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Enforcing Rights in Corporeal Moveables: Revendication and Its Surrogates
Part Two*

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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 des 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.

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**Dean of the Faculty of Law, McGill University. I should like to record my thanks to my colleagues Professors J.E.C. Brierley and Christian Atias, who kindly read and commented upon the major part of material appearing in this section of the study. They bear no responsibility for opinions expressed herein, many of which they would explicitly reject. I should also like to signal some additions to the notes to Part One of this essay.

To note 8 should be added: S. Goyard-Fabre, *Kant et le problème du droit* (Paris: Librairie philosophique J. Vrin, 1975) at 114, 117-18 and 123, who discusses phenomenal and noumenal understandings of possession. To note 93 should be added: R. Houin, "Les situations de fait" (1958) R.I.D.C. 81; G. Morin, "Le sens de l'évolution contemporaire du droit de propriété" in *Le droit privé français au milieu du XXe siècle: Études offertes à G. Ripert*, vol. 2 (Paris: L.G.D.J., 1950) 3 [hereinafter *Études Ripert*]; R. Théry, "De l'utilisation à la propriété des choses" in *Études Ripert*, *supra*, 17; R. Savatier, "Structures matérielles et structures juridiques" in *Le droit privé français au milieu du XXe siècle: Études offertes à G. Ripert*, vol. 1 (Paris: L.G.D.J., 1950) 75; and the essays in (1957) 11 Trav. Assoc. Henri Capitant. To note 101 should be added: C. Giverdou, "La qualité, condition de recevabilité de l'action en justice" D.1952.Chron.29; R. Gasin, La qualité pour agir en justice (doctoral thesis in law, Université d'Aix-Marseille, 1955) [unpublished]. Finally, to note 157 should be added: J.-L. Bergel, "Différence de nature (égale) différence de régime" [1984] R.T.D. Civ. 225 who directly asks whether a legal right can exist prior to its sanction with a judicial remedy. It is obvious that this study answers Bergel's question in the affirmative, although it is to be observed that this does not imply a subservience of remedy to right: ontologically the right is prior; however, its content may often be apprehended only *post hoc*.

Synopsis

2. The Underlying Right Has Been Lost, Extinguished or Surrendered

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2. Titularies of Personal Rights

76. *Revendication of Possession* — In the analysis undertaken to this point, the revendicating plaintiff has been in each case asserting an actual real right (*jus in re*) in the object being revendicated. It is now appropriate to consider whether the action in revendication in Quebec may be invoked as a possessory as well as a petitory recourse.[1] In other words, will the action lie to vindicate the claims of plaintiffs who have, at best, a *jus ad rem* relating to a corporeal moveable?

The civil law knows three general types of personal rights implying the detention of corporeal moveables: first, where a person has a custodial relationship with an object, but may also claim a right to use it to his own profit; second, where a person holds or claims custody of a moveable as a collateral consequence of a non-title contract of which he is a creditor; and third, where a person has a custodial relationship with an object, but cannot claim a right to use it to his own profit.[2] These relationships mirror the categories of real rights reviewed earlier: personal rights of use mirror principal real rights; personal rights giving rise to an execution preference grounded in a creditor's detention or retention mirror accessory real rights; personal rights of pure custody mirror the proposed category of "real rights of administration".

Prior to examining various hypotheses involving a custodial relationship with a right to use (where a holder has a *jus ad rem* in the classical sense), it is helpful to consider situations where a plaintiff has some claim upon identifiable moveables as a type of security for an obligation (where he is vested with a privilege or special execution priority), and situations of purely custodial relationships (where a holder assumes a contractual obligation of care and return). The reason for adopting this modified organization is twofold: first, these two latter classes of rights seem to be uneasily

[1]For the French position on this question, see B. Bouloc, "Revendication" in *Encyclopédie juridique: Répertoire de droit civil*, 2d ed. (Paris: Dalloz, 1975) no. 4 [hereinafter *Encyclopédie Dalloz*]; G. Légier, "Saisic-revendication" in *Encyclopédie Dalloz: Procédure civile*, 2d ed. (Paris: Dalloz, 1980) nos 11-35; P. Ortscheidt, "Prescription et possession: art. 2279-2280" in *Juris-Classeur civil* (Paris: Éditions Techniques, 1984) nos 87-89.

[2]In the discussion which follows the categories of personal rights discussed will be constrained by two further limitations. First, those legal relations implying future or eventual real rights (*e.g.*, promises of sale) will not be considered. Secondly, it will always be assumed that the relationship has a grounding in contract or in some other legal instrument such as a will. That is, just as factual situations relating to real rights (*e.g.*, the case of the usucaptor prior to prescription) were excluded in the previous section, here also the case of factual situations relating to personal rights (*e.g.*, the *negotiorium gestio*) will be excluded.

situated at the boundary of personal and real rights; and secondly, there is already some codal recognition of a right to revendicate in several of these cases.

a. Titularies of Execution Preferences

77. *Types of Privilege* — It is clear that some codal privileges, while not giving rise to an accessory real right *per se*, nevertheless are not, like the privilege for expenses of the last illness, for funeral expenses, or for servants' wages, mere general execution priorities.[3] That is, some privileges afford to creditors a right to gain or retain custody of identifiable assets in their debtor's patrimony, either to ensure expeditious realization of their claim or to facilitate the exercise of some other right. The *Civil Code* lists five such privileges. Two of these — the claim of creditors asserting an ordinary right of retention, and the *exceptio non adimpleti contractus* of unpaid sellers (or other prior owners in contracts translative of ownership) — are grounded in the fact of the creditor's current detention. The other three do not imply a pre-existing and wrongfully interrupted detention by the privileged creditor. These are the claim of the unpaid vendor who has delivered goods to his buyer, the claim of the lessor of an immoveable upon the goods of his lessee (or belonging to third parties) situate on the leased premises, and the claim of a priest for tithes. Of course, to these codal privileges must also be added the plethora of non-possessory privileges to be found in various statutes, some of which may also constitute more than mere execution priorities.[4]

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[3]See R.A. Macdonald, "Privileges and Other Preferences upon Moveable 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, for an analysis and classification of various types of privileges on moveables. See also art. 1994 *C.C.L.C.*.

[4]A computer search of the statutes of Quebec revealed the following instances of the word-stem "privil" in respect of moveables:

— Privileges on Moveables Only: *Railway Act*, R.S.Q. c. C-14, s. 10; *Highway Code*, R.S.Q. c. C-24, s. 110; *Hydro-Québec Act*, R.S.Q. c. H-5, s. 31(2); *An Act Respecting the Ministère du Revenu*, R.S.Q. c. M-31, s. 20; *Notarial Act*, R.S.Q. c. N-2, s. 159; *Special Corporate Powers Act*, R.S.Q. c. P-16, s. 29; *Watercourses Act*, R.S.Q. c. R-13, s. 42.

— Privileges on Moveables and Immoveables: *An Act Respecting Industrial Accidents and Occupational Diseases*, R.S.Q. c. A-3.001, s. 324; *Railway Act*, R.S.Q. c. C-14, s. 10; *Cities and Towns Act*, R.S.Q. c. C-19, s. 482; *Municipal Code of Québec*, R.S.Q. c. C-27.1, ss 983-84; *Hydro-Québec Act*, R.S.Q. c. H-5, s. 31(4); *Education Act*, R.S.Q. c. I-14, s. 370; *An Act Respecting Lotteries, Racing, Publicity Contests and Amusement Machines*, R.S.Q. c. L-6, s. 81; *Mining Act*, R.S.Q. c. M-13, s. 105; *An Act Respecting the Ministère du Revenu*, R.S.Q. c. M-31, s. 12; *Transport Act*, R.S.Q. c. T-12, s. 84.

i. Privileged Creditors with Detention

78. *The Nature of Retention Claims* — In French doctrine execution privileges over moveables typically are distinguished according to whether they are grounded in the idea of a tacit pawn,[5] or in the notion of value added to a debtor's patrimony.[6] While this distinction may reflect the policy origin of most privileges, it does not highlight differences in the intensity of the privileged creditor's relationship with the object of his privilege.[7] Here it is suggested that the key difference between ordinary execution priorities and special privileges giving rise to a type of security on property resides in the creditor's ability to obtain custody of the object of his privilege. In other words, the ordinary privilege is no more than a right to be paid the proceeds of a judicial sale by preference; by contrast, the common theme of all special execution priorities is the creditor's right to immediate detention of a corporeal moveable. In most circumstances this is translated as an existing right of retention.

While most commentators consider the right of retention not to be a real right,[8] the right is nevertheless opposable to co-contractants, true owners (other than the co-contractant) and third parties. Hence, it is important to determine whether, under various hypotheses, this right will sustain an action in revendication against persons who have wrongfully acquired detention of the object.

79. *The Unpaid Seller's Retention Claim* — Analytically, the easiest case involves the unpaid seller who has not yet delivered to his buyer. Here a right of detention which resembles the right of retention is actually grounded

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[5]These include the claim of innkeepers, carriers and landlords. See H.,L. & J. Mazeaud, *Leçons de droit civil*, t. 3, vol. 1, 5th ed. by F. Chabas (Paris: Montchrestien, 1977) nos 165-81.

[6]The privilege of improvers and unpaid vendors is of this type. See M. Dagot, *Les sûretés* (Paris: Presses universitaires de France, 1981) at 169-217, who adds, however, a third category: the privilege for expenses of preservation. In Quebec, there are also various public policy privileges, all of which are simple execution priorities: see J. Deslauriers & L. Poudrier-Lebel, Les sûretés: Notes de cours (Faculté de droit, Université Laval, 1979) [unpublished] at 92.

[7]The best discussion of privileges in France remains J. Bonnecase, *Traité théorique et pratique de droit civil: Supplément*, vol. 1 (Paris: Sirey, 1924) at 75-89.

[8]See, *e.g.*, F. Frenette, "Le droit de rétention" in Chambre des notaires du Québec, ed., *Répertoire de droit: Sûretés* (Québec: Soquij, 1979) nos 55-57; N. Catala-Franjou, "De la nature du droit de rétention" (1967) 65 R.T.D. Civ. 9, no. 6. For the past three decades Quebec courts have taken a similar view. See *Laurentide Finance Co.* v. *Paquette* (1966), [1967] C.S. 62. But compare the earlier cases *Gagnon* v. *Loubier* (1925), [1925] S.C.R. 334 at 337, [1925] 4 D.L.R. 289, and *Lépine* v. *Brunet* (1951), [1953] R.L. 47 at 51 (Sup. Ct).

in the *exceptio non adimpleti contractus.*[9] Articles 1496-1497 *C.C.L.C.* presuppose that the unpaid seller who transfers title retains sufficient rights in respect of the goods remaining in his custody to assert his detention even against a buyer to whom he has given title.[10] Moreover, this right may be projected forward in time and includes a right of stoppage *in transitu.*[11]

Since the *exceptio non adimpleti contractus* protects the seller's detention even against his buyer asserting title, it would follow that it ought also to comprise a right of detention as against wrongfully holding third parties, sufficient to support an action in revendication.[12] In addition, it should permit revendication from creditors and assignees of the buyer who wrongfully obtain detention of possession of the goods prior to their delivery.[13] In other words, the seller's right of detention functions as an analogue to the *vindicatio pignoris,*[14] and can only be extinguished under conditions parallel to those where the unpaid seller's ordinary right of revendication is lost.[15] The seller who properly was asserting his right to refuse delivery ought, therefore, to be able to revendicate on the basis of articles 1496-1497 *C.C.L.C.* from all wrongful holders, including the buyer and the buyer's assigns.

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[9]Most authors deny that this is a true right of retention. Rather they see it as a special incident of the law of obligations as applied to the contract of sale. See N. Catala-Franjou, *ibid.* But compare Mazeaud, *supra,* note 5 at 105 who states: "[C]e droit de rétention se confond avec l'exception *non adimpleti contractus*".

[10]See *Coco* v. *Léonardo* (1981), [1982] R.P. 3 (Prov. Ct). Of course, where an installment sale implies delivery the right to retain disappears. See *Turcotte* v. *Lacombe* (1975), [1975] C.A. 305.

[11]See O.S. Tyndale, "Stoppage in Transitu" (1923) 1 R. du D. 117 at 121-25.

[12]Mazeaud, *supra,* note 5, no. 192. *Vis-à-vis* third parties who wrongfully dispossess them, the right of detention of unpaid sellers who have not delivered could only be based on a right of retention. That is, the contractually grounded exception as against the buyer seems to translate into a general right of retention as against third parties.

[13]The hypothesis here could arise where goods are seized by garnishment in the seller's hands, or where the buyer wrongfully has endorsed documents of title to a third party who then successfully claims the goods from the carrier or warehouseman.The only exceptions to this rule arise if the seller is in competition with a bank holding security under s. 178 of the *Bank Act* (being part 1 of s. 2 of *Banks and Banking Law Revision Act, 1980,* S.C. 1980-81-82-83, c. 40) or with the transferee of property-in-stock. In both cases, the exception arises by special legislation. See s. 179(1) of the *Bank Act, supra,* and ss 4 and 27 of the *Act Respecting Bills of Lading, Receipts and Transfers of Property in Stock,* R.S.Q. c. C-53 as am. *Act Respecting the Transfer of Property in Stock,* S.Q. 1982, c. 55 [hereinafter *Bills of Lading Act*]. For the conflict where the seller asserts stoppage *in transitu* and attempts to recover from a carrier or warehouseman in custody, see the last section of this Part.

[14]See Mazeaud, *supra,* note 5, no. 192; Dagot, *supra,* note 6 at 204. Both authors note that the action is "mislabelled" as it is really an action in revendication of possession.

[15]See arts 1998-2000 *C.C.L.C.*

80. *Retention in Other Contracts Translative of Ownership* —Where an owner remains in possession after having transferred title by gift, exchange, contract of enterprise or loan for consumption, it is less certain whether he may assert the *exceptio non adimpleti contractus* in as complete a manner as the unpaid seller.[16] While article 1597 *C.C.L.C.* suggests that in exchanges the exception operates fully,[17] no article in the *Code* speaks to the case of the contracts of enterprise, donation or loan for consumption.

As a practical matter, of course, this issue does not often arise in contracts of enterprise. Article 1684 *C.C.L.C.* provides that where the workman furnishes material, he remains owner until delivery and, therefore, he could revendicate as such. But if the contract of enterprise actually were to incorporate an ordinary sale under which title passed immediately, the *exceptio non adimpleti contractus* could operate fully. Here the courts would probably analogize the workman's right to that of the unpaid seller and would permit revendication on that basis. In the case contemplated by article 1685 *C.C.L.C.*, where the purchaser supplies materials, the contract is not translative of ownership.[18]

Moreover, the case of gifts and loans is also not problematic. Normally, one would anticipate that a donor (or a lender) who sought to impose collateral obligations on the donee (or the borrower) would effect the gift (or loan) under a suspensive condition.[19] Until the condition was fulfilled, therefore, the donor (or lender) could revendicate as owner.[20] Nevertheless, should the gift be subject to charges, or the loan for consumption subject to giving a deposit or some other undertaking (neither obligation being expressed as a condition), the exception should apply as in sale, so long as the donor or lender retained custody. It follows that the donor or lender, even though

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[16]See J.-L. Baudouin, *Les obligations*, 2d ed. (Cowansville, Que: Yvon Blais, 1983) at 338-41. Of course, where a synallagmatic contract does not transfer ownership (*e.g.*, deposit) the owner would assert the contractual *exceptio non adimpleti contractus* against the co-contractant and revendicate *as owner* against third parties in wrongful possession.

[17]In *Hamel* v. *Gravener* (1960), [1960] B.R. 1223, the court applied the *exceptio non adimpleti contractus* to a contract of exchange.

[18]The workman in such cases, however, would be entitled to claim an ordinary right of retention under art. 441 *C.C.L.C.* and could revendicate as a retention claimant. See below, no. 81.

[19]For a discussion see G. Brière, *Les libéralités: Donations, testaments, substitutions et fiducie*, 8th ed. (Ottawa: Éditions de l'Université d'Ottawa, 1982) nos 76-87a.

[20]Given the purpose of a loan for consumption (and the nature of the objects usually lent) the idea of asserting the *exceptio non adimpleti contractus* as a basis for revendication after custody has been lost is somewhat far-fetched, even if technically possible.

longer owner, should be able to revendicate the object from a non-performing co-contractant who wrongfully gained possession, as well as from wrongfully holding third parties.[21]

81. *The Right of Retention Stricto Sensu* — A legally similar result to that contemplated by articles 1496-1497 *C.C.L.C.* arises in all cases where a creditor has an ordinary right of retention.[22] As long as the conditions giving rise to the right of retention are met, the creditor of the obligation acquires the right to custody by operation of law.[23] Since the essence of the right of retention is the custody of the creditor, any voluntary surrender of possession to the debtor extinguishes the right.[24] The right is not lost, however, if the surrender to the debtor is only temporary, with a clause requiring the object's return;[25] or if it is occasioned by fraud or theft.[26] On the other hand, the *Consumer Protection Act* limits the right of retention which may be claimed by repairmen of automobiles, motorcycles and domestic appliances. Wherever a contract of repair does not meet the formal requirements of the Act, the repairer is deprived of his right to retain even if he has never surrendered physical control to his co-contractant.[27]

What, then, is the recourse by which a wrongfully dispossessed retention claimant may enforce his right to physical control of the object of his right? Drawing on the notion of tacit pawn, it would seem that any retention

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[21]See, generally, R. Cassin, *De l'exception dans les rapports synallagmatiques (exception non adimpleti contractus) et de ses relations avec le droit de rêtention, la compensation et la résolution* (Paris: Sirey, 1914) at 1-139, who suggests this conclusion in discussing the justification for the exception.

[22]See N. Catala-Franjou, *supra*, note 8, for a typology of rights of retention. Classical examples are art. 1679 *C.C.L.C.* (carriers); art. 1816a *C.C.L.C.* (innkeepers); art. 441 *C.C.L.C.* (improvers); art. 1713 *C.C.L.C.* (mandataries); arts 1736 and 1753 *C.C.L.C.* (commission-merchants); art. 1812 *C.C.L.C.* (depositaries); art. 958 *C.C.L.C.* (institutes); art. 1770 *C.C.L.C.* (borrowers); art. 1973 *C.C.L.C.* (pledgees); art. 1546 *C.C.L.C.* (buyers whose rights are redeemed by the seller); and art. 2268(4) *C.C.L.C.* (good faith acquirers).

[23]Mazeaud, *supra*, note 5, nos 110 and 119-23; Frenette, *supra*, note 8, nos 5-6.

[24]*Senecal* v. *Mayrand* (1932), 70 C.S. 505; *Therrien* v. *Royal Bank of Canada* (1941), 79 C.S. 366.

[25]*Dumoulin* v. *Giard* (1950), [1951] R.L. 172 (C.S.); *General Motors Acceptance Corp.* v. *Quebec Drive Yourself Reg'd* (1942), [1942] C.S. 59; *Grobstein* v. *A. Hollander and Son* (1962), [1963] B.R. 440.

[26]See *Kuehne and Nagel (Canada) Ltd* v. *Polygraph-Export G.M.B.H.* (1962), [1963] C.S. 679, where the surrender followed the tender of an N.S.F. cheque. See also *Wilson* v. *Doyon* (1963), [1964] C.S. 93. While this result is doubtful as a matter of negotiable instruments law, the principle announced in the case is uncontroverted. See Mazeaud, *supra*, note 5, nos 122-23; Dagot, *supra*, note 6 at 100; Frenette, *supra*, note 8, no. 33.

[27]R.S.Q. c. P-40.1, ss 179 and 187 [hereinafter *C.P.A.*]. These sections imply that the right may nevertheless be asserted against third parties who demand possession, including the true owner. See *General Motors Acceptance Corp.* v. *Boucher* (1979), [1979] C.A. 250 for an analogous result as concerns a conditional seller's right to revendicate from third parties.

creditor may not only reclaim possession from his debtor who has defrauded him,[28] but may also revendicate against all third parties who have wrongful detention[29] or possession[30] of the goods subject to his right. As in the case of the unpaid vendor exercising the *exceptio non adimpleti contractus*, the plaintiff is revendicating neither ownership, nor a lesser real right, nor even possession of the object; he is simply revendicating its detention.[31] The special favour the law accords the retainor *vis-à-vis* his co-contractant may thus be projected into a more general recourse against third parties wrongfully in possession.[32]

ii. Privileged Creditors Not Having Detention

82. *Quasi-Retention Type Claims* — In the French *Code Napoléon* there are two major anomalies to the theory of revendication of moveables not previously in the possession or custody of the plaintiff. These are, first, the right of revendication of the unpaid vendor who has delivered goods to his buyer, and secondly, the right of his lessor of an immoveable to revendicate the objects subject to the lessors's privilege.[33] In both cases the plaintiff has neither a real right in the goods, nor even an immediate right to their detention founded on contract.[34] Yet, in France, both unpaid vendor and lessor are expressly permitted by the *Code Napoléon* to revendicate from their co-contractants, and in certain cases, from third parties.[35]

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[28]*Standard Credit Corp.* v. *Nadeau* (1955), [1956] R.L. 127 (Sup. Ct); see also, by analogy, *Wilson* v. *Doyon*, *supra*, note 26.

[29]*Bensol Customs Brokers Ltd* v. *Asiatic Company (U.S.A.)* (1981), [1982] C.P. 145.

[30]Mazeaud, *supra*, note 5, no. 129; Dagot, *supra*, note 6 at 95 and 97-99.

[31]Under no conditions does the retainor acquire a right to use the object. Unlike the pledgee, the retainor cannot stipulate a *pacte commissoire*. Art. 734(4) *C.C.P.* contains a procedural expression of the retainor's right to seize before judgment, but it is implicit that the seizing creditor is only claiming detention and not a right to use. See *Wither Evans Ltd* v. *Radio Charly* (13 March 1984), Montreal 500-09-001703-826 (C.A.).

[32]It is precisely this issue which is at the centre of controversy respecting the legal nature of the right of retention. For *e.g.*, see R. Savatier, *Cours de droit civil*, t. 2, 2d ed. (Paris: L.G.D.J., 1949) at 190: "Faute de permettre au rétenteur de revendiquer l'objet dont il est dépouillé, *le droit de rétention n'est pas un droit réel*" [emphasis added]. Since in Quebec this right to revendicate is permitted in the cases noted, there may be better reason now to consider the right of retention as a real right. That is, in Quebec, the right of retention has several elements of reality still absent in France. See Mazeaud, *supra*, note 5, no. 129 and compare Frenette, *supra*, note 8, nos 53-57.

[33]See Légier, *supra*, note 1, nos 11-26 and 31-33; Dagot, *supra*, note 6 at 169-186 and 198-206.

[34]The cases previously considered are anomalous to the extent that a plaintiff with a *jus ad rem* could revendicate, but at least in each case the plaintiff had an immediate and existing right to custody. That is, in the *exceptio non adimpleti contractus* and retention situations, the revendicating party would never have voluntarily surrendered custody.

[35]Arts 2102(4) and 2102(1) *C.N.*

In Quebec, the general theory under which creditors with detention may revendicate has three possible anomalies. First, there are two separate categories of unpaid vendor who may revendicate moveable property: ordinary unpaid vendors under articles 1998-2000 *C.C.L.C.*, and suppliers of construction materials under article 2013e(6) *C.C.L.C.* Second, there is the right of landlord to insist that his lessee furnish the rental property: under article 1640 *C.C.L.C.* the landlord may seize goods for up to fifteen days following their removal from the leased premises. Finally, there is the right of the priest to claim a privilege on the crops of his penitent: this privilege seems to give rise both to a personal action generating an execution priority and to a real action directed to the recovery of the crops themselves.

83. *Theory of the Unpaid Vendor's Claim* — The unpaid vendor who revendicates from a buyer to whom he has transferred both title and possession is claiming neither as owner, nor by virtue of a right to detention of which he has been wrongfully deprived. The legal foundation of the unpaid seller's right to revendicate would seem to be an extension of his right not to deliver goods until he receives payment.[36] That is, if a seller has delivered the goods to his debtor and remains unpaid, articles 1998-2000 *C.C.L.C.* (as well as paragraph 2013e(6) *C.C.L.C.*) provide him with a right to reclaim possession of the property in order then to exercise either his right of detention *non adimpleti contractus*, or to prevent the debtor from selling the property so as to defeat the vendor's right to seek dissolution of the sale under article 1543 *C.C.L.C.*[37] The explanation for the maintenance of this extraordinary right seems to be that under precodification French law, title did not pass to a buyer, notwithstanding delivery, until full payment.[38]

84. *Conditions for Revendication* — The right of ordinary unpaid sellers to revendicate, that is, to claim a right to reacquire detention, is limited by four conditions established in article 1999 *C.C.L.C.*[39] First, the sale must not have been on credit;[40] second, the thing must still be entire and in the

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[36]See Mazeaud, *supra*, note 5, no. 192; Dagot, *supra*, note 6 at 204.

[37]E. Schreuder, "La protection juridique du vendeur non payé d'effets mobiliers" (1979) 24 Ann. Fac. Dr. Liège 13 at 25.

[38]M. Planiol & G. Ripert, *Traité pratique de droit civil français*, t. 12, 2d ed. by E. Becqué (Paris: L.G.D.J., 1953) no. 188; Mazeaud, *supra*, note 5, no. 192.

[39]See, for a general analysis, M. Pourcelet, *La vente*, 4th ed. (Montréal: Thémis, 1980) at 168-69; K. Atlas, "The Vendor of Moveables in Quebec: His Protection and Privileges" (1982) 42 R. du B. 597; 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 377-81.

[40]Thus, if a term is given for payment, the right to revendicate is lost. See *Debro Inc.* v. *Pagé Ltée* (19 March 1982), Quebec 200-05-002158-801 (Sup. Ct). In *Fiducie du Québec* v. *Fabrication Précision Inc.* (1978), [1978] C.A. 255 a sale "net 30 days" was held to be a sale on credit, although now it would seem that courts will accept "net eash discount for payment within 30 days" as cash sales.

same condition;[41] third, the goods must not have passed into the hands of a third party who has paid for them;[42] and fourth, the right must be exercised within eight days of the delivery, except in the case of insolvent traders where the delay is extended by article 1998 *C.C.L.C.* to 30 days.[43] If these conditions are met an unpaid seller may revendicate notwithstanding that he has voluntarily surrendered the object to his buyer.

The second case where an unpaid vendor may revendicate goods sold and delivered arises in construction contracts. Under article 2013e(6) *C.C.L.C.* the supplier of materials may revendicate materials not yet incorporated into a building if the buyer be insolvent or fail to make payments when due. Moreover, this right does not appear to be limited by any of the restrictions set out in article 1999 *C.C.L.C.*[44] It follows that this special "construction" revendication, in addition to being the projection forward

[41]This implies that either juridical or material transformation ends the right. Immobilization by nature, although not immobilization by destination, constitutes juridiçal transformation. Similarly, once goods are manufactured, they are not in the same condition: see *Mercure* v. *Philippe Beaubien et Cie* (1965), [1966] B.R. 413. However, revendication was allowed in one case even after timber had been sawn: see *Roy* v. *Bois Ste. Lucie Inc.* (1977), [1977] C.S. 845.

[42]As a consequence, the goods cannot be revendicated either from a third party who has paid the price and taken delivery or from a pledgee who has advanced funds and taken delivery: Mazeaud, *supra*, note 5, no. 194. Nevertheless, revendication can take place against donees (even if they have taken delivery), purchasers who have taken delivery but not yet paid the price, and purchasers who have paid but not taken delivery. See *Liakao and Son Fur* v. *Rothman* (1964), [1965] R.P. 275 (Sup. Ct). In these situations it is immaterial whether the subsequent sale is cash or with a term. Finally, the seller may revendicate against all precarious holders (*i.e.*, lessees, depositaries, borrowers), since the buyer still retains legal possession of the goods he has purchased. The right of the seller to revendicate from a bank holding security pursuant to s. 178 of the *Bank Act, supra*, note 13, or from a transferee of property-in-stock, is refused by these special statutes, except where the bank or transferee knew of the claim prior to taking security. See ss 179(1) and 27(1) of the *Bank Act, supra.* In cases of prior knowledge, even though the bank or transferee is in a position analogous to a pledgee who has advanced funds and taken delivery, the seller's right to revendicate subsists. For a suggestion (in the case of no prior knowledge) that only the right to revendicate, but not the privilege, is lost in such cases, see *Ménard* v. *Latulippe, Renaud, Bourane Ltée* (1986), [1986] R.J.Q. 657 at 660-61 (Sup. Ct). See also M. Patenaude, "L'origine de la primauté du privilège d'une banque sur les droits d'un vendeur impayé" (1981) 22 C. de D. 667. In all such situations, however, it is special legislation, rather than the *Civil Code*, which subordinates the unpaid vendor's rights.

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

[44]*Miron* v. *Denis* (1948), [1948] C.S. 480; J. Auger, "Le privilège ouvrier: ses bénéficiaires, son objet, ses formalités" (1975) C.P. du N. 65 at 72. The reasons for the less restrictive conditions are several. First, under art. 1998 *C.C.L.C.* the goods sold are to be used as moveables — subject to their possible transformation or incorporation into another moveable; under art. 2013e(6) *C.C.L.C.*, the goods are sold for the purpose of transformation or incorporation into an immoveable. Hence, the requirement that the materials be "entire and in the same condition" is impractical. Secondly, under art. 1998 *C.C.L.C.*, the goods are either consumer goods or goods for resale where a change of title implies a change of *situs*; under art. 2013e(6) *C.C.L.C.*, it is apparent, no matter who actually is owner (often a difficult determination in construction contracts), where the goods will wind up: hence, the arts 1488 and 2268 *C.C.L.C.* issue is not problematic.

in time of a right of detention grounded in the *exceptio non adimpleti contractus*, is also a right in anticipation of a construction privilege over an immoveable.[45]

In both these cases the seller is entitled to revendicate not only from his buyer (and, subject to article 1998(3) *C.C.L.C.*, from third parties who have contracted with his buyer), but also as against third parties wrongfully in possession of the goods (for example, a thief or a finder).[46] That is, as long as revendication against his buyer is possible, in principle the seller retains a sufficient claim upon the goods to recover custody from any person who may have detention or possession.[47]

85. *The Lessor of Immoveables* — In France, because the lessor's privilege over the lessee's moveables is founded on the idea of tacit pawn, the lessor is given not only a right of attachment in revendication,[48] but also a right to revendicate both against his lessee and against wrongfully holding third parties.[49] As in the case of the unpaid seller, however, the lessor is revendicating custody, and not ownership. Moreover, his rights are subject to severe restrictions.[50]

In Quebec, the landlord's privilege is somewhat different.[51] It is clear that the landlord may seize the property subject to his privilege before judgment, but this right is not an attachment in revendication. Rather, it is founded in article 734(2) *C.C.P.* which establishes a separate category of conservatory attachment (or seizure before judgment) for landlords. In other words, even though the landlord's privilege in Quebec also seems to rest on the idea of a tacit pawn, and even though it also affects identifiable property,[52] it does not appear to give rise to a direct right of physical custody as in France.

