreement, the consignor would always be able to revendicate from wrongfully-holding third parties since the powers of the mercantile agent cannot rise above those of the consignor.[362] What is more, the mercantile agent will also be permitted to revendicate either as a deemed owner under article 1740 *C.C.L.C.*, or as a special mandatary in possession.[363]

74. *Statutory Transferees* — The rights of trustees in bankruptcy, liquidators of companies and other statutory transferees are set out in special legislation. There is considerable controversy as to whether these various transferees are owners, quasi-owners, administrators or liquidators, and whether they are vested with real rights in the property transferred to them.[364] Of course, in each of these circumstances the legislation in question sets out in detail the powers of the transferee to revendicate from the transferor, from wrongfully-holding third parties and even from certain *bona fide* third parties in

[360]See *Crane* v. *Nolan* (1875), 19 L.C. Jurist 309 (Q.B.).

[361]See *British American Oil Co.* v. *Roberge* (1963), [1964] B.R. 18; but, if there is an express or implied contract of sale between principal and factor, the factor is pure and simple owner and the principal loses any right to revendicate as owner. See *Roger* v. *Côté* (1949), [1949] B.R. 260.

[362]See art. 1740ff. *C.C.L.C.* See also *Re Distributions Omnibus Inc.* (10 May 1983), Montreal 500-11-003723-828 (Sup. Ct). In other words, while the consignee may act so as to extinguish the consignor's right of ownership, should a thief make off with the property, for example, the consignor could revendicate as owner.

[363]*Lahoud* v. *Truchon* (1949), [1949] B.R. 477.

[364]See, as concerns trustees in bankruptcy, J.M. Deschamps, "Le syndic: Un successeur du débiteur? Un cessionnaire? Un représentant des créanciers?" [1985] Meredith Mem. Lect. 245; and, as concerns liquidators, M. & P. Martel, *La compagnie au Québec: Les aspects juridiques* (Montréal: Thélème, 1985) c. 33.

possession such as, in the case of bankruptcy, secured creditors.[365] In other words, from the moment of the receiving order, the bankrupt or the company administrators, as the case may be, lose the capacity to exercise their rights to revendicate as owner or administrators.[366]

Because of the extensive powers given to the transferee, it is important to fix precisely the moment of the transfer. In the case of bankruptcy, the transfer occurs at the time of the receiving order and not when an interim receiver is appointed, even though an interim receiver has a limited power to seize and dispose.[367] In cases of winding up, different regimes apply to federal and provincial corporations. Where a provincial corporation, which is not bankrupt, has been voluntarily dissolved, the transfer occurs when liquidators are named by a resolution of a shareholders meeting;[368] if the corporation is dissolved judicially, the transfer occurs when the Superior Court so orders and names liquidators.[369] When a provincial corporation is being wound up for insolvency, the federal *Winding-Up Act* applies and the transfer occurs when a liquidator is appointed by the Superior Court.[370] Where a federal corporation which is neither insolvent nor bankrupt is being wound up, no transfer need take place, but the powers of company administrators are circumscribed from the time of a shareholders special resolution, or a judicial order, even though in the latter case a liquidator is also appointed.[371]

In each of these cases the right of the transferee to revendicate is, at once, greater and lesser than the right of the prior owner (or other titulary of a real right). For this reason he should be seen as having independent

---

[365]See *Bankruptcy Act*, *supra*, note 122, ss 50(5) and 49(2); the *Winding-Up Act*, R.S.Q. c. L-4, ss 10-13 and 31; the *Winding-Up Act*, R.S.C. 1970, c. W-10, ss 33 and 35. In the case of a non-bankrupt federal corporation, the winding up involves no transfer of property to a liquidator: see *Canada Business Corporations Act*, S.C. 1974-75-76, c. 33, ss 204 and 207.

[366]See ss 47-50 of the *Bankruptcy Act*, *ibid.*; ss 10 and 14 of the provincial *Winding-Up Act*, *ibid.*; s. 212 of the *Canada Business Corporations Act*, *ibid.*; and ss 19-22 and 33-40 of the federal *Winding-Up Act*, *ibid.*

[367]See the *Bankruptcy Act*, *ibid.*, ss 28 and 50(5). See also A. Bohémier, "Introduction — requête de faillite — cession des biens" in Barreau du Québec, *C.F.P.B.Q.*, vol. 14 (Cowansville, Qué.: Yvon Blais, 1983) 1 at 13-16; and A. Bohémier, "Le désaisissement de l'inopposabilité des actes préjudiciables à la masse" in Barreau du Québec, *supra*, 121 at 126-31.

[368]See the provincial *Winding-Up Act*, *supra*, note 365, s. 5.

[369]See *ibid.*, ss 24, 25 and 30.

[370]See the federal *Winding-Up Act*, *supra*, note 365, s. 19. If the corporation is bankrupt a receiving order under the *Bankruptcy Act* may also be made.

