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The Law governing the "Statut Réel"

In contracts for the transfer inter vivos of moveables "ut singuli" in Quebec Private International Law.

Jeffrey A. TALPIS *

This study is an important part of a thesis which was submitted and defended at the University of Montreal on July 16, 1970 for a Doctorat of Laws under the above mentioned title.

It was directed by Professor Jean G. Castel of York University and assisted by Professor R. de Bottini of the University of Nice. The first chapter of Part one was published as four articles in the *Revue du Notariat* .**

The following article contains the sequel to the first chapter. Part two of the thesis which deals with *De lege Ferenda*, shall be published soon in the University of Montreal Law Journal (Thémis). Whereas the first chapter of Part one dealt with the determination and definition of the applicable conflict rule, this article concerns the domain of its application, thus concluding part one, the positive law. To facilitate the readers' comprehension, I shall commence with a résumé of the already published first chapter, and conclude with a résumé (in french) of the whole thesis.

Résumé of chapter one

The absence of a clear and precise conflict rule to govern the domain of the statut réel mobilier can no longer be tolerated, seeing that moveables and in particular securities have attained, in the modern commercial world the importance formerly reserved to immoveables. Space and homogeneity of interests led me to the consideration of corporeals, simple debts and securities, in themselves, i.e. *ut singuli* ; however the challenge of the most complex, though most important juridical operation with respect to such moveables led me to limit discussion to contracts for their transfer *inter vivos*.

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** (1971) 73 *R. du N.*, p. 275 et seq., 356 et seq., 501 et seq., and (1972) 75 *R. du N.*, p. 5 et seq.

Within these limitations, the thesis concerns the law governing all proprietary questions which could arise on the occasion of the contract to transfer, i.e. the "Statut Réel" in this respect.

I demonstrated at the outset that in spite of the apparent clarity of the phrase "moveable property is governed by the law of the domicile of its owner . . ." Article 6.2 *C.C.*, the legal community is not in agreement that this represents the correct rule for the particular situation under consideration. To some, it is the *lex domicilii*, to others, it is the *lex situs*, while the great majority completely avoid the determination thereof, by a characterization of proprietary issues as contractual. The researches which I have made have led me to the conclusion that the true rule is, in fact, the *lex situs*. Had the legal community, and in particular our courts, correctly interpreted article 6.2 *C.C.* in accordance with the classical method of interpretation dictated by the legislator, always seeking the *ratio legis*, expressed or implied, it would likewise have found that de *lege lata*, the *lex situs* is the applicable rule. Notwithstanding this erroneous judicial interpretation, the solutions reached in all of the Quebec cases except *United Shoe Co.* v. *Caron*, [1904] R. de J. 59, even though badly motivated, can well be explained by the *lex situs*, subject to the application of the correct *lex situs* when there is a dynamic conflict.

Of course, it was not sufficient to affirm the competency of the *lex situs*. This nebulous and highly metaphysical concept had to be defined. Continuing the classical method and heavily relying upon analogous fixations of *situs* for the purposes of the jurisdictional competency to hear a case and to permit execution of Judgment, in contra distinction to the taxation localizations relied upon by the legal community, I found that

a) the *situs* of a corporeal moveable is where it is in fact located
b) the *situs* of a simple debt is at the domicile of the debtor
c) the *situs* of a security is at the domicile of the debtor or issuing authority.

Résumé of whole thesis

"La loi qui doit régir le domaine du statut réel dans les contrats pour le transfert entre vifs de la propriété mobilière "ut singuli" en droit international privé québécois."

L'absence d'une règle claire et précise devant régir le domaine du "Statut réel mobilier" ne saurait être tolérée plus longtemps, vu que les biens mobiliers et en particulier les valeurs mobilières ont atteint, dans le monde du commerce contemporain, une importance autrefois

réservée aux immeubles. L'espace et l'unité d'intérêt m'ont conduit à considérer, dans la thèse soumise, les biens corporels, les créances simples et les valeurs mobilières, en eux-mêmes, c'est-à-dire *ut singuli* ; la difficulté du problème la plus complexe, quoique très importante, de l'opération juridique concernant ces meubles m'a conduit à restreindre la discussion du problème aux contrats pour leur transfert entre vifs. À l'intérieur de ces limites, la thèse soumise a pour objet le droit régissant toutes les questions de propriété qui peuvent se soulever à l'occasion d'un contrat en vue du transfert de ces biens.

J'ai démontré au début que, en dépit de l'apparente clarté de la phrase "les biens meubles sont régis par la loi du domicile du propriétaire", (6.2 *C.c.*), l'ensemble des juristes ne sont pas d'accord pour prétendre que ceci représente la règle véritable quant à la situation juridique particulière sous examen. Pour certains, c'est la loi du domicile, *lex domicilii*, pour d'autres la loi du lieu de la situation du bien, *lex situs*, alors que la grande majorité évite entièrement de déterminer ce problème par la caractérisation des questions de propriété comme relevant du domaine contractuel. Les recherches que j'ai faites m'ont conduit à croire que la véritable règle est en fait la *lex situs*. Si les juristes avaient interprété correctement l'article 6 paragraphe 2 du *Code civil*, selon la méthode classique d'interprétation, recommandée par le législateur, en cherchant toujours la *ratio legis*, exprimée ou implicite, ils auraient également trouvé que la loi à établir devait être celle du lieu de l'objet *lex situs*. De plus, comme je l'ai indiqué, les solutions proposées dans tous les cas de jurisprudence du Québec, à l'exception de l'affaire *United Shoe Co.* v. *Caron*, [1904] R. de J. 59, bien que faiblement motivées, peuvent très bien s'expliquer par la *lex situs*, avec, le cas échéant, une application de la correcte *lex situs* en présence des conflits mobiles.

J'ai constaté, évidemment, qu'il n'était pas suffisant d'affirmer l'application de la *lex situs*. Ce concept nébuleux et hautement métaphysique, devait être l'objet d'une définition. Suivant la méthode classique et nous appuyant sur des modes de détermination du *situs* semblables, pour les fins de l'exécution judiciaire et pour la compétence en matière de juridiction, parfois à l'encontre des principes de détermination invoqués en matière de taxation, j'ai constaté que le *situs* d'une créance simple est au domicile du débiteur, tandis que la valeur mobilière est située au domicile du débiteur ou de celui qui a émis cette valeur.

La détermination du facteur applicable est cruciale parce que, comme je l'ai démontré, le statut réel a, à la vérité, un domaine beaucoup plus vaste que celui qu'on lui a généralement accordé. Même si ce domaine ne comprend pas certains droits apparents de

propriété, comme ceux de la prohibition pour les époux de s'avantager entre vifs, la prohibition des dons entre vifs de biens à venir, la question des risques, les droits de résolution du contrat de vente, le droit d'arrêter les biens en transit, le réméré, et la rétention, j'ai néanmoins démontré que non seulement selon la caractérisation classique selon l'objet du "statut", et son explication juridique, mais selon le but social de ces dispositions, la règle régit au moins les questions suivantes : toutes les classifications et catégories de propriétés, primaires et secondaires, les conditions de transfert ou de réserve de la propriété de biens mobiliers, les litiges quant à leur propriété, le moment exact où le titre est transféré, les effets du transfert par un non-propriétaire, les formalités de la publicité, et la validité des prohibitions d'aliéner, des privilèges, des fiducies et des substitutions fidei commissaire, le tout, tant entre les parties qu'à l'égard des tiers.

Ceci ne signifie pas que d'autres dispositions que celles de la *lex situs* peuvent régler le problème parce que, comme je l'ai démontré par la théorie de la délégation de compétence, la *lex situs*, parfois, permet ou exige qu'une autre loi s'applique. Quand une telle délégation a lieu soit comme référence finale, soit comme référence provisoire avec détermination ultime de la *lex situs*, ceci, comme je l'ai démontré, ne résulte pas en un abandon de la loi du conflit. En effet, ce sont les dispositions et les politiques internes de la *lex situs* qui déterminent cette solution. De plus, j'ai établi que la jurisprudence, à l'exception de l'affaire *United Shoe Co.* v. *Caron*, appuie cette théorie. Il est évidemment entendu que l'on doit s'attendre à ce que la *lex situs* soit l'objet d'une exception, parfois, à cause de l'application des exceptions de fraude à la loi et aussi d'ordre public (lorsque la *lex situs* est en même temps la *lex fori*).

La plus grande difficulté quant à la règle de la *lex situs* vient de la nature mobile du bien mobilier. Quand le bien meuble change de *situs*, il y a souvent un problème à déterminer la *lex situs* applicable. J'ai indiqué que la solution de ces conflits ne se trouve pas nécessairement dans une théorie spécifique de "conflit mobile", découlant des théories générales, comme du respect des droits acquis, de la stabilité des institutions, des situations juridiques réalisées et de la non-rétroactivité des lois (comme dans le droit transitoire). La solution est plutôt déterminée par le juge saisi de l'affaire, selon la nature de la règle de conflits applicable. En effet, ce n'est qu'une qualification *lege fori* à une dernière étape. Mais la délimitation n'est pas faite entre contrat et statut réel par exemple ; elle est faite entre deux *leges siti* successifs. Pour un juge du Québec, la territorialité et la généralité du *situs* exigent que certains conflits soient régis par une *lex situs* antérieure, alors que d'autres sont solutionnés par une *lex situs*

actuelle, c'est-à-dire celle au temps de la contestation. L'on a néanmoins suggéré et accepté certaines dérogations, en vue de protéger les droits en expectative des parties et prévenir du même coup un préjudice au commerce international. J'ai constaté et démontré que la jurisprudence appuie ma proposition, à l'exception de l'affaire *United Shoe Co.*

J'ai voulu aller plus loin, cependant, et rechercher la règle qui soit vraiment la meilleure pour le Québec. A cette fin, j'ai démontré dans la deuxième partie de ma thèse que les règles actuelles sont, sujet à certains tempéraments quant aux valeurs mobilières, les meilleures qui soient applicables en l'occurrence. J'ai trouvé que notre méthode de classification avec de nombreuses catégories offre les plus grands avantages et reflète l'esprit du *Code civil.* J'ai cependant proposé que la catégorie "statut réel" soit clairement fractionnée en "statut réel mobilier *"ut universi"* et en "statut réel mobilier *ut singuli*", *in vaccuo* et dans les contrats.

J'ai alors proposé que les règles suivantes soient adoptées par la législature du Québec pour régir les points examinés :

Un bien considéré individuellement est régi par la loi de sa situation.

a) Un bien corporel est situé à l'endroit où il est en fait localisé.
b) Une simple dette est située au domicile du débiteur.
c) Une valeur mobilière, ou un droit à une valeur mobilière, est située à l'endroit où la compagnie a été constituée, sous réserve de l'article suivant.
d) Une valeur mobilière, ou un droit à une valeur mobilière dans une compagnie constituée sous l'empire de la loi fédérale et toute valeur mobilière d'état ou droit s'y rapportant, sont situés au domicile ou au siège social de l'institution qui les a émises.

J'ai voulu démontrer que les règles que je propose sont les seules acceptables tant sur le plan théorique que sur le plan de la politique législative. Quant à la justification théorique, j'ai constaté que les théories traditionnelles généralement mises de l'avant pour invoquer la *lex situs,* soit, par exemple, l'ordre public, l'acceptation volontaire du propriétaire, la souveraineté territoriale, le contrôle effectif du *situs,* la sécurité des transactions etc..., sont des raisons insuffisantes pour servir de base à la règle. J'ai établi que, en fait, cette règle est basée sur une politique qui se reflète dans plusieurs articles du *Code civil,* exigeant dans toutes les règles "something objective to point to", lequel coïncide avec l'endroit où la majorité des attributs de la propriété se trouve, c'est-à-dire, l'*usus,* le *frutus* et l'*absusus.* Quant à

la dernière justification, j'ai par la suite démontré que, en considérant l'objectif véritable des règles de conflits, c'est-à-dire le reflet et la protection des différentes politiques domestiques tant dans l'intérêt de l'état que des individus intéressés aux transactions, les règles proposées comme devant être retenues constituent le seul choix logique dans cette espèce. Ceci devait naturellement conduire au rejet de toute adhésion possible à la conférence de La Haye sur le droit régissant le transfert des biens mobiliers (1956), comme je l'ai prouvé.

Chapter two : Demonstration

CHAPTER II: DEMONSTRATION **

SECTION ONE: Static Conflicts

Subsection One: Domain of the *Lex Situs* in Contracts for the Transfer *Inter Vivos* Of Moveables *ut Singuli* in Quebec Private International Law

I. Preliminary Remarks

A. *Specialization: A part of Quebec Private International Law*

The existence of articles 6, 7 and 8 *C.C.* is proof that specialization — i.e., the splitting up of a transaction into different categories and the subjection of the various aspects of the contract to different rules, exists in Quebec Private International Law, applicable equally to contracts for the transfer of moveables. The Common Law,[1] generally speaking, rejects this process insofar as the transfer of moveables is concerned, the argument being that as the conditions for the passing of title can only be fixed by the *lex situs*, there is no reason to distinguish between questions of form, capacity, or essential validity. Modern French law also specializes, even though there is a tendency on the part of the French jurists and courts to widen the domain of the *lex situs* to embrace matters which might have been left to other areas.[2]

** The enactment by the Quebec Legislature of the Consumer Protection Act, 1971, S.Q.C. 74 requires that Part One, chapter two be brought up to date. Rather than attempt this in a superficial manner by adding remarks to the present text, I shall in the immediate future present an article entitled "The Consumer Protection Act and the Conflict of Laws".

1. ZAPHIRIOU, G.A., *The Transfer of Chattels in Private International Law*, London, 1956, p. 71 ; LALIVE, P.A., *The Transfer of Chattels in the Conflict of Laws*, Paris, 1958, pp. 123, 125.

2. NIBOYET, J.P., permits specialization to a certain extent, but in the final analysis, all is to be controlled by the *lex situs*, so his theory resembles the Anglo-American approach. Where French law is applicable as the *lex situs*, all of the elements which are instrumental for the creation of proprietary rights, must be determined by its domestic dispositions. The separate elements are governed by their own conflict rules, applicable in accordance with the *lex fori*. Thus, each element would have its own proper law, but the resulting effect on the transfer of property would have to be determined by the *lex situs*. For example, the *lex situs* demands the capacity of a major. This capacity is acquired according to the personal law ; however, even if he be incapable under such law, the *lex situs* determines whether property has passed : *Des Conflits des lois relatifs à l'acquisition de la propriété et des droits sur les meubles corporels à titre particulier*, thèse, Paris, 1912, ch. 3, pp. 123 et seq. This resulting relegation of the proper law of the contract to a secondary role at the expense of the proprietary law is questionable, as under French law the conditions to validate a contract transferring property in a corporeal moveable are the same as the contract which does not. As DESBOIS, H., states in an article entitled *Des Conflits de Lois en matière de*

B. *Basis of Characterizations*

In classifying a problem, article, statute, issue or right, one ought to bear in mind that there is no implication that it is, or is not, one of property, i.e. "Statut Réel", but rather, it is one that ought to be governed by the conflict rule relating to property. This characterization, which for the Quebec court is in accordance with Quebec concepts (i.e. *lex fori),*[3] revolves upon (as in the old law) the unique or principal object of the "statut". As Migneault stated : "A-t-elle (la loi) au contraire, les biens pour objet principal, les affecte-t-elle directement, elle est réelle . . ."[4] In a summary manner, I shall now present what I feel to be the domain of the *lex situs* under Quebec law, by considering various questions which might arise on the occasion of a contract for the transfer of moveables *ut singuli.*

II. Classification of the Distinction and Nature of Property

We are concerned with the law to determine whether a thing [5] is moveable or immoveable, corporeal or incorporeal, alienable or inalienable, public or private, present or future, fungible or not fungible, cessible or incessible and what rights of ownership (beneficial, equitable, and/or absolute), may exist in the thing classified as moveable. The classification of these questions, which comprise the distinction and nature of property, is a normal and natural competency of the "Statut Réel", and as such, is governed by the *lex situs.* But this has not been clearly seen by the jurists and courts.

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transfert de propriété, (1931) Clunet, 281 at p. 299 : "Ainsi, s'agissant d'un bien situé en France, la validité du contrat translatif de propriété doit-elle être appréciée selon nous d'après la même loi qui régit l'obligation contractuelle. C'est à cette loi qu'il appartiendra de fixer les conditions relatives à l'objet, à la cause, au consentement, comme il sera du rôle de la loi personnelle de déterminer les conditions de capacité, de l'âge de majorité ou des conditions d'émancipation". For additional critique of Niboyet's position, see ZAPHIRIOU, *op. cit.*, p. 69.

3. CASTEL, J.G., *Propos sur la Structure des règles de rattachement en droit international privé,* (1961) 21 R. du B. 181 at 193.

4. MIGNEAULT, P., *Traité de Droit Civil,* Montreal, vol. 1, p. 86, see also MERLIN, *Répertoire universel et raisonné de Jurisprudence,* 5th Ed., 1828, vol. II, S. 10, p. 239.

5. Property, in its strict legal sense, means a legal relationship or bundle of rights and not the physical object with which that relationship is concerned or over which rights exist. Historically speaking, however, the law looks more often at the thing, rather than the right, and has classified property rights according to the nature of the object over which the rights exist. "Property is a thing owned", MARLER, *The Law of Real Property in Quebec,* Toronto, 1932 at p. 31 ; and conflicts law as well, conventionally classifies things, rather than rights. See A.H. ROBERTSON, *The Characterization of Property in the Conflict of Laws,* (1941) 28 Georg. L.J. 941.

A. *Primary classifications*

1. Moveable or Immoveable

One should like to admit, that at least with respect to certain property, there can be no conflict between systems as to its moveable or immoveable nature. Land is immoveable by nature, an automobile is a moveable as a simple fact — this seems obvious. We would think that most of the problems would involve questions of intangibles. On the contrary and as Zaphiriou states : "Statutes and cases alike mention moveables or immoveables by nature, but the truth is that this moveable or immoveable character is always considered in relation to a particular system".[6] Thus, even in the case of corporeal property, the physical criterion cannot furnish the solution for every case. For example, in Quebec domestic law, crops uncut and fruits unplucked are immoveable, but when cut are moveable.[7] The fact is, in one system a physical object may be moveable, whereas in another system, it may be immoveable in the contemplation of the law. Insofar as incorporeal property is concerned, there is clearly no visual extra-legal nature that can even be assumed. Its character as moveable or immoveable is clearly fictional, i.e. determined by the legislator.

Article 6 *C.C.* enacts the conflict rule for the classification of property INTO moveable or immoveable :

> "The laws of Lower Canada govern the immoveable propefty situated within its limits. Moveable property is governed by the law of the domicile of its owner. But the law of Lower Canada is applied whenever the question involved relates to the distinction or nature of the property . . ."

At first sight, the law of Lower Canada seems to be obligatory for the Quebec judge, irrespective of the *situs* ; however, the territorial nature of the exceptions in article 6.2 *C.C.* (see Part. I, chapter one) reveals another possibility, that Quebec law is only applicable where the thing is situated in Quebec.

a) The Rule as Determined by Quebec Jurisprudence

The earliest reported case where the question of the qualification of property was considered is the previously discussed, *Rhode Island Locomotive Co.* v. *The South Eastern Railway Co.*, where a contract was made in Rhode Island, in virtue of which two locomotives were sold by the Rhode Island Locomotive Co. to a Quebec railway company, which ran them into Quebec. Promissory notes were given for the payment of the balance of price which were not honoured at

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6. ZAPHIRIOU, *op. cit.*, p. 5.
7. 377 *C.C.*

maturity. The vendor-creditor sued in Quebec and seized the locomotives, taking a writ of revendication in the nature of a conservatory attachment, claiming that the moveable locomotives were subject to Quebec law, the law of the domicile of the owner, which permits the privilege of revendication. One of the pleas was that as the locomotives had been seized on the rails of the defendant company in Quebec, they became integrated with the railway, forming a necessary and component part thereof ; that as a consequence, they ceased to be moveables, had become immobilized by destination, and could not therefore be the object of the action to revendicate. The case turned, in part, on the question of whether the moveable locomotives had in fact become immobilized. The court applied Quebec law without indicating whether it was *qua lex fori* or *qua lex situs*. In any case, they were applying no other law.[8]

The following year, in the case of *La Banque d'Hochelaga* v. *The Waterous Engine Works Co.*, (considered briefly above), which went to the Supreme court, none of the judges mentioned when they were applying Quebec law, whether it was *qua lex fori* or *qua lex situs*, as the property was situated within the jurisdiction of the forum (Quebec) at the relevant time. The material facts of the case were as follows : by a contract of sale concluded in Ontario, the Waterous Engine Works Co. sold unto Kelly Brothers, certain machinery situated at the time of sale in Ontario. The contract stipulated retention of ownership until full payment of the balance of price. The machinery was then delivered to Kelly Brothers in Quebec and was placed by them in a building erected for a saw mill upon their lot of land. Kelly Brothers were unsuccessful in business and were compelled to make a judicial abandonment of their property. The land and machinery were subsequently seized for a debt of a certain creditor ; whereupon the Waterous Engine Works Co. produced an opposition to withdraw, alleging that the machinery was its property. The Hochelaga Bank, claiming to be interested as a hypothecary creditor, intervened and contested the opposition, alleging that the machinery had become incorporated with the building, had become part of the immoveable and had passed therewith to Kelly and his creditors. In the Superior Court, Me. Justice Lormier maintained the pretentions of the Hochelaga Bank ; Waterous Engine Works appealed and the Appeal Court, considering only Quebec and French authorities, reversed the

8. TASCHEREAU, J., (1887) 31 L.C.J. 86 (S.C.) at p. 89. "La compagnie demanderesse a perdu volontairement et sciemment son droit à la saisie conservatoire en permettant, après la livraison des dites locomotives, qu'elles fussent incorporées comme parties du chemin de fer en question, perdant par là, leur dite nature de meuble et devenant des immeubles par destination".

judgment of the lower court, holding, in effect, that the ownership of the machinery and of the immoveable must vest in the same person to effect the destination. Hochelaga appealed to the Supreme Court, which confirmed the judgment of the Appeal Court (Girouard J., dissenting). Once again, the court (Gwynne J. and Sir Henry Strong C.J.A.) considered only Quebec law, without discussing whether it was *qua lex fori* or *qua lex situs*.[9]

The case of *Barker* v. *The Central Vermont Railway Co.*, reveals how deceptive the physical extra-legal criteria as to the nature and distinction of property as moveable or immoveable may be. The material facts were as follows : Central Vermont Railway, incorporated under the laws of the State of Vermont, owned a line of railway extending to the boundary of the Province of Quebec, but operated and ran its trains beyond the boundary into Canadian territory by special arrangement. In virtue of a judgment of a Vermont court, the company was placed in the hands of receivers, the assets thereof passing under their exclusive control and possession and being unseizable by any of the company's creditors. Barker, as "prête nom" of a Vermont creditor, sued in Quebec on a promissory note given by the company and payable in Vermont. Having secured judgment against the company, he seized a locomotive and several cars which had entered the Province of Quebec in the course of the operation of the railway. The receivers opposed the seizure, inter alia, because the cars and locomotives were an integral part of the railway company and had become immoveable in the contemplation of the law. The plaintiff contested the opposition, maintaining that while in the Province of Quebec, the cars and locomotives were not on the company's freehold and were not being used in the operation of its railway in Vermont ; so that, in Quebec, they must be treated as moveables. Mr. Justice Loranger, speaking for the court, maintained the opposition on the grounds that :

> "Attendu qu'il est prouvé que bien que la voie ferrée de la défenderesse soit située en entier sur le territoire étranger, cependant elle se relie à la frontière de la Province de Québec à des voies ferrées sur lesquelles elle fait circuler ses voitures et locomotives pour les fins de l'exploitation de son propre chemin . . . Considérant qu'il est admis, que les voies ferrées se relient avec la ville de Montréal où les chars et locomotives dont il est question en cette cause ont été saisis et forment partie du système de chemin de fer de la défenderesse . . . Considérant que lors de la saisie les

9. (1897) 27 S.C.R. 406, aff'g (1896) 5 B.R. 125, rev. (1897) 5 B.R. 125 (S.C.); see also domestic cases : *Frigidaire Corp.* v. *Duclos*, (1931) 52 B.R. 91 ; *Filiatrault* v. *Goldie*, (1893) 2 B.R. 368 ; *Frigidaire Corp.* v. *Malone*, [1934] S.C.R. 121 ; *Wallbridge* v. *Farwell and the Ontario Car and Foundry Co.*, (1889-1890) 18 S.C.R. ; *Lainé* v. *Béland*, (1896) 26 S.C.R. 419.

> dits chars et locomotives étaient au service exclusif de la voie ferrée de la défenderesse et en faisaient partie ; qu'ils étaient immeubles par destination et régis par la loi de l'État du Vermont, où la dite voie ferrée est située tel que ci-dessus mentionné . . . Considérant que les dits chars et locomotives étant immeubles par destination, ne pouvaient pas être saisis par voie d'exécution de biens"[10].

Johnson feels that the judgment is based upon a principle of extra-territoriality, since the rails in Quebec were part of the system wholly situated in Vermont and the equipment in use on these rails retained its immoveable character while temporarily in Quebec. As such, he says, the principle applied derogates both from the exception in Article 6.2. *C.C.* by which the nature and distinction of property is governed by our law, and from the principle that property brought into the province does not come already characterized to the estoppel of our law.[11] It does appear strange, from an extra-legal viewpoint, that there can be within Quebec an immoveable situated elsewhere, but, juridically, it is possible as long as the characterization be made in accordance with Quebec law. And this is what the court did though failing to distinguish whether Quebec law applied *qua lex situs* or *qua lex fori.*

However, a total and complete disregard of the principle of territoriality and the exception of Article 6.2. *C.C.* that the nature and distinction of property is governed by the law of Lower Canada *qua fori* or *qua situs,* is apparent in a judgment on an intervention by the *American Loan and Trust Co.* in the same case of *Barker* v. *Central Vermont Railway,* rendered by the same Mr. Justice Loranger, the very next day. Under the same circumstances as described abore, two of the cars of the railway company were seized while situated in Quebec. An intervention was filed by the American Loan and Trust Company as mortgagees of the cars in question, under a deed executed in Vermont and there registered against the railway. At the time of the execution of the mortgage, one of the cars was situated in Vermont, the other in Montreal, but both were operated as part of the company's railway system. In virtue of the law of Vermont, these cars were immoveables by destination and included in the mortgage. The same Mr. Justice Loranger speaking for the court, maintained the intervention on the following grounds :

> "Considérant qu'en vertu de la section 3353 des statuts revisés de l'État du Vermont applicable au contrat des parties, les dits chars sont immeubles par destination"[12].

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10. (1898) 4 R. de J. 449 at p. 453.
11. JOHNSON, W., *Conflict of Laws,* Second Edition, Montreal, 1962, at pp. 523-24.
12. (1898) 4 R. de J., 454, 455.

Although the court might have held that the cars were immoveables by destination under Quebec law, *qua lex fori* or *qua lex situs*, it nonetheless gave predominance to the law of the contract in determining the nature and distinction of the property.