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[45]As such, it is the only codal privilege which survives the legal transformation of its object.

[46]While all agree that revendication remains possible against lessees, borrowers, depositaries and repairers who have contracted with the buyer (subject, of course, to liquidating any retention claim) and against purchasers and pledgees (subject to art. 1998(3) *C.C.L.C.*), some claim that a finder acquires a new title analogous to a good faith purchaser. The conclusion is suspect. See below, nos 112 and 126.

[47]Of course, this revendication is in addition to the seller's right to claim an execution priority or to be subrogated for his privilege even beyond the cases set out in the Code, if the price is still due. See *Re Mechanic Supply Co.* (1933), 71 C.S. 400.

[48]Légier, *supra*, note 1, nos 11-26.

[49]Bouloc, *supra*, note 1, no. 178; Dagot, *supra*, note 6 at 184-86.

[50]Mazeaud, *supra*, note 5, no. 175.

[51]See Rousseau-Houle, *supra*, note 39 at 401-08. One major difference is that the landlord's privilege cannot be claimed in respect of residential premises. See art. 1650.4 *C.C.L.C.*

[52]See, for an analysis of the property subject to the privilege, Rousseau-Houle, *supra*, note 39 at 402-05, and *Congrégation du Très Saint-Rédempteur* v. *Rooney* (12 January 1979), Montreal 500-05-013525-777 (Sup. Ct); *Franchise Plus Inc* v. *Dépanneur Bitton & Fils* (1984), [1984] C.S. 394; *Weinberger* v. *Singh* (1977), [1977] C.P. 416.

The landlord's right to compel the lessee to leave the goods on his premises or to "garnir les lieux",[53] his right under article 1640 *C.C.L.C.* to assert an execution priority on property seized within fifteen days following its removal,[54] and his right to seize the property of third parties,[55] have led some courts to conclude that the privilege constitutes a real right in the lessee's property.[56] But this conclusion is suspect. To begin with, the lessee may unilaterally extinguish the landlord's right through sale of the property or through its simple removal from the leased premises. Moreover, third parties may also extinguish the privilege either by removing the goods or by notifiying the landlord of their rights.[57] A right which may be lost by any mutation of title or by physical displacement can hardly qualify as a *jus in re.*

It follows that the landlord has no right to compel the lessee to leave specific goods on the premises, or to compel their return for fifteen days following their removal. He may simply claim an execution priority over specified assets when he seizes them while they are on the rental property or within fifteen days of their removal,[58] or when they are seized by another creditor during that time.[59] Far from having a real right in the lessee's goods, the landlord does not even have a right to their detention analogous to that of the unpaid seller. Consequently, even though he may claim a priority on goods seized (even in the hands of third parties) for up to fifteen days, he

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[53]See *Archambault* v. *Lemay* (1951), [1952] C.S. 65; *Chaput* v. *Pichette* (1965), [1966] C.S. 520. It is this obligation to *garnir* which explains why third party property is subject to the privilege. The landlord would assume that the goods on the premises will satisfy his claim and that they belong to the lessee.

[54]Should a third party wrongfully make off with the goods, the lessor may cause these to be seized in exccution, or seized before judgment within fifteen days of their removal, provided the lessee is in default under the lease in his monetary obligations.

[55]This may be property of sub-lessees: see art. 1638 *C.C.L.C.* and *Prize Realty Corp.* v. *Friedman* (1971), [1972] C.A. 286. It may also be property of co-contractants of the lessee, such as suppliers: see art. 1639 *C.C.L.C.* and *Beraznik* v. *Equipment Finance Corp.* (20 December 1978), Montreal 500-09-000904-711 (C.A.).

[56]*Re décorations Pierre Langlois Inc.* v. *Dallaire* (1983), [1983] C.A. 482 is the most recent decision. See also L.C. Carroll, ed., *Snow's Landlord and Tenant,* 3d ed. (Montreal: Southam, 1934).

[57]*Murray Waxman Realty Inc.* v. *Djihanian* (1983), [1983] C.A. 274. The privilege is also lost if the landlord otherwise becomes owner of the third party's rights: *Rothenberg* v. *Frey* (1978), [1978] C.P. 380.

[58]*Municipal Mortgage Corp.* v. *Bédard* (1965), [1966] C.S. 160; but see *Re Décorations Pierre Langlois* v. *Dallaire, supra,* note 56, where the Court of Appeal seemed to characterize a third party owner's exposure *propter rem* as giving the lessor a real right which could be claimed in the third party's bankruptcy. See also *Paré* v. *Warwick Pants Manufacturing Co.* (1914), 47 C.S. 60.

[59]*Aetna Factors Corp.* v. *Brouillard* (1976), [1976] C.P. 405.

cannot revendicate them from his debtor or from wrongfully holding third parties in order to have them "garnir les lieux."[60]

86. *The Privilege for Tithes* — The privilege for tithes is a codal anachronism, both in its existence and in its object. This privilege constitutes a claim for payment in kind of one twenty-sixth of the harvest of Roman Catholic farmers.[61] To enforce the privilege the priest has a mixed real and personal action. He may revendicate his share of the crop from his penitent, or may seize the crop and claim one twenty-sixth of its price at a judicial sale.[62] But if the crop is sold otherwise than in justice the privilege is lost.[63]

The exact nature of the privilege is, therefore, uncertain. On the one hand, it is an execution priority; on the other hand, it permits the creditor to claim possession of its object. That is, the privilege seems to amount to an expropriation under which the priest can become owner of a fraction of his penitent's crop. Like the unpaid seller's privilege, it may ultimately give rise not only to possession, but also, if the priest so chooses, to title to a portion of the crop. Presumeably, once his claim is liquid and due, the priest could revendicate his share from his penitent, his penitent's non-title co-contractants (such as depositaries, carriers), and from third parties wrongfully in custody of it.[64]

iii. Other Privileged Creditors

87. *Codal Privileges Constituting Simple Execution Preferences* — Several other privileges are set out by the *Civil Code* and *Code of Civil Procedure.* Yet none of these, including the preference of the seizing creditor under article 616 *C.C.P.*, can be characterized as an accessory real right. Neither do they confer even a semblance of a right to follow. Nor do they give their titulary a right to claim detention or possession of specific corporeal objects. As mere execution preferences, they may be asserted only as a right to be

[60]In any event, it is unclear in such a case what right is being revendicated. See *Lallemand* v. *Larue* (1908), 39 C.S. 218, 10 Q.P.R. 118 where the Court of Revision assumed, in a similar case, that the landlord could only claim damages. See also Dagot, *supra*, note 6 at 184, on the question of what right is being revendicated.

[61]P.-B. Mignault, *Droit Paroissial* (Montréal: C.O. Beauchemin & Fils, 1893) at 164-76.

[62]*Roy* v. *Bergeron* (1867), 21 R.J.R.Q. 62, 2 R.L. 532 (Sup. Ct).

[63]See *Gaudin* v. *Ethier* (1884), 1 M.L.R. 37, 15 R.L. 345 (Q.B.). A judicial sale provoked either by the priest or a third party gives the priest a second-ranking privilege in the proceeds. See art. 1994 *C.C.L.C.*

[64]See, by analogy, *Filiatrault* v. *Archambault* (1859), 4 L.C.J. 10, 8 R.J.R.Q. 62 (Sup. Ct). See also *Curés et marguillers de l'oeuvre et fabrique de la paroisse de St. Zacharie* v. *Morin* (1968), [1968] C.S. 615 (Prov. Ct), for a discussion of the privilege for tithes.

paid by priority from the proceeds of a judicial sale.[65] In other words, an ordinary *Civil Code* privileged creditor may protect his rights as against wrongfully holding third parties only through the oblique or Paulian actions, through the seizure by garnishment, or through the conservatory attachment which is open to all creditors under the conditions of article 734(4) *C.C.P.* In no case does a creditor who can claim a privilege giving rise only to a simple execution priority acquire rights in, or in respect of, corporeal property. In no case, therefore, may he bring an action in revendication.

88. *Statutory Privileges* — Of the various privileges over moveables set out in the Revised Statutes of Quebec, very few give more than an execution priority over the assets of a debtor.[66] Only six deserve any consideration here. Two are genuine security devices: the privileges under the *Special Corporate Powers Act* and under the *Railways Act*. The latter privilege is, in fact, simply analogized to the former. While some writers still consider that the trustee for debenture holders acquires no real right in the property of the debtor, in view of the analysis undertaken earlier it is assumed here that indeed he does assert a real right, and may revendicate on that basis.[67]

Two other statutory privileges, while bearing several earmarks of a special privilege, really are ordinary execution priorities. Under the *Notarial Act*, the Chamber may exercise a right of preemption over certain sums to be remitted to a notary's heirs.[68] But this "privilege" gives no right in specific corporeal moveables and constitutes a mere direction to the legal depositary of the deceased notary's minute-book to remit a fraction of fees paid to the Chamber for debts owing to them. Under the *Mining Act*, the government has a privilege on moveables belonging to the concessionaire of a mining lease which are situate on the leased property. This privilege is analogized to a landlord's privilege.[69] Hence, for the reasons given in respect of the ordinary landlord's privilege, this privilege does not give rise to a right of revendication.

The privileges set out in the *Ministry of Revenue Act* and *Hydro-Quebec Act* are, however, more problematic. The deemed trust of section 20 of the

[65]Normally, the privilege may be claimed only on the debtor's property, but if third party effects are seized and sold without opposition, the privilege also applies to the same degree that it would over the debtor's property. See art. 569 *C.C.P.*

[66]Thus the privileges on moveables under the *Highway Code* and the *Watercourses Act*, *supra*, note 4, and the mixed privileges under the *An Act Respecting Industrial Accidents and Occupational Diseases*, the *Municipal Code of Quebec*, the *Hydro-Québec Act*, the *Education Act*, *supra*, note 4, and the *Lotteries and Races Act*, R.S.Q. c. L.-5, are only execution priorities, usually ranking with, or just after, law costs.

[67]See above, no. 67.

[68]*Notarial Act*, *supra*, note 4, s. 159.

[69]*Mining Act*, *supra*, note 4, s. 105.

former Act would seem to give the Ministry a real right in sums collected or to have been collected. Hence, should specific corporeal sums (that is, cheques, banknotes, bonds, or notes), be wrongfully in the hands of the debtor, his liquidator or his trustee in bankruptcy, or of third parties, they can be revendicated. On the other hand, the privilege and legal hypothec of section 12, for the reasons given earlier,[70] cannot be considered as giving rise to an accessory real right. As a mere execution priority this privilege and hypothec gives the Ministry no right to revendicate the taxpayer's corporeal property.[71]

The privileges of Hydro-Quebec are also anomalous. Subsection 31(4) of the *Hydro-Quebec Act* gives the Corporation a first-ranking execution priority for unpaid accounts. Like the privilege under section 12 of the *Ministry of Revenue Act*, this is a simple priority for payment which does not give rise to a right of revendication. By contrast, under subsection 31(2) the Corporation may exercise an unpaid vendor's privilege for any material or equipment sold to its customers. This is an ordinary vendor's privilege, except that none of the restrictive conditions of articles 1998-2000 *C.C.L.C.*. apply so as to limit revendication.[72] Here the Corporation has a true right of revendication.

In view of the conceptual structure of the *Civil Code*, it is difficult to conceive of statutory privileges which are not either accessory real rights or mere execution priorities. As demonstrated earlier, in the former case, revendication is possible; in the latter case, it is not. Nevertheless, at least two statutory privileges are analogized to special codal privileges. They lead, however, to opposite results. The *Mining Act* analogy to the lessor's privilege gives no right to revendicate; the *Hydro-Quebec Act* analogy to the unpaid vendor's privilege consecrates such a right.

89. *Ordinary Execution Creditors and the Seizing Creditor* — By way of conclusion to this assessment of the right of various privileged creditors to revendicate, it is useful to consider the status of ordinary execution creditors. Articles 1980-1981 *C.C.L.C.* provide that the assets of a debtor are the common pledge of his creditors. Nevertheless, a creditor takes a debtor as he is, and suffers the vacillations of the economic value of his patrimony, whatever their cause. In other words, unlike titularies of accessory real rights or special privileges, a chirographic creditor has no claim on specific assets

[70]See above, no. 67.

[71]See L. Payette, "Charge flottante: Privilège de la Couronne et saisie entre les mains du fiduciaire" (1980) 40 R. du B. 337; see also *Banque fédérale de développement* v. *D.D. Transport Ltée* (1984), [1984] C.S. 1127.

[72]Notably, the 30 day limit, the credit sale restriction and the resale limit do not apply. In this sense, the right of revendication flowing from the privilege of Hydro-Québec resembles that of the supplier under art. 2013e(6) *C.C.L.C.*

of his debtor. His position is thus like that of the titulary of an ordinary execution preference. Where a debtor disposes of his corporeal moveables or neglects to maximize his corporeal assets a chirographic creditor has, in principle, no means to protect his rights.[73] There are, however, two main exceptions to this principle: prior to execution, the creditor may bring the Paulian and the oblique actions; and, at the time of execution the creditor may seize by garnishment property of his debtor in the hands of third parties.

The oblique action permits a creditor to enforce a debtor's rights where he is prejudiced by his debtor's failure to do so.[74] All manner of claim may be enforced obliquely, including that in revendication.[75] The Paulian action permits creditors to set aside fraudulent acts of their debtors.[76] Thus, if a debtor fraudulently alienates a corporeal moveable, it may be reclaimed from the debtor's co-contractant.[77] In neither case, however, is the chirographic creditor revendicating either a property right or possession in his own name. In the oblique action, the plaintiff essentially "represents" his negligent debtor, and the result of the action is to obtain the object's return to the debtor's patrimony. In a Paulian claim, while the plaintiff is seeking the nullity of a contract by direct action, the result of the action again is simply to make the object available for judicial sale to the plaintiff's profit. Neither the oblique nor the Paulian actions vest ordinary creditors with a right in their debtor's corporeal property sufficient to ground an independent right of revendication. Their sole function is to augment a debtor's patrimony available for seizure in execution.

This leads to a final consideration. Does the execution creditor who has already seized goods (either in his debtor's hands or by garnishment) have a right to revendicate property which the guardian has either failed to recover from a third party or has fraudulently alienated? That is, even though the creditor has no direct right in relation to the goods and has no contractual relation with the guardian, may he nevertheless claim them from third parties? On at least one occasion the court has permitted a seizing

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[73]See Macdonald, *supra*, note 3 at 267-74.

[74]Art. 1031 *C.C.L.C.*; see *Harris* v. *Royal Victoria Hospital* (1947), [1948] B.R. 28. There are several other examples of the oblique action in the *Civil Code.* See arts 480, 655, 1040b *C.C.L.C.* and art. 502 *C.C.Q.*

[75]G. Trudel, *Traité de droit civil du Québec*, t. 7 (Montréal: Wilson & Lafleur, 1946) at 427-28. See, *e.g.*, *Bouchard* v. *Lajoie* (1886), 2 M.L.R. 450, 10 L.N. 109 (Q.B.). The creditor, in the cases here under consideration, could accomplish the same result through a seizure by garnishment. See arts 625-640 *C.C.P.*

[76]Arts 1032-1040 *C.C.L.C.* See also arts 470, 502, 523 *C.C.Q.*, and arts 484, 655, 745, 803 and 2023 *C.C.L.C.* for other examples of Paulian recourses.

[77]See art. 1036 *C.C.L.C.* and *Millette* v. *Lizotte* (1940), 79 C.S. 218. The Paulian defendant may, however, elect to pay the value of the object to the plaintiff-creditor. See *Re Normandin* (1958), [1959] B.R. 14.

creditor to revendicate property under seizure from a third party, although the legal foundation for this right was not discussed.[78] Regardless of the rationale for revendication, however, it is again clear that the action has no purpose other than to expose the goods revendicated to judicial sale.

90. *Scope of Revendication of Titularies of Execution Preferences* — Even though the *Code Napoléon* recognized from its origins the special rights of sellers and landlords to revendicate possession, no general theory of revendication as a complement to security devices which do not have a character of reality has yet emerged in France.[79] A similar situation exists in Quebec. Nevertheless, the above analysis suggests some general conclusions.

It appears that the *Civil Code*'s characterization of a creditor's right as being privileged has, in itself, no bearing on the question of revendication. The key, rather, seems to reside in whether the privileged creditor has a right to custody. In the first place, privileged creditors who have an existing and actual right of detention in their debtor's property may revendicate both from their debtor and from third parties who wrongfully hold corporeal property subject to the privilege. Second, unpaid sellers and priests, neither of whom has either a real right or actual detention, may revendicate possession either to bring the object to sale or to facilitate a later claim of ownership. Third, while the landlord may assert a special privilege, he has no right to revendicate in his own name. Because he cannot assert either a pre-existing detention or a future claim of a real right, his right to claim an execution preference even over goods no longer on the premises does not carry with it a right to compel their return through revendication. Fourth, a privilege sustaining a mere execution priority is insufficient to vest its titulary with a right to revendicate the property over which it lies.

A statutory privilege not giving rise to a real right (or not analogized to a privilege in the *Code* which gives rise to revendication) will not found a right of revendication. Here the statute book simply defers to the taxonomy of rights elaborated by the *Civil Code*. Moreover, the exceptional right of chirographic creditors to deploy the oblique and Paulian actions to revendicate corporeal moveables is no exception to this principle: in neither case is the creditor revendicating to his own detention. Like the landlord, the chirographic creditor is merely facilitating a future seizure in execution of his debtor's property. Finally, it would appear that a seizing creditor has a right to revendicate objects under seizure which have been negligently or fraudulently disposed of. Here one finds the principles of the Paulian and

[78]*Franey* v. *Costello* (1882), 12 R.L. 300 (Circ. Ct). Presumably the court would be drawing analogies to either the oblique or the Paulian actions.

[79]See Légier, *supra*, note 1, no. 34.

oblique actions extended even to the legal (as opposed to contractual) relationship of the seizing creditor/guardian.

It follows from this analysis that creditors not vested with an accessory real right may revendicate in two main cases: if they have an execution preference flowing from an existing or future right to possession or detention in their own name, and if they are exercising a right of their debtor in order to facilitate a judicial sale. Therefore, it would seem that the action in revendication has, at least in the former case, acquired non-petitory characteristics.[80]

b. Titularies of a Personal Right Implying a Custodial Obligation

91. *The Obligation of Care and Return* — The civil law knows several types of legal relationship under which one party assumes an obligation of care and return of an object belonging to another. In modern parlance these may be grouped under a more general rubric: administration of the property of another.[81] Some of these relationships imply that the holder is the titulary of a real right. Thus, usufructuaries, users and pledgees must care for property entrusted to them and return it at the expiration of the contract.[82] Again, titularies of eventual and future real rights, who are in possession of the object of their eventual and future right, are usually held to such an obligation. For example, promisees of sale with detention, conditional buyers with detention, and heirs in provisional possession are exposed to a contingent liability of care and return. More such obligations are grounded in contractual relations which give rise to only a personal right between co-contractants (that is, where the individual with physical control has at best a *jus ad rem* in connection with the object). The deposit is the model of such a contract, although lease, loan and the special mandate are other examples. Finally, some relationships giving rise to an obligation of care and return have no direct contractual basis. These include situations arising by deed, as in the case of testamentary trustees or testamentary executors, or by judgment, as in the case of judicial sequestrators, guardians of seized property, tutors and curators, or even as a purely factual matter, as in a

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[80]For a discussion of similar developments in France, see G. Goubeaux, "L'extension de la protection possessoire au profit des détenteurs" (1976) Rép. Not. Defrénois 374. See also R. Salcilles, De la possession des meubles: études de droit allemand et français (doctoral thesis in law, Université de Paris, 1907) at 275ff.

[81]See Québec, Civil Code Revision Office, *Report on the Québec Civil Code: Commentaries*, vol. 2 (Québec: Éditeur officiel, 1978) at 372-75 and 505-25 [hereinafter *Commentaries*].

[82]For usufruct and use, see M. Cantin Cumyn, *De l'usufruit, de l'usage et de l'habitation* (Québec: Soquij, 1985) nos 103-27. For pledge see arts 1972-1973 *C.C.L.C.* and R.A. Macdonald, "Exploiting the Pledge as a Security Device" (1985) 15 R.D.U.S. 551 at 602-14.

negotiorum gestio or in the case of a creditor who discovers he has seized property not belonging to his debtor.

This section examines only those legal relationships involving an obligation of care and return, when they are not founded on a real right, an eventual real right, a personal right of use, or a simple relationship of fact. Thus, the analysis here focuses on the obligation of care and return when it constitutes the principal feature of the legal relationship between the parties. To clarify the extent of the obligation in particular cases and to explore the possibilities for revendication which each presents, it is helpful to distinguish between three qualitatively different types of administration of the property of another.[83] Firstly, there are holders who may not use the object which they must care for and return. Secondly, there are those who, by the nature of the contract or juridical situation, may use the object for purposes other than their own benefit. Finally, there are holders who have an obligation of care and return and who, in most situations, simply represent the owner.

i. Those Who May Not Use an Object

92. *Detention and Possession* — The category of holders who may not use a corporeal moveable in their physical custody (that is, who have only pure detention) comprises depositaries, carriers and innkeepers, as well as guardians of seized property, unpaid sellers in possession of an object sold to a buyer who has not yet taken delivery, and good faith purchasers under paragraph 2268(4) *C.C.L.C.* These holders must be distinguished from judicial sequestrators, trustees, testamentary executors, mandataries, and several retention claimants such as repairmen or defendants to an action brought under paragraph 2268(4) *C.C.L.C.*, each of whom retains custody of an object, partly so as to use it for the benefit of the person to whom it must be returned (and thus, each of whom would appear to have at least the rudiments of possession).

93. *Depositaries* — The archetype of a holder with pure detention is the depositary.[84] Even though the depositary has no real right in the object deposited, under articles 1802-1804 *C.C.L.C.* he must preserve and return it to the depositor. From this duty Mignault[85] derives, following French

[83]This follows the typology of the *Commentaries, supra*, note 81.

[84]The depositary is, of course, the only such person mentioned in art. 734(1) *C.C.P.* Both codes frequently describe a holder's rights by reference to the depositary. Sequestration is a sub-species of deposit (arts 1817-1827 *C.C.L.C.*). Innkeepers (art. 1813ff. *C.C.L.C.*) and carriers (art. 1672 *C.C.L.C.*) are assimilated to depositaries. Testamentary executors (art. 918 *C.C.L.C.*) and trustees (art. 981b *C.C.L.C.*) are also held to the obligations of a depositary.

[85]P.-B. Mignault, *Le droit civil canadien*, t. 8 (Montréal: Théoret, 1896) at 154.

doctrine,[86] a right to revendicate. In the only reported cases in which the issue was raised the Courts have come to the same conclusion.[87] This result is also confirmed by paragraph 734(1) *C.C.P.* which permits a depositary to seize before judgment on the grounds of his right of revendication (namely, to exercise the attachment in revendication).

The legal foundation of the depositary's right to revendicate, which today is uncontested, is obscure. Most authors[88] argue that it flows, as a matter of practicality, from the obligation of care and preservation.[89] Because the contract rests on the confidence of the depositor in the depositary, it is argued that the depositary should not be deprived of the legal means to vindicate that confidence, should he be wrongfully dispossessed by a third party.[90]

94. *Holders Analogized to Depositaries* — In several instances the *Civil Code* assimilates other holders having pure detention to the depositary. For example, the rules of ordinary deposit apply by virtue of article 1814 *C.C.L.C.* to the necessary deposit of innkeepers, and by virtue of article 1672 *C.C.L.C.*, to carriers. Moreover, in some cases an obligation of pure detention can be inferred from the *Civil Code*, the *Code of Civil Procedure* or a special statute. Thus, the obligation of a non-debtor guardian holding goods seized in execution (articles 583ff. *C.C.P.*)[91] or seized before judgment (article 737 *C.C.P.*), the obligation of an evicted good faith purchaser under paragraph 2268(4)

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[86]For the current position in France, see Bouloc, *supra*, note 1, nos 4 and 178; Légier, *supra*, note 1, no. 35.

[87]*Morris* v. *Fournier* (1938), 43 R.P. 331 (Sup. Ct); *Ouellette* v. *Laberge* (1921), 28 R.L. 193 (Sup. Ct); *Charron* v. *Walker* (1918), 54 C.S. 439 (Ct Rev.).

[88]See Bouloc, *supra*, note 1, no. 178; Légier, *supra*, note 1, no. 35; M. Planiol & G. Ripert, *Traité pratique de droit civil français*, t. 3, 2d ed. by M. Picard (Paris: L.G.D.J., 1952) no. 391.

[89]See *Charron* v. *Walker* (1918), 54 C.S. 439 at 441; Aix, 19 December 1950, J.C.P. 1951.II.6491 (note M.J. Pierrard); E. Glasson, A. Tissier & R. Morel, *Traité théorique et pratique d'organisation judiciaire, de compétence et de procédure civile*, 3d ed. (Paris: Sirey, 1932) no. 1234.

[90]*Morris* v. *Fournier*, *supra*, note 87. It is to be noted that the depositor himself can never be in wrongful possession such as to give the depositary a right to revendicate as depositary. On the one hand, art. 1810 *C.C.L.C.* requires the object's return to the depositor when demanded, notwithstanding a term. On the other hand, under art. 1811 *C.C.L.C.* the depositary is relieved of this obligation if he establishes his own ownership. But in such a case he would be revendicating as owner, not as depositary. Finally, under art. 1812 *C.C.L.C.* he may refuse delivery if he has a retention claim. Once again, if the depositor obtains possession, the revendication would be as a retention claimant and not as depositary.

[91]*Lamarre* v. *Weinish* (1937), 43 R. de J. 33 (Sup. Ct); *Dionne* v. *Poulin* (1926), 29 Q.P.R. 57 (Sup. Ct); *Zinman* v. *Manie* (1940), 78 C.S. 414; *Hébert* v. *Brûlé* (1956), [1957] R.P. 270 (Sup. Ct).

C.C.L.C. who is holding the property until he is reimbursed the price he paid,[92] and the obligation of the public curator who is holding unclaimed goods[93] are analogous to simple deposit.[94] In each of these cases, therefore, the holder ought to be able to revendicate from a wrongfully holding third party.

ii. Those Who May Use an Object to the Benefit of Others

95. *Quasi-Depositaries* — In addition to cases analogized to pure deposit, the *Civil Code* also provides that other persons are seized as depositaries, even though they may use the rights of the person for whom they hold for the benefit of that person. Such analogies occur notably in successions and liberalities. For example, article 918 *C.C.L.C.* provides that testamentary executors are seized as depositaries[95] and specifically gives them a right to claim possession of property, even as against heirs or legatees.[96] An identical formulation appears in article 981b *C.C.L.C.*, which gives trustees a right to possesssion opposable to beneficiary donees and legatees.[97] Thus, despite confusion as to the locus of ownership of trust property, and doubts as to whether the trustee under article 981a ff. *C.C.L.C.* may claim a "real right of administration", there is no question that he may revendicate, at least as depositary. While there is no explicit reference to depositaries in article 869 *C.C.L.C.*, the reference to legatees who are "fiduciary or simply trustees" coupled with the later reference to testamentary executors in that article suggest that legatees under article 869 *C.C.L.C.* are also seized as depositaries.[98] A similar result would appear to be indicated under article 964

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[92]*Pinard* v. *Bergeron* (1977), [1977] C.S. 1158; *Farmers Insurance Co.* v. *Gravel* (1925), 41 B.R. 370. This would also apply to buyers in possession of goods after the sale has been annulled. See, by analogy, art. 1539 *C.C.L.C.* and *Mortgage and Discount Corp.* v. *Murphy* (1935), 73 C.S. 148.

[93]*Public Curatorship Act*, R.S.Q. c. C-80, s. 12.

[94]Several other situations previously examined could also fall under this rubric. These include, *inter alia*, the cases of repairers (art. 441 *C.C.L.C.*), pledgees (art. 1973 *C.C.L.C.*), usufructuaries (art. 484 *C.C.L.C.*) and sellers in possession (art. 1498 *C.C.L.C.*).

[95]This is true no matter how far the testator acting under art. 921 *C.C.L.C.* extends his powers. See *Gervais* v. *Gervais* (1962), [1963] R.P. 49 (Sup. Ct). The executor, as such, is an administrator who holds as depositary.

[96]See *Banque Canadienne Nationale* v. *Coulombe* (1965), [1966] B.R. 780; *Bellemare* v. *Généreux* (1972), [1973] C.S. 217; *Hôtel-Dieu St-Michel de Roberval* v. *Metropolitan Life Insurance Co.* (1940), 78 C.S. 512.

[97]*Dubreuil-Goyette* v. *Sherbrooke Trust Inc.* (1976), [1976] C.A. 571. Of course, the trust instrument could stipulate that an income beneficiary would have custody of the trust *corpus*, in which case the trustee could not revendicate from such income beneficiary.

[98]See *Valois* v. *de Boucherville* (1927), [1929] S.C.R. 234, [1928] 1 D.L.R. 343; but note the statements of Mignault J. at 241 and Rinfret J. at 270 where the court seems to accord the trustee the status of owner.

C.C.L.C. in cases where a will creates a legatee who is not also an institute of a substitution.[99]

The powers and obligations of judicial[100] and conventional[101] sequestrators are, in principle, also those of the simple depositary.[102] But, depending on the contract or the judgment of the court, the sequestrator may also have the power to manage the property of those for whom he holds.[103] While there is some dispute as to whether the sequestrator is a depositary with the power to manage[104] or a mandatary of the parties,[105] his title to revendicate — should he be wrongfully dispossessed — is not in doubt.[106]

The mandatary acting under a special mandate in respect of a corporeal moveable should also be able to revendicate as mandatary. Article 1713 *C.C.L.C.* imposes upon the mandatary an obligation to execute the mandate as a prudent administrator.[107] Should the mandate simply consist of an obligation to hold and deliver, it will make the mandatary a pure depositary, while if it implies repair or exploitation, it will resemble conventional sequestration.[108] If the mandate arises in the context of a partnership, it encompasses all rights vested in the other partners, including, in cases where one partner contributes property, the right to revendicate.[109]

In each of these cases of a quasi-deposit, the administrator of the property assumes not only an obligation of care and return, but also a collateral obligation to derive profit for the individual for whom he holds.[110] Thus, like the depositary, the quasi-depositary has detention of the object under a relationship of trust out of which he derives no personal use. On the other hand, in none of these cases is the holder merely acting for another (as does

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[99]See *Masson* v. *Masson* (1912), 47 S.C.R. 42 at 89-90, Anglin J. and at 73-74, Fitzpatrick C.J.