[371]See the *Canada Business Corporations Act*, *supra*, note 365, ss 204(6) and (7) and 206(3)-(5). Where a judicial liquidation is sought under s. 207 a liquidator is named, who takes office under s. 213 (as am. S.C. 1978-79, c. 9, s. 67), and has the powers set out in s. 214ff. If the corporation is insolvent or bankrupt a receiving order will be made under the *Bankruptcy Act*.

real rights of administration in the transferred property. That is, while provincial law may provide the procedural apparatus by which the transferee's rights are exercised, the rights themselves do not correspond at all points with substantive provincial law.[372] In this sense, a situation not unlike that which prevails in France will arise: the ordinary rules and concepts of the civil law will be ousted.[373]

75. *Scope of Revendication of Quasi-Owners and Statutory Transferees* — In each of the circumstances reviewed, the *Code* or a special statute describes unorthodox rights primarily by reference to notions of ownership. The inability of the law to permit transfers for the purposes of administration leads to characterization of these devices as establishing a regime of ownership *sui generis*. Unlike section 178 security and the trust for bondholders, two other devices often held to give rise to ownership *sui generis* yet both capable of characterization within the conceptual vocabulary of the civil law as accessory real rights, it would seem that the trust, mercantile agency and the notion of a statutory transfer cannot be understood on traditional civil law principles. The *Code* at this point lacks a theory of a third form of real right, namely, a real right of administration.[374]

Nevertheless, the status of various actors in these unorthodox schemes to revendicate from wrongfully-holding third parties, as well as from wrongful holders *inter se* — namely the constituant, the beneficiary and the trustee of the trust, the principal and the mercantile agent, or the bankrupt and the trustee or liquidator, as the case may be — is not in doubt. The conditions for revendication, however, depend on the specific terms of the *Code* or statute. Thus, while a bankrupt or a company in liquidation remains owner, it loses the capacity to exercise its right as owner. By contrast, while the income beneficiary of a trust never becomes owner, he may, nevertheless,

---

[372]This problem is less acute in non-bankruptcy company liquidations since the transferee, in principle, simply steps into the shoes of the corporation. He must then find his procedural recourses within existing provincial law. The trustee in bankruptcy, however, acquires a status quite unlike that of any other titulary of rights in the civil law. See Deschamps, *supra*, note 364. Moreover, unlike titularies of principal or accessory real rights, trustees and liquidators cannot use or dispose of the property to their benefit. That is, they do not have either a real right of enjoyment or a real right of security. For this reason, classical theory would consider them not as having rights, but mere powers.

[373]See, *supra*, note 195 and accompanying text. For this reason also, in developing a theory of "real rights of administration", it is important not to place undue stress on the position of the trustee in bankruptcy by comparison with company liquidators.

[374]The provisions of the *Draft Civil Code* on the "Administration of the Property of Others" appear to suggest the possibility of such a new real right. See the *Draft Civil Code*, *supra*, note 9, Book 4, Title 6; and *Commentaries*, *supra*, note 51 at 372-75 and 505-25. Unfortunately the National Assembly does not seem to have developed this idea further. See Bill 20, *An Act to Add the Reformed Law of Persons, Successions and Property to the Civil Code of Québec*, 5th Sess., 32d Lég. Qué., 1984.

be able to revendicate as titulary of a *jus ad rem* in possession. In these situations determining priority of the right to immediate possession in competing actions in revendication is often complex.[375]

Appendix

I. Titularies of Existing and Actual Real Rights

- A. Owners
- B. Titularies of Principal Real Rights
  1. usufruct
  2. use
  3. statutory real rights
  4. contractual principal real rights
- C. Titularies of Accessory Real Rights
  1. possessory accessory real rights
     a. pledge
     b. documentary pledge
  2. non-possessory accessory real rights
     a. special pledges
     b. Maritime mortages
     c. bank security; transfers of property-in-stock; trust deed security
     d. provincial tax claims
     e. contractual accessory real rights
- D. Titularies of Real Rights of Administration
  1. trusts
  2. mercantile agents
  3. trustees in bankruptcy
  4. company liquidators

II. Titularies of Personal Rights

- A. Titularies of a *jus ad rem*
  1. lessees
  2. borrowers for use
  3. income beneficiaries of a trust in possession
  4. non-owner spouses
  5. owner-debtors of property under seizure
- B. Titularies of Execution Preferences
  1. in possession
     a. right of retention
     b. *exceptio non adimpleti contractus*
  2. not in possesion
     a. unpaid sellers
     b. lessors of immoveables
     c. tithe creditors
     d. general privileges

[375]That is, unlike the ordinary case of a competition between titularies of real rights, these unorthodox arrangements frequently sever use and possession, with the result that the basic criterion of revendication — the right to physical control — is often unreliable in determining priority.

C. Those With a Contractual Obligation of Care and Return
   1. Who Act in Their Own Name
      a. depositaries
      b. carriers
      c. innkeepers
      d. guardians
      e. sequestrators
      f. mandataries
      g. trustees
      h. testamentary executors
   2. Legal Representatives
      a. tutors
      b. curators
      c. advisors
      d. Paulian plaintiffs
      e. plaintiffs in oblique action

III. Titularies of Potential or Eventual Real Rights

A. Those with physical control
   1. conditional buyers
   2. promisee purchasers
   3. buyers under a term
   4. heirs in provisional possession
   5. buyers under protected sales

B. Those out of possession
   1. substitutes
   2. heirs and legatees by contract of marriage
   3. heirs and legatees including the Crown
   4. capital beneficiaries of a trust
   5. sellers under resolutory condition
   6. donors

IV. Persons in Physical Control Without Contract

A. Persons Claiming Real Rights
   1. finders
   2. purchasers of the thing of another
   3. thieves

B. Persons who are Mere Holders
   1. *negotiorum gestores*
   2. recipients of a thing not due
   3. creditors in possession having seized the property of a third party