Quebec law was applied to determine the qualification of certain machinery in the case of *In re Brupbacher Silk Mills Co. Exparte Crompton and Knowles Loom Works* (already considered in chapter one). The machinery was situated in the Province of Quebec at the relevant time, but it is unclear whether the classification was *qua lex situs* or *qua lex fori*. The machinery had been sold in the State of Massachusetts for installation in a factory in Quebec. The contract had provided that the vendor was to retain title until the full payment of the balance of price. Upon the default of the buyer, the vendor made application to the Superior Court in bankruptcy to obtain the return of the machinery. The Trustee for the bankrupt purchaser opposed the application on the grounds that the machinery had been so connected to the motors and accessories as to form a whole therewith ; and, as such, became immoveable in accordance with the provisions of Article 430 *C.C.* Mr. Justice Boyer speaking for the court simply stated that :

> "The parties having agreed that the machinery should remain the property of the claimant and that it should be entitled to the possession of the same in case of default, article 430 *C.C.* (Quebec), does not apply, as it would defeat the contract, which is the law of the parties hereto and there is nothing illegal herein".[13]

One has to read between the lines, for Boyer J. is implying, that under Quebec law, machinery cannot become immobilized until and unless the buyer was owner of both the machinery and the immoveable with which it was incorporated. Since the vendor reserved title by the contract, under Quebec law the machinery remained "moveable".

Synthesis : It appears from the jurisprudence that the judges have never really interpreted the exception of the nature and distinction of property in Article 6.2 *C.C.* In each of the cases above discussed, the *situs* of the property was within the jurisdictional bounds of Quebec at the relevant time, and the court gave no indication whether it was applying the rule *qua lex fori* or *qua lex situs*. The only case where an opinion was clearly presented, the judgment in the opposition by the American Trust Co. in the Barker case, was wrongly decided. The same judgment might have been rendered in accordance with a

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13. (1932-33) 14 C.B.R. 310, at p. 311 ; see also BRODEUR, J.'s remarks in *Smith* v. *Provincial Treasurer of Nova Scotia*, (1919) 58 S.C.R. 570 at p. 592 : "The law of the domicile of the owner governs moveable property, but when it comes to dertimining the distinction or nature of the property . . . the law of the *situs* governs".

Quebec characterization. The contention that the law of the contract should determine the nature and distinction of property (even with the understanding that property has no extralegal nature) has such disastrous ramifications that it cannot be even seriously considered.

b) The Rule as Determined by the Doctrine

Lafleur, without discussing the exception, considers that the *lex fori* applies exclusively :

> "Our code decides the question for our tribunals when they are seized of a controversy of this kind by enacting that, whenever the question involved in a case before our courts relates to the distinction or nature of property, the law of this province must be applied to the solution of the difficulty".[14]

Langelier, in much the same language, declares :

> "C'est notre loi que les tribunaux doivent appliquer pour décider quelles choses constituent des biens meubles et quelles choses constituent des biens immeubles"[15].

Castel implies that the rule is not a specific characterization in itself but a part of the domain of the "Statut Réel"

> "Il nous semble que la qualification des biens appartient naturellement au statut réel," and "on ne devrait appliquer la qualification du for que lorsque les biens se trouvent situés dans la Province de Québec ou à la rigueur si le propriétaire y est domicilié"[16].

Johnson considers the rule not as part of the domain of the Statut Réel, but as a preliminary classification to be governed by the law of the *situs* because of the principle of territorial sovereignty. If the *lex fori* were to apply indiscriminately and characterize property within and without the Province according to our law, it would mean that by an arbitrary definition in our law, property situated abroad is given a character perhaps contrary to the law of the *situs*. Thus :

> "The exception consecrates the *lex situs*, not the *lex fori*. If the exception applies the principle of the *lex situs*, then the law of Quebec will govern if the thing is here, and if it is without the Province, it will be characterized

14. LAFLEUR, E., *The Conflict of Laws in the Province of Quebec*, Montreal, 1898, p. 112.
15. *Cours de Droit Civil*, Montreal, 1906, vol. 1, p. 77.
16. CASTEL, *Propos sur la Structure des Règles*, *op. cit.*, at pp. 193-194 ; this is also the view of BRIÈRE, G., *Les Conflits de Lois quant aux biens et aux personnes*, (1957-58) 3 Cah. de droit, 121 at p. 129, stating that "les lois réelles traitent uniquement ou principalement des biens, ainsi des lois qui divisent ces biens en meubles ou immeubles," and of JETTÉ, L.A., *Statuts Réels et personnels*, (1923) 1 R. du D., 197 : "Et d'abord, les lois réelles (ou statuts réels) sont celles qui ont principalement pour objet les biens et qui ne parlent de la personne qu'accessoirement, qui ne la considèrent que pour atteindre leur but final. Ainsi, les lois sur la distinction des biens (qui les divisent en meubles et immeubles)".

> according to the foreign *lex situs* . . . Otherwise we predetermine its nature and say it is immoveable by our law, when we should approach it only as property, and let the law of its situation distinguish it as immoveable".[17]

According to Zaphiriou, although the cases are inconclusive, the correct interpretation of the rule seems to support the classification by the *lex situs* and not by the *lex fori.* One reason for his opinion is doubtful from the point of view of determining the polisive law, when he says : "It would hardly be possible for Quebec courts to adopt the latter (the *lex fori*) and to classify property outside the province in a manner neighbouring countries recognize the *lex situs* principle".[18]

The doctrine is thus actually divided and unsettled : generally speaking the early jurists (Lafleur and Langelier) support the *lex fori,* while the modern jurists (Johnson, Brière, Jetté, Castel and Zaphiriou) accept the natural competency of the *lex situs.*

c) The Rule Reached by the Classical Theory of Interpretation

i. Grammatical and Logical Interpretation

I submit that the exception is a legislative characterization to the category of the "Statut Réel" of property considered *ut singuli.*

However, a normal reading of the article gives rise to three possibilities ; that of (1.) the *lex domicilii,* (2.) the *lex fori,* or (3.) the *lex situs.*

(1.) *Possibility of the Lex Domicilii :*[19] Johnson dismisses this theory, on the basis that the law of the domicile of the owner is a law of property, applicable to moveables, but one which only comes into play after there has been a preliminary classification of property as moveable. We must likewise rule out the possibility of domicile on the grammatical level, unless we consider that the exception is only to the rule for moveable property. The fact is, the exception of the distinction and nature of property is to both the rule for moveable and that for immoveable property. The French version makes this clear when it states, "C'est cependant la loi du Bas-Canada qu'on *leur* applique" (6.2 *C.C.*) "Leur" indicates a reference to property, moveable and immoveable, not simply to moveable. If the reference of the phrase "distinction and nature" is only to moveable property, it not only

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17. *op. cit.*, p. 521.
18. *op. cit.*, p. 20 ff.
19. *op. cit.*, p. 521. Castel apparently accepts this view in combination with the *lex situs,* because he considers the *lex domicilii* as the rule for Statut Réel mobilier even *ut singuli* (see chapter one, section one, subs. two, and especially citation # 16 (in this chapter).

makes little sense, but is in disagreement with Article 374 *C.C.*, which uses the same words to distinguish property as moveable or immoveable (for domestic purposes). Either the first paragraph ought to have been added to the second, or, more logically, the phrase "moveable property is governed by the law of the domicile of its owner" ought to have been joined to the first paragraph with the phrase "the laws of Lower Canada govern the immoveable property situated within its limits". The second paragraph would then clearly have appeared as a reference to both types of property.

To emphasize : the rule is not an exception to the law of the domicile but a reference to both types of property. As a consequence, one can rule out the view that Quebec law is applied to distinguish property where the domicile of the owner is in Quebec, and a complementary rule that a foreign *lex domicilii* is applicable in other cases.

(2.) *Possibility of the Lex Fori :* It seems more feasible, on a strictly grammatical interpretation, that Quebec law is applicable as being the law of the forum. Admittedly, the exception is clothed in unilateral terms, but on the bases of reciprocity, equity and justice (as implied intentions of the codifiers), it can be bilateralized to read, "the law of the forum determines the distinction and nature of property". Lafleur, Langelier, and the jurisprudence support this theory.

(3.) *The Rule Proposed : Lex Situs for Property ut Singuli :* Seeing the article as a whole, it is more probable that the *lex situs* shall determine this distinction of property. The fact is, the exception is not to be read alone, nor as an exception to the *lex domicilii*, as above-mentioned. To truly appreciate its nature, and the reason why Quebec law is stated to apply, it must be read in conjunction with the other exceptions. As above-mentioned in chapter one, all of these exceptions have a territorial atmosphere about them.

The competency of the *lex situs* in this respect can be approached in two ways :

Firstly, the rule for the distinction might be thought to be preliminary to the choice of the "Statut Réel" or any other rule, or for any other purpose wherein the distinction is important. The rule thus becomes a preliminary characterization, classification, qualification or distinction. Johnson and the jurisprudence support this theory.

Secondly, seeing the terms of the article and the conflict rule for the "Statut Réel" for all property *ut singuli*, one could say (and it is the proposal herein) that there is no conflict rule or preliminary characterization, but simply a reference to the "Statut Réel" for property *ut singuli*. The distinction of property is an integral part of the organization of the regime of property.

To clarify, the exception is a particular characterization by the Quebec legislator of questions relating to the distinction and nature of property. "The law of Lower Canada is applied . . ." is a reference to Quebec law but only where the *situs* of the property is in Quebec, i.e. *qua* "Statut Réel". This does involve reading between the lines or at least accepting that the "Statut Réel" in Quebec, for moveable property *ut singuli*, is the *lex situs*. Thus, the article bilateralized really means the following : immoveable property is governed by the law of the *situs*. Moveable property *ut singuli* is governed by the law of the *situs*. Thus, the "Statut Réel" for moveables *ut singuli* and immoveables is the *lex situs*. This law inter alia, determines the distinction and nature of property. Further support for this proposition can be deduced from an understanding of the rules for the domestic distinction of property. Thus, the articles, as interpreted by our courts, dealing with moveable property becoming immoveable by destination, are technically connected with the ownership of the properties. The owner of the moveable and the immoveable must be the same to achieve immobilization of moveables by destination. This implies the close and natural connection, intented by the codifiers, between the "Statut Réel" and the distinction and nature of property.

Thus, on a grammatical interpretation, it seems most likely that reference to the law of Lower Canada is not *qua lex situs* or *qua lex fori*, but *qua* "Statut Réel" for particular things, which is *lex situs* (my bilateralization).

ii. The Rule under the Old Law

In none of the passages of the authorities cited by the codifiers in drafting Article 6.2. *C.C.* is there considered the nature and distinction of property. However, the old law had a clear solution. Insofar as corporeal property is concerned, the rule was that the distinction and nature of property was determined by the *lex rei sitae*, because of the principal of territorial sovereignty.

> "Or cette question présentait un grand intérêt dans les anciens conflits de coutumes, la nature même de certains biens, ou les conditions auxquelles ils devenaient immeubles par destination . . . variant avec les ressorts. Certains biens étaient réputés meubles dans une coutume et immeubles dans une autre coutume. La Loi de la situation réelle et non du domicile de la personne tranchait le conflit"[20].

Foelix, firstly cited by the codifiers, placed the classification of moveable or immoveable property within the natural competency of the "Statut Réel". At no. 60, he stated :

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20. GLARD, I, *De la condition des meubles en droit international privé*. Thèse. Paris, 1894, p. 57.

> "Nous allons indiquer dans l'ordre des matières du Code Civil Français une partie des cas d'application du statut réel. La Loi de la situation de l'immeuble décide si un objet corporel ou un droit corporel qui s'attache à un immeuble est lui-même meuble ou immeuble sans égard à la personne du propriétaire ou créancier" [21].

Conflicts in the old law, with respect to the distinction, usually revolved upon the question, which "coutume" determined whether moveable property had become immoveable by destination ? The exclusive competency of the *lex rei sitae* was upheld by the authors. As Lainé stated :

> "Or, la coutume de la situation devait être consultée non seulement pour le règlement du partage de ces biens devenus immeubles, (mais aussi en premier lieu sur le point de savoir à quels meubles et sous quelles conditions le fait du père de famille pouvait attribuer la qualité d'immeubles)" [22].

The same solution prevailed for the inverse situation ; i.e. the conditions under which immoveables by nature could be mobilized.[23] Incorporeals on the other hand were distinguished as to their moveable or immoveable nature by the law of the forum, *lege fori*.[24]

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21. FOELIX, M., *Traité de Droit international privé*, Paris, 1843, vol. I, no. 60, p. 121. He subsequently contradicted himself at no. 64, p. 137, where he stated : "Du principe que le statut personnel régit les meubles, il suit que cette loi décide seulement la question de savoir si l'individu peut valablement disposer des objets mobiliers qui lui appartiennent, mais qu'elle détermine aussi la nature mobilière ou immobilière des biens par rapport à la personne du créancier". See also BOULLENOIS, *Traité de la Personnalité et de la réalité des lois*, Paris, 1766, vol. I, pp. 841, 842, where he borrows an example from Basnage. Basnage, sous l'article 505, coutnorm, *Oeuvres*, vol. II, p. 394, to demonstrate that the *lex rei sitae* governed the distinction. MERLIN reached the same conclusions, *Répertoire*, *op. cit.*, V°. CATTEUX, vol. XI, p. 84 et seq. For the same solution and discussion of the example see LAINÉ, A., *Introduction à l'étude du droit international privé*. Paris, 1858, vol. XI, p. 256 et seq. and in DELAUME, R., *"Les Conflits des lois à la veille du Code Civil*. Thèse, Paris, 1947, pp. 83 at 85, BOUTHIER, J., *Observation sur la Coutume du duché de Bourgogne*, Dijon, 1742, ch. 21, no. 173, p. 608 FROLAND, *Mémoires*, *op. cit.*, vol. 2, p. 1123.

22. LAINÉ, *op. cit.*, vol. II, pp. 208-259 ; BOULLENOIS, *Traité*, *op. cit.*, vol. I, p. 59 et

23. LAINÉ, *op. cit.*, vol. II, p. 262 ; also MERLIN, *Répertoire*, *op. cit.*, Vo. *Rentes Constituées*, vol. XI, p. 378, arrêt du 19 avril, 1687, cited in BOUHIER, *Obs.*, *op. cit.*, ch. 22, no. 154, p. 643 ; BOULLENOIS, *Tr. op. cit.*, vol. I, p. 405 ; FROLAND, *Mémoires*, *op. cit.*, vol. XI, p. 1378 ; also an arrêt dated 19 mai 1762, cited in BOULLENOIS, *Traité*, *op. cit.*, vol. I, p. 405 ; and see DELAUME'S comments, *op. cit.*, p. 86.

24. DELAUME, R., *op. cit.*, p. 90 et seq., cites three cases to support this finding ; one, an arrêt of the Parlement de Paris, 23 Feb. 1741, referred to in BOUHIER, obs., ch. 25, no. 69 et seq., p. 712, in which the *lex fori* was applied indiscriminantly, though on questionable grounds ; the second case cited is one adopted by the Haute Cour de la Hollande et de la Zélande, of 17 Nov. 1705, clearly not a source for Quebec positive law, ref. to in MEIJERS, *op. cit.*, p. 661 ; and a third case, dated after the French codification, 27 July, 1809, which is referred to in MERLIN, *Rép.*, *op. cit.*, *Vo. Vidente*, (droit de), vol. XIV, p. 570 et seq., also not a primary source.

iii The Lex Situs : Bartin's Exception to the General Rule of Characterization Lege Fori

Even the master of the theory of characterization, Bartin, suggests an exception from characterization *lege fori* to *lege sitae* for the distinction.[25] He argued that if the essential objective of security of transactions is to be achieved, it is necessary that the person who deals with property be able to know who has title to it. To find this out he may need to know whether the property is moveable or immoveable, the most suitable test being the law of the *situs*. To allow the *lex fori* this task, the nature of the property would vary as the court.

Modern French law has followed Bartin's exception, with a distinction : whenever the nature of the property influences the choice of the conflict rule, the classification constitutes a real characterization which must be made in accordance with the *lex fori*. Applying this reasoning to our civil code, there would be no place for the law of the forum, at least insofar as "Statut Réel" *ut singuli*, since the law of the situation remains competent at the same time for moveables as well as immoveables, as I have demonstrated.

(iv) Summary

On the bases of a grammatical and logical interpretation, the old law, generally speaking the decisions of our courts, common sense and a universally accepted principle, the distinction of property as moveable or immoveable is determined in accordance with the *lex situs*, applicable not as a preliminary characterization, but as part of the domain of the "Statut Réel" for property *ut singuli*, to which it naturally belongs.

d) The Problem Where the Situs Referred to Adopts the "Realty-Personalty" Distinction

The domestic law distinction for most Common law jurisdictions is a realty-personalty division, though the division of moveables and immoveables is employed for the purposes of conflicts law.[26] The problems brought about by these double distinctions are very real indeed. If we contend that under Quebec law a thing ought to be

25. BARTIN, *De l'impossibilité d'arriver à la suppression définitive des conflits de lois*, (1897) J. droit Int'l, 246, 251 ; *Principes de droit international privé*, vol. I, 19, 236.

26. *Re Hoyles*, 1911, ch. I, pp. 179, 183, at p. 185 ; "The terms 'moveables' and 'immoveables' are not technical terms in English law, though they are often used, and conveniently used, in considering questions arising between our law and foreign systems which differ from our law . . ." "In such cases . . . in order to arrive at a common basis on which to determine questions between the inhabitants of two countries living under two systems of jurisprudence, our courts recognize an act on a division otherwise unknown to our law, into moveables and immoveables".

characterized in accordance with the internal law of the country where it is situated, how should the Quebec Judge, faced with conflict rules based upon the moveable/immoveable division, apply the Common law classification of realty/personalty ? The problem, looked at from a Common law court — e.g. Ontario, is, for a classification of an object situated in Quebec, not the same, for it is accepted that as far as the private international law rules are concerned, the division shall be between moveables and immoveables. Presumably, the Quebec court would allow the *lex causae*, the Common law, as *lex situs*, the role of converting the property from its division of realty and personalty into moveable and immoveable, in the same way as that law would normally do if it were a conflict case from their point of view.

2. The Distinction Between Corporeals and Incorporeals

Is the corporeal-incorporeal distinction to be governed by the same rule as that for the distinction of moveables and immoveables? At first sight, it seems illogical to seek reference to the law of the *situs* to determine the corporeal or incorporeal character of property, as incorporeals have no extra-legal *situs*. However, as the above-mentioned rule for the moveable-immoveable distinction is simply a reference to the "Statut Réel" for property *ut singuli*, the same reference to determine the corporeal or incorporeal nature of property makes good sense on theoretical grounds. Practically speaking, the Quebec court, as the *lex fori*, would have to classify property provisionally, as corporeal or incorporeal, in order to give the property a *situs*. Then the *lex situs* of the property, as being the "Statut Réel" *ut singuli*, would be called upon to determine whether this property is corporeal or incorporeal. The essential justification for this position, namely that the same rule governs both divisions, is apparent from an analysis of the words used in the rule in Article 6.2 *C.C.* Thus, "distinction and the nature of property" is employed. Since "distinction" alone, is used for the domestic classification of property into moveables and immoveables (Art. 374 *C.C. C.C.*), "nature" of property must mean something else.[27] Whatever else was intended to be included by the expression, a normal reading would have it include at least the corporeal or incorporeal character of property. Seeing the lack of importance attached to the distinction

27. POWELL, *Business Situs of Credits*, (1922) 28 W. Va. L.Q., 88 at p. 91 : "As the existence of intangibles can only be ascertained de jure, the same applies to their characterization. This is not to deny that, in many cases, their *nature as tangibles* is obvious." (indicating the connection between 'nature' and the corporeal-incorporeal distinction).

by the Codifiers and the Quebec Legislative,[28] we should therefore have no reason to demand the qualification by the *lex fori*, as a final classification.[29]

Notwithstanding the limited importance of the distinction in the old law, it is not unlikely that a problem with respect thereto could arise today. It is surprising that our courts have never had the occasion to consider the question ; although an examination of the cases does reveal that the Quebec courts have always applied Quebec law to determine the distinction.[30] Nevertheless, since there was never any dispute as to the corporeal or incorporeal nature of the property, it is as equally correct to assert that the *lex fori* applied exclusively, as to contend that the *lex fori* applied provisionally, so as to fix a *situs*, and then the *lex situs* classified the property, as corporeal or incorporeal.

B. *Secondary Classifications*

1. Alienable or Inalienable, Public or Private, Etc.

There exists in domestic law certain classifications, such as public or private, alienable or inalienable, present or future, fungible or not fungible, commercial or "hors du commerce", seizable or unseizable, cessible or not etc. These questions concern the organization of the regime of property,[31] and as such must fall within the

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28. The moveable-immoveable distinction is *the* important one. Thus, all property, corporeal or incorporeal, is moveable or immoveable, (374 *C.C.*). Jurisdiction of the courts is based on the moveable-immoveable distinction ; the private international law rules themselves turn upon the moveable or immoveable quality of property rather than corporeal-incorporeal, etc.

29. In modern French law, the distinction is governed by the *lex fori*. The justification for this, says NIBOYET, *Traité de droit international privé*, Paris, 1947, Vol. IV, nos. 1153, 1190, p. 218 ff., and ARMINJON, *Précis de droit international privé*, 3e éd., vol. II, no. 24 seems awkward. The *lex fori* is supposed to be applicable only when the distinction influences the conflict rule. The rule for the transfer *inter vivos* of moveables *ut singuli* is not influenced. Nevertheless, they apply the *lex fori*. However : "La jurisprudence invoquée en faveur de la qualification *lege fori* est équivoque car, dans les espèces considérées, la *lex fori* était en même temps la *lex causae*". DALLOZ, *Droit international*, 1968, vol. II, Valeurs mobilières, no. 20, p. 984.

30. See, for example, *Neugent* v. *Canadian Rock Products Ltd.*, unreported, Court of Appeals, case No. 1001, Feb. 29, 1936. *Chase National Bank of the City of New York* v. *The Bank of Rockville Centre Trust Co.*, (1933) 55 B.R. 156 ; *The King* v. *Sanner et al and Bank of Montreal*, (1936) 74 S.C. 42.

31. That cessibility be determined by the "Statut Réel" of the "créance" as herein suggested, has not been accepted by some of the French jurists, who do not consider "créances" capable of having a *situs*, and refer the question to the proper law of the contract which created the debt (when such is the origin of the "créance"). H. BATIFFOL, *Les Conflits des lois en matière de contrats*, Paris, 1938, no. 553 ; NIBOYET, *Traité*, *op. cit.*, vol. IV, no. 1295.

domain of the "Statut Réel".[32] The justification being that a normal reading of "nature" of property in the Code includes these questions. However, the question as to whether a "right" is "property" or not — i.e., having economic value sufficient to constitute a patrimony, must be determined by the *lex fori*, for it is nothing else than an interpretation of the word property in the rule itself. The system that furnishes the rule should define the terms used therein.

2. The Possibility of Various Degrees of Ownership in the Moveable : E.g., the Common Law Trusts

Also included in the sub-domain of "nature" of property and consequently in the category of the "Statut Réel", is the type of ownership permitted in moveable property. Therefore it is the *lex situs* that must decide whether ownership in a moveable can be divided, as under the Common law trust, into legal as well as beneficial or equitable ownership.

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32. In some instances the "Statut Réel" *ut singuli* should be exclusively competent — e.g., conditions of individualization of fungible property and the exact moment when it becomes a determinate thing, NIBOYET, *Traité, op. cit.*, vol. IV, no. 119, p. 397 ; in others, the question is considered in conjunction with the title — e.g. (i) alienability resulting from a contract. One must combine the law of the title (the proper law of the contract) with the law of the "Statut Réel", which has the final word. See NIBOYET, *Traité, op. cit.*, vol. IV, no. 1153, 1197 ; H. BATIFFOL, *Traité élémentaire de droit international privé*, 3rd ed., 1959, no. 511; LEREBOURS, PIGEONNIÈRE et LOUSSOUARN, *Droit international Privé*, Eighth Edition, Paris, 1967, no. 471 ; and (ii) the distinction between present or future property. Important in donations, (especially with respect to debts created as constituting the gift *inter vivos*), it is intimately connected with the concept of divestment and consequently the proper law of the contract. Other classifications — e.g., of a transaction as civil or commercial (except insofar as it effects the rights acquired by an innocent purchaser in a sale a *non domino*), voluntary or involuntary, particular or universal, *inter vivos* or a cause de mort (other than the question of present or future property) should be excluded from the domain of the "Statut Réel" and be governed either by the *lex fori* or the proper law of the contract. See LALIVE, *op. cit.*, p. 28, for the Common law position. Also to be excluded from the domain of the "Statut Réel", and from the sub-domain of "nature" of property, is the distinction between the different types of matrimonial property i.e. private property, common property and acquests. For example, see the case of *Lacoste* v. *Lesage*, (1895) S.C. 435, I R. de J., 184, MATHIEU, J., which concerned a gift of moveable property by a donor domiciled in Havana to his *daughier*, married and domiciled in Quebec under the regime of the community of property. Under Spanish law (Havana), the *lex situs* of the gift (the domicile of the debtor) and the proper law of the contract, the sum of money given did not fall into the community. In Quebec, the matrimonial domicile, it fell into the community unless expressly excluded (1276 *C.C.*), which it was not. The court held, *inter alia*, that Spanish law, the law intended to govern the gift, was applicable. The case is consistent with the inclusion of the distinction under "nature" of property — i.e., reference to the *lex situs* which is the "Statut Réel" *ut singuli*. However, such a characterization would not be correct ; as Ulric JORIN correctly stated in (1932-33) 35 R. du N. 668 the law which governs the matrimonial regime must determine such distinctions.

III. The Conditions for a Valid Transfer of the Moveable by Contract Inter Vivos

A. *Capacity of the Parties*

1. Incapables

In principle, the *lex situs* ought not to intervene in connection with the capacity of the parties, which is governed by their personal laws — i.e., *lex domicilii.* There are, however, certain grey areas : the right of an incapable to sell or to give moveables as well as the conditions and formalities under which his representative (tutor, or curator) may validly dispose of same, should be governed by the personal law of the incapable,[33] as the prohibitions or restrictions are established for his protection. In the case of relative incapacities to give or to receive, no problem exists where the "Statut Personnel" of both parties is the same ; but where they differ, preference ought to be given to that of the disposant.[34]

2. Consorts — transfers *inter se* —

The classical problem of the characterization to be given to the prohibition of sales or gifts *inter vivos* between husband and wife (Old Arts. 1265, 1483 *C.C.*) has received considerable treatment by both jurists and courts.[35] For example, on Jan. 1, 1965, a husband made a gift of a certain sum of money to his wife while they were both resident and domiciled in Quebec, under which law, the gift was prohibited. From 1 Jan. 1960, the date of their marriage, to Dec. 1964, the consorts were domiciled in Ontario, under which law the gift is valid. A contractual characterization of the prohibition by a Quebec court would require that the law of the matrimonial domicile — i.e., Ontario, govern the issue and the gift would be upheld, whereas a proprietary or personal characterization would render it void.

Three theories have been put forward, representing three characterizations : proprietary (i.e., "Statut Réel"), personal (i.e., "Statut Personnel"), and contractual (i.e., the proper law of the contract, Art. 8 *C.C.*, being the law governing the matrimonial regime.

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33. See GUY, M., *La Capacité d'aliéner les biens et d'en disposer en droit comparé et en droit international privé*, [1970] R. du N. 257.