[100]See arts 742-750 *C.C.P.*, and arts 1823 and 1827 *C.C.L.C.*

[101]See arts 1818-1822 *C.C.L.C.*

[102]See arts 745 *C.C.P.* and 1819 *C.C.L.C.*

[103]L. Sarna, "Aspects of the Law of Judicial Sequestration in Quebec" (1977) 23 McGill L.J. 508; *Cavanaugh* v. *Machabee* (1969), [1969] B.R. 871; *Gennari* v. *Zervos* (1965), [1966] C.S. 433.

[104]See arts 1794 and 1819 *C.C.L.C.*, and *C.F.M.G. Inc.* v. *Pinto* (5 August 1977), Montreal 500-05-013200-777 (Sup. Ct).

[105]See *System Theatre Operating Co.* v. *Pulos* (1955), [1955] S.C.R. 448, 35 C.B.R. 127.

[106]See *Bissegger* v. *M.G.A. Development Corp.* (1973), [1974] R.P. 265 (Sup. Ct).

[107]Art. 1710 *C.C.L.C.* See also *Mongeau* v. *Mongeau* (1971), [1973] S.C.R. 529. The case of *negotiorum gestores* will be discussed later as a case arising from a purely factual situation.

[108]E. Groffier, "L'importance croissante du mandat en droit québécois: les développements récents" (1985) 15 R.D.U.S. 445 at 453-55; compare *Gennari* v. *Zervos* (1965), [1966] C.S. 433.

[109]See arts 1846 and 1851 *C.C.L.C.*

[110]For a good example of revendication by a depositary with use, see *Perreault* v. *Poirier* (1958), [1959] B.R. 447, rev'd on other grounds (1959), [1959] S.C.R. 843, 23 D.L.R. (2d) 61; see also *J. Watterson and Co.* v. *Montpetit* (1933), 54 B.R. 548.

a tutor or curator); rather, he is always acting on the basis of his contractual or legal obligation of care and return, related to specific corporeal property. For this reason there is no doubt that the quasi-depositary may also revendicate under the same title as a pure depositary.[111]

96. *The Obligation of Administration and Representation* — Apart from the cases of obligations of care and return directly giving rise to a right to use, the *Civil Code* also contemplates that a person may have contractual or legal custody over a corporeal moveable which implies such an obligation in an indirect fashion. Paradigm cases are those of the tutor, the curator, the judicial adviser and the public curator. The right of tutors,[112] curators,[113] advisers[114] and the public curator[115] to revendicate varies according to whether they have a right of administration or merely an advisory role in respect of their charge's property.[116] Tutors may revendicate in their pupil's name, as may curators to interdicted imbeciles and to insane persons.[117] Curators to the property of prodigals and drunkards, as well as certain curators to property under article 347 *C.C.L.C.*, may also revendicate under similar terms.[118] The right of the Public Curator to revendicate is identical to that of private curators.[119] By contrast, judicial advisers have no status to revendicate in their advisee's name.[120]

Quite separate from the question of whether these administrators may revendicate in a representative capacity is the question as to whether they may revendicate under their own name. For example, does their responsibility for property and their possible exposure to an action in damages generate a right to sue in a fashion analogous to the right of the depositary? Situations where a pupil or other charge could not revendicate, but where a depositary or administrator could do so, are difficult to conceive of; therefore, it is not surprising to find no judicial decision on the point. However, as the situation of the Public Curator revendicating "ownerless" property

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[111]In other words, these examples of "quasi-deposit" imply (as the case of the special mandate shows clearly) an element of representation. Nevertheless, the revendication is on an independent footing which does not require the plaintiff to prove the depositor's, mandator's, or settlor's title.

[112]Arts 290 and 304 *C.C.L.C.*

[113]Arts 337, 340, 343 and 348 *C.C.L.C.*

[114]Arts 349 and 351 *C.C.L.C.*

[115]*Public Curatorship Act*, *supra*, note 93, ss 10 and 23.

[116]See *Commentaires*, *supra*, note 81 at 372-75. See also P. Azard & A.F. Bisson, *Droit civil québécois*, vol. 1 (Ottawa: Éditions de l'Université d'Ottawa, 1971) nos 19-20.

[117]Thus, the right to revendicate accruing to the minor or imbecile must be exercised by the tutor or curator.

[118]See arts 90, 91, 676a, 688 and 945 *C.C.L.C.* The case of absentees, where the curator may become owner, is discussed below, no. 112.

[119]*Public Curatorship Act*, *supra*, note 93, s. 10.

[120]See art. 351 *C.C.L.C.*

from a thief or other wrongful holder illustrates, such an action should theoretically be possible.[121]

97. *Scope of Revendication of Plaintiffs with a Personal Right Implying a Custodial Obligation* — Once revendication by a depositary on the basis of an obligation of care and return is admitted, it is clear that the law must also permit a range of other holders and custodians to revendicate from wrongfully holding third parties. Thus, in this context also, the action in revendication reveals non-petitory features. While there can be no objection in principle to permitting the action for those whose primary obligation is pure preservation — depositaries and holders analogized to depositaries — other considerations bear on the situation of those with a right to use the object to the benefit of others. Nevertheless, where the holder is a quasi-depositary — a testamentary executor, trustee, sequestrator or special mandatary — the analogy to deposit is sufficiently strong that the right to revendicate should be permitted. Where, however, the holder assumes an obligation of representation (and thereby acts for another) it is less certain whether that status is enough to sustain revendication in his own name. Presumably, unless such representatives could also claim a status of depositary or quasi-depositary (that is, unless they also had *de facto* custody) revendication in their own name would be impossible.

c. *Titularies of a Personal Right of Enjoyment*

98. *Personal Rights of Enjoyment* — The law also imposes an obligation of care and return on every holder who has a personal right to use an object. While the intensity of the obligation to care for an object varies according to the nature of the contract and to its gratuitous or onerous character, the obligation to return is invariably one of result.[122] That is, subject to any special contractual terms, both the borrower for use and the lessee — the two paradigmatic cases of personal rights of enjoyment (*jus ad rem*) — must care for the object as prudent administrators and maintain its destination.[123] In addition to these rights of enjoyment arising directly by contract, there are two other cases where the *Code* contemplates that a holder may use to his own profit: the income beneficiary of a trust in possession, and the

[121]Only one example involving a private tutor or curator comes to mind. Imagine a minor who upon attaining his majority settles a lawsuit by abandoning an action in revendication brought by his tutor. If he does so prior to his tutor's accounting, the tutor may wish to avoid his potential liability under art. 290 *C.C.L.C.* by revendicating on the basis of his obligation of care and return.

[122]See, *e.g.*, arts 1617, 1623 and 1766-1769 *C.C.L.C.*

[123]See arts 1618 and 1767 *C.C.L.C.*

owner/guardian of property under seizure.[124] The situation of capital beneficiaries in possession, heirs with provisional possession and promisees of sale in possession will be considered under the rubric of future real rights. The situation of the non-owner spouse under certain matrimonial regimes may also be analogized to that of a holder with use, although the exact nature of the rights at issue remains uncertain.[125] In each of these five cases the holder is vested with slightly different prerogatives in the object held, and as a consequence the entitlement to revendicate requires separate discussion.

99. *Borrowers for Use* — The contract involving a personal right of use which most closely resembles deposit is the loan for use.[126] Under a loan for consumption, the borrower becomes owner[127] and thus may exercise an action in revendication as such.[128] The borrower for use, however, neither becomes owner, nor acquires a real right in the thing lent.[129] He is obliged to care for the object and return it in good condition to the lender. These obligations are identical to those imposed upon the depositary,[130] except that the borrower may in all cases use the object, while the depositary may do so only with the consent of the depositor.[131]

Given the rationale for the depositary's right of revendication (the obligation of care and return) one might well conclude that a borrower for use is also vested with a right to revendicate as against third parties wrongfully dispossessing him.[132] Yet this conclusion might be seen to run counter to the basic theory of personal rights of enjoyment, according to which the owner (lender) must ensure the enjoyment of the borrower, who cannot of his own right vindicate that enjoyment. Nevertheless, Quebec courts have permitted borrowers to act directly in order to claim damages from third

[124]See art. 583 *C.C.P.* for the case of an owner/guardian of property under seizure. The situation of capital beneficiaries in possession, heirs with provisional possession and promisees of sale in possession will be considered under the rubric of future real rights.

[125]See, *e.g.*, arts 450(2) and 479(2) *C.C.Q.*

[126]Arts 1763-1776 *C.C.L.C.*

[127]See arts 1777-1784 *C.C.L.C.*, particularly art. 1778 *C.C.L.C.*

[128]See above, no. 54. Quasi-usufruct under art. 452 *C.C.L.C.* resembles in this respect a loan for consumption.

[129]See especially arts 1764 and 1774 *C.C.L.C.*

[130]H. Roch & R. Paré, *Traité de droit civil du Québec*, t. 13 (Montréal: Wilson et Lafleur, 1952) at 169-77.

[131]Compare art. 1766 *C.C.L.C.* with art. 1802 *C.C.L.C.*; art. 1769 *C.C.L.C.* with art. 1805 *C.C.L.C.*; art. 1770 *C.C.L.C.* with art. 1812 *C.C.L.C.*; art. 1763 *C.C.L.C.* with art. 1804 *C.C.L.C.*

[132]One might argue that the deposit implies that the depositor is relying on the depositary to protect his goods and is deemed to give him a mandate to revendicate. Yet, in view of the fact that even those with a simple *jus ad rem* may be depositors, the foundation of the depositary's right cannot be in an implied mandate from the titulary of a real right, but must arise from his obligation of care and return.

parties.[133] In such cases damages have been awarded not only for the holder's loss of enjoyment but also for the damages suffered by the owner to whom he is responsible.[134] In view of the essentially gratuitous character of the loan for use, its analogy to deposit, while unorthodox, does not seem totally misplaced.[135]

100. *Lessees* — A far more difficult case for permitting revendication is that of the ordinary lessee.[136] While articles 1617, 1621 and 1623 *C.C.L.C.* impose upon the lessee obligations of care and return analogous to those of the depositary, other features of the contract suggest that the lessee should have no status to revendicate. For example, articles 1608 and 1609 *C.C.L.C.* oblige the lesssor of moveables to warrant the lessee's enjoyment against legal and factual disturbance.[137] While this latter obligation does not give rise to a claim for damages against the lessor in respect of the acts of third parties (such as a wrongful taking), the lessee may nevertheless in such a situation demand specific performance, cancellation of the contract or a reduction in rent. In other words, the general theory of the lease of things contemplates that because the lessee is paying the lessor a rent (and neither doing him a service as in deposit nor receiving a gratuitous service from him as in loan), he should look to the lessor to vindicate his *jus ad rem.*[138]

On the other hand, the fact that the lessee assumes the same obligation of care and return as a depositary has induced the court, in at least one recent case, to permit a lessee who had subleased an object to bring an opposition to withdraw from a seizure of the sub-lessee's goods. The court concluded: "il n'y a pas raison valable de traiter le locataire qui est sous-locateur différemment du dépositaire puisque comme le dépositaire, il a l'obligation de rendre et dans le cas présent, il a également l'obligation de garde".[139] If the reasoning in this case is valid, it should also apply to any

[133]See *Saint-Pierre* v. *Lambert* (1936), 42 Q.P.R. 393 (Sup. Ct); *Kirouac* v. *Ruel* (1941), 70 B.R. 350; *Perreault* v. *Therrien* (1936), 74 C.S. 481; *Goyette* v. *Vézina* (1946), [1946] C.S. 327, all of which gave a borrower an action in damages.

[134]See *Montpetit* v. *Liboiron* (1954), [1954] B.R. 301; *Delorme* v. *Anocencio* (1957), [1960] R.L. 202 (Sup. Ct) and the comment by C. Perrault, "Qui est autrui?" (1966) 26 R. du B. 368 at 374.

[135]That is, as in deposit, the dominant psychological characteristic of the contract is the trust of the lender in the borrower. Hence, revendication from a third party under circumstances similar to those of the depositary might well be justifiable.

[136]On the analysis presented here, the financial lessee under art. 1603 *C.C.L.C.* is considered to have a real right and not simply a *jus ad rem* like the ordinary lessee. See R.A. Macdonald, "Enforcing Rights in Corporeal Moveables: Revendication and its Surrogates (Part One)" (1986) 31 McGill L.J. 573 at note 280ff. [hereinafter "Revendication: Part One"].

[137]Compare arts 1605-1606 *C.C.L.C.* with arts 1776 and 1812 *C.C.L.C.*

[138]But see 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).

[139]*Discothèque & Golf Lafontaine Inc.* v. *Lussier* (1980), [1980] C.S. 166 at 169.

lessee who is not exempted by contract from an obligation of care and return.[140]

In other words, modern developments in the contract of lease such as the lessee's right to withhold rent so as to effect repairs to the object, and his enhanced right to sublease, reflect a legislative desire to give him greater prerogatives in the object itself. It is, therefore, not surprising that courts respond by permitting a lessee direct access to remedies to protect these prerogatives. Nevertheless, whether courts will permit revendication by lessees who do not also have a contractual claim to detention against the defendant in the action (or by his creditors) remains uncertain.[141]

101. *Income Beneficiaries of a Trust in Possession* — According to modern analyses of the trust relationship neither the income beneficiary nor the capital beneficiary have a real right in the *corpus* of the trust.[142] Rather, they merely have a personal right to enforce the trust as against the trustee.[143] Nevertheless, in certain trust arrangements the income beneficiary may actually be given physical custody of the corporeal moveables subject to the trust, in addition to a right to the revenue produced. In such cases one might well characterize the beneficiary's right as a *jus ad rem* in at least part of the trust *corpus*.[144] The resulting legal relationship might then be seen as analogous to that of the borrower for use or of the lessee.[145] If so, the observations made earlier might also justify the courts permitting a right of revendication based on the income beneficiary's obligation of care and

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[140]The court was influenced by the fact that the lessee (as sub-lessor) assumed many of the lessor's obligations; but the true character of the sub-lessor's title should not matter *vis-à-vis* third parties seizing the sub-lessee's goods.

[141]That is, if the courts see the obligation of care and return as fundamental to all leases (and not just to leases where there has been a sub-lease), it is likely that the lessee will be permitted to revendicate. Paradoxically, therefore, the reasons for attributing a character of reality to the lessee's rights are more persuasive in the case of moveables than in the case of immoveables.

[142]M. Cantin Cumyn, *Les droits des bénéficiaires d'un usufruit, d'une substitution et d'une fiducie* (Montréal: Wilson & Lafleur, 1980) nos 90-91. See R.A. Macdonald, "Revendication: Part One", *supra*, note 136, no. 72.

[143]Depending on the composition of the trust *corpus*, the capital beneficiary may, however, have an eventual or future real right: see below, no. 121.

[144]Of course, everything depends on the specific language of the will or deed of donation. In *Ballantyne* v. *Royal Trust Co.* (1976), [1976] C.A. 606, on one reading of the judgment, the court seems to call such an arrangement a substitution. With minor variances, it might also amount to a usufruct. See Cantin Cumyn, *supra*, note 142 for an analysis of the legal characteristics proper to each of these devices.

[145]On the analogy to lease in such cases, see Cantin Cumyn, *ibid.*, no. 92.

return.[146] To date, however, no judicial decision has been given on this point, presumably because the cases where the trustee refuses or neglects to revendicate are so rare.

102. *Owner/Debtors Whose Property is under Seizure* — Where moveable property is seized in execution the seizing officer must, pending judicial sale, attribute custody of the goods to the debtor, unless there are special reasons for not doing so.[147] Like the guardian who is a third party, the owner/guardian assumes an obligation of care and return analogous to that of the depositary: he may neither damage nor dispose of the goods and he must present them for sale on the date indicated on the writ of seizure.[148] Nevertheless, since he remains owner, the courts have permitted the guardian to exercise a limited right to use the goods.[149] Thus, the owner/guardian should be entitled to revendicate from wrongfully holding third parties, in his quality either as owner or as a depositary with a right to use.[150] Similar principles would also apply whenever an owner is named guardian under a seizure before judgment.[151]

103. *Non-Owner Spouses under Certain Matrimonial Regimes* — The correct characterization of the rights of non-owner spouses in what may be loosely described as "family property" has always been problematic. Moreover, recent reforms to the *Civil Code* seem to have created several new types of rights as between spouses.[152] Under the earlier community of property regimes, the respective rights of spouses in the property of the marriage were equivocal. While the *Code* gave spouses the right to concur in the disposition of household furniture[153] or in the disposition by gratuitous title of all other community moveables,[154] the basic administration of the com-

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[146]In principle, this right should extend not only to third parties wrongfully in possession, but also to the trustee or the capital beneficiary wrongfully asserting custody of the *corpus*.

[147]Arts 583 and 608 *C.C.P.* See *Cie Financière Canadienne* v. *Cotte* (1981), [1981] C.P. 160.

[148]*Hébert* v. *Brûlé, supra*, note 91; *Dallaire* v. *Décor Floral* (1977), [1978] R.P. 124 (Prov. Ct). See also Y. Lauzon, *Droit judiciaire privé: Exécution des jugements* (Montréal: Thémis, 1983) at 61-65.

[149]*Khullar* v. *Décarie Square Inc.* (1980), [1980] C.S. 1097.

[150]For an example of such revendication see *Moisan* v. *Roche* (1877), 4 Q.L.R. 47, 1 L.N. 33 (Q.B.). That is, he ought to be able to reclaim from, say, a thief, simply on the basis of his status as guardian. See also *Franey* v. *Costello, supra*, note 78.

[151]Art. 737 *C.C.P.* See also *Fairview Auto Leasing Ltd* v. *Salvail* (1980) [1980] R.P. 97 (Prov. Ct); *IAC. Ltée* v. *Ameublements Branchaud Inc.* (1980), [1980] C.S. 1129; *Cie de construction Belcourt* v. *Bronzage 3 Soleils Inc.* (18 December 1985), Quebec 200-09-000699-857 (C.A.).

[152]See J. Pineau & D. Burman, *Effets du mariage et régimes matrimoniaux*, 3d ed. (Montréal: Thémis, 1984) *passim*, particularly at 126-28.

[153]Arts 1425a(2) and 1292(2) *C.C.L.C.*, as rep., *An Act to Establish a New Civil Code and to Reform Family Law*, S.Q. 1980, c. 39, s. 66.

[154]Arts 1292(3) and 1425a(2) *C.C.L.C.*, as rep., *An Act to Establish a New Civil Code and to Reform Family Law, ibid.*

munity was conferred on one spouse only.[155] For this reason it is doubtful that the *de facto* right of use of one spouse over community property administered by the other could have amounted to a *jus ad rem* and could have been capable of sustaining an action in revendication, apart from an express or implied domestic mandate.[156]

But the *Civil Code of Quebec* creates additional problems in the integration of these limitations with articles 450 and 479 *C.C.Q.* Under article 450 *C.C.Q.* household furniture used by the family has a protected status regardless of its ownership.[157] An innocent spouse may now seek the nullity of acts in relation to household furniture to which he or she has not consented. Similarly, article 479 *C.C.Q.* generalizes the rule which permits an innocent spouse to seek the nullity of acts which are undertaken in excess of powers vested in the other under a matrimonial regime. However, given that these two rights cannot be exercised against third parties in good faith in onerous transactions,[158] and given a two-year prescription period on such actions,[159] the occasions where the non-owner spouse could actually exercise this right of annulment are quite limited.

On the other hand, where the act is gratuitous or the third party is in bad faith, the innocent spouse should be entitled to recover the property, once having had the unauthorized disposition annuled.[160] Yet the right of annulment appears to be strictly attached to the spouse for this limited purpose only. It would not, therefore, give rise to a general right to revendicate the other spouse's acquests, the community property or the other spouse's private property used as household furniture as against non-contractual third parties such as thieves or overholding *bona fide* co-contractants such as lessees, borrowers or depositaries. Nor would it give a right to revendicate household furniture from a spouse who simply removed it from the family residence.[161] In other words, the non-owner (or non-administrator) spouse's right to use "family property" is merely *de facto*. Thus,

[155]Moreover, art. 479(2) *C.C.Q.* which now applies to all matrimonial regimes, including community of property, severely limits the non-concurring spouse's rights.

[156]See arts 447 and 475-477 *C.C.Q.* on domestic mandate. While an argument for permitting revendication could also be made on the basis of the spouse's future right to a part of the community, there is no asset specificity to this right. Revendication, therefore, could not be possible on this basis either. See Pineau & Burman, *supra*, note 152 at 244-50. A similar result should follow in respect of acquests under the partnership of acquests regime: see arts 493-494 *C.C.Q.*

[157]Pineau & Burman, *ibid.* at 154-59. This is the same rule as for community property and acquests, except that it also includes the private property of each spouse used as family furniture.

[158]Arts 450(2) and 479(2) *C.C.Q.*

[159]See art. 2261.1 *C.C.L.C.*

[160]In other words, the rights created by arts 450 and 479 *C.C.Q.* seem to resemble the Paulian recourse. See above, no. 88.

[161]See Pineau & Burman, *supra*, note 152 at 60. In this sense, the rights of the non-owner spouse are not radically different from those of a lessor of immoveables. See also above, no. 84.

since in the ordinary course of the marriage that spouse assumes no obligation of care and return, it is difficult to see upon what basis (other than the domestic mandate or some tacit *negotiorum gestio*) entitlement to bring the ordinary action in revendication could be grounded.[162]

104. *Scope of Revendication of Plaintiffs with a Personal Right of Enjoyment* — Even though holders with a *jus ad rem* (namely, borrowers for use, lessees, income beneficiaries of a trust in possession, and owner/guardians of property under seizure) assume an obligation of care and return not unlike that of the depositary, doctrinal authorities doubt that this obligation should be sufficient to ground an entitlement to revendicate. However, recent judicial decisions on the rights of borrowers for use and lessees suggest that the action in revendication should be open to any holder who has a legal interest in the conservation of the thing.[163] On this analysis the income beneficiary of a trust in possession, and the owner/guardian of property under seizure, should also be able to revendicate. Nevertheless, it is clear that non-owner spouses, having no *jus ad rem*, also have no general right to revendicate "family property". In asssessing this last situation one arrives at the very limits of the concept of a personal right of enjoyment in respect of a corporeal moveable.

3. Titularies of Future, Conditional and Eventual Real Rights

105. *Conservatory Revendication* — Despite ambiguities at its margins, the distinction between real rights and personal rights remains fundamental to the civil law. Yet legal rights may also be characterized along axes which cut across this classical dichotomy. For present purposes the most important alternative classification is that which distinguishes between actual, future, conditional and eventual rights.[164] In the cases reviewed in the preceding two sections the revendicating plaintiff was always asserting an existing and actual right, whether real or personal. It is now appropriate to consider whether the action in revendication may be deployed strictly as a conservatory recourse. That is, does a future, conditional, or eventual right in respect

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[162]That is, the fact that one spouse may use "family property" and may have some control over its eventual disposition cannot be seen as vesting that spouse with even a *jus ad rem*.

[163]This also seems to be the position which the courts in France are reaching: see Légier, *supra*, note 1, no. 34; but compare H. Mazeaud *et al.*, *Leçons de droit civil*, t. 2, vol. 2, 6th ed. by F. Gianviti (Paris: Montchrestien, 1984) no. 1627.

[164]See J. Ghestin & G. Goubeaux, *Traité de droit civil: Introduction générale*, 2d ed. (Paris: L.G.D.J., 1983) at 182, who distinguish between "droits actuels, futurs, conditionnels et éventuels".

of a corporeal moveable imply a sufficiently intense legal relationship that specific recovery by a wrongfully dispossessed plaintiff should be permitted? In the analysis which follows, only situations involving the assertion of a real right will be discussed.[165]

106. *Modalities of Ownership* — Notwithstanding that the civil law conceives of ownership (and for that matter of any real right) as being indivisible, in any transfer of title the possibility of future or conditional rights may arise.[166] Moreover, as in any real contract, right and detention may be dissociated. Thus, in most circumstances involving a contractual transfer of title, the person whose rights are only potential will actually have physical control of the corporeal object upon which his rights bear. For example, a buyer under a suspensive condition, a buyer in a contract where the transfer of title is deferred by a term, and a promisee of sale normally (although not always) will have detention of the object to be purchased. Similarly, others with only potential rights (such as heirs in provisional possession, and buyers under protected sales) will necessarily have detention.[167] Conversely, some potential owners do not have custody of the object of their potential right. These include, in the context of a sale, sellers who retain a right of resolution notwithstanding delivery, and buyers who take neither title nor delivery. Other examples include the cases of donors and testators who stipulate a right of resolution, and of substitutes, contractual institutes, presumptive heirs and capital beneficiaries of a trust.

While each of the various legal relationships just reviewed has a separate footing, each generates at least one titulary of a potential real right.[168] Even though contractual reservations of title do not presuppose a novel legal institution such as the substitution or the trust, the legal relationship between the titulary of the right and the object of the right is similar. For this reason,

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[165]Eventual personal rights are simply too remote to suggest the availability of revendication, although actions in specific performance may be possible. For example, a promisee/lessee could not revendicate, even though he might conceivably enforce the contract of lease by specific performance. Potential rights not grounded in a contract or other legal relationship (*e.g.*, where they flow from prescription in course) will be discussed in the next section. It should also be noted that in several cases a conditional or future real right is coupled with an existing personal right (*e.g.*, a conditional buyer in possession). In the analysis which follows it is the nature of the real right which will be the focus of discussion.

[166]In principle, the remarks which follow are equally applicable to real rights less than ownership. It is, however, less plausible to find examples of such modalities in respect of lesser principal real rights or even accessory real rights.

[167]The expression "buyer under a protected sale" means the buyer of the thing belonging to another who purchases under the conditions of arts 2268(3) and 2268(4) *C.C.L.C.* and who is holding prior to the acquisition of title through prescription.

[168]In addition to any personal right which may be created (*e.g.*,as between buyer and seller in a contract translative of ownership) these situations imply that one party has a potential *jus in re.*

they will be analysed not according to the precise legal origin of the potential right, but rather according to the locus of detention.

a. Potential Owners with Physical Control

107. *Types of Potential Ownership* — Potential ownership arising otherwise than from a relationship of fact may be the consequence of a contract (usually one of sale, but also of ordinary donation and marriage covenant) or a succession (usually by will, but also by operation of law). In addition to usual contractual modalities of ownership, applicable equally to onerous and gratuitous contracts, the law knows three special institutions — the substitution, the trust and the contractual nomination of an heir — which complicate the regime of liberalities. Nevertheless, except in the most implausible situations, the titularies of potential rights under these latter arrangements will not have custody of the object upon which their right bears.[169] It is therefore appropriate to begin with a discussion of contractual modalities implying possession of the potential owner: conditions, terms, and promises accompanied by delivery.

108. *Ownership under Suspensive Condition* — Like the seller who transfers title under a suspensive condition, the buyer subject to a resolutory condition is considered as an owner and may revendicate as such. In contrast, the buyer or other transferee under suspensive condition and the seller or other transferor under a resolutory condition are considered merely as having a potential right.[170] For purposes of locating ownership (and the right to revendicate as owner) the law considers only the individual whose rights are subject to resolution as owner.[171]

Whether or not the party whose ownership is suspended by a condition may revendicate against a third party who wrongfully interferes with the property is problematic. It is clear that he cannot revendicate as owner.[172] Nevertheless two features of the law of conditions suggest that he has a *jus*

[169]The implausible cases include instances where the substitute is also an undivided institute, where the capital beneficiary of a trust has been given custody *(e.g.*, where he may vote shares, the income beneficiary gets the dividends and the trustee has the right of disposition) and where the contractual institute has a right in specific matrimonial furniture.

[170]Classical doctrine would characterize this as a "conditional right". See G. Marty & P. Raynaud, *Droit civil: Les biens*, 2d ed. by P. Raynaud (Paris: Sirey, 1980) no. 463 and Mazeaud, *supra*, note 163, nos 1395-1401.

[171]See above, no. 52. See also *Accessoires d'Autos Laurentien Ltée* v. *Churchill Constructors* (1973), [1973] R.P. 216 (Sup. Ct).

[172]For an examination of the rights of owners under suspensive condition, see *Montreal Trust* v. *Roadrunner Jeans* (1982), [1983] C.S. 245, 27 R.P.R. 216; and Planiol & Ripert, *supra*, note 38, no. 231.

ad rem sufficient to support revendication. First, article 1086 *C.C.L.C.* provides that the creditor may, prior to fulfillment of the condition, undertake all acts conservatory of his rights.[173] Secondly, should the condition occur, the creditor's rights are retroactively consolidated.[174] The conditional owner's aspiration to ownership distinguishes his detention from that of the lessee (or other titulary of a contractual *jus ad rem* necessarily ending with the return of the object to the co-contractant) and intensifies his legal relationship with the object of his right.[175] In other words, while the possession of the creditor under a suspensive condition is precarious, that custody, in combination with his conditional right and his exercise of material acts consistent with ownership, have been held sufficient to ground a claim in revendication.[176]

The legal rationale behind this result seems to be that because the conditional owner concurrently assumes a contingent obligation of care and return similar to that of the lessee, and acquires a contingent retroactive right of pure ownership, the authorization to take conservatory measures must encompass the right to protect his detention directly.[177] In this sense, revendication by conditional owners seems to reveal at least the rudiments of a petitory character which are absent in ordinary cases where a holder has a *jus ad rem.*[178]

109. *Ownership Suspended by a Term* — The buyer or other transferee whose ownership is suspended by a term is in a slightly different position from that of the conditional transferee. While his rights are more certain than those of the transferee under a suspensive condition, they are still only potential.[179] Moreover, when the term arrives the transferee's rights are not retroactive, but date only from the expiry of the term.[180] Nevertheless, the creditor's potential loss of the benefit of the term for payment (the usual

[173]These include the right to bring an oblique action, actions to interrupt prescription, the Paulian action and the action in declaration of simulation. See M. Tancelin, *Les obligations*, 2d ed. (Montreal: Wilson & Lafleur/Sorej, 1984) no. 249; Baudouin, *supra*, note 16, nos 609-10.