34. MISSIR, *Des Donations entre vifs en droit international privé*, thèse, Paris, 1900. p. 30.

35. At the time of drafting the present thesis, articles 1265 and 1483 *C.C.* were still in force. Notwithstanding their abrogation, we treat of the prohibition because gifts and sales executed prior to the abrogation of the articles are not retroactively validated.

a) Thèse of the "Statut Réel"

Under the old French law, the vast majority of authors and arrêts regarded the prohibition as forming part of the "Statut Réel".[36] The object of same was to prevent the transfer of property from one family to another. Marler also supported this doctrine, on the ground that the prohibition prevented a husband from putting his property out of the reach of his creditors.[37]

b) Thèse of the "Statut Personnel"

A second theory, supported by certain statutists[38] and among Quebec jurists, Lafleur,[39] Billette,[40] and Crépeau,[41] considers the prohibition as forming part of the "Statut Personnel", governed by the law of the domicile of the transferor, most often that of the husband, at the time of the gift. This school looks to the Roman law origin of the prohibition, where it was established in order to preserve the purity of the marriage tie by preventing one consort from acquiring the property of the other by the abuse of authority out of conjugal affection. Furthermore, to the proponents of this theory, the motive for characterizing it as "real", is not valid any more, seeing that our law has introduced the absolute freedom of willing. As well, they note that the prohibition of sale *inter partes* (and, by analogy, gift

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36. See BALDUS in Laine, *op. cit.*, vol. I, p. 171 ; D'ARGENTRÉ in Missir, *op. cit.*, p. 211 ; CONSTANT, *Coutume de Poitou, Préface ;* CHOPIN, *Sur Paris*, bk. 2, no. 15 ; DUMOULIN, *Cons.*, 53 ; BOULLENOIS, *Traité, op. cit.*, vol. II, obs. 35, p. 104 ; LEBRUN, *Communité*, p. 11, no. 18 ; BOURJON, *Droit coutumier*, vol. I, p. 116 ; Ancien Denizart, Vo. *Avantages prohibés* S. 111, no. 18 ; FERRIÈRE, *Dict. de droit*, Vo. *Avantages qui se font entre conjoints ;* GUYOT, *Répertoire*, Vo. *Avantages* p. 712, vol. I ; POTHIER, *Donations entre mari et femme*, no. 18 ; MERLIN, *Questions de droit*, Vo. *Avantages entre époux*, no. 2; FROLAND, *Mémoires, op. cit.*, vol. XI, p. 847; BOULLENOIS, *Questions sur les démissions des biens*, Paris, 1727, vol. VI, p. 123.

37. MARLER, *Law of Real Property, op. cit.*, pp. 202-3 ; applied in *Landry* v. *LaChapelle*, (1937) 2 D.L.R. 504, in Ontario case ; *Laviolette* v. *Martin*, (1858) 2 L.C.J. 61 (rev.), (1861) 5 L.C.J. 21 (C.A.), (1861) 11 L.C.R. 254, is also consistent with this characterization.

38. BARTOLUS, in Lainé, *op. cit.*, vol. I, p. 146, et seq ; J.M. RICARD, the master in the field of donations, stated in *Oeuvres, Traité des donations entre vifs et testamentaires*, Paris, 1784, Vol. II, nos. 325, 327, 328, emphatically, that the prohibition is personnel, esp. at no. 328 ; COQUILLE, *Questions et réponses sur les articles de coutumes de France*, no. 227 ; BOUHIER, *Obs., op. cit.*, ch. XXVII, art. 50, p. 543.

39. LAFLEUR, *op. cit.*, pp. 169-176, based his view on the tendency of modern law to attach greater importance to the personal than to the proprietary law.

40. BILLETTE, *Traité de droit civil canadien (Donations et testaments)*, vol. I, no. 295 : "La Loi qui prohibe les donations entre époux (art. 779 and 1265 *C.C.*) est une loi relative à la capacité, quelle que soit la conception qu'aient pu en avoir les anciens auteurs et arrêts dans un état social différent du nôtre."

41. Conférence prononcée à l'association des notaires de Montréal, 24 Nov., 1959, entitled *Le régime de capacité ou d'incapacité de la femme mariée dans le droit international privé de la Province de Québec.*

inter vivos) is situated in the civil code in the chapter entitled, "Of the Capacity to Buy and Sell", so that the characterization thereof must be "Statut Personnel". There is certain judicial support for this theory : in *Bélèque* v. *Léger*,[42] a sale of an immoveable situated in the Province of Quebec between consorts then domiciled in Ontario was held to be valid, and *In Re Gold Brothers Ex Parte Chernin*, where the validity of a gift of money from husband to wife was in question, Mr. Justice Rivard stated

> "C'est la loi du domicile des conjoints au moment de la donation mobilière qui détermine sa validité et non pas la loi du domicile qu'ils avaient lors de leur mariage".[43]

c) Thèse of the Proper Law of the Contract — The Law of the Matrimonial Regime[44]

The third theory supported by Loranger,[45] Johnson,[46] Faribeault,[47] Trudel[48] and Castel,[49] considers the prohibition to form part of the law governing the matrimonial regime, which if not chosen expressly by the consorts, is the law of the matrimonial domicile. There is judicial support for this thesis in the case of *Eddy* v. *Eddy*,[50] where the court (Gill, J.) held, on the occasion of a benefit from a husband to his wife who were both domiciled at the time of their marriage in Vermont, but at the time of the gift in Quebec, that this question is determined by reference to the law of the matrimonial domicile — i.e., Vermont. (Article 1265 *C.C.* had no application). Similarly in *Huestis* v. *Fellows*,[51] the matrimonial domicile of the

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42. (1920) 57 S.C. 447, Chauvin, J.
43. (1928) 11 C.B.R. 170, 185 ; other judicial support for this school involves *Marital Authorization : McNamee* v. *McNamee*, (1885) 14 R.L. 30, MATHIEU, J., approved by LAFLEUR, *op. cit.*, p. 71 ; *Stephens* v. *Fisk*, (1882) 5 L.N. 79, (1883) 6 L.N. 329 27 L.C.J. 228, (1885) 8 L.N. 42, at p. 53, concerning capacity of a wife to institute proceedings, which capacity changed when the wife's domicile did ; and see *David* v. *Royal Trust Co.*, (1925) 28 P.R. 155, ARCHAMBAULT, J., 42 B.R. 532 ; *X.* v. *Z.* 43 R. de J. 269, MAKINNON, J., ; and MACDONALD, J.'s remarks in *Gauvin* v. *Rancourt*, **[1953]** R.L. pp. 517, 527, 528.
44. See JOHNSON, *Conflict of Laws*, *op. cit.*, p. 339 et seq., and J.G. CASTEL, *Les Conflits de lois en matière de régimes matrimoniaux dans la Province de Québec*, (1962) 22 R. du B. 233, for discussion of the law governing the matrimonial regime.
45. *L'incapacité de la femme mariée*, (1899) 5 R.L.N.S. 145, at p. 164.
46. *op. cit.*, pp. 337-344.
47. *Traité du droit du Québec*, vol. X, p. 48.
48. *Traité du droit civil*, *op. cit.*, *vol. I, p. 43 : "Aussi la capacité des époux de se faire des donations est réglée pour tout le temps de leur mariage par la loi de leur domicile matrimonial"*.
49. *Les Conflits des lois en matière de régimes matrimoniaux . . . op. cit.*
50. (1898) 4 R. de J. 78, 7 B.R. 300, A.C. 299 ; *Laviolette* v. *Martin*, *op. cit.*, dealing with marital authorization also supports this theory.
51. (1927) 6 S.C. 13.

consorts was Ontario; subsequently, the consorts moved to Quebec, where the husband made a gift to his wife of land situated in the Province. Mr. Justice Loranger, for the court, considered the gift valid in accordance with the law of the matrimonial domicile, i.e. Ontario. In an unreported judgment, *Bell* v. *Lefèbvre*,[52] the matrimonial domicile was Ontario, the present domicile Quebec; the wife had purchased, in Quebec, an immoveable paid for by her husband. The court, Perrier, J., held that the capacity of the consorts was fixed immutably by the law of the matrimonial domicile and upheld the gift. In another unreported decision of the Superior Court, *Sewell* v. *McGown*, Mr. Justice Batshaw stated: "Not only the matrimonial convention, but also the capacity of the consorts to make sales or gifts is fixed immutably by the law of the matrimonial domicile of the consorts".[53]

d) The characterization Submitted

If characterization be restricted to the principal object of the prohibition as at the time of codification, one might adhere to the thesis of the "Statut Personnel" and therefore classify it as such. If on the other hand, we be permitted to take account of the Civil Code's subsequent approval of the emancipation of the married woman, (even prior to the abolition of articles 1265, 1483) is it still correct to maintain that the object of prohibition be to prevent the abuse of the husband's position? And furthermore seeing that consorts can modify their matrimonial regime at will, can we still defend the thesis of the matrimonial law characterization? The fact is, a strong argument could once again be made for the "Statut Réel" characterization in view of the fact that most of the jurisprudence concerns attempts by the husband to withdraw *property* from the reach of his creditors.

3. Incapacity of Certain Persons to acquire because of the Nature of their particular office — Articles 1484, 1485 C.C.

There are also certain parties who are unable to acquire certain property by contract because of their duty with respect to the object of the contract. Administrators — e.g., tutors, curators, trustees, executors, cannot acquire property which they are obliged to administer.[54] These prohibitions have as their object the prevention of fraud being practised by the administrators against those for whom

52. Unreported, S.C., Montreal, June, 1955, no. 304470.

53. Unreported, S.C., Montreal, April 9, 1956, no. 377529.

54. See Article 1485 C.C.

they are acting. As such, they ought to form part of the "Statut Personnel" of the minor, interdict, legatee, etc., and no intervention of the *lex situs* is justified. Article 1485 *C.C.*, which restricts the sale of litigous rights to judges, advocates, bailiffs, etc., was enacted for several reasons. On the one hand, it was felt necessary to protect the "cédant", or the "cédé", lest they be in opposition with one so powerful as a judge, and on this basis the restriction appears as forming part of their personal laws ; on the other hand, and what is more likely, the principal object of the prohibition is the preservation of the dignity of the judicial system — i.e., the judge. As such, the prohibition must be governed by the law of the jurisdiction for which the officer exercises his functions.[55]

B. Formal Validity of the Contract to Transfer

1. Possibility of the lex situs

In principle, the *lex situs* ought not to intervene in determining the conditions of formal validity of the contract, which are governed by the law of the country where the contract was concluded (Article 7 *C.C.* bilateralized). Nevertheless, it might still be resorted to in order to validate the form of the contract, in view of the fact that the rule *locus regit actum* as interpreted by the Supreme Court, is only permissive.[56] The *situs* of the moveable then becomes an alternative connecting factor.

2. The Distinction Between Formalities Applicable to the Contract and Formalities Applicable to the Transfer

In referring to formalities, a distinction must be made between formalities applicable to the contract and formalities required to perfect the transfer.[57] Article 7 *C.C.* governs the formalities applicable to the contract including, for example, the rules of solemnities in donations *inter vivos*[58] (e.g., whether or not a writing and/or a notary is required) whereas, when publicity formalities are necessary to insure that a transfer of ownership has taken place, either between the parties

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55. Analogous to the rule governing the formal validity of a public act, *Auctor regit actum*, which is territorial in the sense that the formal validity of a deed before a Notary is governed by the law of this jurisdiction. See CASTEL, J.G., *De la forme des actes juridiques et instrumentaires en droit international privé québécois*, (1957) 35 *Can. Bar. Rev.* 654.

56. *Ross* v. *Ross*, (1894) 25 S.C.R. 307, (1893) 2 B.R. 413, (1892) 2 S.C. 115.

57. See NIBOYET, *Traité, op. cit.*, vol. IV, p. 386 ff.

58. MISSIR, *Thèse, op. cit.*, p. 58 ; PILLET, *Journal de droit international privé*, 1895, *op. cit.*, p. 957 ; DEMOLOMBE, *Cours de Code Napoléon*, 2nd ed., Paris, 1860, vol. I, p. 121.

or vis à vis third persons (i.e., so that the title transferred or reserved shall affect them), these are clearly within the domain of the *lex situs*. Actually, in transfers by sale of corporeal moveables, the same formalities are required to constitute a formally valid contract as to transfer title, but for other moveables, and in donations *inter vivos*, there are additional formalities required, serving to inform third persons as to the ownership of the property. Admittedly, there are very few instances of publicity requirements in Quebec domestic law with respect to contracts for the transfer of moveables, but in all cases where some kind of publicity is requisite, or will so be in the future, these formalities, and the effect when they are not accomplished must be governed by the *lex situs*. Without limiting the generality of the foregoing, this should include the following requirements and definitions thereof : (a) signification of a transfer of a simple debt (Art. 1573 *C.C.*), or "acceptance" thereof by the debtor,[59] (b) the inscription on the books of register of federal and provincial companies in order to perfect a transfer of shares, so that this may affect both the parties and the company,[60] (c) the recording, filing or registration of conditional sales contracts (requisite in most states and provinces) to perfect the reservation of title in the conditional vendor vis à vis third persons (no such requirement, at present, exists under Quebec law), (d) registration of gifts *inter vivos*[61] (which may be in a marriage contract, and/or by way of a trust and/or a substitution),[62] or prohibitions to alienate, (e) "possession" itself of a corporeal moveable serves as a form of publicity, in order that the title may vest

59. The publicity is insufficient, and only publicizes the transfer to the debtor, but for all purposes of law this is sufficient in order for it to affect third persons : see *Côté* v. *Paradis*, (1896) 11 S.C. 2 ; *Banque Provinciale* v. *Federal Life Insurance Co.*, (1917) 26 B.R. 41 ; *Banque Nationale* v. *Loiselle*, (1908) 33 S.C. 154.

60. *Quebec Companies Acts*, *op. cit.*, S. 68, and *Canada Corporations Act*, *op. cit.*, S. 36. This inscription is requisite not only for transfers of unlisted shares, but for listed shares as well. The fact is, that until the inscription is effected, the full attributes of ownership do not vest in the transferee. The *abusus* of an endorsed and delivered listed share vests in the transferee, but until registration thereof, he has no *usus*.

61. The object of this requirement is not only the protection of third parties, such as creditors and subsequent acquirors, but also the heirs of the donor who have an interest in knowing what assets of the donor remain in his succession, see Art. 804 *C.C.* ; as well since the formality might serve to cause the donor to reflect before making a scandalous liberality, it might be classified as Statut Personnel. However, the primary objective suffices to bring the requirement within the domain of the *lex situs*. The obligation to register imposed upon certain persons, however, is governed by the law of the matrimonial regime or by the personal law, as the case may be (see Art. 810 *C.C.*).

62. Registration of substitutions are requisite to make third persons aware that the donnee is the grevée of the substitution, and as a consequence the property in his possession is not freely alienable (see Art. 938 to 943 *C.C.*); BOUHIER, *Obs.*, *op. cit.*, no. 7, p. 582; speaking of the publication of substitutions: "Il doit être mis au rang des coutumes réelles".

in a successive transferee of a moveable previously sold or donated, but not yet delivered to a former acquiror (Art. 1027 *C.C.*) and (f) the necessity and definition of "delivery" to perfect the transfer of ownership *inter partes* e.g., by way of "dons manuels".

C. *Material or Essential Validity of the Contract to Transfer*

In principle, the *lex situs* does not intervene to determine the essential elements requisite to give the contract its *vinculum juris* — e.g., cause, consent, consideration, licitity of object,[63] which are governed by the proper law of the contract. The tendency of jurists and courts is to allow a wide domain to the law of the contract in this respect, because of the French version of Art. 8 *C.C.*, which states that : "Les actes *s'interprètent* et *s'apprécient* suivant la loi du lieu où ils sont passés". Therefore, not only is a contract to be interpreted, but it is also to be weighed intrinsically by its proper law, i.e., its nature as a gift, sale, or modality of either.[64]

At this point, we have an essentially and formally valid contract for the transfer of moveables entered into between capables, but has ownership passed or been validly reserved ?

IV. The Effects of the Contract

A. *Delimitation Between the Lex Situs and the Proper Law of the Contract*

Defining the two categories is not a simple task since the contract gives rise to proprietary effects, while in principle the parties have the right to submit the effects of their contract to the law of their choice. Nevertheless, a distinction must be made : the contractual effects of the contract are governed by the proper law of the contract, the proprietary effects by the *lex situs*.[65]

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63. Curiously, a French court held that the *lex situs* as "Statut Réel" governed the recission of a sale on account of lesion, seeing in it, less a vice of consent than an element of social peace and public order : D.P., 1931, 2.133, note Lereb. Pig., (1931), rev. crit. 19 S. 1931. 2. 145 note Audinet, 1931 rev. crit. 148. Consider MAURY, *La lésion dans le contrat*, (1936) rev. crit. dr. int. privé, 944.

64. See JOHNSON, *Conflicts of Laws*, *op. cit.*, pp. 565-566, and jurisprudence referred ; also CASTEL, *La fiducie créée par donations entre vifs de biens meubles et le droit international privé québécois*, (1967) 69 R. du N. 271, who maintains that the essential validity of a trust of moveables is governed by the proper law of the contract.

65. "There is a difference between a transaction which creates an interest in the moveable chattel and a personal agreement between the parties with the foreign moveable as its subject matter. This is the actual borderline situation between contract and conveyance. The contractual effect of the transaction will be governed by the proper law of the contract, and the property effect by the *lex situs* . .", CASTEL, *Private International Law*, Toronto,

1. The delimitation applies to contractual transfer of all moveables

Once the principle of separation is admitted, I find no reason to limit it to transfers of corporeal moveables.[66]

2. Conditions of transfer *Inter Partes*

The *lex situs* governs the conditions of transfer of ownership of moveables *inter partes* as well as vis à vis third persons. This implies a characterization of Articles 777, 1025, 1027, 1472, 1570 *C.C.*, section 68 of the Quebec Companies Act and section 36 of the Canada Corporations Act as "Statut Réel", irrespective of any declaration to the contrary by the contractants, who might have expressly revealed

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1960, p. 162. Contra, however most of the Quebec judgements (see part one, chapter one, section one) and jurists in particular Johnson and Lafleur who held that the law of the contract governed even the proprietary effects of the contract — i.e., contestations as to ownership. To the same effect, FRÉCHETTE, J.G., made the following comment in his *Report on Moveables Prepared for the Commission for the Revision of the Quebec Civil Code, Private International Law Section*, at p. 46 : "Qui est propriétaire d'un bien meuble, diffère absolument de la question : quels sont les droits d'un propriétaire sur un objet. La première partie de ce mémoire ne cherche donc pas à établir quelle loi sera compétente pour déclarer qui est le propriétaire d'un droit, puisque ce problème découle non pas du Statut réel mais plutôt du Statut des obligations".
The reasons for the failure of our courts to clearly separate the two categories of property and contract, stem from the following : (1) uncertainty as to the connecting factor for the "Statut Réel" for moveables *ut singuli*, (2) in most cases, the *lex situs* and the law of the contract were the same, (3) the problem was complicated by a change of *situs* from one jurisdiction to another, and (4) the law of the contract would, in most cases, have applied to proprietary matters in the light of the operation of the rule (see *infra*).
Modern French law and Anglo-American law are in accordance with the delimitation : DESBOIS, *op. cit.*, p. 290 ; BATIFFOL, *Les conflits en matière de contrats*, Paris, 1938, p. 393 ; *Traité, op. cit.*, no. 524 ; Lereb., Pig. et Lous. *op. cit.*, no. 471 ; NIBOYET, *Thèse, op. cit.*, ch. 1, *Traité, op. cit.*, vol. IV, no. 1160; DAYANT, *J. cl. dr. int. pr.*, fasc. 552, D, E and F ; NIBOYET, *Répertoire de droit international*, Vo. *Meubles corporels*, no. 20 ; ARMINJON, *Précis, op. cit.*, no. 28 ; it applies not only to onerous but also to gratuitous transfers : "Est-ce au contraire la loi adoptée par les parties qui doit décider si la propriété de la chose donnée est transmise *inter partes* par la seule force de la convention ? Les conditions requises pour la transmission des biens se rattachent à l'organisation de la propriété. Elles font partie du Statut Réel au sens strict du mot et doivent être toujours réglées par la loi de la situation. Ce principe serait évidemment admis sans difficulté pour les immeubles situés en France, mais il doit s'appliquer même aux meubles" : E. Audinet, *Des Conséquences et des limites du principe de l'autonomie de la volonté en matière de donations entre-vifs*, (1909) *R.J. de dr. int'l.*, p. 478 ; in the Common Law see Zaphiriou, *op. cit.*, ch. 7, pp. 53 et seq. ; and LALIVE, *op. cit.*, ch. 4, pp. 44 et seq. ; BAXTER, I., Conflicts of Law and Property, (1964) 10 McG. L.J. at p. 7, states that it may not be an adequate solution to say that the rules of contract apply when the problem is merely concerned with contractual aspects, for the aspects may be too interwoven. See however my section on delegation, *infra*, for possible alleviation of this critique.

66. In Anglo-American and French law : (1) *Re : ordinary debts :* Most jurists attribute a *situs* to the simple debt, and distinguish between this law and the proper law of the contract, as with corporeal moveables : GLARD, *op. cit.*, p. 166 ; MILHAUD, *Des Conflits des lois en*

their intention that the law of the contract should apply. This characterization can be appreciated in virtue of three bases :

a) The Juridical Explanation of the Law

Characterization on the basis of a juridical explanation of a disposition, as opposed to that on the basis of its principal or unique object, does not appear to be in accordance with the classical or statutists' method. Certain French jurists however, notably Laurent, Niboyet, and Desbois, characterize the conditions for the transfer of ownership of corporeal moveables in this way. They analyze the process of transfer of the moveable under domestic law and then project the resulting analysis onto the international plane. To Laurent, property is transferred *inter partes solo consensu*, and as such the proper law of the contract governs on the international level.[67] Niboyet and Desbois, however, follow Bufnoir's theory of the transfer of moveable property by contract, to the effect that corporeal moveables are transferred, not only by consent, but in virtue of an understood "dessaisine". Adhering to this theory,[68] Niboyet states :

> "Il est donc inexact de dire qu'actuellement le transfert de la propriété s'opère *solo consensu*. Il ne s'opère pas plus *solo consensu*, qu'avant le

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matière de privilège et hypothèques, Thèse, Paris, 1884, pp. 218-282 ; LAINÉ, *op. cit.*, vol. II, p. 262 et seq. ; SURVILLE, *La Cession de créance et la mise en gage des créances en droit international privé*, (1897) *Journal de droit international*, 671 ; BARTIN, *Principes, op. cit.*, vol. III, S. 374, ; Lereb., Pig. et Lous., *op. cit.*, no. 474 ; WEISS, *Traité théorique et pratique de droit international privé*, 2nd ed. 1912, vol. 4, p. 425 et seq.; DICEY, *Conflict of Laws*, 8th Edition, Morris, London, 1967, rule 153 ; WESTLAKE, *A Treatise on Private International Law*, 7th ed., 1925, S. 152 ; see also *Re : Sewell, Ex Parte Bank of Montreal*, [1933] D.L.R. 295, 2 D.L.R. 392, 14 C.B.R. 320. Others do not so delimitate and allow either (a) the proper law of the "créance" transfered to govern proprietary effects : BATIFFOL, *traité, op. cit.*, nos. 281, 538, 611, 612 ; *Contracts, op. cit.*, no. 557 ; NIBOYET, *Traité, op. cit.*, vol. IV, no. 1293 et seq. ; WENGLER, *La Situation des droits* (1957), rev. crit. 185 et seq., p. 409 et seq. ; DESBOIS, *op. cit., p. 297 ; FOOTE, Private International Law*, 5th ed., p. 396 ; CHESHIRE, *Private Int'l Law*, 6th Ed., 489 or (b) the proper law of the contract transferring the debt to govern such effects: *Lee* v. *Adby*, (1886) 17 Q.B.D. 309 ; *Republica de Guatemala* v. *Nunez*, (1927) 1 K.B. 699.
In any case, even those who consider that there is no *lex situs* intervention in respect of transfers *inter vivos* of "créances", admit the application of the law of the domicile of the debtor to determine the question of opposability of the contract to third persons : PILLET, *Traité, op. cit.*, no. 371, pp. 760-761 ; NIBOYET, *Traité, op. cit.*, vol. 1296 ; however, BATIFFOL, *Traité, op. cit.*, no. 611 ; *Contracts, op. cit.*, no. 536, envisages the law of the contract ceded.
(2) *Re. Securities* : Both modern Anglo-American and French law distinguish between the proper law of the contract and the *lex situs* for transfers of securities.

67. LAURENT, F., *Droit civil international*, Paris, 1881, vol. VII, no. 216-227, pp. 272-288 : The requirement of delivery having been abolished, articles 1138, 1538, C.N. have no reason to be included in the "Statut Réel".

68. BUFNOIR, *Propriété et Contrat, Thèse*, Paris 1924, p. 45 ; DELAUME, *Thèse, op. cit.*, and DESBOIS, *op. cit.*, p. 293 are also in agreement.

> code. Seulement alors qu'autrefois les parties devaient dresser un écrit constatant que la tradition symbolique avait été faite, actuellement on les en dispense et on déclare cet écrit sous-entendu . . ." and further, "De cette explication résulte que là où il sera certain qu'il n'existe qu'une simple obligation, au sens romain du mot, il ne pourra être question de transfert".[69]

As a consequence of the foregoing, Desbois and Niboyet project this juridical explanation onto the international plane, concluding that, in view of the understood "dessaisine" being necessary, this leads to the application of the *lex situs*. With the reservation that this basis of classification might not be correct under the classical theory of interpretation, a brief analysis of the rules dealing with transfer of corporeal moveables in Quebec domestic law leads to an explanation not too far removed from the Bufnoir-Niboyet viewpoint.

The general principle in the Quebec Civil Code is that in a contract for the alienation of a corporeal moveable, whether onerous or gratuitous, there is, by virtue of the consent alone, *ipso facto* created, an obligation to give. This is because ownership has already passed. The ownership has been effectively transferred by the very fact of the obligation. Most of the Quebec Commentators agree that this principle represents the positive law,[70] but one cannot dismiss the Bufnoirian interpretation too lightly, in view of the fact that the codifiers stated that they were following in substance, the Code Napoléon.[71] The true origin of the Quebec provision begins in Roman law, where in order to effect a transfer of property, there had to be an overt and public act over and above the consent of the parties — e.g., *traditio longu manu* (now called delivery). In time, this requirement was relaxed and symbolic or documentary publicity was permitted — e.g., *traditio brevi manu, constitutum possessorium*. The practice developed throughout France of inserting in acts, a clause of "dessaisine-saisine" to take the place of this symbolic tradition. The Bufnoirian interpretation of modern French law considers that the code had not eliminated the necessity of this clause, but it becomes understood. Is this applicable to Quebec law ? Possibly ! Certain

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69. *Thèse, Des Conflits, op. cit.*, p. 127.

70. MIGNEAULT, *Traité, op. cit.*, vol. V. p. 266 ; LANGELIER, *op. cit.*, vol. V, pp. 1-9 ; BILLETTE, *op. cit.*, vol. I, p. 475 ; A.M. HONORÉ — *La promesse de vente dans les droits romain et québécois* (1961) 11 Thémis, no. 40, p. 199 ; G.E. LEDAIN, *The Real Estate Broker*, (1957-58) 4 McGill L.J. 219 at pp. 235-242 ; D. LEFÈBVRE, *La vente en droit québécois est-elle un contrat consensuel ?* (1962) 22 R. du B. 181 ; J. PINEAU, *Le problème de la promesse de vente*, (1965) 67 R. du N. 387.