[174]Tancelin, *ibid.*; Baudouin, *ibid.*; arts 1085 and 1088 *C.C.L.C.*; R. Jambu-Merlin, "Essai sur la rétroactivité dans les actes juridiques" (1948) 46 R.T.D. Civ. 271; M. Vanel, "Propriété" in *Encyclopédie Dalloz*, *supra*, note 1, nos 140-41.

[175]See Ortscheidt, *supra*, note 1, no. 100; but compare Bouloc, *supra*, note 1, no. 178.

[176]See *Studebaker Corp. of Canada* v. *Glackmeyer* (1928), 44 B.R. 216; and *Fréchette* v. *Carrière Lumber Co.* (1947), [1948] B.R. 185.

[177]Jambu-Merlin, *supra*, note 174; see also M.A. Loutre, "Etude sur la rétroactivité de la condition" (1907) 6 R.T.D. Civ. 753.

[178]See Tancelin, *supra*, note 173; Baudouin, *supra*, note 16.

[179]See Tancelin, *supra*, note 173, nos 326-27.

[180]Hence, while the obligation is certain, the creditor has no recourse to oblique or Paulian actions against the transferor: see Baudouin, *supra*, note 16, no. 599. But he may bring an action to interrupt prescription: see Tancelin, *supra*, note 173, no. 242.

correlative of the term for transfer of ownership) exposes him to a contingent liability not unlike that of the conditional buyer or lessee. Consequently, once he obtains custody he should be able to revendicate from third parties who wrongfully dispossess him.[181] In this case, however, the rationale would seem to lie in the transferee's detention. That is, the absence of retroactivity suggests that the buyer's ownership is never equivocal. The revendication would be strictly a possessory recourse as in the case of the lessee.[182]

110. *Promisees of Sale* — The situation of the promisee of sale is analogous to that of the conditional or term buyer.[183] Under article 1478 *C.C.L.C.*, in bilateral promises of sale, delivery and actual possession of the corporeal moveable normally complete the sale. The transferee thus may revendicate as owner against all persons, even if the actual sale be not yet completed or judicially confirmed.[184] In most cases, however, the promise of sale is, in fact, made in the context of an instalment sale — where, notwithstanding both promise and delivery, the seller retains title. That is, the seller promises to transfer title at a future date, upon the fulfillment of a condition: full payment of the purchase price.

In such cases the transferee once again acquires only a potential right. Neither is this right retroactive, as in a conditional transfer, nor is it certain, as in a transfer under a term. Yet an analogy can be drawn between promisees of sale with detention, whose right to obtain title is deferred by a future or uncertain event, and buyers under a term.[185] On this basis promisees have been permitted to revendicate from third parties wrongfully in possession.[186] A similar conclusion may be derived from the *Consumer Protection Act* and the *Automobile Insurance Act*,[187] which establish separate

[181]Tancelin, *ibid.*, argues for permitting the same conservatory measures as those available to a conditional buyer.

[182]In sales where the transfer of ownership is suspended by a term, there is never any doubt as to who is owner. Whether the question is asked before or after the arrival of the term, the answer at any particular point in time is the same. In contrast, because conditions once accomplished have retroactive effect, the answer to the question of who was owner at any particular time will vary according to the accomplishment of the condition.

[183]Nevertheless, because of the maxim *donner et retenir ne vaut*, the remarks that follow cannot apply to donations. A unilateral promise of donation accompanied by delivery generates no rights. Either there is a *don manuel*, or there is a gratuitous loan-type contract. A bilateral promise of donation accompanied by delivery is conceivable, though implausible.

[184]See Pourcelet, *supra*, note 39 at 23-24 who notes, however, that the sale must not be conditional, or that the transfer must not be under some other title such as a lease. See also *Nadeau* v. *Nadeau*, (1977), [1977] C.A. 248; and *Payeur* v. *Dion* (1979), [1979] C.S. 675.

[185]While no court has yet explicitly so held, it would appear that bilateral promises where the transfer is deferred by a term would also be analogized to sales under a term. For a general discussion, see Rousseau-Houle, *supra*, note 39 at 313-44.

[186]See *Studebaker Corp. of Canada* v. *Glackmeyer*, *supra*, note 176.

[187]*C.P.A.*, *supra*, note 27, ss. 15 and 136; *Automobile Insurance Act*, R.S.Q. c. A-25, s. 1.1.

legal regimes affecting the rights of promisee purchasers in possession. The former Act protects promisee purchasers from repossession by their seller, in exactly the same manner as it protects conditional term buyers, while the latter Act exposes promisee purchasers of automobiles to civil liability as "owners" of their vehicles.

It would seem that the legal regime of bilateral promises of sale with delivery parallels that of the ordinary law of sales, or sales with a term, as the case may be, and that the right to revendicate should be established on a similar basis.[188] Recently courts have shown a greater tendency to give such promisee purchasers recourse to conservatory measures, injunctions and seizures before judgment. But in each case these remedies have been explicitly based upon an exceptional recognition of a personal right.[189] In cases of a unilateral promise with delivery, the purchaser has an even more tenuous rapport with the object. Nevertheless courts seem prepared also to allow a possessory revendication by promisee purchasers, even in unilateral promises accompanied by delivery prior to acceptance of the promise.[190]

111. *Dissolution and Resolution of Sale* — A transferor who has given title to his buyer is also vested with a potential right of ownership. This occurs notably as a result of a legal right of dissolution or resolution, or a contractual right of resolution.[191] Where the transferor/former owner retains detention, other than by asserting the *exceptio non adimpleti contractus* of articles 1496-1498 *C.C.L.C.*, his right of detention has an uncertain legal footing. In most cases, he would be acting as the mandatary or depositary of his buyer, although he might also have no more than a simple relationship of fact with the object (as a *negotiorum gestor*). The right to revendicate could, therefore, be grounded in such a status.

But, since he is also a previous owner under a contract translative of ownership, the transferor/former owner could claim the status of a potential owner in possession. As such, and independently of his status to revendicate under any other title, he should have a right to revendicate from wrongfully holding third parties the object previously in his detention. The rationale for such a right is similar to that advanced in the case of buyers under

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[188]See *Ouimet* v. *Guilbault* (1971), [1972] C.S. 859; *Boisvert* v. *Bournival* (1984), [1984] C.A. 133; and especially *Banque Mercantile du Canada* v. *Bouchard* (8 June 1978), Quebec 200-09-000150-76 (C.A.).

[189]For an example with immoveables see *Frénette* v. *Société immobilière du cours Le Royer* (23 February 1979), Montreal 500-05-002549-796 (Sup. Ct).

[190]Since the acceptance is not retroactive, the purchaser could not claim pre-existing ownership at the time of bringing the action. He might argue that the action itself confirms his acceptance, but he may also simply wish to recover the object so as to avoid liability towards the seller for its loss. In the latter case, the revendication cannot be considered petitory.

[191]See arts 1065, 1088, 1543 and 1544 *C.C.L.C.*, and see above, no. 53.

suspensive conditions, except that his custody does not imply a right of use in the object.[192] In other words, notwithstanding any limitations of the *Code* or *Consumer Protection Act* upon his right actually to resolve or dissolve the sale as against his buyer, *vis-à-vis* third parties, his rights as a potential owner in possession are sufficient to sustain revendication.[193]

112. *Buyers under Protected Sales* — Where an object is purchased under the conditions of paragraphs 2268(3) and 2268(4) *C.C.L.C.* (the buyer purchases in good faith at a fair or market, *etc.*) the buyer does not immediately become owner of the object purchased. This is true whether or not he later becomes aware that he has purchased an object belonging to another. Prior to the consolidation of his title by the effect of acquisitive prescription, the legal nature of the buyer's title is simply that of a potential owner in possession.[194]

Yet this is a peculiar potential ownership. Unlike the promissee purchaser or the purchaser subject to a term or condition, the buyer under a protected sale has no contract with the owner; however, in contrast to the ordinary *usucaptor*, he may assert a legally-protected right against the true owner. Moreover, this right has a legal, rather than a factual, foundation. In the event of the buyer's wrongful dispossession by a third party, he may revendicate on the basis of such a right. In such cases (as in situations of conditional ownership) the action has a petitory character.[195]

113. *Heirs in Provisional Possession* — The legal regime of absence has three stages in which the presumptive heirs may assert different rights in the property of the succession. During the first stage the law presumes absence, and the absentee's property is administered by a curator; during the third stage, the possession of his heirs is deemed absolute. In the first stage, the curator to the property of the absentee appointed by the Superior Court under articles 87-92 *C.C.L.C.* revendicates as an ordinary administrator; in the third, the heir revendicates as owner.[196] During the second stage, where an absentee's presumptive heirs obtain provisional possession of his property, these presumptive heirs hold the property, from a functional point of view, as potential owners in possession. Nevertheless, the *Code* characterizes

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[192]In this case he would not normally be performing material acts consistent with ownership, so that his relationship to the object is less intense.

[193]Once he has surrendered custody, however, he may no longer revendicate on this basis. See below, no. 118.

[194]See below, no. 175.

[195]The distinction between protected sales and *usucaption* by a finder or ordinary buyer as a foundation for revendication is important where third-party rights are concerned. Protected buyers revendicate not only possession, but also as a result of art. 2268 *C.C.L.C.* on a petitory basis. That is, they are vested by effect of law with a part of the true owner's prerogatives.

[196]See Azard & Bisson, *supra*, note 116, no. 56; see also above, no. 55.

their possession as a trust and imposes the same obligations of administration upon them as upon the curator named by the Superior Court.[197]

The point at issue, therefore, is whether their revendication has a petitory character. The *Code* answers this question in the negative: even though they may accede to the quality of heir, and even though article 103 *C.C.L.C.* makes them parties defendant to actions against the absentee, heirs in provisional possession are accountable not as potential owners but as administrators. More particularly, because absolute possession is afforded to heirs as of the date of death (where this can be proved), while provisional possession is afforded to presumptive heirs at the moment of the disappearance or "latest intelligence received", it may well be that heirs in provisional possession ultimately will not see their provisional possession deemed absolute.[198] It follows that revendication by wrongfully dispossessed heirs in provisional possession will always be grounded in their status as administrators.[199]

114. *Liberalities Giving Rise to Equivocal Possession* — Because of the particular circumstances of both *inter vivos* and *mortis causa* liberalities, the legal regime of property rights is sometimes equivocal. For example, in addition to ordinary contractual terms, in successions and donations the *Code* provides for revocation for ingratitude or exclusion for unworthiness.[200] Let us consider the improbable hypotheses of a donor of a perfected donation who discovers a cause of ingratitude prior to transferring the object of the gift and who is then wrongfully dispossessed by a third party, or that of an intestate or testate heir in possession (who is not an executor or administrator) who discovers a cause of unworthiness prior to transferring property to a legatee or to a coheir entitled thereto and who is then wrongfully dispossessed by a third party. In both such cases revendication could not be sought as an owner, but only as a potential owner in possession.[201]

The majority of equivocal situations arise, however, from the special circumstances of substitutions, trusts and contractual nominations of heirs. Where examples of potential ownership are at issue in substitutions and trusts (as in the case of the substitute or the capital beneficiary) in most cases the potential owner will not have physical custody. But since the substitution or trust document may vest him with custody, it is worth asking

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[197]Arts 96-97 *C.C.L.C.*

[198]See art. 99 *C.C.L.C.*; see also Azard & Bisson, *supra*, note 116, no. 56.

[199]Unlike the case of conditional owners, the true heir asserts a new legal title, even when his provisional possession is deemed absolute (and is made retroactive to the date of death). Arts 98-99 *C.C.L.C.* give a distinct title to heirs entitled to inherit as of the date of death. The potential ownership is *de facto*, and not the result of a pre-existing contract.

[200]Arts 610-613, 813-816 and 893 *C.C.L.C.*

[201]This example serves to show the distinction between revendication as executor or administrator, and revendication as potential owner in possession.

whether he acquires any superior title to revendicate from wrongfully holding third parties as a consequence of his potential ownership.[202] Because the substitute and capital beneficiary are deemed to take directly from the settlor under articles 962 and 981a ff. *C.C.L.C.* their revendication presumably will be petitory.[203]

The rights of contractual institutes in possession are more problematic. Where the beneficiary of a contractual institution is actually put into exclusive possession (as opposed to having a *de facto* right of use), his rights may plausibly be analogized to those of a buyer or an *inter vivos* donee under a term. The contractual institute may not take conservatory measures and his right is not retroactive.[204] For this reason, prior to the death, revendication by the contractual heir in possession could only be possessory.[205] His future right of ownership under the marriage contract is too remote to give rise to legal protection as such.

115. *Scope of Revendication of Potential Owners with Custody* — The variety of legal relationships under which a potential owner may acquire physical control of a corporeal moveable suggests that revendication to protect such future rights will not have a uniform basis. Where contracts translative of ownership are concerned, revendication will almost always be possessory, although certain conditional owners having a *jus ad rem* may also have the status to revendicate on a petitory basis. Other potential owners in possession will always be revendicating possession, except for heirs in provisional possession who cannot revendicate on any basis in their own name. Rather, they will claim only as administrators of the property of another. In other words, where the title of the potential owner who exercises a present personal right of use is subject to retroactive confirmation, the character of his status to revendicate will not depend on the terms of his future ownership, but rather on a close analysis of the terms of his present custody.[206]

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[202]The consequences of an anticipated renunciation, where the substitute may demand final ownership under art. 960 *C.C.L.C.* — although the capital beneficiary may not: see *Baril* v. *Trust Général du Canada* (1975), [1975] C.S. 892 — are not in issue here.

[203]See, as concerns art. 962(2) *C.C.L.C.*, *Fortin* v. *Robichaud* (1971), [1972] C.A. 140. For the case of a trust, the recent case *Trust Royal* v. *Moon* (1981), [1982] C.S. 939 holds that a lapse directly benefits residual heirs or legatees. Hence, the right to the capital is an eventual proprietary right.

[204]See Brière, *supra*, note 19, no. 468.

[205]See Cantin Cumyn, *supra*, note 142, nos 68 and 84 for a characterization of the rights of contractual institutes as eventual only.

[206]Of the various hypotheses reviewed, therefore, only the revendication by conditional transferors and buyers under protected sales could plausibly be said to be petitory.

b. Potential Owners out of Possession

116. *Potential Ownership and Future Detention* — As in the cases where potential ownership is coupled with present detention, there are several legal relationships which imply that a person may assert potential ownership without having detention. The most common examples arise in the context of liberalities and successions, and involve quite particular legal institutions. Yet in onerous contracts translative of ownership one again confronts not only the possibility of a dissociation of title and custody, but also the possibility of potential rights evidenced by neither title nor custody. It is therefore helpful to consider these contractual variations prior to examining the special situations arising in successions, substitutions and trusts.

117. *Transferees Who Obtain Neither Title Nor Custody* — In principle, one is here confronted with hypotheses arising from a contract of sale, even though the analysis applies equally to exchanges, donations and loans for consumption.[207] A typical example of a contract of sale in which the buyer obtains neither title nor custody would be that involving the brokerage of shares or bonds purchased on margin. But, in any contract of sale where transfer of title is deferred (by a term or a condition) or is merely promised, prior to delivery the buyer has neither title nor custody.[208] In most such cases, were a third party wrongfully to obtain physical control of the objects sold, it is difficult to see upon what basis the buyer could assert an action in revendication.[209]

There are however two cases where the buyer's connection with the object is somewhat less tenuous: conditional transfers and protected sales.[210] In both instances the transferee acquires an immediate right of use from his seller, as well as the right to claim possession and a right to see his future ownership retroactively confirmed. These cases present the strongest claim for permitting revendication from wrongfully holding third parties; but again, it is difficult to see upon what basis revendication could be permitted.

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[207]In donations, of course, one must also consider special limitations on conditions which may be stipulated. See arts 771(1) and 778-783 *C.C.L.C.*, illustrating the maxim *donner et retenir ne vaut.*

[208]It might be argued that where risk of loss passes immediately to the buyer, he obtains a species of detention under which his seller is holding as mandatary or depositary. Yet it is difficult to see how mere detention can be materially dismembered prior to its actual constitution.

[209]Of course, as against the seller, the buyer would have an action in specific performance; against a third party, the buyer's only recourse would be to bring an oblique action should his seller refuse to do so.

[210]Suppose, for example, that a thief stole an automobile from a dealer after a conditional sales agreement had been signed, but before delivery. Or suppose a thief were to steal an object from a seller who had already passed "title" to an object belonging to another to his buyer.

118. *Transferors under a Resolutory Condition* — Most often a transferor who brings an action to dissolve, resolve or revoke a contract will not have physical custody of the corporeal object to which the contract relates.[211] Prior to exercising a right of resolution, it is unclear whether the transferor has sufficient interest in the property to revendicate from wrongfully holding third parties. To isolate the issue here under consideration, let us consider a seller who transfers title under a contractual resolutory condition not relating to payment of the purchase price, who discovers a third party in possession of the goods, and whose buyer is not in default under the contract.[212] Does the mere fact of his being able to assert a potential right of resolution vest the former owner with a right to revendicate? While the transferor can bring conservatory measures, including the action to interrupt prescription, normally the transferor has no vocation to use. Revendication prior to resolution is therefore impossible.[213] The transferor here would be revendicating neither possession nor title.

119. *The Theory of the Substitution* — The fiduciary substitution is a theoretical anomaly which seems to run contrary to several basic premises of the law of property. Most importantly, the device seems simultaneously to create two rights of ownership — in the institute and in the substitute. Some theorists see the rights of the institute of a substitution simply as those of an owner subject to a resolutory condition, and analyse the substitution on that basis.[214] However, since any lapse in the substitution will benefit (in the first instance) the institute and not the settlor or his heirs, the majority of authors view the institute's title as comprising a temporary and limited right of ownership.[215] During the substitution, therefore, the institute holds as proprietor and may revendicate the property under the same conditions as an ordinary owner.[216] After the substitution has opened, however, and assuming that the substitute has not repudiated under article 965 *C.C.L.C.*, the institute loses all rights to the property and can no longer exercise the right of revendication.[217]

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[211]Normal cases would include contractual and legal resolution of a sale, as well as revocation of donations and legacies.

[212]For cases of revendication following default, see above, no. 53.

[213]The Paulian and oblique actions might, however, lie in certain cases where the transferee refuses to act.

[214]See the discussion in R. Comtois, *Répertoire de droit: Les libéralités* (Montréal: Chambre des notaires du Québec, 1979) no. 631.

[215]See, for example, Cantin Cumyn, *supra*, note 142, nos 16-25 and 81-85.

[216]Art. 944 *C.C.L.C.* See also *Minister of National Revenue* v. *Smith* (1960), [1960] S.C.R. 477, 23 D.L.R. (2d) 689, for a confirmation of the institute's status as a time-limited owner.

[217]There is one possible exception to this rule. If art. 959 *C.C.L.C.* incorporates the rules of arts 581 and 582 *C.C.L.C.*, which in turn incorporate the rule of art. 417 *C.C.L.C.* for both moveables and immoveables — then the institute who has made non-necessary improvements which the substitute wishes to keep, will have a right of retention until he is paid. See Frenette,

120. *Rights of the Substitute* — The position of the substitute is more problematical. Once the substitution opens he is deemed owner and is held to have received directly from the grantor, so that he takes the property free and clear of any rights ceded by the institute.[218] Thus, he may revendicate corporeal moveables from the institute or from any third party acquirer,[219] including a purchaser under a forced sale,[220] subject to the exceptions of articles 953, 953a and 959 *C.C.L.C.*

Prior to the opening of the substitution, the substitute has, at best, only an eventual right.[221] Nevertheless, he is permitted certain prerogatives attaching to ownership suspended by condition.[222] He may undertake conservatory acts against the institute or third parties[223] and may, if the institute abandons the property, revendicate on the basis that the substitution has opened.[224] Finally, if the institute deteriorates the property, the substitute may revendicate it under sequestration.[225]

The most difficult case arises where, prior to opening, a third party wrongfully takes the property and the institute refuses or neglects to revendicate. Since paragraph 734(1) *C.C.P.* provides that both institute and substitute may seize before judgment the property which they are entitled to revendicate, it may be that the substitute may revendicate *qua* substitute, prior to the opening of the substitution.[226] There are however no cases in

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supra, note 8, no. 26. He could, presumably then revendicate from third parties who wrongfully dispossess him, even after the substitution has opened, but would be doing so as a retention claimant.

[218]Art. 962 *C.C.L.C.* See also *Fortin* v. *Robichaud* (1971), [1972] C.A. 140; and arts 949 and 950 *C.C.L.C.*

[219]Art. 949 *C.C.L.C.* See *Rzasa* v. *Musial* (1975), [1975] C.S. 1097.

[220]Art. 950 *C.C.L.C.* See also *Saratoga Development Corp.* v. *Harben Investment Corp.* (1966), [1969] C.S. 266.

[221]Arts 956-957 *C.C.L.C.* The right cannot be transmitted, by will or otherwise, should he die before the substitution opens in his favour. See *Millette* v. *Millette* (1968), [1969] B.R. 93.

[222]See Cantin Cumyn, *supra*, note 142, no. 84.

[223]Art. 956(2) *C.C.L.C.* While the saisie-revendication is qualified as a conservatory attachment, see Légier, *supra*, note 1, nos 1-2: it is not clear whether ordinary revendication by a substitute prior to opening is conservatory. Comtois, *supra*, note 214, no. 651 also considers the action to interrupt prescription as being conservatory. Such would be the remedy against a third party with whom the institute has contracted.

[224]This would follow by implication from art. 960 *C.C.L.C.*

[225]See art. 955 *C.C.L.C.*

[226]In theory, this right of attachment could also be founded either on art. 955 *C.C.L.C.* as a dissipation of the substituted property or on art. 960 *C.C.L.C.* as an implied anticipatory opening. See, however, Cantin Cumyn, *supra*, note 142, nos 22 and 85, who insists that the substitute has no real right prior to opening, and exercises these conservatory rights by exception. On this conception, art. 734(1) *C.C.P.* would apply only to cases where the substitute revendicates from the institute either on the basis that the substitution has opened, or that the court will declare it forfeited. Revendication from a third party as a substitute prior to the opening would thus be inconceivable.

which this issue has arisen, and to extrapolate from the conservatory attachment in revendication given to a potential owner out of possession a more general right to revendicate would seem to be a rather extraordinary extension of the protection given to the titulary of a mere eventual right.[227]

121. *Capital Beneficiaries of a Trust* — While there is some authority that the capital beneficiary of a trust acquires rights in the trust *corpus* at the moment of its constitution,[228] the majority opinion is that his rights arise only at the extinction of the trust[229] and that during its currency he has no more than a potential right, not unlike that of the substitute.[230] In other words, the right of the capital beneficiary out of possession to revendicate should be analogous to that of the substitute.[231] The connection of the capital beneficiary to the trust *corpus* is effectively too remote to permit direct judicial vindication.[232]

122. *Ordinary Heirs and Legatees* — In principle the regime relating to the ordinary transmission of property upon death should not create practical difficulties in allocating the right to revendicate, since ownership of property is serial.[233] From the moment of death heirs and legatees may claim property of the succession as owners,[234] by bringing either an action in revendication or the action to recover an inheritance, as appropriate.[235] Thus, where the legacy concerns a thing certain, the legatee by particular title may revendicate the object even from the heir or general legatee.[236] Prior to death the presumptive intestate heir and the legatee of a will which has been made public have only eventual rights and have no status to revendicate. That is, the presumptive heir has no patrimonial right and may not even contract in respect of a future succession.[237]

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[227]This is, in most cases, a theoretical point, since art. 931 *C.C.L.C.* obliges the institute to sell moveables, absent a specific exception in the deed.

[228]*Thoreson* v. *National Trust Co.* (1954), [1955] B.R. 298.

[229]See Cantin Cumyn, *supra*, note 142, no. 93 for a discussion.

[230]*Ibid.*, no. 94.

[231]This is so, even though a renunciation by the income beneficiary will not directly benefit the capital beneficiary. Moreover, the capital beneficiary of a trust does not appear, as such, on the list of potential plaintiffs who may exercise an attachment in revendication under art. 734(1) *C.C.P.*

[232]The beneficiary has a personal action against the trustee and may conceivably, on that account, exercise an oblique action. See the rather unsatisfactory discussion in *Wave* v. *Houghton* (1976), [1976] C.S. 585, and *Hand* v. *Auclair* (1970), [1970] C.A. 253.

[233]For the special case of reappearances following an absence, see above, no. 55.

[234]*Jean* v. *Gagnon* (1944), [1944] S.C.R. 175, [1944] 3 D.L.R. 277.

[235]See A. Mayrand, *Les successions ab intestat* (Montréal: Presses de l'Université de Montréal, 1971) nos 45-64. See also *Lamontagne* v. *Boivin* (1965), [1966] B.R. 295.

[236]See Comtois, *supra*, note 214, no. 282.

[237]Art. 1061 *C.C.L.C.*, and compare arts 1579-1581 *C.C.L.C.* See also Pourcelet, *supra*, note 39 at 223-30.

123. *Heirs Nominated by Contract of Marriage and Donationes Mortis Causa* — A slightly different situation arises in cases where by contract of marriage an irrevocable *donatio mortis causa* has been established or where there has been a contractual nomination of an heir. In the latter case the contractual institution merely warrants the beneficiary's status as heir. It gives no present right in specific property.

In the former case, even though the right of the donee is certain, it is neither a present nor a conditional right. The donee *mortis causa* is not owner and may not revendicate as such;[238] even where identified corporeal property is given, and even if the donee is also vested with a *de facto* right of use, he acquires no greater title than an ordinary presumptive heir.[239] Where a donor gives *mortis causa* both present and future property, the rights of the donee are just as aleatory.[240] He may not bring even conservatory measures in respect of present property, with the consequence that his rights *vis-à-vis* most third parties are susceptible of being extinguished under article 1027 *C.C.L.C.* That is, unlike the case of a substitute or of the capital beneficiary of a trust, where the donor is immediately disseized, in the *donatio mortis causa* the donee may retain possession so as to later transfer both title and possession to a third party.[241] On the other hand, some commentators believe that where the donor refuses to act against third parties the donee may bring a Paulian or oblique action.[242]

124. *Scope of Revendication of Potential Owners out of Possession* — One confronts the limits of revendication in situations of potential ownership where the titulary of a conditional or eventual right has no custody of the object upon which his eventual right bears. While it is arguable, in cases where a plaintiff asserts a potential ownership subject to retroactive confirmation, which implies a present personal right of use, that revendication may be pursued even prior to the transferee's obtaining custody, absent such a present right of use, revendication (unlike conservatory measures) will be refused to conditional owners out of possession. A similar result should obtain in cases of substitutes and capital beneficiaries of trusts. Finally, contractual institutes and donees *mortis causa* do not appear to have sufficient rights even to sustain ordinary conservatory recourses. Like non-owner spouses under matrimonial regimes, they have neither a present *jus*

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[238]*Beauchamp* v. *Verreault* (1966), [1967] R.P. 39 (Prov. Ct).

[239]See above, no. 113.

[240]See Brière, *supra*, note 19, no. 468.

[241]*Ibid.*

[242]See R. Comtois, *Essai sur les donations par contrat de mariage* (Montréal: Recueil de droit et de jurisprudence, 1968) at 118; see also J.E. Billette, *Traité théorique et pratique de droit civil canadien: Donations et testaments*, vol. 1 (Montréal: n.p., 1933) no. 760.

ad rem nor a sufficiently localized future right to call forth *in specie* legal protection.[243]

4. Other Holders of Corporeal Moveables

125. *Relationships of Fact* — The above three sections have illustrated the extent to which the various types of legal rights which may be asserted in or in respect of a corporeal moveable have been granted a degree of recognition and protection. It is now appropriate to consider if other purely factual relationships with physical objects merit legal protection. For the purposes of this study these situations may be seen to be one of three types. First, some *de facto* holders of a corporeal moveable may actually be claiming, in good or bad faith, a real right (generally of ownership) in the object. Thus, finders, thieves and transferees of a thing belonging to another will typically be asserting title and claiming to be possessing as proprietor. Secondly, some *de facto* holders will expressly be holding for another. These include *negotiorum gestores*, recipients of a thing not due who became aware of that fact, and creditors who inadvertantly seize the property of another. Thirdly, some *de facto* relationships do not even imply the claim of detention. This occurs notably in familial situations, where spouses or future intestate heirs make use of corporeal property over which they claim no present, localized right. Each of these instances of a *de facto* right in physical objects has a different legal consequence; each therefore requires separate analysis.[244]

126. *Persons Asserting Title* — The general legal regime applicable to persons in possession of a corporeal moveable may be derived from articles 583, 586, 589, 592, 594 and 595 *C.C.L.C.* These articles describe not only the means by which ownership may be acquired through legal mutation of title (descent, contract, will or expropriation) but also original means of acquiring ownership through creation or occupancy. In addition, they advert to derived title which has a purely factual basis, namely accession and prescription.[245]

For the purposes of this analysis the factual relationship grounded in accession is not problematic, since the object acquired by accession is subject to a legal regime identical to that of the object to which it is attached. The

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[243]For a more detailed analysis of these *de facto* rights, see above, no. 103, and below, nos 125-28.

[244]See Marty & Raynaud, *supra*, note 170, nos 410-17 for a brief discussion of these *de facto* rights in France.

[245]In France a distinction is drawn between *res communes*, *res nullius*, and *res derelicta*, on the one hand, where the person is taking custody of an ownerless object, and treasure or derelict property, on the other, where an owner presumably has lost (but not abandoned) his property. Since in the former case the occupier becomes owner by the simple act of occupation, this is no longer a question of purely factual relationship. It will therefore not be examined here.

case of the usucaptor, however, is more complex. The three classic examples of intending usucaptors who have only a factual relationship with an object are finders, thieves and transferees of the thing belonging to another.

The finder of a lost or stolen corporeal moveable may be claiming either of two statuses. If he takes possession as owner of an object he has found, he should be able to invoke paragraph 2268(1) *C.C.L.C.* and assert an action in revendication against any individual who wrongfully dispossesses him. Here the rule of paragraph 2268(1) *C.C.L.C.* protects peaceful possession during the thirty year period leading up to usucaption, against all but the true owner.[246] By contrast, where the finder purports to be holding for another, he can no longer be said to have possesssion, but is rather a mere custodian — *a negotiorum gestor* — and his right to revendicate against wrongfully holding third parties should be determined on that basis.

A regime not dissimilar to that of the finder will arise when the good faith purchaser of an object belonging to another in a non-protected sale discovers his true status.[247] Prior to acquiring title by prescription of three years, he cannot be considered as owner. But he may invoke the rule of paragraph 2268(1) *C.C.L.C.* and thereby revendicate against all but the true owner, on the basis of his prior possession as proprietor, just like any other intending usucaptor. Insofar as protected sales are concerned, the position in Quebec differs from that in France.[248] In Quebec, good faith acquisition in a protected sale does not immediately transfer title to the buyer. Thus, revendication by the transferee can only be grounded in his prior possession, as in a non-protected sale. However, by contrast with the regime applicable to non-protected sales, the buyer may, in certain cases, reclaim the object from the true owner who regains custody of it. If the sale were governed by paragraph 2268(3) *C.C.L.C.*, revendication against the owner would always be possible: since the owner cannot directly revendicate from the buyer, he ought not to be able to resist revendication by the buyer if he should later obtain possession. If paragraph 2268(4) *C.C.L.C.* is applicable the contrary result is indicated: the good faith acquirer has no right to revendicate from the owner, since he is obliged to disgorge possession upon receipt of the

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[246]Because he has no title the finder will almost always be in bad faith. Only if he has genuine reasons for believing that the object is *res derelicta* could he claim a good faith possession. Moreover, there is some question whether he ever has "colour of right" if he does not have such a belief. If not, some courts have characterised his title as that of a thief. See Mazeaud, *supra*, note 163, no. 1632; and see below, nos 149-51.

[247]This would be analogous to the finder who genuinely believes he is appropriating an abandoned object. Macdonald, "Revendication: Part One," *supra*, note 136, no. 11.

[248]See, for the position in France, Bouloc, *supra*, note 1, nos 147-53; see also Ortscheidt, *supra*, note 1, nos 6-12 and 81-88.

price he has paid. Should the owner refuse payment, however, he should be able to revendicate as a wrongfully dispossessed retention claimant.[249]

The thief, like the finder, may always plead the presumption of article 2194 and paragraph 2268(1) *C.C.L.C.* in support of his title. Thus, a thief who has lost possession may revendicate as owner until his true status is revealed. However, because he is legally unable to acquire ownership by prescription, he can never resist an action in revendication by the lawful owner, as may the finder who prescribes.[250] It would also appear, given the presumption of paragraph 2268(1) *C.C.L.C.*, that the thief whose true title is not revealed may even assert his prior possession as thief to ground an action in revendication against a third party who wrongfully holds the corporeal moveable he has stolen.[251] However, should the defendant in revendication expose the thief's true title, it is unlikely that a court would order disgorgement unless the defendant himself were also a thief. If the defendant were a finder, the court would probably protect his future right to prescribe (assuming that he were not a clandestine holder) in preference to the thief who can never prescribe. If the defendant were also shown to be a thief, the court would probably adjudicate the property to the public curator, refusing to prefer one thief over another.

In all the above hypotheses — finder, good faith purchaser, thief — it is the vocation to ownership (possession as proprietor) which is the basis of revendication, not simply the fact of prior possession.[252] For this reason, once the thief's true title is revealed, a title which means under paragraph 2268(6) *C.C.L.C.* that he never has the vocation to ownership, the court will not enforce revendication.

127. *Persons Not Asserting Title* — The legal situation of the finder who does not claim title is much less complicated. Here his finding is simply a particular instance of a *negotiorum gestio.*[253] The finder holds the corporeal moveable in the name of, and for the benefit of, another, in much the same way as a mandatary would. This is the precise legal characterization of the role of the *gestor.*[254] Wherever, as a purely factual matter, a person manages

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[249]See above, nos 81 and 112.

[250]Art. 2268(6) *C.C.L.C.* A like result is provided for in the cases of violent or clandestine holders, as long as the defect in possession remains. See also arts 2197-2198 *C.C.L.C.*

[251]See Ortscheidt, *supra*, note 1, no. 100.

[252]In other words the fact of a simple use of an object, as in a marriage situation, cannot be found "possession as proprietor" sufficient for revendication.

[253]Finding is not an example of a necessary deposit. See arts 1813-1816 *C.C.L.C.* Both Mignault, *supra*, note 85 at 162-63, and Roch & Paré, *supra*, note 130 at 288-89 consider a finder to be a *negotiorum gestor* since necessary deposit is a contract requiring the depositor's consent.

[254]See Baudouin, *supra*, note 16, no. 380.

the business of another (including the preservation of another's corporeal moveable property) there is a *negotiorum gestio.*[255]

The *Code* analogizes the *gestor*, for purposes of elaborating his duties, to a mandatary. First, he must act as a prudent administrator under article 1045 *C.C.L.C.*; secondly, paragraph 1043(2) *C.C.L.C.* imposes on the *gestor* all the obligations of an express mandate. When combined with the obligation imposed by an paragraph 1043(1) *C.C.L.C.* to "take charge of the accessories of such business", these duties are probably sufficient to sustain the *gestor*'s right to revendicate against third parties on the same footing as that of a mandatary.[256]

Where a creditor inadvertently seizes property belonging to a third party and later discovers the fact, he also will be held to the obligation of a *negotiorum gestor.* The guardian, of course, is his mandatary and is seized as a depositary of the property of the true owner. As such, he should be able to revendicate from any person who wrongfully takes the goods from him while he is guardian.[257]

By contrast with the *negotiorum gestor*, the person who is in reception of a thing not due[258] does not seem to have as strong a claim to revendicate the thing from a third party who wrongfully dispossesses him. This is because, if he is in good faith, he will assume he is owner; the *Code*, therefore, would not require him to act as a prudent administrator. Nevertheless, article 1047 *C.C.L.C.* imposes an obligation upon recipients to restore the object; moreover, under articles 1049-1051 *C.C.L.C.* the recipient who discovers the mistake must return the thing in kind. Even if he has received the thing in good faith, he has a duty to restore it.[259] Thus, like the *gestor*, once his true status is revealed he has the same obligation of care and return as the depositary, and should be permitted to revendicate in the same manner.

128. *Scope of Revendication of Holders Asserting a Merely Factual Relationship with a Corporeal Moveable* — Paradoxically, the true foundation of the right to revendicate appears most clearly in situations where the relationship between person and object has a factual rather than a legal foundation. In permitting finders and buyers under protected sales to revendicate, courts are implicitly recognizing that the protection of rights in corporeal moveables must extend to the protection of any peaceful posses-

[255]See A. Mayrand, Des quasi-contrats et de l'action de in rem verso (Association du jeune Barreau, Montréal, 1939) [unpublished].

[256]See above, no. 95.

[257]See the discussion in *Perlman* v. *J.J. Joubert Ltée* (1954), [1954] B.R. 496 as concerns the true owner's rights. See also *Franey* v. *Costello, supra*, note 78 at 167.

[258]Arts 1047-52 *C.C.L.C.*

[259]See generally, Baudouin, *supra*, note 16, nos 401-09.

sion whose ultimate consequence is a proprietary right. Further, in permitting *negotiorum gestores* and recipients of a thing not due to revendicate, they are also implicitly recognizing that even non-proprietary claims over corporeal moveables are worthy of vindication when their ultimate consequence is to expose their titulary to an obligation of care, preservation and return. Only casual *de facto* users, such as various non-owner members of a family, do not have a factual connection with a corporeal moveable intense enough to sustain an action in revendication against a wrongfully holding third party. In this respect the regime of *de facto* rights parallels that of personal rights: the most problematic case for permitting revendication is where the *de facto* holder asserts a tenuous connection with an object.

5. Towards a Theory of Plaintiffs in Revendication

129. *Restating the Issue* — If one were to adhere strictly to the classical thesis, the question "who may bring the action in revendication?" could be answered easily. According to Mazeaud, "[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*",[260] which is to say: "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."[261]

Classical theory attaches the action not to the *titulary* of specific rights (or even to a relationship of fact such as "possession as proprietor"), but to the *right* of ownership itself. In the words of Mazeaud: "[L]e propriétaire perd alors l'action en revendication en même temps que le droit de propriété; mais cette action ne disparaît pas; elle change de titulaire avec le droit de propriété dont clle n'est que la mise en oeuvre."[262] For this reason, the action historically has been denied "à toute personne qui ne peut pas invoquer un droit réel muni d'un droit de suite sur le meuble, notamment au créancier dont le privilège ne repose pas sur une idée de gage, au commodataire, locataire qui a perdu la détention de l'objet."[263]

But such assertions fundamentally contradict the practical realities of how the action would be brought today. The action in revendication invariably is coupled with the conservatory measure known as the attachment in revendication. In view of the procedural purposes of the attachment (simply to freeze corporeal property pending trial), courts seem less rigorous

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[260]See Mazeaud, *supra,* note 163 at 318, no. 1627.

[261]See Bouloc, *supra,* note 1, no. 4.

[262]See Mazeaud, *supra,* note 163 at 318-19, no. 1628.

[263]See Légier, *supra,* note 1, no. 34, quoting E. Glasson, *Précis théorique et pratique de procédure générale,* 2d ed. by A. Tissier (Paris: L.G.D.J., 1908).

in policing strictly the categories of rights-holders who may bring it. Inevitably, therefore, a certain slippage between the action and the attachment has occurred. As some now note: "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."[264]

To restate the issue, if the rule of paragraph 2279(1) *C.N.* or paragraph 2268(1) *C.C.L.C.* is understood as a presumption of law, it would appear that any person who at one time had possession (whether or not that person were also responsible for the care and return of an object) could exercise the action in revendication. Certain French authors now simply claim that the action is open to those who have a personal right (*jus ad rem*) implying only detention, so long as they have an interest in the conservation of the thing.[265]

130. *Revendicating Custody?* — In response to modern developments, some theorists have attempted to salvage the classical position by modifying it at its margins. These theorists suggest that today the action is called upon to serve a petitory and possessory function. *Stricto sensu*, the action requires the plaintiff to prove his ownership (or more generally any principal real right, any accessory real right and any privilege which can be analogized to the possessory pledge); *lato sensu*, and by exception, the action may also serve in many cases simply to vindicate a prior possession where the custodian (such as a depositary) assumes responsibility for the care and preservation of the thing.

That is, to maintain the major axiom that revendication is the reflection of a real right, some jurists also deduce a minor possessory corollary. But as the above review of various potential plaintiffs in revendication has shown, this minor "possessory corollary" is called in aid by litigants in a modern commercial economy quite as much as the "petitory axiom". What is more, only by fictionalizing the landlord's privilege as a pledge, by fictionalizing commercial and documentary pledges as possessory, and by fictionalizing the unpaid seller's right of revendication as a vestige of an historical ownership right can even the "petitory axiom" be salvaged.

In view of these fictions, one might just as well say that revendication is no less than the action by which the titulary of a present or reversionary right to exercise a *pouvoir matériel* over a corporeal moveable, or any person acting for, and responsible to, such a titulary, may vindicate that *pouvoir matériel* against third parties wrongfully holding an object. In other words,

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[264]Ortscheidt, *supra*, note 1 at 14.

[265]See Planiol & Ripert, *supra*, note 38, no. 391. The first to make such a claim were C. Aubry & C. Rau, *Droit civil français*, t. 3, 4th ed. (Paris: L.G.D.J., 1873) nos 183 and 256.

the relationship being vindicated seems at bottom to be factual rather than legal.

131. *Revendicating Objects, Not Rights* — If indeed the action can be seen as having a factual basis, the question at issue is neither "what legal rights in or in respect of a corporeal moveable will support revendication?", nor "is revendication a possessory as well as a petitory recourse?" Rather the proper way of asking "who may revendicate?" is to ask "who has a right to claim immediate physical control (or a *pouvoir matériel*) over the object?"[266] This is not to say that the action in revendication is simply a pale imitation of the immoveable possessory actions (namely, *la complainte, la dénonciation de nouvel oeuvre, l'action en réintegrande*)[267] and the common law proprietary torts of conversion and trespass. Once courts take seriously the protection of peaceful "possession as proprietor" which is implied by paragraph 2268(1) *C.C.L.C.*, it is difficult to deny the same protection to an individual such as a lessee, who behaves towards others exactly as possessor even though he only has detention of an object.[268] Moreover, in proposing a rationalization of "administration of the property of another" the *Draft Civil Code* recognizes that all manner of rights (real, personal, potential and *de facto*) can imply present detention on account of another.[269] It is therefore no surprise that simple "present detention" impells courts to develop or adapt recourses to protect such detention directly.

132. *Conclusion* — In tracking in detail potential plaintiffs in revendication according to classical theory, and in examining judicial responses to modern commercial practice, one discovers that the action in revendication (rightly or wrongly) has been made available to titularies of rights other than real rights on the basis of some notion of the intensity of the connection that a plaintiff may claim with a corporeal object. It is suggested that this intensity may be measured along three axes in four degrees of intensity.

The axes reflect, first, a measurement of *jouissance*, secondly a measurement of economic value, and thirdly a measurement of physical control. Ownership is central to all three axes, and the measure of intensity for all three progresses through real rights and personal rights to simple *de facto*

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[266]Not surprisingly, other legal systems cast the issue similarly. See J.G. Fleming, *The Law of Torts*, 6th ed. (Sydney: Law Book, 1983) at 61-63.

[267]For discussion, see Mazeaud, *supra*, note 163, nos 1457-68, especially no. 1463ff.; Marty & Raynaud, *supra*, note 170, nos 205-29.

[268]In France, developments in this direction, concerning immoveables, date from the turn of the century. They are now confirmed by the *Loi no 75-596 du 9 juillet 1975*, amending art. 2282 *C.N.*, which provides that possessory actions are open to "ceux qui possèdent ou détiennent paisiblement". That is, except as against their author in title, mere holders may now bring possessory actions.

[269]See Macdonald, "Revendication: Part One," *supra*, note 136, n. 374.

control. These axes reflect basic microeconomic concepts relating to use value and capital value of corporeal property. But their implications for deciding which plaintiffs who should be permitted to revendicate can only be derived once the limitations of the action and its procedural requirements have been assessed. To these tasks this essay now turns.

C. Limitations on the Action in Revendication

133. *Revendication in Principle* — Analyses of revendication of corporeal moveables in France typically commence with the following statement of principle: "en règle générale la revendication des meubles est refusée ... ".[270] Notwithstanding that the action in revendication by an owner of moveable property is imprescriptible,[271] over the vast majority of circumstances in France the underlying right to revendicate is denied or partly denied to an owner who has lost possession of a corporeal moveable. In other words, while the action in revendication is as constant as the right of ownership, in most cases the dispossessed owner will forfeit his action against certain acquirers because he will have lost his status as owner.[272]

The situation in Quebec, however, is quite otherwise. To begin with, the presumption of article 2268(1) *C.C.L.C.* has a far narrower scope than that of article 2279 *C.N.*[273] Moreover, Quebec courts have given a liberal interpretation to the term "stolen" in paragraph 2268(4) *C.C.L.C.*, with the result that there remain few cases where paragraph 2268(3) *C.C.L.C.* actually would prevent revendication.[274] Finally, in Quebec the rudiments of a registry system for various security devices have muted the conflation of title and possession which inheres in French law.[275] Of course, as in France, the

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[270]See Bouloc, *supra*, note 1, no. 100.

[271]Even though all actions are prescribed by thirty years unless the law provides otherwise, under art. 2242 *C.C.L.C.*, because ownership cannot be lost by non-usage the action in revendication should always remain available. See Bouloc, *supra*, note 1, no. 5; A. Weill, F. Terré & P. Simler, *Droit civil: Les biens*, 3d ed. (Paris: Dalloz, 1985) no. 306. But see, *contra*, Ortscheidt, *supra*, note 1, no. 74. See also Y. Caron, "La vente et le nantissement de la chose mobilière d'autrui: Deuxième partie" (1977) 23 McGill L.J. 380 at 417-18. Nevertheless, moveables may be abandoned: see Marty & Raynaud, *supra*, note 170, nos 414-17.

[272]Of course, where revendication is sought by one of the other plaintiffs mentioned (*i.e.* a non-owner), the action in revendication may be unavailable where the right on which the action is based has been extinguished by prescription. See, *e.g.*, arts 479(4) and 488(2) *C.C.L.C.*

[273]Macdonald, "Revendication: Part One", *supra*, note 136, nos 12-14.

[274]See Y. Caron, "La vente et le nantissement de la chose mobilière d'autrui: Première partie" (1977) 23 McGill L.J. 1 at 26-38; P. Martineau, *La prescription* (Montréal: Presses de l'Université de Montréal, 1977) nos 156-58.

[275]See, *e.g.*, arts 1979b and 1979g *C.C.L.C.*; *Bank Act*, *supra*, note 13, s. 178(3); *Bills of Lading Act*, *supra*, note 13, s. 52; and *Special Corporate Powers Act*, s. 29, *supra*, note 4.

action in revendication is imprescriptible;[276] but, by contrast with the French position, one must begin in Quebec with the premise that subject to limitations an owner may always revendicate.

134. *Loss of the Right to Revendicate* — Notwithstanding the general principle, however, there are four main types of situations where the right to revendicate may be lost or restricted. First, and most importantly, the person revendicating may no longer have the right which he claims because another person has acquired it. In the law of corporeal moveables this typically occurs through a voluntary mutation of title, in which case revendication by the transferor is usually not in issue.[277] But the right may also be lost involuntarily, either through a forced mutation of title or through a material transformation of the object. Examples of the former are the following cases: partition (articles 689-753 *C.C.L.C.*), judicial sales (article 1490 and paragraph 2268(5) *C.C.L.C.*), forced sales (articles 1585-1591 *C.C.L.C.*), licitation (articles 1562-1563 *C.C.L.C.*), acquisitive prescription (article 2242 and paragraph 2268(2) *C.C.L.C.*), sales by a seller in possession (paragraph 1027(2) *C.C.L.C.*), informal consumer sales (*Consumer Protection Act*, section 135) and illegal conditions in wills (article 760 *C.C.L.C.*). Examples of the latter (the loss of right through material transformation of the object) include immobilization by nature (articles 376-378 and 416 *C.C.L.C.*), incorporealization, subrogation and accession to moveables (articles 429-440 *C.C.L.C.*).

Secondly, the action in revendication may no longer be brought when the substantive right (other than ownership) supporting the revendication has been lost or abandoned, even if no third party has acquired it. Of course, this is trivially true of all rights. For example, a usufructuary (or lessee, or depositary) whose usufruct (or lease or deposit) expires, is cancelled, or is extinguished by prescription, can no longer revendicate in that capacity. Here again, revendication by the titulary of the right usually is not in issue.[278] But this cause has a particular bearing on security contracts including notably the claims of pledgees, documentary pledgees, unpaid sellers, retention claimants, conditional and promisee purchasers and transferors under resolutory condition. It also includes the situation where the titulary of a security contractually (or by effect of law) renounces his rights *vis-à-vis* certain defendants (for example under articles 462, 1029, 1058 and 1975 *C.C.L.C.*).

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[276]The proof of the ultimate imprescriptability of the action lies, however, in art. 2268(6) *C.C.L.C.*, which prevents a thief or his universal heirs ever acquiring title. If, after fifty or even one hundred years, the owner should prove that the holder of his moveable is the thief who stole it (or his universal heir), he would not be debarred from revendicating.

[277]The transferor may, however, seek to have the transfer set aside or resolved for one reason or another, and thus seek to revendicate. But in such cases, the revendication is consequent upon reestablishing ownership. There is no conflict over the legal cause of the transfer.

[278]Even if the right has expired, the usufructuary assumes an obligation of care and return, and may revendicate from wrongfully holding third parties in order to fulfill this latter obligation.

Thirdly, there are cases where the action in revendication is lost or conditioned even if the underlying right is not.[279] These include common ownership by accession (articles 436, 437 and 439 *C.C.L.C.*), protected sales and pledges (articles 1488 and 1966a, and paragraph 2268(3) *C.C.L.C.*), partially protected sales and pledges (articles 1489 and 1966a, and paragraph 2268(4) *C.C.L.C.*), the sale of automobiles (*Highway Code*, section 22); ordinary consumer sales (*Consumer Protection Act*, sections 132-149), certain rights of retention (*Consumer Protection Act*, sections 179 and 187) and most statutory transfers.

Fourthly, certain claimants may be deprived of the action in revendication where goods are subject to a security or are under seizure. Typical cases include titularies of rights of retention and pledgees in possession. The latter cases include ordinary seizures against all but owners, judicial seizures by a landlord for his privilege (article 1639 *C.C.L.C.*) and non-judicial seizures by a documentary pledgee, inventory transferee, trustee for bondholders or a bank. In each situation one confronts the major difficulty flowing from a multiplication of plaintiffs in revendication: which plaintiff's right should prevail?

135. *Scope of Revendication* — Under all of the above hypotheses the action in revendication may be lost or postponed against certain defendants. But given the possible multiplicity of plaintiffs in revendication, it is not at all clear when the loss of an owner's right to revendicate operates to wash title. Hence it is also necessary to determine, in those situations where an owner's rights are lost, which other rights sustaining revendication will also be eliminated. There are two possibilities: either title may be washed completely, subject to exception, or the owner may be deprived of the action in revendication with certain other claimants being able to continue to assert it. Deciding this further question, which effectively defines the scope of each limitation on revendication, will be the object of the last section of this Part.

1. A Third Party Has Acquired the Object

136. *Material and Legal Transformation* — The action in revendication only protects ownership and other rights in objects indirectly; it vindicates rights by allocating physical control. Thus, where a corporeal moveable loses its identity as a separate object, the action to recover it is extinguished along with the owner's rights. In such cases, a material transformation of the object leads to a legal mutation of title.

[279]The action in revendication as such survives, to protect the true owner's rights from wrongful interference by most third parties; it simply cannot be exercised against certain holders.

But an object may also be acquired simply through a legal mutation of title. Most often this will occur consensually (by the effect of contracts and gifts), in a manner deemed consensual (by descent or by will), or by statutory transfer (in bankruptcy or the winding-up of companies), although it may result by operation of law. The effect of consensual dispositions and statutory transfers has already been considered.[280] It remains, therefore, to examine the consequences of material transformation and involuntary legal mutation on an owner's right to revendicate.

a. Material Transformation

137. *Loss of Identity and Loss of Individuality* — The law establishes two distinct means by which an object may be materially transformed. First of all, a corporeal moveable may cease to be a moveable. This occurs notably when it becomes immobilized as a consequence of the rules of accession to immoveables, through its attachment to, or incorporation into, an immoveable. But a corporeal moveable may also cease to be corporeal. For example, wood may be burned to produce electricity or steam; goods may be destroyed giving rise to an insurance claim; or a corporeal negotiable instrument may become simply a book entry on a bank ledger. In each of these cases it is important to determine whether the object has lost its *identity* as a corporeal moveable.

A corporeal moveable may also lose its *individuality* even while remaining a corporeal moveable. Hops and barley remain corporeal moveables as beer, but they have lost their identity; mixed inventories are no longer individuated; an automobile chassis remains a corporeal moveable even if no longer separable from the vehicle of which it is a part. It is necessary, therefore, to examine how both loss of identity and loss of individuality affect the right of revendication.

i. The Object Has Become Immobilized

138. *Immobilization of Moveables* — Of the various means by which corporeal moveable property may be immobilized, three are of importance here: immobilization by determination of law, immobilization by destination and immobilization by nature.

There are essentially two types of immobilization by determination of law: public policy immobilization under article 382 *C.C.L.C.* and fictional immobilization of temporary moveables under paragraph 386(2) *C.C.L.C.* Article 382 *C.C.L.C.* declares certain sums due to minors or children and the capital of constituted rents to be immoveable. Presumably, were these

[280]See Macdonald, "Revendication: Part One", *supra*, note 136, nos 51-55. See also above, nos 105-23.

sums evidenced in a corporeal instrument and were the instrument to be lost, revendication would not be possible other than by petitory action under article 771 *C.C.P.* Conversely, under paragraph 386(1) *C.C.L.C.*, temporary moveables could be revendicated as moveables. However, were these moveables to fall under the conditions of paragraph 386(2) *C.C.L.C.* they could be claimed only under article 771 *C.C.P.* In each of these cases, however, the material transformation of legal status usually does not also produce an involuntary mutation of ownership, so that the owner's title to claim physical control of his property is not compromised.[281]

Immobilization, by nature or by destination, however, is not simply notional: in both cases, corporeal objects are affixed to an immoveable. Immobilization by destination under articles 379-380 *C.C.L.C.* is rarely problematic (for purposes of revendication) since the *Code* requires an identity between owner of land and owner of moveable.[282] In other words, like immobilization by determination of law, immobilization by destination does not itself effect a mutation of an owner's title. For this reason, sellers will frequently use the conditional or installment sale to protect their right to revendicate corporeal moveables they have sold. Thus, even if the object sold has the vocation to become immobilized by destination (for example, a telephone switchboard), the conditional sale prevents that immobilization until the buyer becomes owner.[283] It follows that only immobilization by nature will ever produce an involuntary mutation of title.

139. *Immobilization by Nature* — Where construction materials, such as bricks and lumber, are completely incorporated into an immoveable, they lose their characteristics as moveables and become immoveable by nature. Moreover, the courts have held that certain other items, such as furnaces and elevators, which are indispensable to the completion of a building, are immoveable by nature, notwithstanding that they may retain their individuality as objects.[284] In both cases immobilization results, whether or not the owner of the immoveable is also owner of the immobilized moveable.

As a result, the material transformation from moveable to immoveable by nature may often produce a legal mutation of title, which automatically

[281]Problems can occur in respect of other rights giving rise to an action in revendication. Imagine giving a child, under the conditions of art. 382 *C.C.L.C.*, a bearer bond already impressed with a perfected pledge. Would the immobilization extinguish the pledge? Similarly, it is worth asking whether the temporary mobilization under art. 386(2) *C.C.L.C.* would also affect immoveable rights of emphyteusis, usufruct, habitation, hypothec, *etc.*

[282]See *Foyer du Cadeau Inc.* v. *Imperial Enterprises Inc.* (1967), [1968] C.S. 456 and *Banque fédérale de développement* v. *Champlain Air climatisé et Chauffage Ltée* (1980), [1980] C.A. 12.

[283]Immobilization by destination will, however, affect other rights such as those of unpaid vendors, commercial pledgees, *etc.* See below, no. 187.

[284]*Horn Elevator Ltd* v. *Domaine d'Iberville Ltée* (1971), [1972] C.A. 403.

extinguishes a prior owner's action in revendication.[285] This immobilization also extinguishes the rights of all persons deriving rights from the prior owner.[286] Of course, the person effecting the immobilization may in certain cases be liable in damages to the owner or other titulary of the right to revendicate.[287]

ii. The Object Has Become Incorporeal

140. *Incorporeal Rights and Subrogation* — Where a corporeal moveable has been destroyed, the owner obviously may no longer revendicate. But in certain cases the destruction gives rise directly to incorporeal property.[288] Through the application of notions of *subrogation réelle* the prior owner retains rights in the incorporeal.[289]But these rights must be vindicated by remedies appropriate to incorporeals, and not by the action in revendication. Only if by a further subrogation the incorporeal again becomes corporeal (for example, insurance money purchasing a replacement object) may the original owner revendicate.[290] In these cases, however, the loss of identity as corporeal property usually does not effect a mutation of title.[291]

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[285]Of course, a special regime is established with respect to construction projects, so that the seller may exercise a privileged claim for the price of materials. See art. 2013e *C.C.L.C.* Similarly, if by the rules of subrogation, rights in a moveable (fertilizer) which becomes immobilized (crops) and remobilized (harvested crops) are maintained, revendication by the titulary is possible after remobilization. For an example of statutory subrogation, see ss 178(1)(c)-(j) and 178(3) of the *Bank Act, supra*, note 13, which transform the bank's rights in fertilizer into a right in crops.

[286]But, for an exception, see ss 178(1)(g)-(h) of the *Bank Act, supra*, note 13, which preserve the bank's claim even when wiring is immobilized by nature. See below, no.187.

[287]See arts 416-418 *C.C.L.C.*

[288]A distinction is being made between incorporeal things and incorporeal rights. An owner whose object is expropriated and who is left with a usufruct has only an incorporeal right. But the object upon which that right bears remains a corporeal moveable. For a discussion of the frontiers of corporeal movcables, see Caron, *supra*, note 274 at 22-25; and Martineau, *supra*, note 274, no. 154.

[289]The question of the extent to which the doctrine of *subrogation réelle* will permit an owner's claim to be traced into an incorporeal is of most interest where a creditor with an accessory real right seeks to assert his security in the proceeds of an ordinary course disposition of secured collateral. For a discussion see R. Macdonald, "Inventory Financing in Quebec After Bill 97"(1984) 9 Can. Bus. L.J. 153 at 159-62.

[290]That is, assuming ownership by subrogation can be proved, it is immaterial that a present corporeal moveable was formerly an incorporeal. The action in revendication is directed to the recovery of the present object.

[291]The only plausible example where transformation from corporeal to incorporeal would automatically produce a mutation of ownership would arise in the ease of a sale of future book debts under art. 1571d *C.C.L.C.* where the debts arise from the sale of an object. Here the owner sells a corporeal moveable, generating an incorporcal (a book debt) which he has previously sold. Hence, he cannot claim a right to the incorporeal, and the transformation from corporeal to incorporeal actually effects a mutation of title.

iii. The Object Has Become Part of Another by Accession

141. *Accessio, Specificatio, Confusio* — A material transformation of a corporeal moveable implying legal mutation of title can also occur by operation of the rules of accession. In other words, title is sometimes transferred as a consequence of the loss of individuality of an object. This may occur through the incorporation of one object into another, through the transformation of an object by manufacture, through the combination of objects owned by several persons or through confusion of inventories. Article 429ff. *C.C.L.C.* elaborate the basic rules governing accession to moveables, including forced transfers of title, subject to contractual undertakings between the parties to the contrary.

142. *Ordinary Accession* — When two objects are united, the owner of the object which is the accessory loses his right of ownership, notwithstanding that the objects may be separated.[292] However, should the accessory greatly exceed the principal object in value, the owner of the less valuable object loses his right of ownership to the owner of the more valuable part.[293] Finally, if neither is accessory and both are of equal value, the bulkier is deemed principal.[294] In each of these cases the *Code* provides for a forced mutation of title and the owner who loses title also loses the action in revendication.