71. *Codifier's Report*, Arts. 44 and 46 comment ; "en matière de vente, le fond du droit est le même en France et dans la Province de Québec". RINFRET, *De la vente en la Province de Québec et en France*, (1936) *Journées du droit civil français*, p. 383.

jurists maintain that domestically, there is a distinction to be made between a sale (the transfer of ownership) and the contract to transfer.[72] In the first place, the principle of pure consensualism is reduced to a shadow in the light of its limited application. (E.g., it is inapplicable with respect to the transfer of indeterminate corporeals, and of corporeal things belonging to another). In the second place, with respect to bilateral promises of sales, it is meaningless. One would have thought, that as an application of the principle, the statements of the parties, "I promise to sell . . . I promise to buy", would effect a transfer. However, the codifiers did not intend to go even as far as the code Napoléon, for they stated, "a simple promise of sale is not equivalent to a sale" (1476 *C.C.*).[73] Gow observes that :

> "Taken as its face value, this would seem to mean that whenever the contract is not expressed as 'I here and now sell . . . and I here and now buy' but as 'I promise to sell if and when you accept and I now accept and hereby promise to buy', (although possibly in the Roman sense the contract may be perfect or nigh thereunto), there can be no sale unless and until either a *formal conveyance has been executed by the seller or he has "delivered" the goods to the buyer.* Generalized out this would mean that whenever the bargain is not of present sale and purchase, articles 1025 and 1472 do not apply and the pre-1866 requirement of tradition still applies".[74]

Whereas we cannot go as far as Bufnoir, in viewing Articles 1025, 1472 and 777 *C.C.* as including an understood divestment requirement, the fact is that the transfer of corporeal moveables seems, in almost all instances, to require something more than consent alone. The projection onto the international plane of such "additional element" justifies the "Statut Réel" characterization.

b) The Principal Object of the Law

As above-mentioned, the French statutists at the end of the Eighteenth Century were of the opinion that the characterization of a "statut" depended upon its principal object. The principle object of the above-mentioned dispositions is clear : they elucidate a mode of

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72. TRUDEL, *op. cit.*, vol. VII, pp. 24-31 ; and GOW, *Sale of Corporeal Moveables*, (1967) 13 McG. Law J. 244.

73. "It is perfectly plain that both of these articles of the code — i.e., 1476 and 1478, refer to a bilateral promise of sale, where the vendor has promised to buy, because nobody pretends that a sale takes place before the acceptance of the purchaser ; so that these articles are of very little assistance, *except of show that in one respect, our Code hesitates to go the length of the Code Napoleon in the application of the doctrine that a contract of sale is perfected by the mere consent of the parties." Glendening*, v. *Cox*, (1915) 49 S.C. 71 at p. 75, ARCHIBALD, J. ; see also LANGELIER, *Cours*, *op. cit.*, vol. V, p. 15 ; MARLER, *op. cit.*, nos. 417, 440, 192 ; MIGNEAULT, *Traité*, *op. cit.*, vol. VII, pp. 131-132.

74. *op. cit.*, p. 254.

acquisition of property. Property may be acquired by prehension, occupation, accession, will, by *contract*, prescription, and otherwise by the effect of law obligations.[75] The dispositions hereabove referred to do no more than state the contractual method of acquisition of property. The fact that property is acquired as an effect of the contract should not influence its characterization although it may, to a certain extent, influence in the final analysis, the applicable law (see infra subsection two).

c) The Social Goal of the Law

According to Pillet, the court should seek the social goal or purpose of the law in order to determine whether it ought to be territorial or extra-territorial. One must maintain extra-territoriality for those laws, when the social goal sought for by their existence would be lost if they did not follow the person ; whereas one must maintain territoriality for those laws whose social goals would not be achieved in each country if they did not apply to aliens and domiciliaries alike. Is the law in existence to protect the particular activities of individuals, or is it there to guarantee the conditions and functioning of a social body ? The former he calls individual laws, or laws for the protection of the individual and adopts their personal law to govern them ; the latter he calls social laws, or laws of social guarantee and applies either *lex fori, lex situs,* or *lex loci contractus.*[76] The theory does not really go very far in that it stops at two general categories ; however, the basis of distinguishing has merit. If the conditions for the transfer *inter partes* of moveables were laws for the individual contractants alone, we should then apply, not their personal laws, but the proper law of the contract, seeing that the parties have extensive liberty in contractual domestic transactions. In fact, however, the conditions of transfer affect the interested community, i.e. creditors, subsequent acquirors, so much so that the social goal of protecting them to the limits so desired would be lost, if the rules, even *inter partes*, were not uniform within the territory of the situation of the moveable.

d) Synthesis

Thus, in a general manner, the law of the *situs* as the "statut réel" must govern the conditions to effect the transfer of ownership of

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75. Art. 583 *C.C.*

76. PILLET, *op. cit.*, (1897) *Journ. du dr. int'l pr.* , as Lalive, *op. cit.*, remarks at p. 177 . "In the realm of domestic law, the sphere of property relations is regarded as a domain of human activity where the intervention of the community is particularly required."

moveables *inter partes*.[77] Leaving aside particular problems hereafter to be discussed more fully, this includes questions such as : whether delivery is required, if so, what kind of delivery, fictitious, symbolic or real, the issue whether a promise of sale is equivalent to a sale (although the essential validity of the promise of sale as such, is governed by the proper law of the contract), the exact moment in time when a transfer of ownership is realized, including the conditions for and the time when the individualization of indeterminate things according to Article 1026 and 1474 *C.C.* takes place,[78] the intrinsic validity of clauses reserving ownership in the vendor until certain conditions have been met,[79] the duration of time parties can limit the free circulation of property by unlimited substitutions or prohibitions

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77. This was the position adopted by the Conference of International Law ; Madrid session : April 15-22, 1911, discussed by DIENA, *Les conflits de lois en matière de droits réels*, in [1911] *R. de dr. int'l.*, 561, and his report in *Anm. de dr. int'l.* vol. XIII, pp. 231-250. In spite of the opposition by such notables as Pillet, the conference adopted in Art. II, the competency of the *lex situs* even *inter partes* : Il . . . "Un droit réel ne peut cependant s'établir et subsister de façon à être opposable aux tiers qu'en remplissant les conditions de forme exigées par la *lex rei sitae*, pour la sauvegarde des intérêts généraux et de l'ordre public.
Cette loi doit déterminer, même dans les rapports entre les parties, les conditions auxquelles on peut considérer un individu comme saisi d'un droit réel, en fixant notamment comment et quand a lieu la transmission de la propriété."

78. *NIBOYET, Traité, op. cit.*, vol. IV, no. 1199, pp. 396, 397. *contra* JOHNSON, *op. cit.*, at p. 646 : "the rule (1474 *C.C.*) is not a matter of statut but of intention". See *Beaudoin* v. *Sylvain et MacDonald*, [1953] S.C. 156, where the contractual characterization of this rule was implied. See also Gérald E. LEDAIN, *The Transfer of Property and Risk in the Sale of Fungibles*, (1954-55) 4 McG. L.J. 238 for a thorough discussion of the articles 1026 and 1474 *C.C.* The author's remarks at p. 252 imply that insofar as transfer of ownership is concerned, Art. 1474 *C.C.* is *imperative*, outside the domain of the parties. "It goes without saying, however, that the Quebec courts are just as concerned to discover the intention of the parties, for the rules concerning the transfer of property and risk are not rules of public order (although it is in the very nature of things that ownership cannot be transferred before the goods have been made certain and determined)".

79. See the cases of *Hochelaga* v. *Waterous Engine Works, op. cit.*, *In Re Brupbacher Silk Mills Ltd., op. cit.*, and *Williams* v. *Nadon*, (1907) 32 S.C. 250, rev'g C.R. Feb. 5, 1907, where clauses of reservation of ownership were considered by the Quebec courts. Note also that clauses in a contract reserving title to the vendor until fulfillment of a condition and suspensive contracts, where there is no contract at all, and as such no transfer of ownership until the condition occurs, must be treated in the same way in re : the transfer of title. A conflict may, however, arise with respect to the retroactivity of the conditions. The *lex situs* may allow retroactivity, whereas the contractual law may not. Some jurists say both laws must be consulted with the *lex situs* having the final word : NIBOYET, *Des conflits, op. cit., Thèse*, p. 170; *Traité, op. cit.*, vol. 4, no. 1201 ; BATIFFOL, *Traité, op. cit.*, no. 525; BARTIN, *Principes, op. cit.*, vol. III, no. 406, p. 176 whereas others say the effect of the retroactivity of the condition, even as to the proprietary effect depends upon the law of the contract : ARMINJON, *Précis, op. cit.*, vol. XI, p. 113 ff, and DESBOIS, *op. cit.*, pp. 302-305, who makes this classification conditional : the *lex situs* must permit transfers by consent alone. It is submitted, Articles 1079-1088 *C.C.* are wholly within the contractual domain. The retroactivity of the transfer is only a consequence of and incidental to the retroactivity of the obligation.

to alienate, and the conditions under which title to shares of a company may be acquired.

However, it must be understood that the law of the contract governs all and every aspect thereof, excepting form and capacity, which does not concern the creation and content of the proprietary right. Thus the validity of all the conditions of formation of the contract, questions relating to the execution of the contractual obligations — i.e., delivery, warranties, payment of the price and sanctions for the inexecution of these obligations (excepting privileges) must be governed by the law of the contract.

3. Conditions of transfer Vis à Vis Third Persons

The issues above-mentioned, classified *inter partes*, are likewise within the domain of the *lex situs* insofar as third persons are concerned. The essential problem concerns formalities which are often required in order for the transfer to affect third persons — e.g., the registrations of gifts *inter vivos*, substitutions, prohibitions to alienate, the inscription of share transfers on the company books of register, or signification of transfers of "créances". There are two ways of approaching these rules of publicity. One could say that they do not really concern the transfer of the property. Technically articles 1027, 1571, 804 *C.C.* do not modify articles 777, 1025 and 1472 *C.C.* and have nothing to do with the "statut réel" ;[80] or the rules might form part of the "statut réel", on the basis that they determine the true and effective owner — i.e., *erga omnes*. Even if the first possibility is correct, what other law could legitimately govern them but the *lex situs* ? As such, whatever the basis, the rules of opposability should be governed by the *lex situs*, for they have a common purpose : to protect third persons against the dangers of not knowing the owner of the moveable with respect to which they are contracting.[81]

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80. NIBOYET considered that the *lex situs* is competent to govern rules of opposability, but on the basis that they are rules of public order, *Thèse*, *op. cit.*, pp. 27-28 ; this was also the view of the conference of the *Institute of International Law*, Madrid session (1911), *op. cit.*, art. 2 : "Un droit réel ne peut cependant s'établir et substituer de façon à être opposable aux tiers, qu'en remplissant les conditions de forme exigées par là *lex rei sitae pour la sauvegarde des intérêts généraux et de l'ordre public*"

81. "La loi de la situation apparaît comme seule compétente pour régir l'opposabilité aux tiers. Les dispositions qui organisent la publicité sont destinées à garantir la sécurité dans la transmission des droits ; alors pour remplir leur fonction il faut qu'elles présentent un caractère de généralité absolue et qu'elles soient applicables quelle que soit la nationalité des contractants et la loi choisie pour le régime de leur convention" DESBOIS, *op. cit.*, p. 288, also BOULLENOIS, *Dissertations sur les questions qui naissent de la contrariété des lois et des coutumes*, Paris, 1732, quest. 127, pp. 127 et seq., and BOUHIER, *obs*., *op. cit.*, ch. XXI, no. 2, p. 501.

B. *Characterization of Two Problems Common to Both Onerous and Gratuitous Transfers*

1. The Question of Risk[82]

The problem of risks in the transfer of moveable property might be stated in the following manner :

A sells to B a moveable by a contract in virtue of which ownership passes to B immediately on consent alone. Before delivery, the object of the sale is destroyed by a "force majeure" or "cas fortuit". A is in the impossibility of executing his obligation of delivery. Notwithstanding, has the buyer B still the obligation of paying the price ? The answer to the problem depends upon who bears the risks ; if the buyer, then he still must pay the price, if the seller, then the buyer is liberated. It is clear under Quebec domestic law, excluding any agreement to the contrary, that the risk falls upon the buyer. What is not clear, is the basis of this burden, and this might be important in a conflictual situation. To the extent that it falls upon him because he is the owner, we might say that the question of risks forms part of the "statut réel". If, on the other hand, it falls upon him as the creditor of an obligation (to receive delivery), it should form part of the domain of the proper law of the contract.

French jurists characterize the question of risk as "statut réel", seeing its close connection with the transfer of ownership,[83] whereas the Common law considers it a contractual question which must be governed by the proper law of the contract.[84]

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82. For a general discussion, see: *Les risques dans la vente : De la Loi Romaine à la Loi de la Protection du Consommateur*, Daneil Jacoby, (1972) 18 McGill L.J., 344; A. BAGGE, *Les conflits de lois en matière de contrats de vente de biens meubles corporels*, (1928), *Recueil des cours de l'académie de droit international de La Haye*, p. 201, at p. 212; F.H. LAWSON, *The Passing of Property and Risk in the Sale of Goods, — A Comparative Study*, (1949) 65 L.R.Q. 352; A. DUVAL, *L'Enrichissement sans cause*, (1955) 15 R. du B., p. 486; L.A. JETTÉ, *Les obligations, (1938-9) 13 R. du B. 475; Mil. BEAULIEU, La frustration d'un contrat*, (1942) 2 R. du B. p. 381 ; R. TASCHEREAU, *Du cas fortuit quant au débiteur d'un corps certain*, (1901) 7 R.L.N.S. 345; G.A. WASSERMAN, *Impossibility of Performance in the Civil Law of Quebec*, (1952) 12 R. du B., 366; BOHÉMIER et FOX, *De l'effet des changements de circonstances sur les contrats dans le droit civil québécois* (1962), 12 *Thémis* 77; Michael L. BLUMENSTEIN, *Theory of Risks*, McGill University Essay, Faculty of Law, 1962.

83. Because of *res perit domino* the creditor of the obligation to receive delivery subsists because he is the owner : DESBOIS, *op. cit.*, p. 296 ; BATIFFOL, *Traité*, *op. cit.*, no. 525, *Contrats*, *op. cit.*, p. 399. For the proper law of this contract : BARTIN, *Principes*, *op. cit.*, vol. III, no. 405, p. 164, (1909), Clunet, p. 127. Roman law on the basis of equity placed the risk on the buyer. It was considered that if he were to profit after the sale, as a result of the increase in value of the thing, then he must bear the risk of loss before delivery. As LAWSON stated, *op. cit.*, p. 352 : " . . .The rule (passage of risk) obviously belonged to the law of obligations".

84. ZAPHIRIOU, *op. cit.*, p. 98 et seq., see authorities therein referred.

There are two currents of thought among Quebec jurists and judges, the one maintaining that as in French law the theory of risks is tied to the theory of ownership; the other that it is connected with the law of obligations. The bulk of legal thought actually supports the first-mentioned school — i.e., the doctrine of *res perit domino.* Marler states that: "A thing is always at the owners' risk".[85] Similarly to Ledain:

> "The transfer of risk in Quebec civil law takes place in the absence of agreement or usage to the contrary, at the same time as the transfer of ownership. The maxim *res perit domino* is thus applicable to the contract of sale in Quebec. This is nowhere explained in the code, but it is clearly to be inferred from the title of obligations where the question of risk is dealt with".[86]

The second-mentioned school of thought, to which I subscribe, considers that the principle, *res perit domino,* is an application of the broader principle of *res perit creditori.* Both of these principles represent derogations in contracts transferring ownership from the general rule of *res perit debitori.* I.e., where one party is prevented from executing an obligation of which he is the debtor, by a "force majeure" or "cas fortuit", the other is not required to execute his. The juridical basis of the general rule is founded either upon the presumed intention of the parties, or upon the theory of cause (the cause of each party's obligation is that of the other party) : in either case, the origin of the principle is clearly tied up with the will of the parties. Further support can be deduced by a comparaison of articles 1200 and 1202 *C.C.* Article 1202 *C.C.* states: "When the performance of an obligation to do has become impossible without any act or fault of the debtor and before he is in default, the obligation is extinguished and both parties are liberated . . ." When, however, there exists under the contract an obligation to give a thing certain and determinate, an exception to the theory of risks is introduced. The rule *res perit debitori* is reversed and a new rule governs the question of the execution of the obligation — *res perit creditori,* which principle is an expression of the presumed intention of the parties. Thus article 1200 *C.C.* provides : "When the certain specific thing which is the object of

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85. MARLER, *Law of Real Property, op. cit.*, no. 481.

86. LEDAIN, *Transfer of Property, op. cit.*, (1954) 1 M.L.J. and authorities cited therein 239 ; see also for this view : Joel BELL, *Theory of Risk,* McGill University, essay, 1962, at p. 133 et seq. to the effect that risk is conceived in proprietary terms rather than obligatory ; MIGNEAULT, *Droit civil canadien,* vol. V, p. 402, "Mais pourquoi est-elle à ses risques ? Parce que la loi interprétant les volontés des parties présume que celui qui a dès à présent transféré la propriété de sa chose a voulu faire un contrat définitif non subordonné aux éventualités de l'avenir qu'elle n'a pas entendu rester responsable d'une chose *qui n'était plus dans son patrimoine*" ; and Jacoby, *op. cit.*

the obligation perishes or the delivery of it becomes, from any other cause, impossible, without the act or fault of the debtor, and before he is in default, the obligation is extinguished . . ." Reading the articles together, one can say that in transfers of property, the obligation of the debtor to deliver is extinguished since he no longer has an obligation to do (art. 1200 *C.C.*), while that of the creditor to pay, subsists and is exigible.

As further support for the contractual characterization proposed under Quebec law, articles 1200 *C.C.* et seq., which deal with the respective positions of the debtor and creditor in the event of the impossibility of performance, make no mention of ownership. Ownership is treated in one place in the code, risk in another; ownership is thereby not contemplated as a bais for the continued existence of the creditor's obligation.

To recapitulate, while the consequences of Roman, French and Quebec law are the same (it is the purchaser who assumes the risks), the Roman solution rests in an equitable solution between the purchaser and vendor, vis à vis each other, (therefore contractual), that of the French is based on *res perit domino* (therefore "statut réel"), and the Quebec solution is based on the principle *res perit creditori* (therefore contractual).[87]

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87. This separation of ownership and risk should apply to all modalities in contracts for the transfer of moveables:

(a) In the sale of goods not yet certain and determinate, the risk falls upon the vendor, who is also the debtor of the obligation to deliver, not because he remains owner until the thing is determinate, but because there is no executory obligation on the part of the creditor until the thing is determinate, at least as to kind (art. 1061 *C.C.*). The creditor purchaser cannot be forced to perform his obligation, which is not yet executory, and the loss therefore falls upon the debtor-vendor.

(b) In the case of conditional sales contracts, whereby possession is transferred to the buyer, but the transfer of ownership is delayed until the full payment of price, the same rule *res perit creditori* applies to the question of risks. In this case, we have a clear conflict between *res perit domino* and *res perit creditori*; if the loss falls upon the owner, then the conditional vendor, or for that matter, any vendor in a sale under a suspensive condition, bears the risk, whereas if the rule is *res perit creditori*, the creditor of the obligation to receive the thing which may been destroyed, must bear the risk and perform his part of the obligation. The principle of *res perit creditori* was applied by Mr. Justice Challies, in the case of *Latreille* v. *Isabel*, Montreal, S.C. unreported # 362, 954, April 24, 1956, on appeal [1958] B.R. 43. The Learned Judge based himself on a footnote accompanying Migneault's treatment of the question, in *Traité, op. cit.*, vol. V, p. 402 ff: "La règle qui met la chose aux risques du créancier n'a pas pour base la maxime *res perit domino*. Elle se rattacherait, au contraire, au principe, que le débiteur d'un corps certain est libéré par la perte de la chose arrivée sans son fait et sa faute et avant qu'il soit en demeure (art. 1200 *C.C.*).

2. The Effect of the Contract Transferring a Moveable not Owned by the Transferor: [88]

a) The Rule and its exceptions

Under Roman law, where the contract of sale was only productive of obligations, a contract for the transfer of property belonging to another was conceivable. It was also possible under old French law for the same reason. The Code Napoléon[89] instituted, and our codifiers adopted the principle that the contracts of sale and gift could be not only productive of obligations, but translative of ownership. This necessitated the presence of a rule to the effect that the transfer of a thing not belonging to the owner is null. Accordingly, the Quebec legislator enacted art. 1487 *C.C.* "The sale of a thing which does not belong to the seller is null" . . . and art. 773 *C.C.* "The gift *inter vivos* of the property of another is void . . ."

Two exceptions to this rule are common to both the contracts of sale and gift : firstly, the transfer by the non-owner is valid if the seller or donor subsequently becomes the owner of the object transferred (articles 773, 1487 *C.C.*). Secondly, and as art. 1027.2 *C.C.* provides, a transfer by a non-owner in certain circumstances can give title to the purchaser in good faith :

> " . . . But if a party oblige himself successively to two persons to deliver to each of them a thing which is purely moveable property, that one of the two who has been put in actual possession is preferred and remains owner of the thing although his title be posterior in date ; provided, however, that his possession be in good faith."

There are, however, further exceptions for the onerous contract, due to the favour of commerce. These are stipulated in articles 1488, 1489, 1490 and 2268 *C.C.* I shall herein-after demonstrate that the effect of the contract of transfer of moveables by a non-owner to an innocent purchaser must be characterized as proprietary.

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88. For a thorough discussion of the subject in Quebec domestic law, see the following : JASMIN, *De la vente d'un objet qui n'appartient pas au vendeur, Thèse*, U. de Montreal, 1924 ; MIGNEAULT, *op. cit.*, vol. IV ; Roger OUIMET, *De vente de la chose perdue ou volée*, 9 McG. L.J. 165 ; RINFRET, *De la vente en la Province de Québec et en France, op. cit.*, Codfiers' Reports, 4th report, vol. II, p. 11 ; POTHIER, *Traité de cheptel*, ed. Bugnet, vol. IV, p. 354 ; RIOU, *Nullité de la vente de la chose d'autrui*, (1900) 6 L.N. 509 ; G. LEDAIN, *Security upon Moveable Property*, M.L.J. 83 ; POULIOT, *Nullité de la vente de la chose d'autrui*, (1933-34) 12 R. du B. 450; Louis BUADUIN, *Le droit civil de la Province de Québec*, Montreal, Wilson and Lafleur, 1953, pp. 438-444 and authorities cited ; J. CHALLIES, *The sale of a Thing not belonging to the Seller in the law of Quebec*, (1932) 14 Can. Bar Rev., 801 ; PERREAULT, *Traité de droit commercial*, vol. XI, no. 184, p. 161 et seq.

89. 1599, 2279, 2280, C.N.

b) The object transferred

Are the rule and the exceptions applicable to all kinds of moveable property? Originally the rule was associated with corporeals, but what of incorporeals, such as shares, bonds and ordinary debts? In order for rights to pass to the innocent acquiror (mainly purchasers), the act (e.g., consent or with delivery) effected by the transferor must be the one which transfers ownership. As such, where recourse must be to a third person to aid or complete the transfer of title, the exceptions cannot apply. Bearing this in mind, the following are the rules which should apply:

i) Shares:

Shares listed or unlisted cannot be the Object of a "Vente a *Non Domino*" for recourse must be had to the share registry to perfect the transfer even *inter partes*, to vest in the acquiror the *absolute* ownership thereof.[90] Even if this were not a necessary requirement, share certificates are but *prima facie* evidence of title. If lost, they can be replaced. A certificate even endorsed in the hands of a non-owner is not freely marketable:

> "The holder of any such certificate takes the shares represented thereby subject to any infirmity in the title of the person from whom he acquires them, so that if the share certificates were lost by or stolen from the owner, the subsequent holder of the certificate is vested with no title whatsoever to the shares represented thereby".[91]

ii) Simple Debts

They can be the object of a "vente a *non domino*" in one particular case, i.e., where the transferor has sold a debt to one person and before signification of the transfer to the debtor, resells it to a third person who signifies before the transferee (similar to article 1027.2 *C.C.*)

iii) Registered Bonds

They may not be the object of a "vente a *non domino*", for reasons similar to those set forth with respect to shares.

iv) Bearer Bonds

When they are treated by the Companies' Acts or Acts of

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90. In any case, the good faith of the innocent purchaser could be questioned where he did not investigate at the head office of the company, registry office, etc. (through his broker, no doubt): "Good faith does not need to be "une bonne éclatante". It suffices that it be an honest belief that the vendor is the owner of the thing sold:" MIGNEAULT, J., in *Grossman* v. *Barnett*, [1926] S.C.R. 129 at p. 137.

91. *1967, Interim Report of the Select Committee on Company Law, Ontario*, Tabled in the Legislative Assembly, 5th Session, 27th Legislation, 15-16 Elizabeth II; p. 41.

Parliament under which the company or authority issuing the security was created and by the company or authority itself (its by-laws and resolutions) as fully and absolutely transferable by delivery, they can be assimilated to corporeals, and as such, be the object of a transfer by a non-owner.

c) The Problem

The problem in a conflictual situation might arise in the following manner:

> B, not the true owner of a moveable, sells it to C, a purchaser, unaware that B is not the owner, by a contract of sale concluded in country X; the moveable at the time of the transaction had its *situs* in country Y. A, the true owner domiciled and resident in country X, seeks to revendicate the moveable, which C now possesses in country X, under the law of which country he has this right; according to the laws of country Y, the *situs* at the time of the transfer, A has lost his right of ownership, or it is conditional upon a reimbursement to C of the price the latter has paid. The case comes before a Quebec judge, who must characterize the effect of the transfer by the non-owner either as contractual, bringing about the application of the law of country X or proprietary, and if so which *lex situs* applies, that at the time of the conclusion of the contract — i.e., the law of Y, or at the time when the true owner seeks to exercise his right — i.e., the law of X?

d) Critique of the Jurisprudential Characterization (contractual) and the Characterization proposed, (proprietary).

In all of the decided cases, the problem was complicated because the *situs* of the moveable changed from that at the time of the transaction to that at the time of an action with respect thereto. While reserving discussion of this aspect of the problem to Section Two, it undoubtedly influenced the court in their characterization of the problem.

The courts with rare exception lean towards a contractual characterization.[92] It is submitted that such a characterization is

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92. See my discussion of their attitude in Part one, section one, and in particular *United Shoe Co.* v. *Caron, op. cit.*; *Union Acceptance Corp.* v. *Guay*, (1960) B.R. 827; *Reid* v. *Favour*, (1955) S.C. 370, where Challies, J., implied the proprietary classification; and *Neugent* v. *Canadian Rock Products Ltd., op. cit.*, where the court was divided: Dorion, J., contractual; Barclay, J., Walsh, J. and Survoyer, J., *ad hoc* (dissenting), proprietary. See also *McKenna* v. *Prieur and Hope* (1924) 56 O.L.R. 389, where the Ontario court had occasion to interpret articles 1487 C.C. et seq.: a car stolen in Rhode Island was sold by a dealer in similar articles to an innocent purchaser in Quebec. The contract was concluded in Quebec, which was also the *situs* at that time. The effect of the Quebec transaction was in issue — i.e., whether it could negate or modify the true owner's rights. As Quebec law was applicable either as the law of the contract or the proprietary law, the court had need to characterize the issue. One of the judges held that there was no sale to the innocent purchaser, only an executory contract; The Chief Justice, Muloch, C.J.A., held that the

juridically incorrect. It is not the contract between the transferor and the innocent purchaser that deprives the owner of his rights in whole or in part. To him, that contract is *res inter alios acta*. The basis of the rights of the innocent purchaser lies somewhere in the legitimation given by the transferor that he is the owner of the moveable, and the policy of the legislator to promote commerce. As such, characterization should be proprietary and the applicable law the *lex situs*.