143. *Confusion* — In cases of confusion, either through adjuncture[295] or admixture,[296] one or more owners may also be expropriated. Where one owner's material greatly exceeds the quantity and price of any of the other owners' materials, the first may claim ownership of the whole object or whole inventory. The other owners lose any claim to ownership,[297] subject to the right of an innocent owner to demand separation, if conveniently possible. With the loss of ownership these other owners also lose their right to revendicate.[298]

144. *Specification* — Articles 435 and 436 *C.C.L.C.* set out the principles governing the attribution of ownership of corporeals being manufactured. In some cases, specification will lead to a transfer of title to a corporeal moveable. Where an owner's object is transformed by an artisan, and the

[292]Arts 430 and 431 *C.C.L.C.* A good example of such accession would be the case of the attachment of an aluminum sail mast to a fibreglass sailboat hull.

[293]Art. 432 *C.C.L.C.* Thus, a single diamond in a large silver necklace would be deemed the principal.

[294]Art. 433 *C.C.L.C.* For example, a bulkier engine would be considered principal over a transmission that was smaller, but equal in value.

[295]Art. 437 *C.C.L.C.* An upholstered chair would be an example of the adjuncture of objects.

[296]Admixture covers the case of mixed inventories, which are dealt with in a fashion similiar to adjuncture.

[297]Art. 438 *C.C.L.C.*; that is, even assuming that a conditional seller were able to establish that he had retained title to part of the inventory, he would still be expropriated.

[298]This is subject to the case described in art. 437(2) *C.C.L.C.* See below, no. 168.

workmanship greatly exceeds the value of the materials, the right to revendicate will be lost (along with title) if the workman chooses to keep the object.[299] A similar rule applies in cases where the artisan also supplies some of the materials used in the manufacturing process.[300]

145. *Consequences of Accession to Moveables* — In each of the above cases, where one party loses the right of ownership (and with it the right to revendicate) he may claim both the value of his object[301] and, if the transformation was without his consent, damages as well.[302] In certain cases of adjuncture or admixture, however, ownership is deemed common and either party may demand that the object be disposed of by licitation.[303] Finally, an exceptional regime of restitution is established where materials are used without an owner's consent to make an object of a different description: the owner is not expropriated but may claim, in preference to the new object itself, either its value or restitution of material of a similar kind.[304] If the owner chooses to claim the new object, he will be exercising an ordinary action in revendication; if he opts to receive material of a similar kind, until the fungible property is identified, he will not be able to claim it in revendication. His claim will be at best in contract or delict.[305]

b. Legal Transformation

146. *Forced Mutation of Title* — Any legal system provides for a variety of mechanisms by which the owner of a corporeal moveable may be forced against his will, express or implied, to give up his title to an object. This occurs notably in cases of expropriation for a public purpose, statutory transfers, partition, judicial sales, forced sales and licitation. Moreover, in several other cases the law permits a third party to extinguish an owner's rights, as for example in the case of acquisitive prescription and subsequent transfers by a non-owner transferor in possession. Finally, in one or two

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[299]Art. 435 *C.C.L.C.*

[300]Art. 436 *C.C.L.C.*

[301]Arts 430, 435 and 438 *C.C.L.C.*

[302]Art. 441a *C.C.L.C.*

[303]Art. 439 *C.C.L.C.* This specific example is not a case of the underlying right being lost, but rather of revendication being refused, despite the right.

[304]See art. 440 *C.C.L.C.* But see ss 179(1) and 179(7) of the *Bank Act* and the *Bills of Lading Act*, *supra*, note 13, which would maintain the bank's or transferee's security in such future property, once the debtor became owner. However, where the accession rules actually expropriate the interest of the bank's debtor, the bank or transferee would also lose both its security and its right to revendicate.

[305]Contractual and delictual actions leading to the specific recovery of corporeal moveables are not real actions. They are discussed in Macdonald, "Revendication: Part One", *supra*, note 136, nos 21-22; and Macdonald, "Enforcing Rights in Corporeal Moveables: Revendication and Its Surrogates (Part Three)" (1987) 32 McGill L.J. [forthcoming].

exceptional situations, the law deems, notwithstanding the agreement of the parties or the desire of one party, that certain contracts or deeds will transfer title. The most common examples of "public order" title transfers occur in respect of informal consumer sales and illegal conditions in wills.

i. Partition

147. *Indivision and Partition* — The rule of article 689 *C.C.L.C.* that no one may be compelled to remain in a state of undivided co-ownership means that the action in partition is always available as an ultimate recourse to co-owners. Prior to partition each individual co-owner is reputed owner of the whole common property and may revendicate it from wrongfully holding third parties.[306] Following partition, however, each co-owner is deemed to have taken his share directly from the transferor, and never to have had rights in any property that does not fall into that share.[307] Hence, with the localization of ownership the action in revendication is lost by each co-partitioner over the property which is no longer subject to his right of undivided co-ownership. Nevertheless, even though the partition extinguishes the title of several co-owners, it is not translative of title between co-owners; the new owner takes his property subject only to whatever charges existed at the moment the undivided co-ownership began.

ii. Judicial Sales, Forced Sales and Sales by Licitation

148. *The Theory of Judicial Sales* — The rules relating to judicial sales are set out in articles 1585-1591 *C.C.L.C.* and in the *Code of Civil Procedure.* Paragraph 2268(5) *C.C.L.C.* provides an absolute bar to an owner's right to revendicate if his property has been mistakenly sold under authority of law.[308] This provision is a reflection of article 1490 *C.C.L.C.* and applies not only to sales following a seizure under article 569 *C.C.P.*[309] but also to sales by trustees in bankruptcy, to municipal tax sales after the delay for redemption has expired, to sales by customs officers, and to all other forced sales under legal process.[310] Moreover, paragraph 2268(5) *C.C.L.C.* applies to licitations under articles 1562 *C.C.L.C.* and 808 *C.C.P.* wherever a partition in kind is impossible.

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[306]See Légier, *supra*, note 1, no. 10.

[307]Art. 746 *C.C.L.C.*, subject of course to his right to seek rescission under arts 751-53 *C.C.L.C.*

[308]See Caron, *supra*, note 271 at 398-99. Of course, the exception may be pleaded only if all formalities were properly followed: *Brook* v. *Booker* (1909), 41 S.C.R. 331. If not, then revendication remains possible until ownership is lost under some other title such as acquisitive prescription. See, however, the protection given by art. 612 *C.C.P.* to a buyer who has paid the price.

[309]*Héroux* v. *Royal Bank of Canada* (1941), [1942] S.C.R. 1, [1942] 1 D.L.R. 192; *Perlman* v. *J.J. Joubert Ltée*, *supra*, note 257.

[310]Caron, *supra*, note 271 at 398, n. 32a.

By contrast, an absolute transfer of an owner's right under paragraph 2268(5) *C.C.L.C.* will not arise from various non-judicial sales in execution. These include sales by a pledgee who has not stipulated a *pacte commissoire* under article 1971 *C.C.L.C.*,[311] sales by trustees for bondholders,[312] other sales in realization by secured creditors,[313] and private sales by certain creditors having a right of retention.[314] In each of these latter cases the sale will either be a public sale or a sale "in a commercial matter generally" under paragraph 2268(3) *C.C.L.C.*; in none of these cases therefore will it effect an absolute bar upon the true owner's revendication.[315]

149. *Effect of a Judicial or Forced Sale* — An ordinary sale following a seizure in execution vests the purchaser with absolute title in any property belonging to the debtor.[316] In France, it is an open question whether the judicial sale transfers ownership *a non domino*, or whether it merely impedes revendication by the true owner.[317] But in Quebec, the issue is no longer debated: article 577 *C.C.P.* provides that ownership is transferred and title passes *a non domino*.[318] Although the owner's right to revendicate is purged once the sale takes place, he is permitted to bring an opposition to withdraw under article 597 *C.C.P.* prior to sale.[319] If an opposition to withdraw is not brought, the true owner loses his right to revendicate from the purchaser (*adjudicataire*)[320] unless the sale is set aside for fraud or collusion.[321] However, if the true owner could have revendicated prior to the sale, he may claim a privilege in the proceeds of the sale.[322]

iii. Acquisitive Prescription

150. *Acquisition of Ownership by Prescription* — Under paragraph 2268(1) *C.C.L.C.* the holder of a corporeal moveable is presumed to have lawful

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[311]See *Campbell* v. *Beyer* (1906), 30 C.S. 86; *Societé Canadienne d'Hypothèques et de Logement* v. *Caisse Populaire Saint-Denis* (1980), [1981] R.L. 1 (C.A.).

[312]*Pagé* v. *Montreal Trust Co.* (1981), [1981] C.S. 217; *Marois* v. *Alimentation B.M.R. Inc.* (1981), [1982] C.P. 335, rev'd in part (*sub nom. Trust Général du Canada* v. *Marois*) (1986), [1986] R.J.Q. 1029 (C.A.).

[313]For example, by bank's transferees, documentary pledgees and commercial pledgees (arts 1979c and 1979i *C.C.L.C.*).

[314]For example, jewellers (art. 1671a *C.C.L.C.*) and innkeepers (art. 1816a *C.C.L.C.*), or other holders of unclaimed goods. See Macdonald, *supra*, note 3 at 345-47.

[315]See below, no. 174.

[316]*Banque de Montréal* v. *Théberge* (1968), [1969] R.P. 73.

[317]See J. Vincent, *Voies d'exécution et procédures de distribution*, 14th ed. (Paris: Dalloz, 1981) no. 68bis.

[318]*Héroux* v. *Royal Bank of Canada*, *supra*, note 309.

[319]*Felton* v. *Camoco Electronics* (1969), [1969] R.P. 424 (Prov. Ct); and see Lauzon, *supra*, note 148 at 67-68.

[320]*Breault* v. *Trudeau* (1953), [1954] C.S. 97.

[321]*Banque Provinciale du Canada* v. *Desjardins* (1978), [1978] C.P. 392.

[322]Arts 2005a(2) *C.C.L.C.* and 604 *C.C.P.*

title.[323] Nevertheless, the true owner is not debarred by this presumption from revendicating his object if he can establish his claim as well as the defects in the holder's title. For example, the owner may be able to establish the precarity of the holder's possession (in which case prescription can never be acquired according to article 2193 *C.C.L.C.*), or show that the possession, although not precarious, has been of insufficient duration.[324]

Nevertheless, should the owner fail in this proof, his right to revendicate will be lost, barring further proof of some other defect in the defendant's title. But the dismissal of the true owner's action does not itself entail a transfer of title. Until the possessor acquires title by effect of law, the true owner remains owner, even if he cannot establish the fact with sufficient certainty to succeed in an action in revendication.[325]

Where, however, the possessor acquires title by the effect of acquisitive prescription, the former owner's right to revendicate is extinguished along with the ownership.[326] In principle all possessors, even those in bad faith, acquire ownership of corporeal property at the expiration of thirty years.[327] Additionally, if the possessor is in good faith (which is presumed under article 2202 *C.C.L.C.*),[328] the prescription period is reduced to three years, reckoning from the owner's dispossession.[329]

151. *Nature of the Three-Year Prescription* — The three-year acquisitive prescription is a juridical anomaly which is unique to Quebec law. It differs from the rule set out in article 2279 *C.N.* in three respects. First, the true owner may always prove his title until prescription is acquired.[330] Secondly, the term "corporeal moveable" in paragraph 2268(2) *C.C.L.C.* has been interpreted as referring to the right and not to the object over which the

[323]See *Compagnie de publication de La Presse* v. *Terres laurentiennes Inc.* (1970),[1970] R.P. 333 (C.P.) for an analysis of this presumption.

[324]See *Assh* v. *Cité de Lévis* (1939), 77 C.S. 153 on proving one's title, and *Belisle* v. *Caron* (1942), 80 C.S. 160 and *Fonderie de Plessisville* v. *Caron* (1934), 72 C.S. 427 on proving defects of possession. The defendant must establish that the prescription is of sufficient duration, or that the conditions of art. 2268(3) *C.C.L.C.* are met. See *Tremblay* v. *Duval* (1931), 70 C.S. 239, and *Rogers* v. *Goldberg* (1948), [1949] C.S. 74. See generally Martineau, *supra*, note 274, nos 161-63.

[325]See Mazeaud, *supra*, note 163, no. 1629.

[326]Thus, while ownership of corporeal moveables cannot be lost by extinctive prescription, it can be extinguished by the acquisition of ownership by another through acquisitive prescription. See Martineau, *supra*, note 274, no. 164.

[327]Art. 2242 *C.C.L.C.* But see art. 2268(6) *C.C.L.C.* which prevents prescription by thieves and their successors by general title.

[328]See *René T. Leclerc Inc.* v. *Perreault* (1969), [1970] C.A. 141; *Morgan, Ostiguy & Hudon Ltée* v. *Sun Life Assurance Co. of Canada* (1975), [1975] C.A. 473.

[329]See art. 2268(2) *C.C.L.C.* See also Caron, *supra*, note 274 at 38-40

[330]Compare with Ortscheidt, *supra*, note 1, no. 81. In France the owner may reclaim for up to three years only if the object was lost or stolen.

right lies. Hence, incorporeal rights in corporeal moveables (such as usufruct) may only be prescribed by thirty years.[331] Thirdly, in order to invoke the abbreviated prescription, it is not necessary that the possessor or his author have accumulated three years' good faith possession. It is sufficient that the possession of the person who claims prescription commenced in good faith, and the owner has been out of possession for three years.[332]

The import of this third requirement is difficult to grasp, since it dissociates the quality from the quantity of possession. Certain examples will clarify its scope. A thief never has possession sufficient for prescription but if he sells the object he has stolen to a good faith purchaser four years after the theft, the purchaser immediately acquires ownership by prescription.[333] Again, if a good faith possessor (namely an individual who does not know of the defect in his own title) sells to a bad faith possessor more than three years after the true owner's loss of possession, the party in bad faith nevertheless will acquire ownership. This is because his seller (the good faith possessor) had already become owner (on the basis of the three-year prescription) prior to the sale. By contrast, should the owner's dispossession be of only two years, the bad faith possessor who acquires under particular title from a good faith possessor can only prescribe by thirty years.[334] Finally, the dispossession required by the *Code* is *de jure* and not *de facto*. Hence, if an owner leases an object to a lessee who sells to a third party four years later, the owner loses possession only at the time of the sale; the new good faith acquirer can acquire the object by prescription only at the expiration of three years from the date of sale.[335] Moreover, the three-year prescription can never be set up as between a possessor and his author, since the attempt to prescribe against title will always amount to a bad faith possession.[336]

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[331]See Caron, *supra*, note 274 at 22-25.

[332]*Rickner* v. *Picard* (1945), [1945] C.S. 432. In France, this is seen as a *délai préfix*: see Bordeaux, 14 January 1974, D.1974.Jur.542 (note R. Rodière).

[333]See Martineau, *supra*, note 274, nos 161-63. The thief is unlikely to make a sale which would fall under arts 2268(3) or 2268(4) *C.C.L.C.*

[334]Arts 2197 and 2198 *C.C.L.C.* In this case, the date of the owner's dispossession is irrelevant. Thus, if a thief steals and holds for two years prior to selling to a good faith purchaser, who immediately sells to a bad faith purchaser, prescription is not acquired thirty years after the theft, but rather thirty years from the demonstrable origin of the possession (arts 2198 and 2200 *C.C.L.C.*). Of course, in most cases there would be an intervening good faith purchaser who would get immediate title.

[335]See Caron, *supra*, note 274 at 40; see also A. Mayrand, "Le nantissement de la chose d'autrui" (1943) 3 R. du B. 313 at 320. A similar result would occur in dispositions by owners under a suspensive condition.

[336]See Mazeaud, *supra*, note 163, nos 1525 and 1541; G. A. Rosenberg, "The Notion of Good Faith in the Civil Law of Quebec" (1960) 7 McGill L. J. 2. See also art. 2203 *C.C.L.C.*, and Bouloc, *supra*, note 1, nos 139-46.

152. *Effect of Prescription* — The prescription of thirty years or three years, as the case may be, may be set up not only against owners, but against all those asserting a right of revendication in the object prescribed. Like the judicial sale, acquisitive prescription constitutes a "*titre nouveau*" which extinguishes all existing rights in the object.[337]

iv. The Object Is Re-Transferred by a Transferor in Possession

153. *The Nature of the Transferor's Rights* — A major modification wrought by the 1866 *Code* was the adoption of the rule of consensualism in contracts.[338] Article 1025 *C.C.L.C.* confirms this principle in respect of contracts for the alienation of a thing certain, whether the contract be a sale, an exchange or a gift.[339]

Because sale is a consensual contract which is perfected without delivery,[340] a seller who retains possession of a moveable which he has sold no longer has title, as his buyer has become owner. Nevertheless, paragraph 1027(2) *C.C.L.C.* provides that, should the seller sell the corporeal moveable a second time and deliver the object to the second purchaser who is in good faith,[341] the former owner will lose his rights and the subsequent purchaser will be deemed owner. For the rule of paragraph 1027(2) *C.C.L.C.* to apply, the subsequent acquirer must have a *bona fide* title to the goods in his own account[342] (either by sale or gift), although it need not be a title translative of ownership;[343] in addition, the goods must still have been in the possession of the transferor at the time of the second transfer.[344] Nevertheless, the first

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[337]This is true even of registered security devices. See *A.G. Canada* v. *Mandigo* (1964), [1965] B.R. 259, and *Banque Provinciale du Canada* v. *Dionne* (1956), [1957] C.S. 167, which hold that the bank's right to revendicate may be limited by arts 2268(2)-(4) *C.C.L.C.* For a critique of the result as concerns arts 2268(3)-(4) *C.C.L.C.*, see R. A. Macdonald, "Security under Section 178 of the Bank Act: A Civil Law Analysis" (1983) 43 R. du B. 1007 at 1043-51. See also below, no. 187.

[338]See the discussion in T. McCord & A.D. Nicholls, eds, *The Civil Code of Lower Canada*, 3d ed. (Montreal: Dawson Bros, 1880) i at ii-iii.

[339]In contracts of gift a notarial deed is required to transfer title without delivery. But a donor, having executed the deed while having remained in possession, could then sell the object or give it by *don manuel*. For a discussion in the context of a contractual institution, see Brière, *supra*, note 19, no. 468.

[340]Arts 1025 and 1472 *C.C.L.C.*

[341]*Tardif* v. *Fortier* (1946), [1946] B.R. 356.

[342]Thus, possession by a depositary or mandatory of the seller is not sufficient. See *Church* v. *Bernier* (1892), 1 B.R. 257.

[343]It could be, for example, by way of pledge. *Dupuy* v. *Cushing* (1878), 22 L.C. Jurist 201 (B.R.). It could also involve the concession of a usufruct to a second transferee who takes possession.

[344]This possession could in fact be effected through the transferor's warehouseman, carrier or mandatary.

transferee need not actually have taken personal delivery in order to defeat the second transferee's claim; he need only have taken possession.[345] The application of paragraph 1027(2) *C.C.L.C.* is restricted to cases where the transferor retains possession and not mere custody.[346]

154. *Effect of the Sale* — Once the conditions set out by paragraph 1027(2) *C.C.L.C.* are met, the second acquirer may set up his title against an action in revendication brought by the former owner.[347] Once again, this is a case of a transfer of ownership rather than a mere refusal of revendication.[348] An example will demonstrate the nature of the rule. Suppose a seller who is left in possession by a first buyer, then sells to a second buyer who takes possession, but who constitutes the seller as his depositary. If the seller then delivers to the first buyer, the second buyer could revendicate from the first buyer on the basis that he was the first to obtain "actual possession." In cases of purported successive pledges, the first pledgee's right to revendicate as such never arises, since a pledge without creditor possession is a mere promise of pledge.[349] However, in other transactions such as gift, exchange, enterprise and loan for consumption the effect of paragraph 1027(2) *C.C.L.C.* would be to extinguish the first transferee's title, as well as the rights of all parties who have contracted with him.[350] It follows that the second alienation is translative of title *a non domino* in much the same way a judicial sale would be.[351]

v. Informal Consumer Installment Sales

155. *Sales with a Term for Payment* — Sections 66 to 150 of the *Consumer Protection Act* set out several obligatory requirements which must appear in consumer credit contracts. Section 135 of the Act provides that where these requirements are not met, an installment sale under which ownership is not transferred until full payment of the purchase price is automatically transformed into an ordinary contract of sale; title passes immediately to the buyer, who is deemed to have been given a term for payment. Section

[345]A buyer might expressly constitute his seller as a depositary on his account, yet, given the seller's equivocal custody, the courts are sceptical of such arrangements. See *Mailloux* v. *Beaudry* (1915), 48 C.S. 9 (Ct Rev.).

[346]See *Lafleur* v. *Bélanger* (1943), [1953] C.S. 181, and the cases cited by Caron, *supra*, note 271 at 411-12.

[347]*Woodward & Sons* v. *Auger* (1933), 71 C.S. 569.

[348]Art. 1027(2) *C.C.L.C.* gives the case of the second acquirer: "that one of the two who has been put in actual possession is preferred and remains *owner* of the thing. . .[our emphasis]"

[349]*Thompson and Alix Ltd* v. *Lapierre* (1933), 72 C.S. 460.

[350]Thus, commercial pledgees, or trustees for bondholders of the first buyer, would lose their rights.

[351]A special difficulty arises concerning the respective rights of the second buyer and of the transferee or bank. One would expect the same result as in the case of acquisitive prescription, in that the sale is not merely protected; rather, it transfers ownership. But see below, no. 187.

15 states that this provision applies to any title-deferral contract, whether a credit contract or not. Thus, by operation of law, a seller may lose his action in revendication because he loses his right of ownership. However, the *Consumer Protection Act* does not give the buyer a new title; it merely modifies the date at which the rights transferred under the existing consumer contract (invariably title) are vested in the purchaser. For this reason, other rights of revendication opposible to the seller are not necessarily extinguished.[352]

vi. Illegal and Immoral Conditions in Wills

156. *Conditional Transfers of Title* — Article 760 *C.C.L.C.* provides that both gifts *inter vivos* and wills may be conditional. However, as is the case in all contracts translative of ownership, a condition contrary to public order and good morals in a gift *inter vivos* is not only void in itself, but renders void the obligation to which it relates.[353] In wills, however, an illegal or immoral condition is simply reputed not written and the disposition stands.[354] As a result, where a legacy is deferred by such a condition, the residuary legatees or intestate heirs immediately lose their right of succession to the beneficiary of the conditional legacy.[355] No longer having ownership of any corporeal property, they have no right to revendicate. Here again the law imposes a non-consensual transfer of title by advancing the date at which the transfer of title occurs. But the heir does not acquire a new title; like the consumer purchaser, he assumes whatever charges were existing on the corporeal property at the time the succession opened.

2. The Underlying Right Has Been Lost, Extinguished or Surrendered

157. *Negative Limits on Revendication* — Each of the cases reviewed above involved a right to revendicate being lost because a third party actually acquired ownership of the property being revendicated. As a consequence, the former owner (or anyone deriving rights from him) would be attempting to revendicate a third party's property. A second frequent type of situation where the action in revendication will be refused occurs when, without a new transfer of ownership, the substantive right less than ownership sustaining revendication has been lost or abandoned. This occurs most notably in cases of extinctive prescription (or other lapse of time), including the expiration of a contract, in cases where the revendicating plaintiff no longer

[352]Notably, those of the seller's vendor or secured creditor, to the extent that they are not suppressed by some other provision of law, such as art. 2268(3) *C.C.L.C.*

[353]Arts 760(1) and 1060(1) *C.C.L.C.*, provided of course that the gift depended on the illegal condition.

[354]Art. 760(3) *C.C.L.C.*, unless the testator makes the legacy dependent on the fulfillment of the condition.

[355]For a complete analysis of the differences between gifts and wills concerning illegal and immoral conditions, see Brière, *supra*, note 19, nos 76-81.

meets the material conditions required to assert his rights (whether this failure arises from a voluntary act on his part or not), and in cases where he has contractually renounced the right to revendicate. These cases each are examples of a plaintiff revendicating on the basis of a *jus in re aliena* or some non-ownership right: the plaintiff will be asserting in good faith a legal right to revendicate a third party's property, but will in fact have lost his entitlement to do so.

a. Extinctive Prescription and Other Lapses of Time

158. *The Theory of Extinctive Prescription* — Article 2242 *C.C.L.C.* provides that "[a]ll things, rights and actions the prescription of which is not otherwise regulated by law, are prescribed by thirty years". Therefore, in cases involving corporeal moveables, absent any special statutory provision, non-usage for thirty years extinguishes a legal right.[356] Only ownership cannot be lost by non-usage, although corporeal moveables, unlike immoveables, may, following abandonment, be left ownerless.[357] It follows that all real rights inferior to ownership may be lost by non-usage; moreover, all personal rights giving rise to a *jus ad rem* may also be extinguished by prescription. In these cases the extinction of the underlying right also extinguishes the action in revendication.

159. *Legally Time-Limited Revendication* — Certain other potential plaintiffs also lose their right to revendicate, independently of prescription, by mere passage of time. This occurs most often in the context of a security agreement or other accessory rights. Where contractual security is at issue the law usually limits the duration of the security instrument. For example, an agricultural or forestry pledge may secure a loan for up to fifteen years or a line of credit for a five-year term.[358] Similarly, a commercial pledge expires after ten years.[359] Endorsees of documents of title by way of collateral guarantee lose their title after six months.[360] Finally, transferees of property in stock may not take security for a term exceeding five years, without reregistration.[361]

Time limits also affect the rights of various privileged revendicating plaintiffs. Thus an unpaid vendor must normally revendicate within eight

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[356]For a complete discussion, see Martineau, *supra*, note 274, nos 231-406.

[357]See Marty & Raynaud, *supra*, note 170, nos 49, 50 and 414-17.

[358]Art. 1979a *C.C.L.C.*

[359]Art. 1979e *C.C.L.C.* In commercial pledge, as well as agricultural and forestry pledge, the pledge is void if the contract of loan exceeds the time limits. See *Caisse Populaire de St-Casimir* v. *Raymond, Chabot, Fafard, Gagnon Inc.* (1982), [1983] R.L. 99 (Sup. Ct).

[360]*Bills of Lading Act, supra*, note 13, s. 6.

[361]*Ibid.*, ss 22-25.

days following delivery.[362] If he wishes to revendicate on the basis of his former ownership, he must bring an action in resolution of the sale within thirty days of delivery if the buyer becomes insolvent.[363] The lessor of immoveables also has a time-limited legal security, but as noted earlier, this right does not give rise to an action in revendication *per se*.[364] Again, the tithe creditor may only revendicate his share of the crop for a claim less than two years old.[365]

Apart from security and quasi-security agreements, other rights giving rise to revendication are limited in time. Testamentary executors lose their seizin one year and one day after the death, unless their term is extended by the testator.[366] Similarly, the seizin of trustees lasts only for the duration of the trust.[367] Rights of usufruct and use which are not life-usufructs or which are not otherwise limited by contract expire after ninety-nine years.[368] Finally, the right of the heir in provisional possession expires after thirty years from the disappearance with the result that his right to revendicate on that basis also expires.[369]

In each of these cases the mere effluxion of time sets a limit on the plaintiff's right to revendicate. That is, quite apart from the extinction of a claimant's right by prescription, in several cases the substantive right basing revendication constitutes no more than a temporary title. These time limits are especially important in facilitating the consolidation of ownership and the protection of the presumption of paragraph 2268(1) *C.C.L.C.*

160. *Consensually Time-Limited Revendication* — In all cases where the right to revendicate is grounded in a title less than ownership, the right can be lost by the expiration of the contract which creates the underlying right. This is true whether the titulary claims a real right (principal or accessory) or a mere *jus ad rem* such as a right of deposit. In these situations the parties expressly tie the action in revendication to a particular contractual right. When the right expires the status to revendicate ceases to exist.

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[362]Arts 1998-1999 *C.C.L.C.* Where the debtor is insolvent this delay is extended to thirty days.

[363]Art. 1543 *C.C.L.C.*

[364]Art. 1640 *C.C.L.C.* See above, no. 85.

[365]See above, no. 86.

[366]Art. 918 *C.C.L.C.*

[367]Art. 981b(2) *C.C.L.C.*

[368]Cantin Cumyn, *supra*, note 142, nos 14-17.

[369]Art. 98 *C.C.L.C.*

b. Failure to Comply with Other Conditions for Revendication

161. *Revendication Based on Possession* — Many rights less than ownership imply that their titulary will have a right of detention of a corporeal moveable. For example, a revendicating plaintiff often will be attempting to regain custody of an object in order to perfect some security against its owner. Since creditor possession is the essence of many of these security devices, any voluntary surrender of possession to the debtor will extinguish the right to revendicate. Thus, ordinary pledgees, retention claimants, and holders such as unpaid sellers asserting the *exceptio non adimpleti contractus* who voluntarily give up possession will lose the right to assert that possession against their cocontractant (or the true owner).[370] It follows that these creditors also give up any right they may have had to revendicate from wrongfully holding third parties.

On the other hand, where the responsibility of the possessor continues notwithstanding any loss of custody (that is, where the holder's primary responsibility is administration) even a voluntary surrender of custody does not extinguish the underlying right, and revendication continues to be possible.[371] Thus, depositaries, sequestrators, trustees, executors, mandataries, *negotiorum gestores*, recipients of a thing not due, lessees and borrowers for use retain the right to revendicate even if they have voluntarily transferred custody, by way of, for example, sub-deposit, replacement mandate or sublease.[372]

162. *Abandonment and Abuse* — There are a variety of other cases where the underlying right, and consequently the action in revendication, are lost. For example, whenever the titulary of a right (other than ownership) sufficient to sustain revendication abandons the object or renounces his right, he also irrevocably gives up the right to revendicate. Of course, should the owner of a corporeal moveable abandon his object he will not necessarily lose his right to revendicate. If a third party has acquired it by occupation or prescription the abandoning owner will have lost his title; if no one has claimed the object the owner may simply take it back.[373] Where a third party claims the abandoned object *animo domini* but has not yet acquired ownership, the court is called upon to decide whether to prefer a repentant former owner or an actual possessor. In such a case the presumption of article 2268(1) *C.C.L.C.* ought to protect the present possessor's ownership, assuming he can prove the prior abandonment.[374]

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[370]Except a temporary surrender, for purposes of repairs, *etc.* See above, no. 81.

[371]Unless the surrender is intended to terminate the contract. See below, no. 161.

[372]*Discothèque & Golf Lafontaine Inc.* v. *Lussier*, *supra*, note 139.

[373]See Mazeaud, *supra*, note 163, no. 1629.

[374]Moreover, even if the owner abandons with *animus*, if he should change his mind prior to another taking possession, he may plead art. 2268(1) *C.C.L.C.*

The underlying right upon which revendication is grounded may also be forfeited in cases of abuse. Only an owner (or someone explicitly authorized by the owner) is permitted to exercise the prerogative of material *abusus*. Thus, where the titulary of a real or personal right such as usufruct or lease, wastes or dissipates a pledged, loaned or leased object the underlying right will be forfeited.[375] This is also true for non-contractual possessory rights such as the right of retention. In all such cases, the result is the same as if the time limits for the contract expired.[376]

163. *Identity and Individuality* — In various cases already examined the loss of identity or individuality of a corporeal moveable actually operated a transfer of ownership.[377] But several rights less than ownership may be lost through a loss of identity or individuality, even where title itself is not transferred. For example, where the owner of land immobilizes an object belonging to him by nature, no transfer of ownership results. But all lesser rights (real or personal) in or in respect of the object will be extinguished. Obvious examples include the case of usufructuaries, pledgees or unpaid sellers.[378] The underlying right is also lost, with respect to most of these lesser rights as a consequence of immobilizations by destination.[379]

Not only must an object retain its identity as a corporeal moveable, but it must in most cases also retain its individuality. This limitation is not particularly problematic, since the rules of accession to moveables will generally operate to transfer title as well. If the right of ownership of an object is extinguished by accession so also would be all lesser rights in that object. But with respect to certain types of non-possessory security, a loss of individuality is possible, even without a change of ownership. Such a loss of individuality will extinguish an unpaid seller's and a commercial pledgee's rights,[380] although not those of a bank, transferee of property-in-stock, or a trustee for bondholders.[381] In all these cases, if the underlying right is lost, for lack of identity or individuality of the object upon which it bears, so too is the action in revendication which sustains it.

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[375]Arts 480, 1766, 1805, 1975 *C.C.L.C.*

[376]See above, no. 159.

[377]See above, nos 136-45.

[378]This is because, while the same person remains owner, the basis of his title has changed. Only banks asserting s. 178 security and transferees of property-in-stock are exempt from this loss of title in certain cases. See below, no. 187.

[379]But see art. 1979ff. *C.C.L.C.* for commercial pledge, and s. 178 of the *Bank Act, supra*, note 13. See also art. 571 *C.C.P.* and *Banque d'épargne de la cité et du district de Montréal* v. *Gaz Métropolitain Inc.* (1976), [1976] R.P. 83 (Prov. Ct).

[380]Art. 1999 *C.C.L.C.*; *Roy* v. *Bois Ste-Lucie Inc., supra*, note 41; see art. 1979f *C.C.L.C.* by implication.

[381]See, *e.g.*, the *Bank Act, supra*, note 13, s. 179(7).

164. *Contractual Informality* — While most contracts relating to moveables are strictly consensual, several security or quasi-security devices require a degree of formality. In most cases, a failure of formality will mean that the right claimed is radically null. This would be the case, for example, with an informal trust deed, commercial pledge or transfer of property-in-stock. In two cases, however, informality merely restricts the opposability of the right which is claimed. Thus, a failure to register an "intention to give security" under section 178(4) of the *Bank Act* does not void the bank's security; it merely makes it inopposable to certain creditors. For this reason, revendication on the basis of a section 178 right would remain possible, except as against those listed creditors. Similarly, the limitation on a repairer's right of retention set out in sections 179 and 186 of the *Consumer Protection Act* only applies as against the consumer.[382] Should the true owner (in cases where the consumer is not the owner) attempt to regain possession, the repairer may oppose his right; hence, should the repairer be wrongfully dispossessed by anyone other than the consumer, he may be able to revendicate.

c. Contractual Renunciations

165. *Licenses to Deal and Partial Waivers* — Normally the action in revendication will be exercised only against a third party who has no contractual relationship with the owner. Such a third party could be a finder, a thief or a person who himself has contracted with the owner's co-contractant. The most common example of this last situation would be the case of the purchaser from a holder who is merely a lessee or conditional purchaser. In such cases the relationship of the third party purchaser and the true owner would be governed by the rules relating to the sale of the thing belonging to another.[383] A variation on this theme occurs when an owner-debtor sells property over which he has granted a non-possessory security; if he attempts to do so free of his creditor's security, a conflict between the third party and the creditor will arise. Normally the rules of the *Code* will apply to determine the respective rights of purchaser and secured creditor.[384]

Nevertheless, in certain cases, an owner or secured creditor will expressly give a co-contractant a license either to deal with the property free of his rights or to subordinate his rights to a third party. In such cases, the third party may avail himself of rights arising from a contract to which he was not a party.[385] For example, a stipulation by which a seller who retains

[382]See, by analogy, *General Motors Acceptance Corp. of Canada* v. *Boucher* (1979), [1979] C.A. 250.

[383]See arts 1487-1490 and 2268 *C.C.L.C.*

[384]See Macdonald, *supra*, note 337 at 1043-51.

[385]Art. 1029 *C.C.L.C.* See C.K. Irving, "Article 1029 C.C.: Stipulation for a Third Party" (1963) 9 McGill L.J. 337.

title agrees with his buyer that he will not enforce his right to revendicate against ordinary course purchasers of the buyer may be invoked in defense to an action in revendication brought by the original seller, provided the stipulation is a genuine stipulation for a third party.[386] A similar result may be reached in respect of the right to sub-lease[387] and the right to assign principal real rights such as usufructs.[388] Finally, the owner or secured creditor might agree that the debtor could engage in ordinary course dealings giving rise to a right of retention, in which case the right to revendicate would be subordinated to that of the retention claimant.[389]

166. *Inter Partes Stipulations* — It is common for the titulary of a right to revendicate to agree with his own co-contractant to postpone or forfeit the right to revendicate under certain conditions. Most often these agreements occur in the context of a security agreement, where for example a conditional seller will agree to give notice prior to revendicating his object. These arrangements are simply a reflection of the ordinary law of contract and constitute no more than limitations on the underlying right which translate into limitations of the action in revendication.[390]

3. Loss or Limitation of the Action in Revendication *Per Se*, without Loss of the Underlying Right

167. *Survival of the Underlying Right* — Perhaps the most distinctive feature of the action in revendication is the fact that it may be lost or conditioned even when the underlying right which it protects subsists. In some situations a plaintiff otherwise entitled to revendicate may be unable to do so because the remedy is unavailable against the party in physical control of his object. This obviously occurs where a co-contractant (or a person directly deriving inferior rights from him) has a right to custody of the corporeal moveable but it also arises from certain legal impediments to revendication which protect the rights of third parties.

The most common cases involving a denial of revendication against third parties are the protected and partially protected sale hypotheses of article 2268 *C.C.L.C.* In addition, there are two cases where the plaintiff cannot revendicate against a co-contractant or a person with whom he has a direct legal relationship. These are the cases of imposed indivision and of ordinary consumer installment sales. Finally, in certain cases a statutory

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[386]Compare *Juneau* v. *Plamondon* (1930), 69 C.S. 327.

[387]Art. 1619. *C.C.L.C.*

[388]See art. 457 *C.C.L.C.*

[389]See Macdonald, *supra*, note 337 at 1043; *Boston Bank of Canada* v. *Montreal Fast Point (1975) Ltd* (28 August 1986), Montreal 500-05-005445-869 (Sup. Ct).

[390]Rather, these restrictions can be analogized to those arising in protected sales hypotheses. See below, no. 172ff.

transfer will not deprive a potential revendicating plaintiff of his right of ownership but will nevertheless suppress revendication, the remedy to enforce that right.[391]

What is notable in each of these cases is that the underlying substantive right (even if one of ownership) survives. Thus, revendication remains possible against all persons except those whom the law explicitly protects from revendication.[392]

a. Inter Partes *Limitations on Revendication*

168. *Nature of the Right* — Normally, a party seeking to recover a corporeal moveable from a co-contractant will do so through an action in specific performance. However, in two situations the action in specific performance will be unavailable. First, in cases of imposed indivision, there may not be an applicable contractual term concerning custody between owners whose goods have been intermingled. Here, any attempt at recovery would have to be grounded in revendication. Secondly, there are cases where the law restricts the freedom of parties to contractually stipulate the circumstances under which custody of an object may be transferred. Thus, the plaintiff out of possession is no longer asserting a contractual right, but rather a right to possession grounded in his status as a titulary of a real right (most often that of ownership).

i. Imposed Indivision

169. *Limited Revendication* — Under articles 436, 437 and 439 *C.C.L.C.*, when adjoined or admixed moveables belonging to several owners cannot be separated and their relative value is equal, the rules of accession do not operate so as to permit one owner to expropriate the other.[393] Similarly if the value of the workmanship and materials of one person is equal to the value of the materials of the other, and the moveables cannot be separated, article 436 *C.C.L.C.* also prevents expropriation.[394] Each becomes an undivided co-owner of the whole. Therefore, while each retains a right to revendicate against third parties,[395] neither may revendicate from the other. As in the case of any other type of indivision, the recourse of the undivided

[391]See Macdonald, "Revendication: Part One", *supra*, note 136, no. 74.

[392]In other words, this is the obverse of the title-washing problem. In asking whether title is washed, one is concerned to know if any of the various plaintiffs in revendication may still bring an action. In the present context the question is to determine which defendants can resist revendication.

[393]If one owner's material demonstrably exceeds the other owner's material in value, art. 438 *C.C.L.C.* gives a right to expropriate.

[394]But if the relative values are unequal, then expropriation occurs either to the owner (art. 434 *C.C.L.C.*) or to the workman (art. 435 *C.C.L.C.*).

[395]See Lêgier, *supra*, note 1, no. 10.

co-owners *inter se* is either partition or licitation.[396] It follows that an innocent owner whose material was confused or specified remains owner but loses a part of the right to revendicate which he previously could have exercised indiscriminately.

ii. Ordinary Consumer Installment Sales

170. *Nature of Consumer Installment Sales* — Under the *Consumer Protection Act*[397] the owner of property sold to a consumer by installment sale, or under any other contract which defers the transfer of title until complete performance of the buyer's obligations,[398] may not always be able to revendicate the goods from his buyer according to the terms of the contract of sale. Section 138 of the Act subjects the action in repossession to various preconditions which are set out in sections 139 to 146.[399]

Sections 139 and 140 provide that the owner may not retake possession without giving the consumer a thirty-day notice to remedy any default under the contract. Moreover, sections 142-144 require the seller to obtain judicial permission to retake possession from a consumer who has paid more than half of the purchase price. In such cases the court may not only refuse permission to repossess, but may also modify the credit terms respecting the balance owing at that time.[400]

171. *Scope of the Seller's Right to Revendicate* — In these hypotheses, the *Consumer Protection Act* does not effect a transfer of title to the consumer.[401] In contrast to the sanction resulting from an informal consumer installment sale, the seller remains owner. However, the seller's right to revendicate is severely restricted as against his buyer. On the other hand, as owner the seller could revendicate from any third party who wrongfully holds the property as well as from any person acquiring the property from the consumer, subject nevertheless to the limitations set out in article 2268 *C.C.L.C.*[402] As in the case of imposed indivision, the law protects the substantive right, while at the same time restricting the titulary's judicial recourses available to vindicate it.

b. Limitations on Revendication as against Third Parties

172. *The Notion of a Protected or Partially Protected Sale or Pledge* — Paragraphs 2268(3) and 2268(4) *C.C.L.C.* provide that in certain cases an owner may lose the right to revendicate his corporeal moveable property

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[396]Art. 439 *C.C.L.C.*

[397]*C.P.A., supra,* note 27.

[398]*C.P.A., ibid.,* s. 15.

[399]In addition, *C.P.A., ibid.,* s. 136(6) prevents contractual recapture clauses (*des voies parées*).

[400]*C.P.A., ibid.,* s. 15, makes these provisions apply *mutatis mutandis* to resolutory provisions.

[401]See *C.P.A., ibid.,* s. 135, and see above, no. 154.

[402]See also *C.P.A., ibid.,* s. 137.

from a holder who has not yet acquired it by prescription under paragraph 2268(2) *C.C.L.C.*[403] First, paragraph 2268(3) *C.C.L.C.* establishes a rule that certain purchasers automatically acquire a legal position unassailable by the true owner. Secondly, paragraph 2268(4) *C.C.L.C.* provides that in other cases the true owner may revendicate only upon reimbursing the purchaser the price he has paid. In this study, the former will be characterized as a protected sale, the latter as a partially protected sale.

i. Protected Sales and Pledges

173. *Conditions for Protected Sales* — The *Code* sets out four conditions which an acquirer must meet in order to avail himself of paragraph 2268(3) *C.C.L.C.* First, he must be in actual possession of the corporeal moveable.[404] Once this is established the acquirer must also meet three other conditions:[405] he must be in good faith,[406] the corporeal object must not have been lost or stolen[407] and he must have acquired the object in one of the protected sale circumstances set out in paragraph 2268(3) *C.C.L.C.* (that is, at a fair, market, or public sale, or from a trader dealing in similar articles, or in a commercial matter generally).

174. *Types of Protected Sale* — The notion of a "sale at a fair or market" is self-explanatory, but seldom encountered today. The conditions under which other types of protected sale may arise require discussion.[408] The term "public sale" was at one time interpreted to mean only an auction under articles 1564 to 1568 *C.C.L.C.*,[409] although it would seem that public

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[403]For an extensive study, see Caron, *supra*, note 274, and see above, note 271.

[404]See Martineau, *supra*, note 274, no. 165.

[405]It is to be remembered that the onus rests on the acquirer to prove these three other conditions. See Martineau, *supra*, note 274, nos 166-77; Caron, *supra*, note 271 at 416; and *Rogers* v. *Goldberg* (1948), [1949] C.S. 74.

[406]Art. 2268(3) *C.C.L.C.*; *Fortin Foundry* v. *Palmer Bros* (1960), [1960] C.S. 324.

[407]Art. 2268(4) *C.C.L.C.* Martineau, *supra*, note 274, no. 156 believes that the expression "stolen" should be given a narrow interpretation. That is, rather than to be interpreted as encompassing the hypotheses covered by the *Criminal Code* (which would include conversion by a person given custody by the seller), the term should be given the same restrictive interpretation as in France. See *Globe Slicing Machine Co.* v. *Ethier* (1948), [1948] C.S. 257; and Mazeaud, *supra*, note 163, nos 1521-23. On the other hand, Caron, *supra*, note 274 at 26-38, believes, on the basis of *Sauvé* v. *Guildhall Insurance Co.* (1961), [1961] B.R. 733, *Rocheleau Automobile Ltée* v. *Guay* (1963), [1963] B.R. 770 and *Commercial Credit Corp.* v. *Royal Insurance Co.* (1968), [1969] B.R. 793, that there will be few eases where property passes into the hands of a third party against the owner's wishes, without there being a theft or loss. The clear intention of the codifiers in proposing art. 2268(3) *C.C.L.C.* has, therefore, been subverted by the cases.

[408]See Martineau, *supra*, note 274, no. 165; Caron, *supra*, note 274 at 17

[409]P.-B. Mignault, *Droit civil canadien*, t. 9 (Montréal: Wilson & Lafleur, 1916) at 553, n. 84.

sales in realization by a secured creditor today would also qualify as public sales.[410]

The expression "trader dealing in similar articles" means

> celui qui exerce publiquement, ostensiblement et habituellement son négoce dans la localité où il est connu ... le fait d'en vendre occasionnellement des effets, au lieu d'affaires des acheteurs, ne peut constituer tel vendeur d'occasion commerçant trafiquant en semblables matières.[411]

Thus, a watchmaker who sells watches is such a person, although an ordinary service-station owner who sells a used car is not.[412]

By far the most problematic qualifier is the phrase "nor in commercial matters generally". Here the *Code* seems to contemplate a very broad category of sales.[413] In fact, courts have systematically held that revendication is not to be permitted whenever a commercial operation is envisioned, regardless of whether the seller is a trader dealing in similar articles, whether the sale is at a fair or market, or whether it is a public sale.[414]

175. *Protected Pledges* — Article 1966a *C.C.L.C.*, which makes article 2268 *C.C.L.C.* applicable to contracts of pledge, does not fit very well with the scheme of the *Code*. While it seems obvious that article 1966a *C.C.L.C.* applies to ordinary possessory pledges,[415] doubts remain about its application to non-possessory pledges. Of course, because agricultural pledges do not involve commercial operations, they are excluded;[416] but courts have applied article 1966a *C.C.L.C.* to commercial pledges.[417] Again, while it is not clear whether transfers to trustees under the *Special Corporate Powers Act* are subject to article 1966a *C.C.L.C.*,[418] all agree that transferees under

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[410]Caron, *supra*, note 274 at 17; and Caron, *supra*, note 271 at 398.

[411]*Charron* v. *Walker*, *supra*, note 87 at 443. See also *Laforest & Frères Inc.* v. *Dagenais* (1960), [1961] C.S. 415; and Caron, *supra*, note 274 at 17-18.

[412]*René T. Leclerc Inc.* v. *Perrault* (1969), [1970] C.A. 141. But see below for special rules relating to automobile dealers.

[413]See Martineau, *supra*, note 274, no. 166; and Caron, *supra*, note 274 at 5-15. See also G. Owen, "Sale of a Thing not Belonging to Vendor" (1936) 14 Can. Bar Rev. 434; L.A. Pouliot, "Nullité de la vente de la chose d'autrui" (1934) 12 R. du D. 450; *National Cash Register* v. *Demetre* (1905), 14 B.R. 68; *Frigidaire Corp.* v. *Malone* (1933), [1934] S.C.R. 121; but see *Gotfredson Corp.* v. *Fillion* (1929), 46 B.R. 52.

[414]See Caron, *supra*, note 274 at 15-16. See also art. 2260(5) *C.C.L.C.* on the presumption of commerciality.

[415]*Canadian Bank of Commerce* v. *Stevenson* (1892), 1 B.R. 371.

[416]Agricultural pledge cannot be a commercial matter. See *Caisse Populaire Notre Dame d'Hébertville* v. *Encans de la ferme Inc.* (1972), [1973] R.L. 292 (Prov. Ct).

[417]*Re Bertrand* (1967), [1967] C.S. 596. But see Macdonald, *supra*, note 82, for arguments supporting the contrary proposition.

[418]See the discussion in Caron, *supra*, note 271 at 406-09 and 412-13.

the *Bank Act* or the *Bills of Lading Act* cannot resist revendication by invoking paragraph 2268(3) *C.C.L.C.*[419]

A further complication arises when a debtor grants two commercial pledges, or grants a simple pledge to a second creditor after having given a first commercial pledge. Does the second pledgee who takes possession have the right to resist revendication by the first pledgee? The majority view of the courts has been to the contrary: registration of the commercial pledge is deemed sufficient to defeat the second pledgee's claim to good faith.[420] Thus, a first commercial pledgee could revendicate the object of the pledge from a later pledgee (whether commercial or ordinary) who had obtained possession of it.

176. *Effect of Protected Sales and Pledges* — The effect of paragraph 2268(3) *C.C.L.C.* is to prevent revendication by the owner or other person normally entitled to do so.[421] In other words, pledgees or acquirers under the (rarely applicable) conditions set out by paragraph 2268(3) *C.C.L.C.* obtain a right opposable to the revendicating party under any title. It should be noted, however, that the purchaser or pledgee does not immediately acquire title to the goods as against the owner: only the owner's right of revendication is suppressed.[422] Thus, if a buyer of the thing of another in a protected sale should later lose the object, prior to three years following the true owner's dispossession, the true owner should always be able to revendicate it from the finder.

A more difficult case arises where a protected purchaser later sells in a non-protected sale, even to a good faith purchaser prior to three years' dispossession of the owner. Given the drafting of article 2268 *C.C.L.C.*, the action in revendication ought still to lie against the purchaser. This seemingly unreasonable result can be justified on two bases. First, article 2268 *C.C.L.C.* was designed to facilitate commercial transactions rather than private dispositions; and secondly, if paragraph 2268 *C.C.L.C.* were held to transfer title, then paragraph 2268(4) *C.C.L.C.* could only be explained by

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[419]Caron, *supra*, note 271 at 413; G.E. Le Dain, "Security Upon Moveable Property in the Province of Quebec", (1956) McGill L.J. 77 at 104; *Chaine coopérative du Saguenay* v. *Laberge* (1959), [1959] C.S. 320. *Bank Act*, *supra*, note 13, s. 178(2).

[420]*Re Macajo Construction Inc.* (1972), [1973] C.A. 505; *Re Bertrand*, *supra*, note 417; *Société coopérative agricole de Plessisville* v. *Tardif* (1963), [1963] C.S. 658.

[421]For the view that the bank acting under s. 178 would not be precluded from revendicating, see Macdonald, *supra*, note 337 at 1043-50. But see *contra*: *Mandigo* v. *A.G. Canada* (1964), [1965] B.R. 259.

[422]But see, *contra*, Martineau, *supra*, note 274, nos 167-68, citing French authority such as Marty & Raynaud, *supra*, note 170, no. 391; Mazeaud, *supra*, note 163, no. 1540. Caron is equivocal on this point: see Caron, *supra*, note 271 at 390-91 where he notes the difference between French and Quebec law and concludes "c'est tout comme si la vente ... expropriait, sans plus de formalités, le propriétaire de ce bien".

by some notion of defeasible title — that is, as a forced sale from the good faith purchaser back to the original owner. It follows that, while acquisitive prescription, judicial sales, and sales by a seller in possession effect a transfer of ownership, paragraph 2268(3) *C.C.L.C.* only establishes a defense which can be set up by purchasers at certain types of sales. It does not, to use a current expression, "wash title" or create a "*titre nouveau*" as would be the case in France.[423]

ii. Partially Protected Sales and Pledges

177. *The Notion of a Partially Protected Sale or Pledge* — Notwithstanding the general rule preventing revendication in cases of protected sales and pledges, paragraph 2268(4) *C.C.L.C.* elaborates one hypothesis where the owner against whom prescription has not been acquired may nevertheless regain custody of his corporeal moveable. If a buyer purchases, or a pledgee takes possession, under the conditions of paragraph 2268(3) *C.C.L.C.*, but the true owner has been dispossesed by theft or has lost the object, the buyer or pledgee may be compelled to surrender that object. Where the object is lost or stolen, therefore, the paragraph 2268(3) *C.C.L.C.* defence is no longer open to a buyer.[424]

178. *Effect of a Partially Protected Sale or Pledge* — To revendicate, however, the true owner must reimburse the buyer the price paid to acquire the goods, or pay the pledgee the amount of his secured claim.[425] Of course, if the acquirer or pledgee is not in good faith,[426] the owner may revendicate without being obliged to reimburse the purchaser or pledgee. In all events, the owner must not have been dispossessed more than three years, since the holder, being in good faith, would then have acquired title by prescription.[427]

As in the case of a protected sale, a partially protected sale does not effect a transfer of ownership. It merely conditions the right of an owner (or of any other plaintiff) to revendicate his object from the specific purchaser who may plead paragraph 2268(3) *C.C.L.C.* Revendication without reimbursement remains possible from wrongfully holding third parties, and

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[423]Ortscheidt, *supra*, note 1 nos 5-9. Some claim that such a result would mean that the ultimate buyer would suffer. Yet he has a recourse in warranty against his seller. Does the "protected buyer" then have a recourse against the "protected seller", and the "seller" a recourse further up the chain of title? Caron suggests that such recourse is possible: see Caron, *supra*, note 271 at 390. If so, there is no reason of policy to extend the effects of the "protected sale" to later acquirers from the "protected buyer".

[424]See above, note 407 for a discussion of the term "stolen".

[425]See Caron, *supra*, note 271 at 391-93; Martineau, *supra*, note 274, nos 169-70; and *Laforest et Frères* v. *Dagenais* (1960), [1961] C.S. 415; *Lapointe dit Desautels* v. *Charlebois* (1912) 42 C.S. 57.

[426]*Econ Oil Co.* v. *Eddy Veilleux Transport Ltée* (1974), [1973] C.S. 1068.

[427]*Federation Insurance Co.* v. *Craig Forget Cie* (1973), [1973] C.S. 431.

until prescription is acquired from subsequent acquirers who cannot themselves plead paragraph 2268(4) *C.C.L.C.*[428]

iii. Protected Sales of Automobiles

179. *The Licensing Requirement* — Under section 22 of the *Highway Code*[429] the sale of an automobile by any person who is not licensed to do so is presumed to be neither a sale by a trader dealing in similar articles nor a sale in a commercial matter.[430] In other words, for the purposes of paragraphs 2268(3) and 2268(4) *C.C.L.C.*, even a person ostensibly falling within the list of privileged sellers cannot give a protected title to his buyer unless he holds the appropriate license. The true owner may revendicate against the buyer from an unlicensed dealer, without owing an indemnity[431] even if the buyer is in good faith.[432] The buyer who neglects to demand proof that his seller holds the required license loses the right to any of the protections of paragraphs 2268(3) or 2268(4) *C.C.L.C.*[433] and must suffer revendication without reimbursement by the true owner.

180. *Effect of Holding a License* — Where the seller holds a permit, the normal rules of article 2268 *C.C.L.C.* will apply,[434] so that a buyer in good faith may resist revendication until reimbursed. The owner who must reimburse the defendant for the price paid under paragraph 2268(4) then has a claim against the insurance fund of the licensed seller for the true amount of his loss,[435] even if, according to some cases, this amount is greater than the purchase price received by the licensed seller.[436] Once again, as in partially protected pledges and sales, the true owner does not automatically lose his right of ownership. He merely loses his absolute right to revendicate against particular buyers. Of course, should prescription be acquired, he loses whatever rights he had in his automobile and can never revendicate.[437]

c. Statutory Transfers

181. *The Theory of Statutory Transfers* — In a number of situations arising under the *Winding-Up Act* or the *Bankruptcy Act*, from the moment a winding-up or receiving order is made, the true owner would seem to be deprived

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[428]The analysis, *supra*, note 423, is also applicable in this situation.

[429]*Supra*, note 4.

[430]*Industrial Acceptance Corp.* v. *Couture* (1953), [1954] S.C.R. 34; D. Jacoby, "Le régime exceptionnel du Code de la Route" (1971) 31 R. du B. 243.

[431]*Home Fire & Marine Insurance Co.* v. *Baptiste* (1933), [1933] S.C.R. 382.

[432]*Wawanesa Mutual Insurance Co.* v. *Plante* (1967), [1967] C.S. 540.

[433]See Caron, *supra*, note 271 at 400-06; and Martineau, *supra*, note 274, nos 173-76.

[434]*General Motor Acceptance Corp.* v. *Federation Insurance Co.* (1960), [1960] S.C.R. 726.

[435]*Highway Code, supra*, note 4, s. 22. See *Canadian Survey* v. *Industrial Acceptance Corp.* (1971), [1972] C.A. 71.

[436]*Guildhall Insurance Co.* v. *Levac automobile Ltée.* (1967), [1968] B.R. 152.

[437]See Caron, *supra*, note 271 at 406.

of his right of ownership *per se*. In other cases, however, only certain prerogatives of ownership, such as the right to revendicate, are transferred. In these cases, therefore, the underlying right of ownership seems to remain intact, while only the action in revendication is transferred from the owner to transferee. Paradoxically, in cases of protected sales, ownership and revendication remain intact but not exercisable against certain defendants. In a statutory transfer it is the titulary of the action who is legislatively defined, independantly of the titulary of the right of ownership.[438]

4. Possessory Security Devices and Seizures in Execution

182. *Special Features of Security and Executions* — In the three preceding sections various hypotheses relating to the loss of the action in revendication were examined: first, where the right sustaining revendication was transferred to another who automatically acquired title to the action in revendication along with the underlying substantive right; secondly, where the substantive right less than ownership giving rise to revendication was simply lost, so that the action was also lost; thirdly, where the underlying substantive right survives, but the action in revendication is limited *vis-à-vis* certain defendants or is transferred to an administrator. It is now appropriate to consider several situations where the right is lost or conditioned as a result of execution process or of a special defense afforded to a particular holder.

a. Rights of Retention

183. *Opposability of the Right of Retention* — In various dispositions the *Civil Code* provides that a person who has manufactured, repaired, preserved or otherwise expended money on moveable property may retain it until his account is paid.[439] In essence, the holder may retain the object until his claim is paid.[440] As noted, this right also entitles the retention claimant to revendicate the object of his claim against third parties wrongfully in possession. In addition, the right of retention is opposable to the retainer's debtor,[441] to his debtor's secured or unsecured creditors[442] and to his debtor's trustee in bankruptcy.[443] Most importantly, in cases where the debtor is not owner of the property retained, the right is opposable to the

[438]See R.A. Macdonald, "Revendication: Part One", *supra*, note 136, no. 74; *Canadian Business Corporations Act*, S.C. 1974-75-76, c. 33, ss 204(6) and (7); *Bankrupcy Act*, R.S.C. 1970, c. B-3, ss 47-50; *Winding-Up Act*, R.S.C. 1970, c. W-10, ss 33-35.

[439]Frenette, *supra*, note 8, nos 25-27.

[440]*Pinard* v. *Bergeron* (1977), [1977] C.S. 1158.

[441]*Gagnon* v. *Loubier*, *supra*, note 8.

[442]*Elliot Krever Ltd* v. *Montreal Casting Repairs* (1968), [1969] C.S. 6.

[443]*In re William Edward Hayes* (1928), 10 C.B.R. 283.

true owner[444] or any of the owner's assigns.[445] Thus, the true owner or any other claimant may not exercise a right of revendication against a person holding under a right of retention until the price of the latter's services have been paid.[446] Once again, the party defendant is claiming a defence to the action in revendication in a fashion analogous to that of a protected sale and is not contesting the plaintiff's title to bring the action.

b. Ordinary Seizures in Execution and Private Realizations

184. *Limits on Oppositions to Seizure* — In any execution process, as well as in any seizure before judgment, there will likely be conflicting claims between various individuals, each of whom will be vested with a right to revendicate. While the specific features of the opposition to withdraw from seizure will be discussed later, it is important to note here that an owner who is not the debtor of the seizing creditor may normally recover property under seizure. Similarly, titularies of principal real rights in corporeal moveables who are not execution debtors may require that the sale be made subject to their rights. Hence, if they have a possessory right, they may assert that possession against the seizing creditor. Finally, where a secured creditor has a right to revendicate, the right to oppose a seizure will depend on whether the opposant is a higher or lower-ranking creditor.

A substantially similiar regime applies where a creditor who is vested with a private right of realization seizes corporeal property. Since under both the *Bank Act* and the *Bills of Lading Act* the documentary pledgee cannot acquire rights in the property covered by the security agreement until the debtor becomes owner thereof, third party owners may in principle revendicate their property. But section 179(1) of the *Bank Act* and sections 4 and 27 of the *Bills of Lading Act* give the documentary pledgee preference over the rights of an unpaid vendor. Thus, the unpaid vendor's right to revendicate cannot be exercised against a documentary pledgee who has taken possession of the pledgor's goods, if the documentary pledge was acquired without notice of the vendor's rights.[447] All other persons entitled to revendicate the property may nevertheless do so against the documentary pledgee, or as against any other creditor attempting to realize privately, under the same conditions as would apply if a seizure in execution had taken place.