That the characterization of transfers by non-owners is proprietary can be seen, in a general way, from the principle object of the relevant articles with respect thereto (i.e., articles 1487 to 1489, 1027.2, 2268 *C.C.*). They dictate the effects of a transfer by a non-owner. As such, whether or not an absolute right of ownership is vested in the innocent purchaser or only a right of retention, or lien, etc., should not affect the characterization. The question deals with *property* and in accordance with the general wide domain herein attributed to the "statut réel", it ought to be classified as "proprietary". If a closer test is desired, one might ask the following question : does the transfer from a non-owner to an innocent purchaser affect the rights of the true owner so as to negate, deprive or restrict his rights of ownership ? The courts are divided as to the characterization, because they are unclear about the test. Under the domestic law of Quebec, the rights of ownership of the true owner are very definitely affected. In some cases, a condition of reimbursement is imposed upon him, which is not only a legal limitation, but is a practical and economical restriction ; in others, his right of revendication is totally lost ; and in all cases, the possibility of acquisitive prescription by the possessor of a corporeal moveable, even if stolen from him, casts a shadow on his absolute right of ownership.

As proof whereof, consider the ramifications in the following juridical situations, bearing in mind that the right of prescription exists in all cases, which is a very short three years for corporeal moveables (2268 *C.C.*).

1. *The Sale is not Commercial, and Does Not Take Place in a Fair or Market Place, etc.* (1487 *C.C.*): In this instance the true

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innocent purchaser acquired no proprietary right but only a possessary lien ; while Smith, J.A. held that article 1489 *C.C.* did not operate to transfer title, just to restrain to owner, the restraint not being a proprietary right. In France the characterization is clearly proprietary, NIBOYET, *Des Conflits . . ., op. cit.*, pp. 281-328 ; as it is in Anglo-American law : "whether an innocent purchaser has acquired a valid title from a non-owner or an agent without authority is determined in accordance with the *lex situs* of the chattel at the time of the alleged transfer" : ZAPHIRIOU, *op. cit.*, p. 104, see also FALCONBRIDGE, J.D., *Essays on the Conflicts of Law, second edition, Toronto, 1954, p. 451 et seq.*

owner can unconditionally revendicate the moveable sold in spite of the good faith of the purchaser (barring acquisitive prescription).

2. *The Sale Takes Place in a Fair or Market or at a Public Sale, or From a Trader dealing in Similar Articles, and is Commercial. However, the Object of the Sale had been Lost or Stolen from the True Owner* (1489) : [93]. In this situation, a limitation is imposed on the owner's absolute right of ownership : the owner may not revendicate the object from the innocent purchaser without reimbursing him the price the latter has paid for the purchase of it.[94]

3. *There has been a Sale of a Moveable in a Fair or Market, or at a Public Sale, or from a Dealer in Similar Articles, or at a judicial Sale, but the Sale is not Commercial. The object of the Sale had not been Lost or Stolen :* Judges and jurists are unanimous in the opinion that in this case, the true owner has lost his right of revendication, and his right of ownership, *ipso facto.*[95] As Mr. Justice Challies stated, for this situation : "This exceptional application of the maxim 'la possession vaut titre' can be explained by the codifiers desire to benefit commerce generally, because it is an all important element in a country's prosperity".[96]

4. *The Same Juridical Situation as in 3., But the Sale is Commercial :* Most of the jurisprudence and jurists maintain the exact same effects in this situation as for that set forth in no. 3 : that is, the owner is, *ipso facto,* deprived of his rights of ownership. The leading case of *National Cash Register* v. *Demetre,* held that article 1488 *C.C.* applies to the owner and prevents his revendication if the transaction has been commercial. The court held that the owner could not revendicate, notwithstanding that the acquisition was not made from a dealer in similar articles. Broadly interpreting article 2260(5) by not restricting commercial matters to objects sold in a dealer's trade, the

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93. I feel there is no need to dwell at any length with the most clear cut protection of the innocent purchaser, the judicial sale of a thing lost or stolen, " . . . it cannot be reclamed" *(1490 C.C.)*

94. Note that in a sale by an unliscensed used car dealer of an automobile not owned by him, the vendor is not considered a trader in similar articles ; in which case, article 1487 *C.C.* applies and the true owner can revendicate without being obliged to reimburse the purchaser. S.R.Q. 1964, ch. 231 art. 23.

95. Assuming of course that the object sold "was one generally sold in the vendors' trade . for if not (where the sale is not commercial), the true owner may revendicate (1487 *C.C.*)

96. *The Sale of a Thing* . . *op. cit.*, p. 808.

court validated a sale of a cash register, as well as the sale of a business, since it was a commercial matter.[97]

e) Synthesis

That the protection of acquired rights be sacrificed for the benefit of an innocent purchaser has its source in the desire of the codifiers to maintain a free flow of commerce in moveable property. To this end, they did not allow moveable property to be hypothecated ; no hidden charges are to exist over them, other than in the exceptional case where they are limited in time and carry little or no "droit de suite" (e.g., privileges). That moveables cannot be the object of a "droit de suite" as a general principle, is thus the juridical explanation behind the economic motive. The rules of deprivation, total or partial, of the owner's rights, coupled with the right of the possessor to prescribe the ownership of corporeal moveables after three years, are the manifestations of the consequences of this principle in Quebec property law. As such, they are proprietary in nature. Quebec, as the *situs* of the property, cannot allow the freedom of contract to override this.

In view of the fact that in situations 1 and 2 no real title is acquired by the innocent purchaser (except perhaps a lien which might be classified as proprietary), it might be contended that in these cases the exceptions are not to be classified as "statut réel". This would be a wrong appreciation of very real limitation on the owner's rights, especially in situation 2, which is why the characterization must be proprietary.

Furthermore, we might even consider that the principle and its exception be characterized in this way, as being rules for the classification of property. Just as the distinction between things which can be sold and those which are "hors du commerce" fall under the rule for the distinction and nature of property, so could the effects of the sale *"a non domino"* be classified, because they are situated together in the civil code in title V, chapter III, under the title *"of things which may be sold"*.

It is also submitted that the various elements required for a valid

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97. (1905) 14 B.R. 68 ; a few cases do restrict "Commercial matters" for the purposes of article 1489 *C.C.* to be sales in articles of the dealer's trade : *Cassils* v. *Crawford*, (1876) 21 L.C.J. 1 ; *Goldie* v. *Filiatrault*, *op. cit.* ; but "nor in commercial matters generally" is not intended to cover 1489 cases and the rights of the owner can be negated : *Koriziuk* v. *McBride*, (1923) 29 R.L.N. 328 ; *Tremblay* v. *Mercier*, (1909) 38 S.C. 57 ; *Spencer* v. *Lavigne*, (1889) 15 Q.L.R. 101 ; and RINFRET, J., in *Frigidaire Corp.* v. *Malone*, [1934] *S.C.R. 121 aff'g.* [1933] B.R. 462 ; see *Comment Owen*, (1936) 14 Can. Bar Rev. 434 ; *Gauthier* v. *Bouchard* (1930) 37 R.L.N. 14 ; *Marier* v. *Turgeon*, (1932) 39 R.L.N.S. 37 ; *Hétu* v. *Morin*, (1910) 38 C.S. 289.

transfer by a non-owner must be determined by the *lex situs* — e.g., the requirements of good faith, commercial matter, theft, etc.

C. *Characterization of Certain "Statuts" in particular Contracts*

1. Sale

Most of the obligations of the buyer and seller are suppletive. They can thus exclude, restrict or modify their respective obligations — e.g., of delivery, warranty, or payment of the price. They may likewise insert any conditions so long as these are not contrary to public order or impossible (article 1061 *C.C.*). These obligations and conditions are construed according to the law intended by the parties to apply to the contract. Sanctions for non-performance of obligations take the form of rights. These rights arising out of non-performance of the obligations, which affect the ownership of the moveable, often have to be classified as proprietary or contractual. The classical theory, that characterization is to be in accordance with the principle object of the disposition, requires a contractual characterization where the right is most closely connected with the person (debtor of the obligation), and a proprietary one where it is most closely connected with the thing. This is the distinction between *jus ad rem* and *just in re*. As the former is a right against the person, requiring him to do something (though it affects the thing), it ought to be classified as contractual; whereas, the latter right being directly against the thing itself, ought to be within the domain of the "statut réel".

a) The Right of Dissolution

The right of dissolution for non-payment of the price (article 1543 *C.C.*) and for failure to take the object of sale away where the price has not been paid, (article 1544 *C.C.*) are both rights against the person of the debtor, and are therefore contractually characterized. This is unanimously accepted by Quebec courts and jurists.[98]

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98. *The Rhode Island case, op. cit.* ; followed in *Hollinger* v. *Wettstein*, (1927) 33 R. de J. 71 (1928) 8 C.B.R. 174 : A contract of sale was made and completed in Switzerland under which law a sale could not be dissolved for non-payment of the price. The court, (Panneton, J.) characterized the right as contractual. MIGNEAULT, *op. cit.*, vol. I, p. 100, approves of the characterization, stating that sales of moveables are contracted under a tacit resolutory condition that it will be resolved, if the buyer does not pay the price. See also *Rosenzweig* v. *Hart*, (1920) 56 D.L.R. 101 ; *Girouard* v. *Montmarquet*, (1903) 24 S.C. 396 ; *Longchamps* v. *Gosselin, (1920) 59 S.C. 225 ; also JOHNSON, op. cit.*, at p. 942 ; FALCONBRIDGE, *Contract and Conveyance in the Conflicts of Laws*, (1934) 2 D.L.R. 1 at p. 101. It was also characterized by the Ontario court in the case of *Re Hudson Fashion Shoppe*, (1926) 1 D.L.R. 199 : a contract of sale of moveables was concluded in Quebec, which was the *situs* of the goods at the time of the contract. Subsequently, the goods were

b) The Right of Retention [99]

In virtue of article 1496 *C.C.*, "the seller is not obliged to deliver the thing if the buyer does not pay the price, unless a term has been granted for the payment of it." I submit that the juridical nature of the right of retention under Quebec law is not "real". There is simply an obligation on the part of the seller not to do something, until and unless something else is done for him. It may be explained as a personal exception of the debtor (of the obligation to deliver), but in any case, it is contractual and outside the domain of the "statut réel". As such, irrespective of the *situs* of the property, the Quebec court will only allow recourse to this exception of the seller, where the law of the contract so permits. On the other hand, Johnson [100] suggests that the exception in article 6.2. *C.C.*, that rights of lien are governed by the law of Quebec, might include what are known as possessory liens entitling a person to retain possession of moveables belonging to another until certain legal demands are satisfied. He thus implies that the vendor's right of retention would be governed by article 6.2. *C.C.* — i.e., the *lex situs*, (if in Quebec) and presumably, a foreign *lex situs* if situated outside the Province. I find it difficult to accept this interpretation. Not only has the expression in article 6.2. *C.C.*, "droits

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removed to Ontario. When the buyer became insolvent, the unpaid seller claimed a right of dissolution under Quebec law (art. 1543 *C.C.*) If Ontario law applied, no such right existed. It was held that the law of Quebec applied. The apparent classification was contractual ; commented by ZAPHIRIOU, *op. cit.*, pp. 140-141 and LALIVE, *op. cit.*, at p. 142, who suggests that the classification should have been proprietary. The contractual characterization did prejudice the local creditors of the buyer at the second *situs*, Ontario. For this reason, i.e., the protection of local creditors, the legislature of Ontario enacted a statute R.S.O., 1927, ch. 105 amended by 1929, ch. 23, requiring foreign contracts giving unpaid vendors certain rights, to be registered in Ontario, when goods come into the Province, see S.S. 8,10. See also *In Re Meredith*, (1930) 11 C.B.R. 405 ; *In Re Satisfaction Stores*, (1929) 2 D.L.R. 435 ; *In Re Modern Cloak Co. Ltd.*, (1929-30) 11 C.B.R. 442 ; FALCONBRIDGE, *op. cit.*, at p. 463 ; and JOHNSON, *op. cit.*, pp. 949-954 for general discussion of the Canadian jurisprudence. In France, the right of dissolution of the contract for inexecution of obligations is also a matter of the proper law of the contract : Civ. 12 May, 1930, S. 1931. 1.129, note NIBOYET, Com. 18 Nov., 1959, Rev. Crt. 1960.83, note BATIFFOL ; 6 July 1959 Rev. Crt., 1959. 708, note BATIFFOL ; BATIFFOL, *Contracts*, *op. cit.* no. 511 ; NIBOYET, *Traité*, *op. cit.*, vol. 4, no. 1423.

99. French law is divided on whether characterization of this right is contractual or proprietary : (i) *The Proper Law of the Contract Governs :* NIBOYET, *Thèse, Des Conflits*, *op. cit.*, pp. 231-244 ; *Traité*, *op. cit.*, vol. 4, 1184, no. 1221 ; FIORE, *De la possession et du droit de rétention*, (1889) France judiciaire, p. 264, rejects the *lex situs* rule for rights of retentions which are accessory to the contract ; LAURENT, *Cours de dr. int'l pr.*, *op. cit.*, vol. VII, nos. 407, 182, 291. (ii) *The lex rei sitae governs :* BATIFFOL, *Traité*, *op. cit.*, no. 521, p. 624 : the right is founded upon possession and the conflict rule governing possession is the *lex rei sitae*, even though the right itself may not be technically a real right. This competency does not exclude the reference to the proper law, for to invoke the right, it must equally be allowed by the law of contract.

100. JOHNSON, *op. cit.*, pp. 538-39.

de gage", been interpreted in the technical sense of the word "gage" (pledge),[101] but also it is significant that the codifiers did not attach to the vendor's right of retention any "droit de suite", as they did to other persons having a similar right (art. 2001 *C.C.*). This detracts from any possible reality of the "statut". Nevertheless, the law of the contract might require a reference to the "statut réel" in order to determine whether or not the seller has lost possession of the moveable, and thereby forfeited his right.[102]

c) The Right of Stoppage in Transitu [103]

It now appears settled that the right of stoppage *in transitu* does not exist under Quebec law. At one time there was no doubt that it did,[104] and a vendor had the right upon a completed sale on credit, to interfere and prevent the buyer from taking possession, if before delivery, he became insolvant. This right brought with it a right to resiliate the sale. In the event of it being necessary for a Quebec court to characterize the right of stoppage *in transitu*, it is submitted that the correct classification would be contractual. The right is one against the person, even though it seeks to effect the return of the thing. The principle object thereof is similar to a right of retention, except in this case the goods have already left the possession of the vendor. The law

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101. *Barker* v. *Central Vermont Railway, op. cit.*, Archibald, J.

102. NIBOYET, *Traité, Op. cit.*, vol. IV, p. 471. In the event of any conflict between the rights of a retaining seller and third persons who may be claiming real rights over the things, such as a privilege, the law of the *situs* would intervene exclusively to determine whether or not the rights of the creditors are preferred to the rights of the "détenteur".

103. For a thorough discussion : W. JOHNSON, *Stoppage in Transitu in the Province of Quebec*, (1936), XIV, Can. Bar Rev. 177 ; F. HELLENDAL, *The Res in Transitu in the Conflict of Laws*, p. 7 ; JOHNSON, *Conflict of Laws, op. cit.*, pp. 621-627 ; FALCONBRIDGE, *Contract and Conveyance in the Conflict of Laws*, (1933) 81 U. of Penn. L.R., pp. 824-827.

104. For awhile it was assumed that this right, which is of English origin, was equivalent to the right of dissolution under art. 1543 *C.C.*, and was applied in Quebec as part of our law : *Campbell* v. *Jones*, (1858) 3 L.C.J. 6 ; *Rogers* v. *Mississippi and Dominion S.S. Co.*, (1888) 14 Q.L.R. 99, at p. 106 : "The right of stoppage *in transitu* remains intact." ; *Abinovitch* v. *Ehrenbach*, (1911) 41 S.C. 55 ; In *Acme Glove Works Ltd.*, v. *Canadian S.S. Co. Ltd.*, (1925) 38 B.R. 487, at p. 502, ALLARD, J.'s dissent ; in some cases, the vendor's right of stoppage *in transitu* was held to stem from the principles of justice and equity : *Ross* v. *European Trading Co.*, (1915) 21 R.L.N.S. 194 (Rev.) ; in others, it flowed from articles 1492 and 1497 *C.C.* : *Abinovitch* v. *Ehrenbach, op. cit.*, ; see also *Brown* v. *Hawksworth*, (1869) 14 L.C.J. 114. BADGELY, J., dissenting ; In *Re Thomson Whitehead & Co.*, v. *Darling and Greenwood*, (1877) 9 R.L. 379 ; *Bank of Toronto* v. *Hingston*, (1868) 12 L.C.J. 216 ; *McNider* v. *Beaulieu*, (1890) 14 59. The state of the law is now to the effect that the Common law right of stoppage *in transitu* is not a part of Quebec law *Acme Glove Works Ltd.*, v. *Canada S.S. Line Ltd., op. cit.* ; and in *Re Heckt, Ex parte Parr . Hylands & Co.*, [1931] C.B.R. 34 : "We have no disposition in our law of the nature of stoppage in transitu of the English law".

is protecting the vendor, who is in danger of not receiving payment. The right thus arises out of the principles of justice and equity, not as general concepts, but insofar as the respective obligations of the buyer and seller vis à vis each other are concerned. As such, it is not a real right over the thing itself. Whenever our courts have had to consider the juridical nature of this right, they have generally refrained from connecting it with any *jus in re*, such as a lien. It is generally discussed in contractual terms.[105] Thus, under a foreign contract which grants this right, the unpaid vendor may stop goods in transit situated in Quebec (subject, of course, to any exception of public order, which is unlikely). In accordance with which law is "delivery" to the buyer to be ascertained, i.e., when has he the possession of the goods ? Do we look to the *lex causae* i.e., the proper law of the contract where the right is born or to the *lex situs ?*[106] In spite of the fact that the possession by the buyer is intimately connected with the whole institution of the right of stoppage *in transitu*, it is submitted that in virtue of article 6.2 *C.C.*, bilateralized, contestations as to possession must be governed by the *lex situs*.

d) The Right of Redemption (1546 *C.C.*)

The sale with a right of redemption is an ordinary contract of sale, in which the parties have stipulated that the vendor shall have the right to demand from the buyer the return of the object, when the former shall have fulfilled certain conditions. To the extent that the vendor, with a right to redeem, retains, as some consider, a real right over the moveable sold [107] we should ask of the *lex situs* — i.e., the

105. As Andrew, J. stated in the case of *Rogers* v. *Mississippi and Dominion Steamship Co.*, *op. cit.*, p. 106 ; "On the whole I am inclined to think the right of stoppage *in transitu* is not a mere lien, "droit de gage", which, by *Civil Code*, article 6, is, as to us, confined in its operation to the country in which it originated, but rather to be a right accruing to the vendor from the inherent defect in the title of a vendee who has not, on his part, fulfulled the primary obligation incumbent upon him of paying the price." Approvingly, LAFLEUR, *op. cit.*, pp. 150-151 ; JOHNSON, *op. cit.*, p. 627 ; in *Re Assaly Bros. Ex. P.H. Tompkins & Co.*, (1926) 7 C.B.R. 521, it was stated by Panneton, J., "the nature of the right (of stoppage *in transitu*) under the English law . . . does NOT DEPEND UPON THE TITLE TO THE GOODS: the sale is complete and transfers the title of the goods to the purchaser irrespective of their delivery or possession. The right claimed . . . in one by virtue of which notwithstanding the completed sale, the vendor has the right to resiliate." Contra, however ZAPHIRIOU, *op. cit.*, p. 137 who considers this right proprietary for the same reasons as he so considers the right of resolution. His assimilation of the rights of revendication, resolution and stoppage *in transitu* is justified perhaps de *lega ferenda*, but is inaccurate as descriptive of Quebec positive law. However, LALIVE, *op. cit.*, at p. 125 states: "It is a matter of some doubt whether this right is to be characterized as contractual or proprietary and cases may be cited in support of either view". .

106. JONHSON, *op. cit.*, pp. 186-187, implies reference is to the *lex causæ*.

107. As MIGNEAULT held, *op. cit.*, vol. VI, p. 154 : "C'est-à-dire que le vendeur à réméré conserve, malgré la vente, un droit réel dans la chose, comme *jus in re* et non pas seulement

"statut réel", to determine the validity of the clause. However, it is generally believed that there is no real right created, only a personal right in favour of the vendor against the purchaser, requiring the latter to transfer the moveable to him upon the fulfillment of certain conditions. As such the validity of the clause must be determined by the proper law of the contract.[108]

e) The Proprietary Consequences of the Contractual Characterizations

Characterization of the rights of dissolution, stoppage *in transitu*, and redemption as contractual are undoubtedly correct in accordance with classical classification. However, the effect of each of these rights is, inter alia, to retransfer ownership of the property. Should this "real" effect be determined in accordance with the *lex situs* ? If so, it should naturally be the *lex situs* of the moveable at the time the judgment upholding the right is sought to be enforced. The buyer, however, might then be able to remove the moveable to a jurisdiction more favourable to him in order to prevent the effective retransfer. This would create greater uncertainty and insecurity for unpaid vendors and third persons in general. There is thus no advantage to be gained by a further breaking up of the contractual classification in this respect.

f) Privileges of the Unpaid Vendor [109]

In accordance with articles 1998, 1999 and 2000 *C.C.*:

"The unpaid vendor of a thing has two privileged rights :
1. a right to revendicate ;
2. a right of preference upon its price . . ."

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un *jus ad rem*." On the basis that the vendor is owner under a suspensive condition, the buyer under a resolutory condition. However this depends upon the view that there are two owners ; similarily BEADY-LACANTINERIE, *op. cit.*, p. 571. The jurisprudence contradicts Migneault. See : *Sirois* v. *Carrier*, (1904) 13 B.R. 242. The fact is, the buyer's right of ownership is not restricted, the object is not burdened with a real charge and any action taken by the buyer is not as holder of a real right, but as OWNER ; LAURENT, *Droit civil international, op. cit.*, vol. VI, no. 72 ; "Le droit a un rapport avec une chose mais ce rapport, cette relation à la chose est tout à fait mediate. La relation immédiate du droit de réméré est à l'obligation personnelle de l'acheteur de consentir à la retourner", *De la nature du droit de réméré*, 19 Thémis, p. 103 ; similarily FOELIX, *op. cit.*, vol. I, p. 249, BOULLENOIS, *Traité, op. cit.*, vol. I, Obs., 39, p. 9, vol. II, ch. 2, obs. 46, pp. 450-454.

108. Where the exercise of the right of redemption takes place in Quebec, our courts could intervene on the exception of public order ; they might consider, as they do in purely domestic cases, that where the stipulation was entered into solely to secure a loan, it will be ineffective against third persons unless possession had been transferred to the buyer. See LEDAIN, G., *Security of Moveable property, op. cit.*, p. 90, and authorities therein cited.

109. See MILHAUD, *op. cit.* ; and G. PATINET, *Privilèges et hypothèques en droit int'l pr., Thèse*, Paris, p. 186 et seq.

while article 6.2 *C.C.* states, " . . . but the law of Lower Canada is applied whenever the question involved relates to . . . privileges . . . procedure . . ."

i. Characterization by the positive law :

— *The Right of Revendication :* [110] My critique of the important case of *Rhode Island Locomotive Co.* v. *South Eastern Railway Co.* has been presented in other parts of this paper. The court, failing to recognize the nature of a privilege and paying only lip-service to the principle that the mere presence of a moveable in a jurisdiction does not bring about the competency of the "statut réel", felt compelled to exclude all reference to the notion of reality, and held that the privilege of revendication is to be governed solely by the law of the contract.

Basing himself on this case, Johnson stated :

> "Whether a foreign vendor under a contract made abroad has a right to revendicate is a matter of substance depending on the relevant foreign law".[110a]

— *The Right of Preference upon the Price:*[110b] Johnson makes an accurate distinction when he maintains that the question of priority amongst creditors having rights over a thing, i.e., the order in which they rank, is not a substantive right, but wholly procedural, being simply a method of payment, a condition of the remedy. However, the right to be paid or to claim by being ranked, as distinct from the order of ranking, is a substantive right. Until this point, his interpretation is correct. However, his reference to the law of the contract [110c] to determine the substantive right is not in accordance with a logical interpretation of article 6.2 *C.C.*

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110. NIBOYET classified this right as one of a mixed nature, suggesting its operation depends upon the proper law of the contract and the *lex situs : Traité, op. cit.*, vol. IV, pp. 421-422 ; see ZAPHIRIOU, *op. cit.*, pp. 142-145 ; see also *Trib. Comm.*, Seine 6, Sept., 1906, Clunet, (1907) p. 366 ; Trib. civ. Liège, 14 Nov., 1907, Clunet (1908), p. 565.

110A. JOHNSON, *op. cit.*, p. 527 ; also, BRIÈRE, *Les Conflits des lois . . ., op. cit.*, p. 130. Lafleur simply states that the *lex fori* governs all aspects of the questions relating to privilège, *op. cit.*, p. 123.

110B. Some French jurists characterize the privilege of preference on the price realized, as a coordinated competency of the proper law of the contract and the law of the *situs* : NIBOYET, *Thèse, op. cit.*, p. 218, et seq. ; also for this view, PILLET, cited by DIENA, *op. cit.*, in *Rev. de dr. int'l pr.*, 1911, p. 573, and see art. 3 of the text adopted by the Institute of International Law (Madrid), 1911, p. 199, and BATIFFOL, *Traité, op. cit.*, pp. 518-519 ; Others consider that the *lex rei sitae*, is of exclusive application to determine whether or not privilege exists : NIBOYET, *Traité, op. cit.*, vol. 4, p. 464, et seq., reversing his former views: "La *lex sitæ* s'applique seule, ce qui entraîne, de même que pour les 'privilèges généraux la double conséquence suivante : (1) d'abord qu'un privilège existera même si la loi de la créance ne le confère pas, (11) ensuite qu'il n'existera qu'autant que la *lex sitae* le créera", similarly BARTIN, *Principes, op. cit.*, vol. III, pp. 255-8.

110C. *Conflict of Laws, op. cit.*, implicitly at pp. 526, 527.

ii. The Characterization Proposed

Judge Archibald's statement, in *Barker* v. *Central Vermont Railway*, that the exception as to "privileges and rights of lien" of article 6.2 *C.C.* relates to substantive rights and not to remedies is exact.[111] The code itself implies the delimitation between substance and procedure with respect to privileges, by including each as a specific exception. The substance of the privilege, whether it be a right of revendication or a right of preference, is stated in article 6.2 *C.C.* to be governed by the law of Quebec. In accordance with the interpretation of the exceptions suggested above, seeing their territorial nature, it is Quebec law that applies because the thing is situated there. On the basis of the principles of reciprocity and justice, we should be entitled to bilateralize the rule, so that where a thing is situated in a foreign country, it will be governed by the foreign *lex situs*. As such, from a textual analysis, questions concerning privileges are governed by the law of the *situs*, which law determines its *SUBSTANCE, NOT THE LAW OF THE CONTRACT.*

As I shall show in the subsequent subsection, where the *situs* of the moveable is in Quebec at the relevant time, our law will require a reference to the law of the contract to determine whether there may be such a privilege. However, as it is a real right, the *situs* will control and, if not considered as a privilege by Quebec law, it shall not be entitled to be ranked in accordance with the procedural law. Inversely, if the *situs* (in Quebec) allows the privilege, while the law of the contract does not, no privilege will exist. However, one might well ask, does not the fact that a privilege is not a guarantee for the vendor's "créance", but a right created by law, imply that there is to be no connection with the law of the contract ? Should not, therefore, the *lex situs*, at the time of the transaction or at the time of seizure, govern exclusively, with the effect that a privilege may exist if the *situs* allows one, even though the proper law of the contract does not ? It is true that the privilege results only from the "cause" of a "créance" ; i.e., *it is created by law and cannot be created by convention* (1983 *C.C.*) ; however, the parties do have a right to exclude this privilege by contract. And furthermore, even though the privilege attaches to the thing, it nevertheless must arise out of a contract which considers it a privileged right. Reference to the law of the contract as such is justified.

Looking at the problem from another angle, one can distinguish : The debt owing to the vendor is a personal right, representing the

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111. *Barker* v. *Central Vermont Railway*, *op. cit.*, p. 449.

obligation of a person, whereas a privilege can be considered as a dismemberment of property. As such, the conflict rule relating to moveable property *ut singuli* must govern the right — i.e., the *lex situs*. The consequences of adopting Johnson's theory that the substance of the privilege is determined by the contractual law was cleverly stated by Milhaud :

> "Ainsi, supposons que ce soit la loi de l'obligation qui régisse les droits réels accessoires. La loi qui s'applique à l'obligation étant choisie par les parties, une même personne peut être tenue d'obligations relevant de lois distinctes. Ses biens peuvent donc être grevés de causes de préférence régies par des lois différentes, qu'il sera très difficile ou impossible de concilier entre elles".[112]

g) Instalment Sales (1561 a to j C.C.) [112] and Other Conditional Sales Contracts

The sale on the instalment plan,

> "a written contract whereby the vendor of a moveable grants to the buyer the right to pay the price of same by means of an initial payment in cash and by deferred payments and RETAINS FOR HIMSELF THE OWNERSHIP IN THE THING SOLD until the price thereof has been paid",

or any other conditional sale agreed to by the parties reserving title in the vendor, affects third parties as well as the parties to the contract, without any additional formality under Quebec law. As above-mentioned as a general principle, and now applied hereunder, the validity of the clause of reservation of ownership is a matter of "statut réel", governed by the law of the *situs* of the moveable.

Most of the provisions of articles 1561 (a to j) *C.C.* would have to be characterized as contractual [113] though they are, for the most part, imperative rules from which the parties may not derogate. However, the "statut réel" should intervene in connection with conflicts arising out of the provision of article 1561i *C.C.* providing that, where the seller fails to comply with provisions concerning the minimum down payment, maximum maturity periods, and the form and contents of the contract, he shall lose his title in the goods, in which case the instalment sale will then be considered a sale with a term.[114] One might

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112 . MILHAUT, *op. cit.*, pp. 52-53.

112A . Notwithstanding the repeal of articles 1561 a to j by the *Consumer Protection Act*, op. cit., S. 120, I have included this section, as the new law is not intended to have a retroactive effect.

113 Of course, once the price is paid the conditions of the transfer of ownership to the buyer are governed by the "statut réel" in accordance with the classification above-mentioned.

114. See, for a thorough discussion of the conflict problems with respect to conditional sales contracts, J. ZEIGAL, *Conditional Sale and the Conflict of Laws*, (1967) 45 Can. Bar Rev. 324 ; see also ZAPHIRIOU, *op cit.*, pp. 186 et seq.

also justify the intervention of the "statut réel" in a conflict with respect to the provisions of article 1561 g *C.C.*, which provides that upon a default by the conditional buyer, his creditors may pay to the conditional seller the balance owing and the thing sold shall then become the property of the buyer. This provision, in accordance with article 1561 j *C.C.*, applies to every sale, promise of sale and conditional lease of a moveable comprising the right for the buyer, the promising buyer and the tenant to become owner after the payment in whole or in part of the price of sale or rent.

2. Donations *Inter Vivos* [115]

Assuming an essentially and formally valid contract of donation *inter vivos*, made between capables, the *lex situs* intervenes to govern all the questions hereinabove generally classified as "statut réel". There are, however, other grey areas concerning property, which might conceivably by characterized as "statut réel".

a) The Prohibition to Alienate, Stipulated or Implied in Donations Inter Vivos (Articles 968 to 973 *C.C.*)

For the same reasons that the inalienability decreed by the legislator was classified as "statut réel", inalienability intended by the contractants in a gift *inter vivos* must also be governed, both as to the validity of the clause and as to its effect by the *lex situs*. This is classical characterization according to the object, although there is a necessary reference to the law of the contract, operating in the manner hereinafter to be discussed. The question whether the prohibition to alienate, valid by the *lex situs* and the proper law of the contract, implies the unseizability of the moveable, is governed exclusively by the *lex situs* at the relevant time; whereas, whether or not a prohibition to alienate can be stipulated in an onerous contract (impossible domestically under Quebec law, 970 *C.C.*) should be determined by the proper law of the contract. The juridical explanation of this prohibition is related to our concept of the essence of the contract of

115. For a general discussion of donations in the conflicts of law concerning the passage of title, see : LEREBOURS, Pig., *op. cit.*, no. 366 ; BATIFFOL, *Traité, op. cit.*, nos. 654, 664 ; NIBOYET, *Traité, op. cit.*, vol. IV, nos. 1203, 1342, 1352 ; vol. V, nos. 1398, 1450, 1452 ; MISSIR, *Thèse, op. cit.* ; Champcommunal, *Étude sur les donations et le testament en droit international privé*, [1896] Rev. Crit., 294 at p. 366 ; BAUDRY-LACANT, *Traité, op. cit.*, vol. I, nos. 1712-1723 ; PILLET, *Principes, op. cit.*, no. 168, 169 ; PACILLY, *Le don manuel, Thèse*, Caen, 1936 ; BARTIN, *Principes, op. cit.*, vol. III, no. 456 AUDINET, *Principes élémentaires du droit international privé*, nos. 733-744 ; LAURENT, *Droit civil int'l, op. cit.*, vol. VI, no. 264 etc.; AUDINET, *Des conséquences et des limites du principe de l'autonomie de la volonté en matière de donations entre vifs, op. cit.*, ; LAFLEUR, *op. cit.*, pp. 142-144 ; JOHNSON, *op. cit.*, pp. 441-455.

sale, in virtue of which the buyer should obtain an absolute right of disposition (406 *C.C.*). It is thus the nature of the contract that renders void the clause in onerous contracts; therefore, the contractual characterization.

b) The Prohibition to give Future Property (778 *C.C.*)

As above-mentioned (footnote 32) the distinction between present and future property is a matter of classification of property, governed by the "statut réel". The classical distinction between present and future property relates to the possibility of the thing being or not being in the "patrimoine" of the donor at the time of the disposition thereof;[116] this implies the determination of title to the moveable, hence the proprietary characterization and the *lex situs*. In the case of the gift where the promise to pay is the gift itself, there is, as we shall see in the following subsection, a necessary delegation to the proper law of the contract to appreciate the seriousness of the obligation.

Where the gift is considered not present, but future property, how should the prohibition in article 778 *C.C.* be classified? I submit the court should adopt a personal characterization and look to the *lex domicilii* of the donor.

In order that donations take effect *inter vivos*, they must be irrevocable — i.e., the donor must divest actually and irrevocably of the object given.[117] Of course, all contracts are irrevocable in the sense that they bind the parties to them, but the legislator has insisted upon the character of irrevocability in donations *inter vivos*. The donor is not to have the power to annul, restrict, or determine the effect of the gift once contracted. As such, he is prohibited to donate a gift of future property. This immediate consequence of the principle (the prohibition) should be characterized in the same manner as the rule itself. Quebec jurists have neither characterized the principle nor the prohibition, whereas French law, which has, is divided: some assimilate same to the law of succession[118] and apply, for moveables, the

116. "Biens présents" are : "les biens qui figurent dans le patrimoine du donateur au moment de la donation ou qui doivent y entrer plus tard, en vertu d'un droit alors existant et dont l'acquisition ne dépend plus de sa volonté". : BAUDRY-LACANTINERIES : *op. cit.*, vol. 10, no. 1436.

117. Arts. 757, 777 *C.C.* ; our code enunciates in different terms the old maxim "donner et retenir ne vaut" (cf) art. 274 coutume de Paris.

118. LAURENT, *op. cit.*, vol. VI, p. 487.

lex domicilii; others view it as property;[119] while still others adhere to a contractual qualification.[120]

The original juridical explanation of irrevocability was related to the requirement of "delivery" to perfect the contract to transfer property. With consensualism now the rule, this cannot remain its "raison d'être". Nor is the motive of retention of property within the family feasible as an explanation, seeing the introduction of the absolute freedom of willing. To Billette, its maintainance by the codifiers was purely as a "question de forme". I submit that it is tied to the reasons for all the solemnities in donations. By submitting the contract of gift to all kinds of formalities — e.g., before a notary, en minute, requiring registration, etc., the legislator is attempting to protect the donor against himself, to allow him to reflect upon what he is doing, to make him aware of the effect of the liberality. As such, the *lex domicilii* of the donor must govern the principle, and the immediate consequence thereof, i.e., prohibition against gifts of future property.[121]

Furthermore, the exception to the rule should be governed by the same law that governs the rule and its consequences. The *lex domicilii* of the donor should thus determine whether or not he can validly make a gift of future property in a marriage contract.[122] Once permitted by this law, reference would be to the law of the contract to determine whether the gift can take effect *inter vivos*, or be, of necessity, *mortis causa*. This law, (the proper law of the contract) should also determine whether there could be a prohibition to alienate by gratuitous title where there has been a gift *mortis causa* (823 *C.C.*).

c) The Don Manuel (776 *C.C.*)[123]

The *lex situs* is applicable to determine the conditions for the

119. AUBRY and RAU, *op. cit.*, vol. I, p. 84; Duranton, *op. cit.*, vol. I, p. 85; DEMOLOMBE, *op. cit.*, vol. I, no. 83; also see Arrêt, 3 mai, 1815, S. 1815.352.

120. BAUDRY-LACANTINERIE, *op. cit.*, *Donations et testaments*, vol. I, p. 707 *contra*, MISSIR, *Thèse*, *op. cit.*, p. 108, on the basis of the imperative, not facultative nature of the domestic rules. This is an inappropriate consideration as Quebec law classifies many imperative dispositions as contractual. It is nonetheless true that the insistance of irrevocability in gifts implies a rule over and above the law of the contract.

121. See, for this view, DESPAGNET, *Précis de droit international privé*, 5th ed., pp. 509-510. One could also justify the classification submitted on policy considerations. If Quebec domiciliaries could give future property, classified as such by *lex situs*, (possibly in combination with the proper law of the contract), the donor might lose his motivation to work, seeing that all he would earn would be payable to or vested, *ipso facto*, in the donnee.

122. See, for thorough treatment of Quebec law on gifts in marriage contracts, Roger COMPTOIS, *Essai sur les donations par contrat de mariage*, Montréal 1968.

123. See generally MISSIR, *op. cit.*, p. 80 et seq.; JOHNSON, *op. cit.*, pp. 524-5; NIBOYET, *Thèse*, *op. cit.*, pp. 323-4; *Traité*, *op. cit.*, vol. IV, p. 405, no. 1203. [1909] Rev. Crt. 900.

transfer of ownership as in all contracts *inter vivos*, but it is also applicable in this respect, as the law necessarily delegated to by the proper law of the contract, called upon to determine its essential validity. This is due to the fact that the contract itself is inexistent unless there is, *inter alia*, delivery of the moveable.[124] As such, moveable property situated in Quebec, cannot be the object of a don manuel, unless delivery of it can effectively transfer the ownership thereof[125] (irrespective of the *lex domicilii* of either party or the law of the contract).

d) Fiduciary Substitutions (925 et seq. *C.C.*)

A fiduciary substitution of moveables is created in a donation *inter vivos* when the donee is charged to deliver to another, either at his death or at some other time (the person charged to deliver over called the institute, and the one entitled to take after him, the substitute (art. *927)*). These two successive liberalities, both emanating from the original donor, are governed as to the transfer of ownership of the property in the same was as in the single transfer under a gift *inter vivos* (925.4 *C.C.*). Various attempts have been made to explain the juridical nature of the right of ownership of the institute, who in accordance with article 944 *C.C.* holds the property as owner, subject of course to the obligation of delivering over and without prejudice to the rights of the substitute. It is sometimes considered that he is an owner under a resolutory condition, with the consequence that, upon fulfillment thereof, he is deemed never to have been owner. This view disregards the essential nature of a substitution , requiring

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124. It is also indirectly referred to by the *locus regit actum*, if this leads to Quebec. To be formally valid (i.e., without being in writing, before a notary, en minute) there must be a valid don manuel — thus reference to the law of the contract, which requires delegation to the *lex situs* for the question of the delivery.

125. This is the accepted test of the moveable that may be the object of the don manuel. The early restrictive interpretation of "choses mobilières in article 776 *C.C.* : LANGELIER, *op. cit., vol. III, p. 38 ; O'Meara* v. *Bennet*, [1922] S.C. 80, at p. 84 ; *Malarie* v. *Décary* (1932) 70 S.C. 74, has given way to a none liberal one : BILLETTE, *op. cit.*, vol. I, no. 337 ; H. ROCH, *Traité de droit civil*, Montréal, 1953, vol. V, p. 98 ; *Pesant* v. *Pesant*, [1934] S.C.R. 249, pp. 264-65 ; and *Harvey* v. *Harvey*, (1929) 35 R.L.N.S. 171, to the effect that promissory notes may be the object of a don manuel ; Bearer bonds may be, *Chase National Bank, Neugent* cases, *op. cit.* : whereas registered bonds may not : *Cashman* v. *Royal Trust Co.*, (1935) 73 S.C. 528. The courts seem to consider that unlisted shares cannot be the object of a don manuel, as registration is required to perfect title, but that listed shares may be, because the donnee becomes owner by the delivery of the certificates ; (cf) BILLETTE, *op. cit.*, no. 337-8 ; and *Leduc* v. *Leduc* [1959] B.R. 779. This is not technically and legally correct, full *usus* is not conferred upon the transferee, even of a listed share, until registration thereof. Commercial expediency and the treatment by the security world has led to the policy of considering these listed shares as fully negociable, but it is not juridically correct.

two successive liberalities. Another theory therefore has been put forward which considers that there are two transfers of ownership, but the first is limited as to time.[126] In any case, the substituted property is inalienable in the hands of the institute. There is an "indisponibilité réelle" affecting the property. As such, any alienation by the institute of the substituted property is null, (save these circumstances wherein a final alienation is permitted) seeing that the substitute has the right to become owner of same, at the opening of the substitution.

The law of the contract should be called upon to determine whether there is truly a substitution or a donation of usufruct and bare ownership (928 *C.C.*), whether the substitution is conditional, as well as the validity of the conditions, what is to be done with the moveable property — i.e., sold publicity, invested, and if so, the kind of investment to be made, and finally, whether or not the donor has created a substitution *de residuo* (952 *C.C.*) — i.e., indefinitely allowed the alienation of the substituted property.

The *lex situs* should intervene, in the first place, to determine the very validity of the act as a substitution and its permissible duration (see 932 *C.C.*). Due to the fact that there is an "indisponibilité réelle" affecting the substituted property, and that the *jus abutendi* with respect thereto is withdrawn, the substitution can only be valid insofar as the *lex situs* permits. French law maintains the control of the *situs* on account of the nullity of substitutions being of public order, since it hinders the free flow of commerce.[127] It is submitted that Quebec law must also control substituted moveables situated herein. Although substitutions are permitted in Quebec, and possession only presumes title (with respect to corporeal moveables), we view with disdain limitations upon property circulation.

The *situs* of the substituted property may change by a simple change in the type of investment. Is the property still validly substituted where the second *situs* does not allow substitutions? I submit, and shall hereinafter demonstrate, that the second *situs* should apply only where the moveable is there dealt with. To be precise, if it is alienated while situated in the second jurisdiction an acquiror thereof obtains clear title.

As in all contracts, the *lex situs* intervenes to determine the mode of transfer of ownership. There is really only one transfer of

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126. See MIGNEAULT, *op. cit.*, vol. V, p. 58 ; LAURENT, *op. cit.*, vol. XIV, no. 62 et seq.

127. Les règles relatives aux substitutions sont en effet étroitement liées au régime des biens, l'interdiction de l'article 896 C.N. était fondée sur les dangers d'une entrave à la libre circulation des biens. La loi réelle sera donc applicable même en matière mobilière". DALLOZ, *Droit international*, 1968, A. PONSARD, p. 619 . BATIFFOL, *Traité*, *op. cit.*, no. 666 ; Lereb. Pig. et Louss., *op. cit.*, no. 370.

ownership,[128] and this is effected in accordance with the *lex situs* of the moveable at the time of the act creating the substitution. What the second donee (i.e., the substitute) receives, is simply "possession" of the property, which he had already been "seized" of by law at the opening of the substitution. The *lex situs* of the moveable at the time of the opening then governs to determine, not whether there is a new transfer of ownership, but whether there has been a transfer of possession to the substitute.

e) Trusts Inter Vivos [129]

Based on the English Common law of trusts, articles 981a to 981n *C.C.* were introduced into the law of the Province of Quebec in 1888. The essential validity and nature of the institution would be determined by the proper law of the contract creating the trust.[130] This law would determine a vast range of issues, including the controversial question — who owns the trust in Quebec law ? [131] The contractual characterization is required, because it is the nature of the institution that determines the owner of the *res* and the rights of the trustee and beneficiary vis à vis each other.

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128. The substitute takes the property directly from the substitutor, but *obliquo modo* from the hands of the first donee. The substitution operates by operation of law at the time agreed upon, without the necessity of any delivery of other act on the part of the person charged to deliver over (925 *C.C.*).

129. There is no Quebec doctrine or jurisprudence on the proprietary aspect of the subject. I refer the reader to the following works in French law: BATIFFOL, *Traité, op. cit.*, p. 558, note 17, stating that the trust *inter vivos* depends upon the proper law, as well as the *lex situs* ; LEPAULLE, *Traité théorique et pratique des trusts*, (1932) p. 428 et seq. ; SCHNITZER, *Le Trust et la fondation en conflit de loi*, [1965] Rev. Crit. 479, [1966] Rev. Crit. 165 ; in the Common law see Hoar, *Some Aspects of Trusts in the Conflict of Laws*, 26 Can. Bar Rev. 1415 ; CAVERS, *Trusts Inter Vivos and the Conflict of Laws*, 44 Harv.L. Rev. 164, p. 175 ; BEALE, *Living Trusts of Moveables in the Conflicts of Laws*, 45 Harv. L.R. 969 ; CROUCHER, *Trusts of Moveables in Private International Law*, (1940-41) 4 Mod.L. Rev. ; LAND, *Trusts in the Conflict of Laws*, (1940) ch.iv,p. 43 ; LATHEM, *Trusts in the Conflict of Laws*, (1953) *6 Current Legal Problems* 176 ; FALCONBRIDGE, *Conflicts of Law, op. cit.*, p. 640.

130. See CASTEL, *La Fiducie . . . op. cit.*

131. Where Quebec is the proper law of the contract, thus applicable to this question, the solution is not clear. The ownership of the trust has been stated by some to *vest in the beneficiaries* : MIGNEAULT, *Traité, op. cit.*, vol. V, p. 158 ; MANKIEWICZ, *La fiducie québécoise et le trust de Common law*, [1952] R. du B. 16; *or the trust as a corporate body is the owner* : FARIBEAULT, *La fiducie dans la Province de Québec*, no. 122, p. 150, and MONET, FABIO in *no. 199* v. *M.N.R.*, [1954] D.T.C. 488, at p. 495 ; or the owner *is the trustee* : MIGNEAULT, *À propos de fiducie* (1933-34) 12 R. du D. 73, reversing his previous opinion ; also *Greenshield's and Chartered Trust Co.* v. *The Queen*, (1958) S.C.R. 216, at p. 218, approvingly Peter GRAHAM, *Some Peculiarities of Trusts in Quebec*, 22 R. du B. 137, at p. 144, also confirmed to a certain extent in *Curran* v. *Davis*, [1933] S.C.R. 283, where the beneficiary was defined only as a creditor of the trustee, approved in *Guaranty Trust Co. of New York* v. *The King*, [1948] S.C.R. 183, at pp. 205-206.

The interference of the "statut réel" in connection with trusts is threefold : (a) it should determine whether or not there has been a transfer of ownership of the *res* either to the trustee, the beneficiary or to the trust itself,[132] and it should also determine whether there has been a valid delivery or transfer of possession to the beneficiaries. (b) Furthermore, as there is a tying up of property, the *lex situs* would intervene not only to limit the permissible duration of the trust, as art. 932 *C.C.* does for substitutions,[133] but because there is an "indisponibilité réelle" likewise created. (c) As above-mentioned, the law of the situation is applicable to determine what real rights may exist over moveable property within its jurisdiction. It is the *situs* which will determine whether ownership of the trust res can or cannot be divided into legal as well as a beneficial or equitable ownership.

V. Summary

All classifications of property, conditions of transfer of ownership of moveables, *inter partes*, and vis à vis thirds, the validity and effect of clauses reserving ownership or prohibiting alienation, the effect of transfers by non-owners, the validity of trusts and substitutions, must all be governed by the *lex situs*. In common, therefore, with modern French and Anglo-American law, I attribute a wide domain to the "statut réel", but the general agreement ends at this point. The question of renvoi aside, I do not consider the internal law of this *situs* to be, in all cases, the law applicable to the issue. This depends on the policies of the *situs* itself, as I shall demonstrate in the subsequent section.

Subsection Two: The Operation of the Lex Situs — A Theory of Delegations

I. A theory of delegations

Classical characterization according to the principle object, does require a wide domain to the *lex situs*. However, it is submitted that the connecting factor for the "statut réel" in contractual transfers

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132. This solution even prevails under the Common law where it is clear that are two types of ownership in a trust, legal and equitable, Falconbridge, *op. cit.*, p. 561.

133. In *Masson* v. *Masson*, [1912] S.C.R. 97 the Supreme Court held that the civil law provisions of article 932 *C.C.* concerning substitutions apply to trusts, so that trusts cannot extend to more than two degrees exclusive of the first beneficiary ; see, however, *Barclay's Bank Ltd.* v. *Paton*, (1934) 56 B.R. 481 , at p. 485, where it was held that a group of persons may inherit as one head under a substitution, and the various mutations within that group, resulting from the death of individuals comprising the group, do not constitute a new degree.

inter vivos, by necessity, allows and requires at times, a delegation of competency to another law. In some instances, the delegation will be to the proper law of the contract to govern the question finally, in others it is provisional with ultimate control reserved to the *Lex Situs* : while in still other cases, the delegation of competency will be to some other law.

The following propositions might be stated to show when the delegations are permitted, and if so, when they are absolute or subject to control by the *situs*.

The First Hypothesis

a) *With respect to the conditions of transfer or reservation of ownership inter partes, including the moment when title passes*, where the applicable *lex situs* allows the parties in domestic transactions, complete liberty to fix the manner of effecting such transfer or reservation of ownership, where the very mode of acquisition depends completely on the will of the parties, we might say that the rules are "facultative", and allow the proper law of the contract to exclusively govern these questions by delegation from the *lex situs*. Where, on the other hand, a formality such as delivery, or registration is imperatively required, where the contractants cannot agree to the passage or reservation of ownership in any other way, i.e., where the mode of acquisition of the right of ownership rests not solely on the will of the parties, we might say that the rules are imperative and not allow any delegation, the *lex situs* governing exclusively.[134]

b) *With respect to the opposability of the transfer of ownership to third persons :* If under the domestic law of the applicable *lex situs*, the transfer *inter partes* affects third persons without any additional formality, we might then apply the operation for "facultative" rules hereinabove set forth in First Axiom (a) ; however, where an additional formality is requisite for the right to be considered duly acquired or reserved *erga omnes* (not simply excersizable within the jurisdiction), we might in such event, apply the operation for imperative rules by analogy.

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134. This distinction of "facultative" versus imperative has been suggested by certain jurists, notably PILLET, *Essai d'un système général de solution des conflits des lois* (1894) 27 *Jour. dr. int'l. pr.*, p. 417, et seq., p. 711 et seq., and continued in (1895) 22 *Jour. dr. int'l. pr.*, p. 241 et seq., p. 500 et seq., p. 929 et seq., who use it as a basis of characterization. (See our discussion under basis of characterization supra). In opposition to imperative laws, "facultative" laws are those from which the parties are free to derogate, and are governed by the proper law of the contract. Under Quebec law it is felt that on the classificatory level, the distinction is of little assistance seeing that may imperative laws are governed by the proper law of the contract — e.g., requirements of cause, consent and consideration, etc.

The Second Hypothesis

Certain other proprietary questions must of necessity require a prior reference or delegation by the *lex situs* to the law of the contract: Into this category falls: *the validity of clauses of reservation of ownership, prohibitions to alienate stipulated in donations inter vivos, inter vivos fiduciary substitutions, inter vivos trusts, privileges of the unpaid vendor, and the determination of "present" property in certain gifts inter vivos*[135]: Whether or not these issues shall be then governed exclusively by the delegated proper law of the contract, depends upon the nature of the contract and the importance attributed by the *lex situs* to this proprietary issue.

It is submitted that the operations hereinabove suggested do not constitute acceptance of the theory of "renvoi" in the classical sense of the concept. It is not the conflict rule of the *lex situs* referred to that leads to another applicable law, but it is the domestic law of the *situs* that may necessarily imply the reference or delegation to the proper law of the contract.[136]

The propositions above-stated should be resorted to by the Quebec court wherever the applicable *situs* may be. Neither time nor space permits an inquiry into the domestic law provisions of all foreign *leges siti*; however, let us consider how the delegations would operate where the moveable is at all times situated in the Province of Quebec.

II. The Demonstration

Without attempting coverage of every conceivable property issue, consider the following as examples demonstrating the validity of the propositions above stated:

A. *The Demonstration of the First Hypothesis* (a)

Example (i): Conditions of Transfer of Ownership of a Corporeal Moveable by Onerous Contract, e.g., Sale.

A purports to sell to B a moveable which is situated in Quebec (where consent alone transfers ownership). The proper law of the contract is Germany (where delivery is required). Who is the owner until delivery?

Solution: A is the owner. The *lex situs*, applicable because the

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135. I.e., where the object of the gift intended to be *inter vivos* is the creation of an obligation.

136. Of course, one might still apply the "renvoi" — e.g., before the operation suggested. The court refers to the *lex situs*, and the international law rules of the *lex situs* either refer to another law or its own. As most jurisdictions accept the *lex situs*, the foreign court would refer to its own domestic law, in which event, the "operations" could commence.

issue is proprietary, delegates to the law of the contract, since under Quebec law the parties are at liberty to determine the mode of transfer of ownership.

Example (ii) : Conditions of Transfer of Ownership of a Simple Debt by Onerous or Gratuitous Contract :

A purports to transfer to B, by contract, an existing debt. Under the proper law of the contract, this can be effected by consent alone. The *situs* — i.e., domicile of the debtor (Quebec), requires an authentic act, or delivery of it if under private signature (1570 *C.C.*) to perfect it *inter partes*. In the event of a conflict, Quebec law as *lex situs* must govern exclusively. There can be no delegation here since, under Quebec law, the parties cannot agree to transfer the debt in any way — e.g., by consent alone.