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[444]*Laurentide Finance Co.* v. *Paquette, supra,* note 8.

[445]*Gingras* v. *Maher* (1917), 53 C.S. 289.

[446]The retention creditor must surrender the object if it is seized in execution but he may claim his money by preference from the proceeds of the judicial sale. See Frenette, *supra,* note 8, no. 49.

[447]See Macdonald, *supra,* note 337 at 1051-60.

c. The Object Is Seized by a Lessor Exercising a Privilege

185. *Nature and Effect of the Lessor's Claim* — The one exception to the principle that an owner may exercise his right of revendication by bringing an opposition to the seizure under article 597 *C.C.P.*, whenever his property is judicially seized by the creditor of a third party, arises where a landlord seizes his tenant's furnishings to exercise his privilege for rent due or for damages.[448] Article 1639 *C.C.L.C.* extends the lessor's privilege to certain property of third persons which is found on the leased premises. In order for such property to be exposed to seizure, it must be there with the third party's consent,[449] not merely temporarily or accidentally,[450] and the lessor must have had no notice of the rights of the third party.[451]

While the lessor's privilege cannot be claimed in respect of residential leases,[452] in all other cases it operates to deprive the owner of the right to prevent the sale of his property. In other words, because the lessor's claim under article 1639 *C.C.L.C.* lies directly on the property of third parties, the article 597 *C.C.P.* "opposition to withdraw from seizure" cannot be raised by the third party owner. Of course, the goods may be revendicated in all cases of wrongful possession by the lessee (in which case they would not be on leased premises with the owner's consent) and they may also be revendicated prior to any seizure in execution (or seizure before judgment) by the lessor.[453]

5. Revendication and Title-Washing

186. *The Concept of Title-Washing* — Whenever any titulary of a right to revendicate loses the right to do so on one of the bases outlined in this section, it is important to determine whether all other rights to revendicate the corporeal moveable in question necessarily must also be lost. In many cases, the owner's loss of a right to revendicate occurs because another person has acquired a *titre nouveau*; here, as a general principle, all existing rights to revendicate would also disappear. In other cases, the loss of the right to revendicate is relative to the titulary of the right, and no *titre nouveau* is created; here it is necessary to establish which other rights are not compromised by any given creditor's inability to revendicate.

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[448]Arts 1637-1640 and 2005 *C.C.L.C.*

[449]*Morin* v. *Paquin* (1968), [1968] R.P. 332 (Prov. Ct).

[450]*Vachon* v. *Area Decal Inc.* (1971), [1971] R.P. 27 (Prov. Ct).

[451]*Enterprises Saillant et Fils* v. *Côté* (1974), [1974] C.S. 380.

[452]Art. 1650.4 *C.C.L.C.*

[453]See art. 1640(2) *C.C.L.C.* Once the goods of a third party are no longer on the premises, they are free of the lessor's privilege.

a. Where Title Is Washed

187. *Original and Derived Title* — Many of the limitations on the action in revendication reviewed above are a direct consequence of a mutation of title. That is, while there are some rights of ownership which are original, in that no person is directly a prior owner of the goods,[454] most rights of ownership are derived from a transfer of ownership. It is only in cases of derived ownership, therefore, that the question of title-washing can arise. Hence it is necessary to determine when a derived title gives the acquirer a *titre nouveau.* Moreover, in certain cases where title does not pass, the owner's loss of the right of revendication implies a similar loss by all other titularies of such a right. Here, while no *titre nouveau* is created, the law generalizes the partial expropriation of the owner's title.

188. *The Creation of a Titre Nouveau or Its Equivalent* — The most obvious cases where an owner acquires a *titre nouveau* occur when an object loses its character as a corporeal or as a moveable. All rights of revendication, with the exception of those of banks,[455] disappear when an object is immobilized by nature. Moreover, only the right of revendication given to banks, transferees and commercial pledgees survives immobilization by destination.[456] Where title is transferred by accession a similar regime is applicable: only certain secured creditors may continue to exercise their rights.[457] In cases where a moveable becomes incorporeal, all rights to revendicate are lost, even though certain secured creditors may claim rights in the resulting incorporeal proceeds. That is, apart from modern non-possessory securities, a material transformation of a corporeal moveable washes title.

A *titre nouveau* is also created in any contract or deed translative of ownership, yet such contracts almost never operate to extinguish other real rights,[458] rights of certain creditors based on possession (for example, the *exceptio non adimpleti contractus* and the right of retention) or rights of administrators. On the other hand, the unpaid vendor's right of revendication and the claim of the title creditor are extinguished in such cases.[459] Where title is transferred by effect of law — expropriation, judicial sale, acquisitive prescription and sale by a prior transferor in possession — the *titre nouveau* is a washed title.

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[454]See Marty & Raynaud, *supra,* note 170, nos. 407-18.

[455]*Bank Act, supra,* note 13, s. 178.

[456]*Bank Act, ibid.,* ss 178(3), 179(2); *Bills of Lading Act, supra,* note 13, s. 11(2); art. 1979h *C.C.L.C.*

[457]*Bank Act, ibid.,* s. 179(7); *Bills of Lading Act, ibid.,* s. 11(2).

[458]Thus, the transfer of title resulting from an informal consumer sale or from an illegal condition in a will does not wash title.

[459]See art. 1999(3) *C.C.L.C.*

The anomalous case (that is, where title is washed although no *titre nouveau* is created) occurs in respect of protected and partially protected sales. For here, the buyer's right to resist revendication by the true owner can be set up against any person also deriving rights from that owner, except a bank holding section 178 security.[460] It cannot, however, be used to defeat revendication by the seller (either under article 1494 or article 1998 *C.C.L.C*) who is claiming against his own buyer.

It follows that there is no necessary coincidence between the generation of a *titre nouveau* and a washed title. Each type of washed title is justified on a separate basis.

b. Where Title Is Not Washed

189. *Loss of Special Rights of Revendication* — In most cases, where an individual other than the titulary of a real right is attempting to revendicate, but loses that right, this will not have a generalized effect. Thus, when a particular right is time-barred, forfeited for abuse, or is renounced, other rights to revendicate will not automatically fall.[461] Similarly, where revendication is based on possession or some other factual condition, and a creditor no longer meets that condition, the loss of the special right to revendicate does not automatically compromise other real rights. In each case the reason the action is lost does not relate to any transformation of the object or general mutation of title. Hence, no other rights should be affected.

190. *Partial Losses of the Right of Revendication* — In several cases the right of a titulary of the action in revendication is only partially lost. For example, where an undivided co-owner loses his rights in certain objects following partition, that loss has no impact on the ability of any person not deriving rights from him to revendicate.[462] A similar result occurs in respect of informal consumer installment sales. The partial loss or postponement of the action in revendication has only a relative effect. Its cause cannot be generalized so as to limit revendication by other plaintiffs.[463]

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[460]See Macdonald, *supra*, note 337 at 1043-51; but see cases cited therein.

[461]However, this is not the case where these other rights are derivative of the right which is extinguished. This would occur, for example, if a usufructuary were to grant a right of use for a period exceeding the length of the usufruct.

[462]That is, while the extinction of the co-owner's rights would extinguish any usufructs he has granted (but, by virtue of art. 1966a *C.C.L.C.*, not any pledges), it does not affect any rights in the property antedating his own.

[463]In other words, the limitation on revendication is relative to particular debtors and creditors.

c. The Relativity of Title-Washing

191. *The Problem of Registered Rights* — Much of the theory of revendication, not only as concerns potential plaintiffs but also as concerns limitations of the actions, can be derived directly from paragraph 2268(1) *C.C.L.C.* But if possession has, in principle, traditionally been seen as the best *indicium* of title to corporeal moveables, in modern times its claim to priority has come under assault. Both in France and in Quebec, various techniques for registering rights in corporeal moveables have undermined the scheme of the *Code*.[464] As a result, generally applicable principles relating to the creation of a *titre nouveau* or to the washing of title are discarded in special legislation which gives registered rights (usually in the context of a security agreement) a permanence greater than the right of ownership itself. That is, even if in certain cases the material transformation of an object or the forced legal mutation of title can extinguish all ordinary rights of revendication (including that of an owner), registration under the *Bank Act* or the *Bills of Lading Act* often will preserve a security device which gives rise to revendication. It follows that even where the *Code* presumes that title is washed, in certain cases only a relative effect is produced.

D. Exercise of the Action in Revendication

192. *Translating Rights into Actions* — In the preceding sections an attempt has been made to discern the limits of the action in revendication by identifying which plaintiffs are, in principle, vested with a right to revendicate, and by enumerating the conditions under which the right to revendicate may be lost, devalued or postponed. But the action in revendication is a judicial recourse: it is the procedural translation of an abstract right and is subject to the normal constraints of all actions. Hence, it is necessary to consider who has carriage of the action in any specific case, who is to be the proper defendant to the action, and how the action is, in fact, to be brought.

1. The Plaintiff

193. *Multiple Plaintiffs* — The primary function of the action in revendication is to vindicate ownership by the recovery of possession.[465] Yet it is frequently the case that several persons having the right to revendicate may bring judicial proceedings concurrently. Three rather complex examples will illustrate how this may be so. Suppose that the depositary of an object over which the institute of a substitution has given a section 178 security, or that the repairer of an object over which a usufructuary has given a commercial pledge, or that the lessee of an object over which a conditional

[464]See Marty & Raynaud, *supra*, note 170, nos. 425-26.

[465]Bouloc, *supra*, note 1, no. 1; *Service Finance Corp.* v. *Decca Radar Canada (1967) Ltd* (1971), [1971] C.A. 664 at 665.

purchaser has given a "floating charge", come to be wrongfully dispossessed by a third party. In the first case, the depositary, bank, institute and substitute may each claim a right to revendicate. In the second case, the repairer, commercial pledgee, usufructuary and bare-owner may each revendicate. In the third case, the lessee, conditional purchaser and trustee for bondholders all have at least a plausible claim to revendicate, along with the conditional seller.

The question which arises, therefore, in all such cases where there is a multiplicity of rights to revendicate, is whether the action in revendication is vested in only one plaintiff. And, if so, who is titulary of the action? On the other hand, if all titularies of the abstract right to revendicate are also titularies of the action in revendication, after joinder of actions under articles 66 and 67 *C.C.P.* or joinder of parties under articles 216 to 222 *C.C.P.*, which party has carriage of the action, and to whom will the object under contestation be awarded?

Because the civil law historically has denied the right of revendication to certain persons having the best right to physical control of an object (for example, lessees, borrowers and buyers in possession whose ownership is suspended by a term), it would seem that this criterion has not heretofore been determinative. But, since the goal of the action is physical control of an object, one might argue that the owner who has granted a usufruct or who has pledged his object should not have a preemptive right to the action. In other words, it would seem that carriage of the action in revendication cannot be grounded either in abstract legal right, or in any concrete *de facto* right to custody of an object.[466]

191. *Importance of the Attachment in Revendication* — From a procedural point of view, the question of who has the carriage of an action in revendication is less significant today than it formerly was. This is because the object being revendicated will invariably have been seized before judgment, and the respective rights of competing revendicating plaintiffs will have been organized prior to trial.[467] If the efficient protection of lawful rights in or upon, and the expeditious recovery of, corporeal moveables is the policy goal to be pursued, then sorting out who has carriage of an action is less important than deciding who may bring an attachment in revendication.

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[466]Of course, the person who can establish that he last had the object in his custody is presumed to have possession rather than mere detention; and he who has possession is presumed to be owner. See *Cie de publication de La Presse* v. *Terres laurentiennes Inc.* (1970), [1970] R.P. 333 (Prov. Ct).

[467]Nevertheless, the action in revendication need not be accompanied by an attachment in revendication. See *Hamelin* v. *Vulcan Steel Architectural Construction, Ltd* (1950), [1950] B.R. 766.

In all events, courts now seem to be permitting any person with a right of revendication, whose title is being denied by a third party, to bring an attachment in revendication for the purpose of protecting his rights.[468] Should a contestation about who has the best right to custody later arise, the court would adjudicate upon that issue as a subsidiary matter. In no case does it appear that the defendant to an attachment in revendication can plead, as against any person vested *in abstracto* with a right to revendicate, the fact that some other person has a better right to physical control of the object.[469]

192. *Attributing Custody* — While courts have had little trouble in concluding that any party who makes out a case for revendication may reclaim an object from a wrongfully holding third party, they have rarely been confronted with litigation between multiple plaintiffs. This is because, except as concerns competing security devices, the respective rights of the parties will be established by contract. For example, the usufructuary in conflict with a bare-owner need only establish his contractual right to the object in order to prevail.[470] Similarly, the dispossessed depositary will prevail over all but his own depositor.[471] Again, the wrongfully dispossessed pledgee need only prove the contract of pledge in order to take precedence over an owner who reclaims his object from a third party. The competition between conditional owners, or between owners and secured creditors, is more complex. Nevertheless, it would follow that wherever the conditional owner or secured debtor is not in default, custody should be attributed to the person who was last in possession of the object. Between competing secured creditors, of course, the priority rules of the *Civil Code* or special statute creating the security device will govern who may take possession for the purposes of realization.

Courts face more difficult issues where the titulary of a right to revendicate with the best claim to immediate custody refuses to act. Consider the case where a usufructuary refuses to act and the bare-owner is claiming a "reversionary" right of use, or the case where an institute refuses to claim an object from a third party and the substitute wishes to do so. Two theories may be advanced to support the claims of the bare-owner and of the substitute: one might say that the refusal of the usufructuary or of the institute to act constitutes an abuse leading to forfeiture; or one might claim that the presumption of paragraph 2268(1) *C.C.L.C.* means that the only sure way to interrupt prescription by the wrongful possessor is to deprive him of custody. Of course, in any claim by a "reversionary" plaintiff, those collateral rights vesting in the usufructuary or institute (such as fruits, or dam-

[468]See *Discothèque et Golf Lafontaine, supra,* note 139.
[469]See *Prescotte* v. *Goyette* (1945), [1946] C.S. 147.
[470]*Kimber* v. *Judah,* (1885), 2 M.L.R. 86 (Ct Rev.).
[471]Art. 1810 *C.C.L.C.*

ages for loss of enjoyment) could not be claimed directly. Unlike custody of the object, they are exclusively vested in the titulary of the right of *jouissance.*

2. The Defendant

193. *Defendants in Possession* — In Quebec law today it is generally accepted that the only proper defendant to an action in revendication is the person with actual possession.[472] This restriction flows from the *in rem* character of the action.[473] Thus, in *Morgan, Ostiguy & Hudon Ltée* v. *Sun Life Assurance Co.*[474] the Court of Appeal explicitly refused to transform an action in revendication against a defendant who had in good faith disposed of a corporeal moveable into an action in damages.

In other words, if, without fraud or fault of a defendant in revendication, an object once in his possession has passed into the possession of a third party, the defendant may successfully resist the action in revendication.[475] This conclusion would apply whether the object was sold,[476] given or pledged[477] in good faith to another. Only the new acquirer or the pledgee is an appropriate defendant party.

194. *Defendants Notionally in Possession* — Nevertheless, under the former *Highway Code,*[478] the Court of Appeal twice permitted an action to proceed against an automobile salesman no longer in possession of the object being revendicated. In both cases, the plaintiff was unaware of the resale and had framed his action in the alternative as a claim in damages against the salesman's insurance fund.[479] These cases cannot, however, be seen as reflecting a general exception to the principle that the defendant must be in possession; rather, they are grounded in the special provisions of the *Highway Code.*

A similar result, substituting damages for revendication, has been reached in certain cases where the object has passed beyond the writ of the court (where, for example, it is out of the province),[480] or where it has been completely consumed[481] or physically has changed character.[482] In each case,

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[472]Art. 2268(1) *C.C.L.C.*; Caron, *supra,* note 271 at 413-416. See below, no. 195.

[473]Bouloc, *supra,* note 1, no. 175.

[474]*Supra,* note 328 at 476.

[475]Caron, *supra,* note 271 at 416.

[476]*Ottawa Beach Motor Co.*v. *Barré* (1928), 45 B.R. 157.

[477]*Lord* v. *Robin* (1924), 39 B.R. 426.

[478]*Motor Vehicles Act,* R.S.Q. 1941, c. 142, s. 21; and *Highway Code,* R.S.Q. 1964, c. 231, s. 23, respectively.

[479]*Rocheleau Auto Ltée* v. *Guay* (1963), [1963] B.R. 770; *Garage W. Martin Ltée* v. *Industrial Acceptance Corp.* (1969), [1970] C.A. 43.

[480]*Hamelin* v. *Vulcan Steel Architectural Construction, Ltd, supra,* note 467.

[481]*Econ Oil Co.* v. *Eddy Veilleux Transport Ltée, supra,* note 426.

[482]*Fortin Foundry Ltd* v. *Palmer Brothers, supra,* note 406.

the court found that the defendant was still notionally owner. In the first, the only impediment to revendication was the jurisdictional limit of the court's writ: the out-of-province *mis en cause* was in possession but had not yet become owner. In the second, the defendant himself consumed the object (fuel oil) and derived its economic benefit. In the third, various iron castings had been broken down into scrap metal and resold as such.

Some earlier cases seemed to permit a transformation of revendication into a damages claim on a more liberal basis. In two cases it was held that a previous good faith possessor who had also disposed in good faith was liable in damages.[483] In both cases the court was not concerned to find fault by the defendant in the disposal. In view of the *Morgan, Ostiguy & Hudon Ltée* v. *Sun Life Assurance Co.*[484] case, however, these two cases would probably be decided differently today.

195. *Defendants Having Only Custody* — The law of Quebec follows the law of France in requiring that the action in revendication ultimately be directed against the person who has possession, even though physical detention is in the hands of a third party.[485] Thus, the courts have upheld an action brought against an individual who claimed to be owner of a corporeal moveable actually held by a third party.[486] Where the plaintiff knows that the person with possession (the seller under conditional sale, lessor, or commercial pledgee) is not the person with actual custody, he must also bring an attachment in revendication against the precarious possessor (holder) at the same time as he brings his action.[487] That is, while a seizure before judgment is not normally required as an adjunct to the action in revendication, where defendant and custodian are distinct, judicial process against both is required. If in the first instance the action is brought against a mere holder, the action can be maintained providing that the holder or the plaintiff impleads the actual possessor, once he becomes aware of the defendant's precarious title.[488] Presumably, when the possessor is impleaded, an attachment in revendication against the holder would then be necessary.

196. *Defending the Action* — As a result of several recent cases, it has become standard practice to implead both the party claiming possession (the owner, usufructuary, or pledgee) and the party with custody (a lessee, retention claimant or depositary). The defendant to the action will normally succeed

[483]*Aluminum Company of Canada* v. *Selig* (1952), [1952] C.S. 455; *Goldsmith, Smelting & Refining Co.* v. *Roy* (1922), 34 B.R. 520.

[484]*Supra*, note 328.

[485]See Bouloc, *supra*, note 1, no. 175; Ortscheidt, *supra*, note 1, no. 101.

[486]*Bélisle* v. *Poliquin* (1917), 52 C.S. 346.

[487]*Dargus* v. *Irwin* (1937), 75 C.S. 47.

[488]*Vachon* v. *Roy* (1921), 32 B.R. 88.

if he can establish that he has neither possession nor custody of the object.[489] Only exceptionally does the action lose its *in rem* character. First, if the defendant has fraudulently alienated the object[490] or otherwise committed a civil wrong,[491] he will be condemned to pay its value. Secondly, if the special insurance provisions of the *Highway Code* are applicable, the automobile salesman no longer in possession will be required to disgorge the object's value.[492] Thirdly, if the defendant notionally retains possession (either of the object or its value) but cannot render the object, he will be required to pay its value.[493] In all other cases, the court will either condemn the defendant to render the object, or will reject the plaintiff's action.[494]

3. Procedural Considerations

197. *Nature of the Action* — Because revendication is, in principle, a real action, the plaintiff brings suit with the service of a writ, in which he demands return of an object. The action may, therefore, be distinguished from any proceeding in specific performance or in restitution of an object, where the claim lies by virtue of a contract.[495] Typically, the action will also be joined to an attachment in revendication, although this is not necessary where the action is brought against a possessor who has physical custody of the object.

198. *Burden of Proof* — As a consequence of paragraph 2268(1) *C.C.L.C.*, the plaintiff in revendication assumes the burden of proof, although this is a lesser burden than it would be in France.[496] As noted earlier, the effect of article 2279 *C.N.* is to require the plaintiff to establish not only his own right, but also the fact that the object has been lost or stolen.[497] In Quebec, however, the defendant benefits only from a presumption as to the quality of his possession. That is, once the plaintiff establishes his own prior title to revendicate, the defendant must then prove acquisitive prescription[498]

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[489]*Morgan, Ostiguy & Hudon Ltée* v. *Sun Life Assurance Co., supra*, note 328.

[490]Ortscheidt, *supra*, note 1, no. 102.

[491]*Garage W. Martin Ltée* v. *Industrial Acceptance Co., supra*, note 479.

[492]*Rocheleau Auto* v. *Guay et Penot* (1963), [1963] B.R. 770.

[493]*Hamelin* v. *Vulcan Steel Architectural Construction, Ltd, supra*, note 467; *Econ Oil Co.* v. *Eddy Veilleux Transport Ltée, supra*, note 426.

[494]In *Vachon* v. *Roy, supra*, note 488, the court refused to permit the defendant to keep the object upon consigning the value as established in subsidiary conclusions to the plaintiff's action in revendication.

[495]Bouloc, *supra*, note 1, no. 3.

[496]Bouloc, *ibid.*, nos 176-78; Orscheidt, *supra*, note 1, nos 91-98 and 102-12.

[497]Mazeaud, *supra*, note 163, no. 1552.

[498]*Rogers* v. *Goldberg* (1948), [1949] C.S. 74.

or the exceptions of paragraphs 2268(3) and 2268(5) or article 1027 *C.C.L.C.*[499] Should the plaintiff succeed in proving both a defect in the defendant's title, as well as his own title, he will prevail.[500]

In the cases where the defendant attempts to plead paragraph 2268(3) *C.C.L.C.*, it is not necessary for the plaintiff to consign the purchase price paid by the defendant[501] or even to prove loss or theft. However, by failing to do so, the plaintiff runs the risk of having his action dismissed under paragraph 2268(4) *C.C.L.C.*, in the event the defendant proves his good faith purchase of the object in a protected sale.[502] In other words, once a protected purchase is made out by the defendant, the burden of proving loss or theft also lies on the plaintiff.

The plaintiff in revendication who is not owner (and who cannot claim some other real right) and the defendant who pleads a defence other than that flowing from the presumption of paragraph 2268(1) *C.C.L.C.* both assume the burden of proving their particular allegations. For example, a revendicating lessee will have to prove not only his own title but also the title of his lessor, should the defendant have succeeded in establishing the precarity of the plaintiff's detention. Similarly, a revendicating unpaid vendor must prove that he falls within each of the conditions for revendication elaborated by articles 1998-1999 *C.C.L.C.* Again, an owner under suspensive condition must prove not only his prior possession, but, should his true status be revealed, his entitlement to custody under his purchase contract as well. Only the depositary (or a holder analogized to depositary) need not establish his author's title, once the precarity of his own possession is proved.[503] The defendant who pleads immobilization, accession, a protected consumer sale, a right of retention or a contractual defence must prove his special defence, in the same manner as he would under article 1027, or paragraphs 2268(2), 2268(3), or 2268(5) *C.C.L.C.*

199. *Conclusions of the Action* — It is common in an action in revendication to request damages in the alternative, should it not be possible to restore

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[499]See *Farmers Insurance Co. of Iowa* v. *Gravel* (1926), 41 B.R. 370, aff'd (1926), [1926] 3 D.L.R. 699 (S.C.C.); *Commercial Acceptance Corp.* v. *Tournay* (1964), [1964] B.R. 896; *Belisle* v. *Caron* (1942), [1942] C.S. 160; *Joyal* v. *Murphy Automobile Inc.* (1955), [1956] C.S. 311; *Lapointe dit Desautels* v. *Charlebois, supra*, note 425.

[500]This includes establishing title, which by the operation of art. 2268(1) *C.C.L.C.* the plaintiff may do simply by proving his prior possession (Bouloc, *supra*, note 1, no. 177) as well as the identity of the objects revendicated (Ortscheidt, *supra*, note 1, no. 99). See generally *Assh* v. *Cité de Lévis, supra*, note 324.

[501]*Lake Megantic Pulp Co.* v. *Taylor* (1935), 41 R.L. 141 (C.S.); *Laforest et Frères* v. *Dagenais* (1960), [1961] C.S. 415.

[502]*Morin* v. *Piché* (1933), 71 C.S. 195.

[503]This is because the depositary benefits from art. 1806 *C.C.L.C.*

the object.[504] This conclusion is entirely separate from an action for damages resulting from deterioration of the object or from the loss of its use value. In these latter cases, the revendicating plaintiff must establish fault on the defendant's part.[505] Where return of the object is not possible, the courts have occasionally held intermediate possessors liable in damages — invariably for the price to be reimbursed under paragraph 2268(4) *C.C.L.C.*[506] In actions in revendication against the defendant in possession, which conclude in the alternative for damages, the courts have held that the successful plaintiff cannot be forced to accept damages[507] unless he expressly puts the defendant to his option.[508]

200. *Subsidiary Proceedings* — Typically, a defendant in an action in revendication will implead his author in title. Where the defendant, such as a lessee, holds a precarious title, he will claim damages from his lessor under paragraph 1604(3) and article 1608 *C.C.L.C.* In the case of contracts translative of title, the defendant who is obliged to give up the object will plead his recourse in warranty against eviction under article 1508 *C.C.L.C.* Such a recourse in warranty may be pleaded all the way up the chain of title to the thief or finder.[509] Where any defendant in warranty is insolvent, the creditor of that seller alone bears the loss.[510]

Where a defendant who is reimbursed by the revendicating plaintiff surrenders the object, he has in principle no recourse against his author in title.[511] But it may be that the object has increased in value, that he has improved it, that he has suffered legal costs or that he must render up certain fruits. In all such cases, the good faith possessor may claim damages from his author, assuming that he has not by his own act prejudiced his seller's rights.[512] He may also claim reimbursements for improvements from the

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[504]*Hamelin* v. *Vulcan Steel Architectural Construction, Ltd, supra,* note 467.

[505]The defendant could be the ultimate possessor (as in *Econ Oil Co.* v. *Eddy Veilleux Transport Ltée, supra,* note 426), or an intermediate holder (as in *Aluminum Co. of Canada* v. *Selig, supra,* note 483).

[506]*Fortin Foundry Ltd* v. *Palmer Brothers Ltd, supra,* note 406.

[507]*Vachon* v. *Roy, supra,* note 488.

[508]*Accessoires d'Autos Laurentien Ltée* v. *Churchill Constructors, supra,* note 171; *Tremblay* v. *Duval* (1931), 70 C.S. 239.

[509]Ortscheidt, *supra,* note 1, no. 136.

[510]Bouloc, *supra,* note 1, no. 182.

[511]He receives the price he has paid. If the object is worth less, he keeps the profit. See Mazeaud, *supra,* note 163, no. 1592.

[512]Bouloc, *supra,* note 1, no. 182. One example of this is surrendering without demanding reimbursement under art. 2268(4) *C.C.L.C.* See *Piché* v. *Laurentide Finance Co.* (1982), 1983 C.A. 301.

plaintiff[513] and may retain fruits received prior to becoming aware of the precarity of his title.[514]

The rights of the owner who must reimburse are more problematic. Of course, he has no claim against anyone except the original finder or thief to obtain repayment of his expenses. He has the object back, with improvements. On the other hand, he will always have an action in damages against the finder or thief to recover the amount paid to the possessor.[515] But, will an action lie against intermediate possessors, most notably against the merchant who sold the object? Courts in Quebec, with rare exceptions,[516] have refused such an action unless the owner can prove a fault by the intermediate holder or seller.[517] The owner is neither subrogated in the holder's warranty against eviction against the seller,[518] nor may he claim unjust enrichment from the intermediate holder.[519] The fault required may arise either from the holder's bad faith or from negligence, but will in all cases be grounded in article 1053 *C.C.L.C.* and not in any correlative liability attaching to the action in revendication.[520]

4. Situating the Action in Revendication

201. *Revendication, Specific Performance and Damages* — While the action in revendication is the primary recourse for vindicating rights in corporeal moveables, it co-exists with other actions. Thus, to appreciate the true regime of revendication, and especially to be able to assess whether judicial and legislative uses of the term are always exact, it is necessary now to examine other recourses tending to the specific recovery of corporeal moveables and to the action in damages. For only by situating a real action in context with personal actions may its necessary attributes be identified. Moreover, because the object of the action is to have the court attribute physical custody of a corporeal moveable, its availability need not be identical to other actions (such as a recourse in damages) or proceedings (such as the attachment in revendication) which do not require the court to un-

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[513]*Farmers Insurance Co. of Iowa* v. *Gravel*, *supra*, note 498.

[514]Art. 412 *C.C.L.C.* He is not obliged to set these off either against the claim for expenses against the owner, or against his claim in warranty against his seller.

[515]Bouloc, *supra*, note 1, no. 183; Ortscheidt, *supra*, note 1, no. 137.

[516]See, *e.g.*, *Aluminium Company of Canada* v. *Selig*, *supra*, note 483.

[517]See *Morgan, Ostiguy & Hudon Ltée* v. *Sun Life Assurance Co.*, *supra*, note 328; *Econ Oil Co.* v. *Eddy Veilleux Transport Ltée*, *supra*, note 426; and *Cholette* v. *Bourbonnais* (1948), [1949] C.S. 36.

[518]Bouloc, *supra*, note 1, no. 184; Ortscheidt, *supra*, note 1, no. 138; Martineau, *supra*, note 274, no. 169.

[519]Ortscheidt, *supra*, note 1, no. 139. This is because, had he acted earlier, he need not have paid to obtain possession.

[520]See, *e.g.*, *Morgan, Ostiguy & Hudon Ltée* v. *Sun Life Assurance Co.*, *supra*, note 328.

dertake such a definitive attribution. Once again, only by locating the action in the context of these other recourses is it possible to determine whether any modern extensions to the actions (both in terms of its availability to certain plaintiffs and in terms of the purpose to which it is directed) are justifiable. This task will be undertaken in Part Three of this study.