Example (iii) : Conditions of Transfer of Ownership of a Share in a Company by Onerous or Gratuitous Contract :

A purports to transfer to B the ownership of a share in a company which has its domicile in Quebec — i.e., the *lex situs*. According to the proper law of the contract, endorsement and delivery of the certificate suffices to pass title (because that law considers shares freely negotiable). According to the *lex situs*, however, registration on the books of the company is requisite in addition to endorsement and delivery of the certificate. This registration is required not only for unlisted, but for listed shares (even though the commercial world customarily treats the holder of a property endorsed security as the owner of the shares). Since the domestic rules of the *lex situs* are imperative, no delegation to the proper law is possible. B has not full ownership until all the formalities are accomplished.

Example (iv) : Conditions of Transfer of Ownership of a Bond, Whether in Registered or Bearer From By Contract, Onerous or Gratuitous :

No delegation to the proper law is possible because Quebec domestic rules are imperative — i.e., the parties could not agree to the transfer of ownership of the bond by consent alone.

N.B. : Additional Possible Delegations with Respect to Examples Three and Four : The *lex situs*, imperatively applicable as above-mentioned with respect to the conditions of transfer of ownership of securities may, notwithstanding, require delegations to a law other than the proper law of the contract.

a. *Re Shares :* The company's domicile is Quebec. Article 1573 *C.C.* refers to the Act of Incorporation and Companies' By-Laws to regulate the transfer of the company's shares. *Assuming a Quebec incorporated company*, reference to the Quebec Companies Act,

reveals the existence of the registry book system, requiring for all transfers of shares, registration in the book of registers. Where the central registry office is in Quebec, as it must be for Quebec companies,[137] this law governs any conflicts with respect to the registration or non-registration. Therefore, there is no delegation outside of Quebec. *Assuming a federally incorporated company,* with its head office — i.e., domicile, in Quebec, reference for the transfer of its shares *inter partes* is likewise to the Incorporation Act and By-Laws. The Federal Act imperatively requires a central registry book of transfers at its head office,[138] while permitting duplicate registers elsewhere. There can be no conflict between the branch registry books and the head office registry books, for upon these last-mentioned books must be registered all transfers registered in any other permissible place. As such, no delegation from the head office (Quebec) is permissible. The shares might, however, be considered by the Incorporation Act as freely negotiable — e.g., share warrants (Q.C.A. S. 51.2), in which case there might be a delegation by the *lex situs* (via the Incorporations Act) to the law of the place where the certificate may be found, to determine whether there is a transfer of the share.

b. *Bonds* :

i. *Of Companies* : The domicile of the debtor company is in Quebec ; art. 1573 *C.C.* refers to the Incorporations Acts and By-Laws to regulate the manner of transfer of ownership of the security. Assuming it is either a Quebec or federally incorporated company, neither of the Incorporation Acts stipulate imperative requirements as to the conditions of transfer of ownership of bonds. Therefore, this matter is delegated to the proper law of the contract of incorporation which may from time to time change — i.e., the by-laws, letters patent, resolutions. It is this law which determines whether certain bonds are to be freely negotiable, i.e., as bearer bonds. If so, then the proper law delegated further delegates to the law of the place of the certificate the competency to determine whether there is a transfer of the bond. It is also this proper law delegated which determines whether a registration system is to be requisite for nominative or registered bonds. If so, this law will determine the effect of non-registration and surrender of the certificate, or it too might delegate part of this function to the law of the place of the registry office. The important point to realize is that the transferability of the bonds emanates from the *lex situs. For Quebec or federally incorporated*

137. Q.C.A., *op. cit.*, S. 101, and S. 103.

138. *Canadian Corporations Act, op. cit.*, S. 107 and S. 108.

companies having their domicile in Quebec : in virtue of the non-regulation of the transferability by the Incorporations Acts, there is a delegation to the proper law of the contract of association. Other Incorporations Acts may also require a similar delegation, or they may imperatively regulate the question, in which case there would be no further delegation. The jurists who contend that the transfer of a bearer bond is governed by the law of the place where the certificate is, put the cart before the horse. The only reason the bond is freely negotiable is because the real *lex situs* treats the holder of the document as the owner of the security.

ii. *Of Public Authorities — e.g., Government Bonds :*

a. *Provincial, Municipal :* The domicile of the authority which issued the security is obviously the geographical situation of the public authority. If Quebec, transferability would be governed either by the *Act of Parliament* allowing for the issue of the security, or in the absence of provisions therein, by the rules for Quebec incorporated companies, by analogy.

b. *Federal Bonds :* The domicile of the Canadian government which issues Canada Saving Bonds is at its head office, normally Ottawa. Transferability of the bonds would be governed either by the Act of Parliament allowing for the issue of the security, or in the absence of provisions therein, by the rules for federally incorporated companies, by analogy.

Example (v): Conditions of Transfer of Ownership of a Corporeal Moveable by Gratuitous Contract :

A purports to make a gift to B of a corporeal moveable situated in Quebec ; The proper law requires delivery to perfect the transfer. Is there a delegation by Quebec law to the proper law of the contract ? Art. 777 *C.C.* states that a particular divestment is requisite under Quebec law. If it is something additional to the requirement of consent, the rules are imperative. The fact is, that as divestment is the ordinary consent required of all contracts,[139] the rules, in common with those for sale, must be "facultative". Therefore, the proper law of the contract governs exclusively to determine when ownership passes to the donee.

Example (vi) : Conditions of Transfer of Ownership of a Simple Debt, Where the Gift is the Obligation Created in the Act — e.g., husband promising to give a certain sum of money to his wife in their marriage contract.

In these instances, the gift is really only productive of obligations

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139. BILLETTE, *op. cit.*, p. 374 ; nor is registration required to perfect the transfer *inter partes*: MIGNEAULT, *Traité, op. cit.*, vol. IV, p. 168; BILLETTE, *op. cit.*, nos. 569, 571.

not translative of ownership, but as the donee becomes vested with the asset, the "statut réel" must determine the conditions under which this will take place. Where the donor, now debtor, is domiciled in Quebec, this will be the *lex situs* of the debt. There is, however, a necessary delegation to the proper law of the contract, because the rules are permissible.

B. *The Demonstration of the First Hypothesis* (b)

Example (vii): Conditions of Opposability of Transfers of Ownership of a Corporeal Moveable by Onerous Contract:

Domestically under Quebec law, the rule for the transfer *inter partes* affects third persons without a possession transfer or other formality. By analogy, the delegation rule *inter partes* should apply insofar as the contract may affect third persons, i.e., total delegation to the proper law of the contract. Therefore : if the *situs* be Quebec, and the proper law of the contract be that of country X requiring possession to affect third persons, it is the law of country X that governs.

Example (viii): Conditions of Opposability of Transfers of Ownership of an Ordinary Debt by Onerous Contract:

In addition to the imperative rules for *inter vivos* transfers, in order for the transfer to affect third persons, (where the *situs* is Quebec (i.e., the domicile of the debtor is in Quebec), there must be signification or acceptance of the transfer. The *lex loci actus* governs the acceptance by delegation from the *lex situs*, but there is no delegation to the proper law.

Example (ix): Conditions of Opposability of Transfers of Ownership of Securities by Onerous Contract:

All rules were imperative *inter partes*. There is no additional formality for the transfer to affect thirds. As such, there is no delegation to the proper law other than the possibilities explained under the note to examples (iii) and (iv).

Example (x): Conditions of Opposability of Transfers of Ownership of all Moveables by Gratuitous Contract:

The moveable is situated in Quebec ; for gifts *inter vivos* to affect third persons, they must in all cases, be registered at the domicile of the donor. Thus, even with respect to corporeal moveables, to affect third persons, there is an addtional formality and the *inter partes* rule is inapplicable. There is, therefore, no delegation by the *lex situs*.

In virtue of examples (v) and (x), it is apparent that there is a delegation to the proper law of the contract to govern the conditions of transfer of ownership of corporeal moveables by gift *inter partes*. but none insofar as third persons are concerned.

Example (xi) : The Effect of the Transfer by a Non-owner :

There is to be no delegation to the proper law with respect to the effect of the transfer by the non-owner where the *situs* is in Quebec, because the basis of the right acquired by the innocent purchaser (if any) lies in the legitimation of ownership exhibited by the transferor and definitely not in the contract between himself and the transferor.[140] Therefore, the *lex situs* applies exclusively.[141]

C. *The Demonstration of the Second Hypothesis*

Example (xii) : Validity of the Clause of Reservation of Title to a Corporeal Moveable Stipulated in an Onerous Contract :

Under Quebec law as the *lex situs*, the parties have complete liberty to reserve title in any way they wish by contract (except for certain formal provisions for instalment sale contracts of certain moveables, 1561a —j *C.C.*), and this reservation affects third persons without additional formality — e.g., registration. As such, Quebec law allows, by delegation, the proper law of the contract the right to determine whether title to a moveable situated in Quebec has been validly reserved *inter partes* and vis à vis third persons.[142] Assume for example, that under the proper law of the contract, registration is required to reserve title to the moveable to have it affect third persons ; where this formality is not effected, is title nonetheless validly reserved over a moveable situated in Quebec ? I submit that Quebec law should delegate the solution of the problem to the proper law of the contract. However, a distinction must be made : so long as the registration requirement was intrinsic to the retention of the right,

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140. The decisions in the *Union Acceptance Corp.* v. *Guay, op. cit., Reid* v. *Favor, op. cit.*, and *Neugent* cases all support this theory notwithstanding the views expressed. In the last mentioned case, the *situs* of the bearer bond was Quebec where the company had its head office, but the company allowed its bearer bonds to be freely negotiable; as such, the law of the place of the certificate, delegated by the *lex situs*, governed the effect of the transfer by the non-owner without any further delegation to the law of the contract. The *United Shoe Co.* case qhich wrongly considered the right of the innocent purchaser to flow from the contract cannot be defended. It is juridically incorrect.

141. This operation applies to corporeal transfers by non-owners in virtue of article 1487 et seq. *C.C.*, successive transfers of corporeals via article 1027 *C.C.*, and even to successive sales of incorporeals (the one who signifies first upon the debtor owns the debt, though the date of his acquisition be posterior to another's). One can even apply it to the sale of stolen securities, which would operate in the following way for the sale of a stolen but endorsed share certificate : The *lex situs* is applicable because the issue is proprietary ; If this leads to Quebec, reference is to the Incorporation Act., which reveals that, as lost certificates can be easily replaced, a transfer of the certificate can give to the innocent purchaser no title thereto (even aside from the requirement of registrations being a bar to an effective transfer by a non-owner.

142. A proprietary characterization as *lex situs* and operation as above would have meant the same holding in *William* v. *Nadon, op. cit.* ; *in Re Brupbacher Silk Mills* case, *op. cit.* ; and *Banque d'Hochelaga* v. *The Waterous Engine Works Co., op. cit.*,

and not a mere condition of exercise in the jurisdiction, the title is not reserved over the moveable in Quebec ; if, however, the registration requirement simply relates to the exercise of the right against third persons in the jurisdiction, then its absence does not nullify a retention of title over a moveable situated in Quebec.

Example (xiii) : The Privilege of Revendication of the Unpaid Vendor of a Corporeal Moveable :

Where the *situs* is Quebec, our law delegates to the proper law of the contract the determination of the question whether a privilege of revendication may exist. This is so, because, irrespective of the fact that the privilege exists by law alone, it is permissible in that it can be excluded by contract. Nevertheless, even though valid according to the delegated law, it must also be permitted by Quebec law as the *situs*, because the right is intimately connected with our property laws with respect to moveables, which, *inter alia*, allow only a limited "droit de suite".[143]

Example (xiv) : Effect of Prohibitions to Alienate Stipulated in Gifts Inter Vivos :

Where the *situs* is in Quebec, one must have regard to article 972 *C.C.*, which, *inter alia*, provides that it is the intention of the parties to the contract that determines the juridical nature of the prohibition to alienate. As such, the *situs* must refer to the law of the contract to determine whether the prohibition to alienate is (1.) mere advice (972.1 *C.C.*); (2.) a simple prohibition (972.1 *C.C.*), (3.) a right of return (972.2 *C.C.*), or (4.) confirmation of a substitution (973 *C.C.*). The juridical nature thus determined by the proper law of the contract, referred to by the *lex situs*, will determine what control the *lex situs* retains, if any.

(a) Where the proper law reveals that the prohibition is but simple advice, the *situs* will allow exclusive delegation to the law of the contract ; (b) where the proper law reveals that the prohibition is a

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143. *The Rhode Island case, op. cit.*, could have been justified upon a proprietary classification of the privilege of revendication, governed by the *lex situs* at the time of the contract (Rhode Island), and the delegation above, probably to the law of the contract (also Rhode Island), instead of the courts' outright contractual characterization. The operation hereabove suggested for privileges is similar to the effect of the two articles proposed by the *Institute of International Law*, Madrid (1911), *op. cit.*, : *I.* "Il appartient à la *lex rei sitae* de déterminer quelles sont les choses susceptibles d'être l'objet d'un droit réel donné, de limiter ou d'exclure la revendication, la prescription et même les effets des privilèges établis par la loi qui régit le rapport juridique auquel le privilège est attaché. *IV.* Pour déterminer si une personne a titre à un certain droit réel, spécialement en matière d'hypothèques légales ou conventionnelles, on doit consulter la loi à laquelle est soumis le rapport juridique auquel peut être rattaché le même titre".

"droit de retour" [144] (a right of return) in favour of the donor and his heirs, the donee becomes personally bound to return the moveable. The solution becomes the same as that for sales with a right of redemption, and the proper law of the contract governs exclusively ; (c) where the proper law of the contract reveals that there is only a simple prohibition in the interest of the donee, to protect him against his inexperience, imprudence or prodigality, there are three possibilities : (1) one could consider that the donee is given a personal incapacity with respect to the thing given, and refer to his *lex domicilii* to govern, or (2) the prohibition could be considered to constitute an obligation not to do, thereby retaining the competency of the law of the contract, or, (3), one could admit that there is an "indisponibilité réelle", a charge attached to the moveable, withdrawing from the owner the *jus abutendi* for a short while. It is submitted that the latter is the correct juridical explanation of the prohibition in this instance. As such, the *lex situs* must control in the final analysis ; and (d) the proper law of the contract may reveal that there is a substitution. The prohibition has been made in the interests of persons other than the donor and donee. There is in such event, an "indisponibilité réelle" created, and the *lex situs* if Quebec, must control and allow it, assuming of course, that it is valid by the proper law of the contract.

Example (xv) : Donations inter vivos, either by way of the Fiduciary Substitution or Trust :

The *lex situs*, if Quebec, controls in the final analysis, because in both cases there is the "indisponibilité réelle" over the moveable for a certain period. However, the *situs* requires a prior delegation to the proper law of the contract, which must also consider it valid and permissible.

Example (xvi) : Classification of Property as "Biens Présents" or "Biens Futurs" in Gifts where the Object Thereof is an Obligation by the Donor :

Where the *situs* is Quebec, we require in contracts of gift, where the promise to pay a sum of money is the gift itself, a reference to the law of the contract to determine whether the property is present or future. The classical distinction of present and future property as above-mentioned has been by-passed by the courts, who now consider property "present" when the donor has really become a debtor to the

144. The "droit de retour" being intrinsically different from the substitution, for the return is to the source (the donor) and one cannot be both substitute and substitutor.

donee for the sum promised ;[145] thus the exclusive delegation to the proper law of the contract.

III. SUMMARY

As a general rule, the amount of delegation permitted, if any, depends upon the internal provisions of the *lex situs*, competent because it is a proprietary issue. To demonstrate this principle, I assumed in all cases that the law of Quebec was the applicable *lex situs*. But it must clearly be understood that it is a general, universal principle which is herein proposed, to be resorted to by the Quebec judge, wherever the *lex situs* may be.

As such, it is submitted that statements, in reference to the Common law, by Castel, referring to the delimitations between contract and property that : " . . . although in case of conflict the *lex situs* should prevail over the proper law of the contract",[146] and by Falconbridge that : "The contractual rights and liabilities of the parties under the proper law of the contract can be enforced only insofar as they are consistent with the recognition of the property rights existing or created under the *lex situs*",[147] are too broad. I do not consider that the *lex situs*, if Quebec, should have final control with respect to issues set forth in examples i, v, vi, xii, xiv a, b, and xvi. On the contrary, these issues which are clearly "proprietary" should be governed, in accordance with the delegation from Quebec law (i.e., the *lex situs*), by the proper law of the contract, and exclusively. Furthermore, and as above-mentioned, in virtue of this theory, all Quebec judgements can be supported, save the *United Shoe Co.* case, which is totally erroneous.

One must, nevertheless, dispose of two objections which might be directed against the theory : firstly, the operation of the *lex situs* to some of these proprietary issues might, at first sight, appear disturbing to the reader. Why, he may ask, if the provisions with respect to certain questions are to be governed by the law of the contract, not adopt a contractual characterization at the outset ? The fact is, those jurists who do adopt a contractual characterization of most of these

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145. *Dorval* v. *Préfontaine*, (1905) 14 B.R. 80 ; *Lemieux* v. *Lindsay*, (1926) 41 B.R. 18 ; *Archambeault* v. *Gariepy*, [1942] S.C. 428 ; *Demers* v. *Demers*, (1934) 72 S.C. 48 ; *Lepage*, (1935) 73 S.C. 515 ; *Dorion* v. *Deslaunier*, (1933) 71 S.C. 146 ; *Bennett* v. *Cameron*, (1928) 66 S.C. 55 ; *Ciot* v. *Bowes*, [1961] S.C. 518 ; and see COMPTOIS, Roger, *Essai sur les donations par contrat de mariage*, *op. cit.*

146. *Pr. Int'l Law*, *op. cit.*, p. 162.

147. *op. cit.*, 34 D.L.R. 2nd, p. 6, approved by LALIVE, *op. cit.*, p. 137 ; NIBOYET, to a certain degree in *Thèse*, *op. cit.*, p. 145, but absolutely in *Traité*, *op. cit.*, vol. VI, no 1196.

questions, as do Johnson, Lafleur, and most of the judges of our courts (see *supra*), are not characterizing in accordance with the principal object. The theory above submitted does combine the classical characterization according to the object, but recognizes the liberty of the contractants in certain cases on the operative level. Secondly, the reference by the Quebec judge to the competency of a law different from that directed by his conflict rule, apparently contravenes an unwritten principle, that the rules of private international law are obligatory for him. However, the theory submitted does retain the obligatory nature of the rule. The judge is actually applying the *lex situs*. Nonetheless, if the internal provisions of the *lex situs* are completely "facultative" and reflect a "laissez-faire" attitude towards the mode of transferring property, the law of the contract may govern. To apply obligatorily the internal provisions of the *lex situs* in this case would mean a more restricted liberty in international transactions than in domestic ones. Private international law in Quebec is territorial, not superimposed on the domestic system. The theory submitted reflects this nature.

SECTION TWO : Dynamic Conflicts [148]

Subsection One : The Problem Stated

The previous section was concerned with the domain of the *lex situs*, when the moveable remained at all times within a single jurisdiction. It is now necessary to determine the applicable *lex situs* when the situation of the moveable changes from one jurisdiction to another. The *situs* of a corporeal moveable (including an incorporeal treated by the real *lex situs* as corporeal) changes by a simple change in the physical *locus* of the thing, whereas that of an incorporeal changes when the domicile of the debtor or issuing authority (for securities) does. The problem is precisely : for the various proprietary issues, is the applicable *lex situs* that at the time of the completion of the contract with respect to the moveable, that at the time of reception

148. As applied to changes of the "statut réel mobilier", see : FAHMY, *Le conflit mobile, Thèse*, Paris, 1951 ; NIBOYET, *Thèse, Des conflits, op. cit.*, Part Two, pp. 351-540 ; RIGAUX, *Le conflit mobile en droit international privé*, (1966) 117 Recueil des cours de la Haye, p. 333 ; SZASSY, *Les conflits des lois dans le temps*, (1934) 47 Recueil des cours de la Haye, p. 196 ; ARMINYON, *Précis, op. cit.*, vol. II, p. 73 ; *Traité, op. cit.*, no. 369 ; SAVIGNY, *op. cit.*, vol. VIII, p. 364 et seq. For the Common law solutions, see : LALIVE, *op. cit.*, ch. 8, p. 148 et seq. ; ZAPHIRIOU, *op. cit.*, chs. 15 and 16, p. 157 et seq. ; BAXTER, *Conflicts of Law and Property, op. cit.*, p. 20 et seq.

of possession of same by the transferee, or that at the time when an action with respect to the moveable is taken ? Most jurists consider dynamic conflicts as a real problem and in connection with general theories of respect for acquired rights, juridical situations completed, vested rights, etc, they generally ask to what extent if at all, are property rights created under a first *lex situs*, recognized, affected or divested when a second *lex situs* comes into play and is in conflict with the former? On the other hand, there are others with whom [149] I agree, who consider dynamic conflicts as a false problem, being nothing more than an interpretation of the conflict rule. It is simply characterization at a subsequent stage.

Subsection two : Solutions under Quebec Position Law

I. Absence of Rules for the Solution in Quebec Doctrine and Jurisprudence [150]

Generally speaking, doctrine and jurisprudence have avoided consideration of the conflicts that arise upon a change of *situs*, because they have characterized proprietary issues as contractual. As a consequence whereof, the change of *situs* of a moveable became irrelevant from the point of view of the governing law. There are scattered remarks however, to the effect that rights acquired under a foreign law, which was applicable prior to the change in the localization of the connecting factor, ought to be respected by the *lex fori*. Thus, in the *Rhode Island* case, the *situs* at the time of the contract and delivery of the locomotives was Rhode Island, that at the time of their seizure, Quebec. Although it was not necessary to the holding of the case because of the contractual characterization, judge Taschereau in the lower court appeared to be stating a principle applicable as if it really were a proprietary issue. Though *obiter dicta*, his statement that the actual *situs* (Quebec) could not create a privilege over property not subject to it before arrival, is correct [151] (as I shall hereinafter demonstrate).

Dynamic conflicts involving proprietary issues were likewise avoided in other contractual transfer cases ; for example, in the *Williams* v. *Nadon* case, where a piano situated in Ontario at the time

149. For instance, FAHMY, *op. cit.*

150. J.G. CASTEL, *Conflicts of Laws in Space and Time*, (1961) 39 Can. Bar Rev. 604 ; see also JOHNSON, *op. cit.*, at pp. 514 et seq.

151. See similarly MONTGOMERY, J., in the *Union Acceptance Corp.* case, who pointed out that the fact of *situs* at the time of seizure in Quebec could not *give* greater rights. Although obiter, it is correct, as shall hereinafter show, if it means that Quebec could not then govern so as to create new rights in virtue of the mere presence of the moveable in the province.

of the contract and delivery was seized in Quebec, the dynamic conflict was avoided upon a contractual characterization of the validity of the retention of title clause. Nor do the cases dealing with the effect of transfers by non-owners furnish any rule : Thus, in the *United Shoe Co.* case the machinery, and in the *Union Acceptance Corp.* v. *Guay* case the automobile, was situated in a foreign jurisdiction at the time of the transfer by the non-owner, but in Quebec at the time of seizure. In both instances, the judges avoided the determination of the applicable *lex situs*, because they characterized the issue as contractual. The *Neugent* case, the only one where a clear characterization of a proprietary issue as "statut réel" was made and the *lex situs* applied, reveals the problem clearly : While three judges agreed as to the *lex situs* [152] governing the question, one referred to the *lex situs* at the time of the contract (Barclay J.), the other to the *lex situs* at the time of reception of possession by the innocent purchaser (which was the same *situs* as that at the time of the contract — Walsh J.), while a third, considering that the issue was a contestation as to possession, referred to the *lex situs* at the time of the seizure (Surveyer J. dissenting).

In virtue of the foregoing, it is obvious that insofar as the problems arising as a result of the change of the localization of the connecting factor for the "statut réel mobilier", Quebec Doctrine and Jurisprudence furnish no solution.

II. Absence of a Conceptual Explanation Under the Old Law

In Feudal France, the principle of territoriality was strictly applied, with the consequence that proprietary rights were only effective to the extent that the territory where they were sought to be enforced recognized them in their own domestic law. Inspired by ideals of justice and equity, the French statutists of the Seventeenth and Eighteenth Centuries began to make exceptions to the strict territoriality of the "coutumes" by classifying proprietary questions as "statuts personnels".[153] Gradually, the extra-territorial effect of laws began to be thought of, not as a natural outcome of the operation of the conflict rule, but in virtue of various theories concerning the very basis of Private International Law — e.g., comity, acquired rights

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152. *Situs* of the bearer bond was considered at the place of the certificate. I have shown that it is only by delegation from the real *lex situs* but as this *situs* considered the bond equivalent to a corporeal moveable and freely negotiable, there is a justified reference to the *situs* as the place of the certificate.

153. LAINÉ, *op. cit.*, vol. II, p. 77 et seq.

vested rights, etc.[154] In fact, the old law had no theory in this respect, although jurists supporting one theory or another seem to find applications of their views in the works of the French statutists.[155]

III. Possibility of a Solution On the Basis of the Respect for Acquired Rights [156]

The theory holds that on basis of a mutual respect of independent sovereignties, rights acquired in one country must be respected in others. The right acquired is that acquired in conformity with the conflict rule of the forum. This right, validly acquired, produces in principle, the same effects as in the law of the country where it was created. The right may, however, be set aside where there is no equivalent juridical institution in the country where it is sought to be recognized, or where the right is contrary to the public order of that jurisdiction. The right acquired subsists (as long as all of its effects are not exhausted) until replaced by another duly acquired right whose existence is incompatible with its own. Note, however, that the right must be validly acquired, failing which there is no question of the application of the old law. The repercussions of this, in fact, lead to its inappropriateness to solve most of the problems involved in dynamic conflicts. Applying the theory to the change of the "statut réel mobilier", the rights acquired under an old *lex situs* must be respected under the empire of the new *lex situs* ; this new *lex situs* will only be competent to govern future transactions.

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154. See LAFLEUR, *op. cit.*, p. 12, rejecting "Comity" as a basis for application of foreign law in Quebec.

155. DELAUME, *op. cit.*, pp. 21-23.

156. See ARMINJON, *La notion des droits acquis en droit international privé*, (1934) 44 Recueil des cours de la Haye, p. 1 ; PILLET, *Principes, op. cit.*, no. 13 et seq., *La Théorie judiciaire des droits acquis*, (1925) Recueil des cours de la Haye, p. 496 ; FAHMY, *op. cit.*, pp. 38-46. Consider also, a different form of this theory by NIBOYET, called *L'Efficacité internationale des droits définitivement constitués, Traité, op. cit.*, vol. III, 285, at pp. 300-393 ; also *The Institute of International Law*, Madrid, (1911) *op. cit.*, in article 5 adopted a resolution borrowed from the notion of "droits acquis" : "En cas de déplacement d'un meuble d'un territoire à un autre les droits réels valablement acquis sur la chose doivent être respectés, lors même que la chose se trouverait ensuite sur un territoire différent. La loi de la nouvelle situation peut toutefois exiger pour des motifs de tutelle sociale et de l'ordre public que l'on remplisse les conditions ou certaines des conditions prescrites pour que le droit réel puisse produire effect vis à vis des tiers". See as approving this theory for Quebec law : JOHNSON, *op. cit.*, p. 514 ; FRECHETTE, *Commission Report, op. cit.*, pp. 89-90 ; and possibly LAFLEUR, *op. cit.*, p. 12 ; possibly CASTEL, *Conflicts of Laws in Time and Space, op. cit.*, p. 604 et seq. . consider the theory of vested rights in the Common law : BEALE, *Treatise on the Conflict of Laws*, (1935) vol. I, p. 53 et seq.

IV. Possibility of a Solution On the Basis of Bartin's Theory Of the Stability of Institutions

According to Bartin,[157] the nature of the institution determines the solution. The law normally competent must be determined, both in time and in space. In this way, one can achieve the stability of institutions in the conflicts of law. Having determined the competent law in time, all that was established in virtue of this law must be maintained, notwithstanding any change in the localization of the connecting factor. As the idea of security in the acquisition of a real right is central to the "statut réel", the time one wishes to acquire a real right is the focal point. Thus, the *lex situs*, on the date when an acquisition of the moveable is contemplated, is competent both in space and time. The theory disregards, to an even greater extent than that of the respect for acquired rights, the sphere of application of the new *lex situs*. As such, there is necessary extensive recourse to the exception of public order at the actual *situs*.

V. On the Basis of the Rules Applicable to Conflicts of Law In Time, by Analogy

A conflict of law in time may arise where there is a change, either in the content of the conflict rule of the forum, or in the content of the substantive law of the foreign legal system selected by the private international law rule of the forum. In this type of conflict, as well as that under consideration, there are two laws successively applicable. In conflicts of law in time, the laws successively applicable emanate from the same legislator, whereas in dynamic conflicts, they emanate from different ones. In view of the apparent similarity, it has been suggested that the rules for the former ought to govern the latter.

The conflicts of law in time, where the forum's conflict rule has changed, are solved in the same manner as a change of any domestic law. Consider, then, transitional law :

A. *The Principle of the Immediate Application Of The New Law*

According to Roubier [158] and other jurists,[159] French domestic

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157. BARTIN, *Principes, op. cit.*, vol. I, nos. 7-8, pp. 193-195, discussed in ARMINJON, *La notion des droits acquis en dr. int'l. pr., op. cit.*, vol. II, nos 62-74.

158. ROUBIER, *Conflits dans le temps en droit international privé*, [1931] Rev. Crt. 79 et seq.

159. BATIFFOL, *Traité, op. cit.*, no. 321, *Mélanges Ripert*, 1950, vol. I, p. 292 ; *Mélanges Roubier*, vol. I, p. 39 et seq.; LEREBOUIS-PIG., *Précis, op. cit.*, no. 280; MARIN, *Essai sur l'application dans le temps des règles de conflits dans l'espace, Thèse, Aix*, 1928 ; RIGAUX, *op. cit.*, p. 332 ; SZASSY, *op. cit.*, p. 147 ; GAVALDA, *Les Conflits dans le temps en droit international privé, Thèse*, Paris, 1955.

transitional law applies the principle of the immediate application of the new law. According to this theory, the new law applies, immediately and indiscriminately to all juridical situations "en cours de formation d'effets"; whereas in the event that the juridical situation is realized before the promulgation of the new law, it escapes its empire. Of course, the new law governs without distinction, the future effects from the date of its promulgation. Support for this solution in transitional law is found in both the desire to maintain a unity of legislation, and in the contention that every new law is considered better than the old in the eyes of the legislator. It is this technique which Batiffol and others apply, by analogy, to the "conflicts mobiles", considering that the change of the applicable law, emanating from an act of an individual and not the legislator, should not vary the solution. As such, the old *lex situs* governs completed juridical situations, while the actual *lex situs* governs all other questions.

B. The Principle of the Non-Retroactivity of Laws — Quebec Transitional Law Rules

In spite of the absence of a specific provision in the civil code,[160] Quebec law adopts the principle of the non-retroactivity of laws, the meaning of which is the following : a law is retroactive if it affects an acquired right, but it is not retroactive if it affects only a simple expectation.[161] Retroactivity is thus connected to acquired rights. Transposition of these rules to the "conflicts mobiles" would lead

160. But see Arts. 2, 2613 *C.C.*, and S.R.P.Q. art. 50.

161. Originally enunciated by the first commentators of the *Code Napoléon* ; see art. 2 *C.N.* and MERLIN, *Rep., op. cit.*, V° *eff. Rétroactif.*, vol. 3, no. 3. It is unanimously accepted by Quebec doctrine and jurisprudence : MIGNEAULT, *Traité, op. cit.*, vol. I, p. 69 : "Donc la loi nouvelle doit être appliquée d'une manière absolue, c'est-à-dire sans s'occuper de la date des faits dont il s'agit de déduire les conséquences, lorsque la rétroactivité de la loi ne fait qu'entraîner de faibles atteintes, de vagues expectatives. D'autre part la loi nouvelle est inapplicable toutes les fois qu'on ne peut l'appliquer aux faits antérieurs qu'en détruisant des atteintes très fortes sur la réalisation desquelles le citoyen avait eu un juste sujet de compte" ; LANGELIER, *Traité, op. cit.*, vol. I, p. 2 : "La loi nouvelle ne doit pas affecter les droits acquis, mais elle peut détruire les simples expectatives en général" ; L. BÉLANGER, *Non-rétroactivité de la loi nouvelle*, (1894) 4 R.L.N.S. 465 ; L. BEAUDOIN, *op. cit.*, p. 193 ; *Gilles* v. *Ready*, (1899) 2 R.P. p. 78 ; *Hudson Bay Co.* v. *Dion*, (1917) 52 S.C. 69 ; *La Cie de Chemin de fer Quebec et Lac St-Jean* v. *Valliers* (1914) 23 B.R. 171, at p. 173 ; *Albert* v. *Becker*, (1888) 17 R.L. 678 ; *Montreal Protestant Central School Broad* v. *The Town of Montreal East*, (1931) 69 S.C. 286 ; *Capagna* v. *Ashby*, (1941) 79 S.C. 216 ; *Peltier* v. *Boldier*, [1946] S.C. 440 ; *Larouche* v. *McCashey*, 41 R.P. 104 ; *Blais* v. *l'Assurance des architectes de la Province de Québec* [1964] S.C. 387 , see also the *Interpretation Act*, 1964, R.S. Q. ch. I, art. 12, which states : "L'abrogation d'une loi ou de règlement faits sous son autorité n'affecte pas les droits acquis, les infractions commises, . . ."

to the following partition of competencies between the old and new *leges siti*: Are we faced with an acquired right in virtue of the old "statut"? If so, it continues to apply under the actual *lex situs*; Are we, on the contrary, faced with a "simple expectation"? If so, it is the new *lex situs* that applies. It is obvious that this extension, by analogy, leads to the adoption of the theory of the respect for acquired rights hereinabove discussed.[162]

VI. Necessary Rejection of the Theories Proposed in Paragraphs III, IV, and V

Even if one was permitted under the classical theory of interpretation to resort to any of these explanations (which we are not),[163] the solutions they offer are totally unacceptable, seeing the general basis and objective of property law. The theories of the respect for acquired rights, the stability of institutions, and the immediate effect of the new law, lead to such untenable consequences in the particular dynamic conflicts which shall hereinafter be discussed, that I must reject them absolutely. Without anticipating the subsequent demonstration, it is sufficient to say that they *all* have the following ramifications:

(1) In requiring absolute recognition to rights validly acquired, or juridical situations completed under the old *lex situs*, the actual *lex situs* can only intervene on the ground of an exception — i.e., public order (with the understanding that the actual *lex situs* be also the *lex fori*).

(2) The position that the actual or new *lex situs* governs all rights not completely or validly created under the old *lex situs*, simple expectations, or juridical situations "en cours de formation", leads to an undesirable amount of uncertainty in property law, as it amounts to too much competence to the actual *lex situs*.

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162. Thus NIBOYET, who adheres to the theory of the respect for acquired rights, states in *Traité, op. cit.*, vol. IV, no. 1193, p. 373 : "Dès l'instant où la *lex rei sitae* est compétente en matière de meubles, il en résulte que tout droit relatif à un meuble doit, pour être valable, exister d'après la loi de la situation contemporaine de sa création. Il convient d'appliquer la distinction comme en droit interne et consacrée par la jurisprudence qui s'est formée sur le terrain de l'article 2 C.N., des *droits acquis et des simples expectatives*".

163. The only possible resort is to Quebec domestic transitional law by analogy — i.e., the acquired right/simple expectations distinction. However, the resemblance between the conflicts in time and conflicts in space is too slight. The only common premise being that in both cases there are successive laws. The rules of transitional law have at their base the unity of legislation and the presumption that the new law is better than the old, neither of which makes sense where two systems of law are in conflict. As such, the extention by analogy is unfounded.

Subsection Three : The Proposed Solution : A Subsequent Stage of Characterization

I. Dynamic Conflicts Viewed as a Subsequent Stage of Characterization

The above discussed solutions view dynamic conflicts as a special type of conflicts problem to be resolved by a general theory, applicable wherever there has been a conflict of laws created by a change in the localization of a connecting factor (whatever the "Statut").

In my opinion, dynamic conflicts simply necessitate the process of characterization at a final stage in the processus of solving a conflict problem. The reader is well aware of the technique of characterization at the first stage, where the task of the court is to allocate a legal question to a particular category, and then apply the conflict rule attached thereto. Where this conflict rule has a variable connecting factor, such as residence, nationality, domicile, or *situs*, a conflict of law might be created when the localization of the factor changes. In such event, faced with successive domestic laws potentially applicable, the court's role should once again be one of characterizing. Whereas the first classification was to one or other of the categories of the forum, this subsequent characterization envisages a delimitation between the old and the new localizations.

II. The Basis of the Characterization : The Reasons Predicating the Choice of the Rule

Consideration of the reason or policies predicating the choice of the conflict rule to solve dynamic conflicts, has the obvious consequence that the solutions will vary from "Statut" to "Statut". My only concern being dynamic conflicts in so far as they affect the "Statut réel mobilier" *ut singuli*, I shall restrict my remarks to this category. The characteristic traits of this "Statut", territoriality and generality,

> "Le Statut est territorial en ce sens qu'il s'applique dans une sphère spatiale limitée, et par conséquent, son autorité ne saurait atteindre, les biens au-delà du territoire. Encore est-il général ; en deçà de ces limites territoriales il s'applique indistinctement à toute chose qui tombe sous son empire matérialisée, du moins en principe".[164]

best reflects the predominent policy under Quebec law of protecting the security of transactions.[165] *It is submitted that it is on the basis of*

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164. FAHMY, *op. cit.*, no. 379, p. 191

165. See part two, *infra.*

these characteristics, reflecting this primary objective in contractual transfers of property, that the judge should divide the competencies of successive leges siti (i.e., characterize). Notwithstanding, strict adherence to these traits would in certain instances, frustrate an equally important objective, that of the protection of the or security of titles "droits acquis". In these last mentioned situations, it is suggested that in order not to frustrate international or interprovincial commerce, these above-mentioned characteristics should not furnish the basis of the delimitation.

One final remark, before the presentation of the rules to be applied : my position reaffirms the territorial and nationalistic character of Quebec Private International Law. And this is logical, for it should not be vague theories based on the nature of Private International Law which should determine the solution of dynamic conflicts, but the very nature and meaning of the Quebec Conflict rules as interpreted by the Quebec Judge.

III. The Rules Proposed

A. *The Law that Governs the Juridical Condition of the Moveable in Futuram is the Actual Lex Situs*

B. *The Law that Governs Prior Rights Over the Moveable*

(1) *as to its validity:* (a) the actual *lex situs* governs the primary classifications, i.e., its corporeal or incorporeal, moveable or immoveable quality, whereas the old *situs* governs secondary classifications, e.g., alienability ; (b) the old *situs* governs the mode of acquisition of the right ;

(2) *as to its contents* : the actual *lex situs* governs.

IV. Demonstration of the Application of the Rules Proposed

It will be shown that the decisions reached in most of the Quebec cases, where a conflict occurred between successively applicable laws, can be justified by application of these rules (together with recharacterization at times, of certain issues as properly "statut réel").

A. *The Law that Governs the Juridical Condition of the Moveable in Futuram : The Actual Lex Situs*

From the moment the moveable has changed its *situs*, it is the law of the actual situation which determines its juridical condition *in futuram*. This is due as much to the territoriality of the old "statut" as to the generality of the actual "statut". The old statut being territorial, its dispositions ceased to affect the moveable once it left its jurisdic-

tion ; while the actual "statut" being general, applies indiscriminately, both to the moveable previously situated there, as to the one recently introduced into the territory.[166]

The moveable will thus be subject to the new "statut", insofar as : (1) *the primary classifications of property :* thus, for example, under Quebec law, the locomotives, moveables in Rhode Island, became immoveable in Quebec (the *Rhode Island* case) ; machinery, moveable under Ontario law, remained so under Quebec law to which jurisdiction it was removed (*Banque d'Hochelaga* case) ; machinery originally situated in and moveable by the law of Massachusetts, remained so in virtue of Quebec law, the successive *lex situs* (in *Re Brupbacher Silk Mills* case) ; and locomotives, originally situated in Vermont were considered to be immoveable by destination under Quebec law when they were seized in Quebec (the *Barker* v. *Central Vermont Railway* case) ;

(2) *the secondary classifications of property in futuram :* thus, for example, if A sells to B, in country X, an object inalienable in X, and B brings it to Quebec and sells it here, it is alienable *in futuram* if our domestic law so permits,[167] and

(3) *the determination of the real rights the moveable may in the future be the object of, the content of these rights, the mode of acquisition, transmission, and extinction thereof :* This competency of the actual *situs*, consistent with all the other theories hereabove presented, has given rise to a vast number of conflict cases in North America. They usually arise on the occasion of a transfer by a non-owner, who is most often a conditional buyer who has removed an object of which he has possession but not ownership, to a second jurisdiction e.g., the actual *situs* and has there dealt with it.

Example :

Title is validly reserved in country X and the moveable is subsequently removed to country Y (e.g. Quebec), where it is subjected to a further dealing, such as a sale to an innocent purchaser. The validity of this transfer depends on the law of country Y (e.g. Quebec, the new *lex situs* of the moveable.[167a]

166. FAHMY, *op. cit.*, no. 384, p. 194.

167. See the French case of Seine, 17 April, 1885, (1886) Clunet, 593 ; religious articles inalienable under the old *lex situs* (Spain) could be alienated in the actual *situs* (France) : NIBOYET in *Thèse, op. cit.*, p. 49, maintains this solution on the basis that as this was a conflict as to the existence of rights, between the two successive institutions, the actual "statut" prevailed ; also discussed in *Traité, op. cit.*, vol. IV, no. 1209, p. 422 ; see also BARTIN, *Principe, op. cit.*, vol. III, no. 421.

167a. ZAPHIRIOU, *op. cit.*, at p. 187 : "The law of country Y cannot apply retrospectively to facts which have taken place while the chattel was situated in country X ; on the other hand,

Similarily:

A chattel mortgage is validly created over a moveable in country X. The possessor thereof removes the moveable to Quebec and sells it to a third person. Seeing that moveables are not subject to hypothecation (art. 2022 *C.C.*), an acqueror thereof obtains a clear title overriding and destroying the mortgagee's rights. This is the result of the Quebec policy of favoring the security of transactions at the expense of the security of titles.

B. *The Law that Governs Prior Rights over the Moveable*

1. The Law that Governs the Validity of the Right

Giving effect to real rights over the moveable in the actual *situs* is difficult to reconcile with the two characteristics of the *lex situs*, its generality and territoriality. However, a derogation to the territoriality of the old "statut" and the generality of the actual is required in the interests of international and interprovincial commerce, which would otherwise be paralysed. Nevertheless, this extra-territorial effect should not extend to all aspects of the validity of the old right. A distinction should be made with respect thereto, whereby :

(a) the actual *lex situs* governs the primary classifications of the juridical quality of the property, while the old *lex situs* governs secondary classifications ; and

(b) the old *lex situs* must govern the mode of acquisition of the right.

a) Primary and Secondary Classifications

(i) The primary classification of the juridical quality of the property as a moveable, is to be determined in accordance with the actual *lex situs*. Insofar as this classification of property is concerned, there is no difference between a moveable which was always situated in the territory and one recently introduced. The generality of the actual *lex situs* is dominant in this respect.

(ii) The secondary classification must be governed by the old *lex situs*. Thus, alienability of the moveable must be determined by the *situs* at the time of the contract. The attachment is closer in these issues to the contract than to the territory.

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the facts which will take place in Country Y will be governed by the law of Country Y and the law of country X can have no say in the matter. Thus, if the domestic law of country Y provides that A the real owner of the chattel is estopped from apparent ownership a contrary provision of the law of country X would be immaterial".

Example :

A moveable inalienable by law in Quebec is removed to Ontario, where it is considered alienable, and there sold ; the purchaser brings it to Quebec. The moveable is inalienable in Quebec in futuram, but the purchaser must still be considered owner, *ceteris paribus*.

This is in accordance with the rejected theories. The old "statut" which determines the validity of the right should also determine the juridical quality thereof in respect to secondary classifications.

Fahmy maintains otherwise.[168] To him, the purchaser can not be considered to have any right over the moveable now situated in the actual *situs* : the generality of the actual *situs* being commanding in this respect. His solution, it is submitted, must be rejected, as it would create great reticence and fear in prospective acquirors who might then see their acquired right *ipso facto* lost on a change of location.[169]

Inalienability may also arise as a result of the contract — e.g., substitutions, trusts, prohibitions to alienate. The change of *situs* would be irrelevant in this respect, as there remains the same reference to the law of the contract for prior validation thereof.

Example :

A debt is situated in Quebec at time of its transfer by gift *inter vivos* by way of a fiduciary substitution ; the proper law of the contract is New York law ; validity of the substitution over the moveable situated in Quebec depended upon prior reference to New York law and then to Quebec law as the controlling *lex situs*. When the investment is changed to shares in an Ontario company ; Ontario law as the new *lex situs* is inapplicable in so far as the formerly acquired right is concerned. (Of course, *in futuram*, if no substitution is permitted by Ontario law, the shares are freely alienable).

The solutions hereinabove suggested for the Quebec judge apply, whether the actual *lex situs* is or is not Quebec.[170]

b) The Validity of the Mode of Acquisition of the Right

The Old Lex Situs, that at the Time of the Completion of the Contract, must govern the Validity of the Mode of Acquisition of the Real Right over the Moveable :

168. *Op. cit.*, no. 412, at p. 206.

169. This is one example of the necessity to protect the security of titles.

170. Contra FAHMY, *op. cit.*, no. 409, p. 208, no. 416, no. 417, pp. 208-9, who suggests that the situations requiring the application of the actual *lex situs* only apply where the actual *situs* is also the *lex fori*, since the judge is then guardian of the generality of the *situs*. Where the actual *situs* is not the *lex fori*, he refers the total validity of the real right (including the juridical quality of the moveable) to the old *situs*. The distinction, it is submitted, is unwarranted. Just as the Quebec judge does not consider the *situs* of the moveable or proper law of the contract as a basis of characterization, he should not decide the competency of competing *leges siti* in one way where the moveable is situated in his province and in another way when it is outside the *lex fori*.

In this instance, the strict territoriality of the actual *lex situs* gives way to the extra-territoriality of the old *lex situs*. Protection of the security of transactions is to be sacrificed for the protection of titles, i.e., for the sake of international commerce.

This position is accepted by both Desbois, "Le transfert de propriété obéit à la loi de la situation contemporaine de la naissance du titre d'acquisition, quels que soient les déplacements du bien",[171] and Fahmy: "Les modes d'acquisition de la propriété sont territorialement indécomposables" [172]. Furthermore, the old *lex situs* is that at the time of the completion of the contract, and not that at the time of the transfer of ownership.

I thus reject the suggestion by Mr. Justice Walsh in the *Neugent* case (supra) and by certain statutists that the applicable old *situs* might be the place where the transferee receives delivery — i.e., possession of the moveable. This possibility is certainly based upon the broader principle, that the applicable *lex situs* should be that at the time when the fact bringing about the juridical effect — i.e., transfer of ownership, is accomplished.[173] So that, if the *situs* at the time of the contract adopted the principle of consensualism, this would be the applicable *lex situs* ; whereas, if it required delivery, then the *lex situs* applicable would be the one where delivery was received. This theory must be rejected, for it amounts to an inquiry into the relevant domestic dispositions of a potentially applicable law, in order to determine the applicable *lex situs* when this determination must come from the *lex fori*.

Consider the following applications of this rule:

Example 1 :

A "don manuel" of a corporeal moveable is effected en country X, vesting ownership of the moveable in the donee by consent alone. The moveable is brought to Quebec, where delivery is requisite. The Quebec judge must recognize his right of ownership even before delivery.

Example 2 :

A transfers to B a debt owed to him by C, domiciled at the time of the

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171. *Op. cit.*, at p. 315.

172. *Op. cit.*, no. 425, p. 313.

173. The new Polish code has enacted such a disposition in its article 3 : "La création, le transfert ou l'extinction des droits réels sont soumis à la loi de l'État sur le territoire duquel le bien se trouve *au moment où s'est produit ce fait entraînant les effets juridiques en question*". Apparently this is also LALIVE's view, *op. cit.*, at p. 150 : "The principle here called the rule of the *lex situs*, to the effect that the validity of a transfer of chattels is governed by the law of the country where the chattels are situated *at the time of the transfer* must be *applied in a strict manner*". (Note that he does not say at the time of the completion of the *contract* to transfer).

contract in country X, where the transfer *inter partes* is perfected by consent alone. The debtor, C, changes his domicile to Quebec. Even though there was no authentic act or delivery of the private agreement to B (1571 *C.C.*), the Quebec judge must recognize B's right of ownership of the debt as against A.

Example 3 :

A corporeal moveable is situated in country X at the time of the completion of a contract between A and B, domiciliaries of country X. Under the law of country X, delivery is requisite for the transfer of ownership to take place. The moveable finds its way to Quebec where the ownership of the property passes upon consent alone. The Quebec judge should not consider B as owner until delivery, or, in conformity with rule A, a new act, even verbal consent, with respect to the moveable takes place in Quebec.

The logical consequence of following any of the rejected theories above presented, would be that once the moveable reaches Quebec, in Example 3, B is to be considered owner because, until delivery, B has only a simple expectation, or, in any case, has not a validly created right (Niboyet), or until delivery, there is only a juridical situation "en cours de formation" — both requiring immediate application of the new law [174] (that of Quebec in this case).

Example 4 :

A, a purchaser in good faith, buys in Quebec a stolen typewriter from a dealer in similar articles. As a consequence, he acquired at least the right to keep possession until the true owner reimbursed him. He brings the moveable to France where "la possession vaut titre". The Quebec judge must allow the true owner the right to revendicate. Quebec law applies. French law can give no greater rights. The same solution would apply if under a foreign law, the innocent purchaser acquires rights not as favourable as the innocent purchaser in a similar situation in Quebec. The foreign law applies and Quebec law as the actual *situs* can give no greater rights.[175]

Our courts have actually and clearly followed the principle enunciated: Thus, in the *Neugent* case, the applicable *lex situs* was held to be that at the time of the execution of the contract (Barclay J.), or reception of the possession (Walsh J.), but not that at the time of a seizure or contestation relating to the moveable (the actual *situs*,

174. See the case : *Trib. superieur de Deux-ponts*, 13 July, 1898, Sirey 1901. 4.25, which applied the actual *situs* in such an instance ; critisized by DESBOIS, *op. cit.*, pp. 310-315, LALIVE, *op. cit.*, p. 150 ; discussed by PILLET, *Traité, op. cit.*, no. 362 ; BARTIN, *op. cit., Principes*, vol. III, no. 425 ; NIBOYET, *Traité, op. cit.*, vol. IV, p. 373 ; approved by Lereb. — *Pig., op. cit.*, no. 472, p. 467.

175. Policy also requires this solution. There is no intent in articles 1487 et seq. to promote commerce outside Quebec. Thê exceptions are territorially motivated. The solution is accepted by NIBOYET, *op. cit.*, vol. IV, p. 376 ; DESBOIS, *op. cit.*, p. 314 ; BARTIN, *Principes, op. cit.*, vol. III, p. 245, *contra* BATIFFOL, *Traité, op. cit.*, p. 516.

Quebec) ; in *Union Acceptance Corp.* v. *Guay*, *situs* at the time of the seizure was considered irrelevant, as no greater rights could be obtained by the buyer simply by moving the automobile to Quebec (Montgomery J.). The clearest approval of the principle was stated by Judge Taschereau in the *Rhode Island* case, when he pointed out that the mere presence of the moveable in Quebec could not create a privilege over it to which it was not subject previously.[176] True, and as above-mentioned, the characterization was contractual and the statement therefore *obiter dictum* ; nevertheless, it is clear proof that the actual *situs*, that at the time of a seizure, is irrelevant from the point of view of a contestation as to the existence of a real right over the moveable.[177]

Another problem [178] in this respect has perplexed many jurists. It concerns the change of *situs* where there has been a contract for the transfer under a suspensive condition valid under an old *lex situs*. The condition is fulfilled after the moveable has changed *situs*. Where the old *lex situs* requires consent alone to pass title and the new *lex situs* requires a delivery, does ownership pass *ipso facto* on the fulfillment of the condition ? The problem, it is submitted, should be resolved in the following manner : the reservation of title must be permitted by the old *situs*. If permitted, the proper law of the contract determines whether the transfer of ownership is retroactive or not upon the fulfillment of the condition. If so, ownership will be effected by the mode of acquisition of the old *lex situs* ; if not, then in accordance with that of the actual *situs*.

(2) The Content of the Right

Content of the right includes in the first place, its nature. The actual *lex situs* will determine the degrees of ownership in the moveable. On this basis, the Quebec judge should not have to resort to the exception of public order to apply Quebec law (when it is the

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176. I disagree with FAHMY, who maintains that no extra-territorial effect is to be given to privileges and other accessory real rights, *op. cit.*, no. 466, p. 232.

177. In view of the foregoing, I disagree with Frechette, who in his Report *to the commission for the revision of the civil code*, op. cit., p. 90, suggests that proprietary questions be governed by the law of the *situs* au moment de la naissance du conflit". In the first place this position contradicts the judicial pronouncements herein referred ; and in the second place, it contradicts his own previous acceptance of Niboyet's theory of respect for acquired rights. Possibly, he implies that the *situs* at the time of the seizure ought to determine whether there is an acquired right. If so, this is equally unfounded, since this is a task for the *Lex fori*.

178. LALIVE, *op. cit.*, p. 151 ; NIBOYET, *op. cit.*, *Thèse*, p. 420 ; *Traité*, *op. cit.*, vol. IV, no. 1201.

actual *situs* and the *lex fori*), where Common law trusts are sought to be enforced in this province.

Strict application of this rule [179] under Quebec law, should mean that the Quebec Courts should not permit the exercise of a foreign created chattel mortgage over moveable property in Quebec, and that *Faubert* v. *Brown*[179a] *and Union Acceptance Corp.* v. *Guay*[179b] were wrongly decided.

I would suggest however that the rule not be strictly applied under all circumstances. There is undoubtedly under Quebec law a policy of favoring the security of transactions at the expense of the security of titles. However, when there is no clash between these two policies, the spirit of the law is to protect the security of titles or *droits acquis*. As a consequence whereof, I consider that so long as the mortgagor retains the possession of the moveable subject to the chattel mortgage, effect be given to it. However, once the property subject to the mortgage passes to the hands of a third person, the mortgagee should have no right to follow it and the chattel mortgage should, *ipso facto* be lost.

In the second place the content of the right includes the conditions for the exercise of the property right. The characteristic of generality of the *situs* requires that there be no distinction based on the origin of the property right in so far as its exercise in this province. This is normal, not abnormal (as an exception of public order) competency.[180]

The problems which usually occur in this respect involve formalities of publicity. In the event of *failure to accomplish a formality in the actual situs*, the court should make certain that the formality really concerned the exercise of the right before refusing to give effect to it. If the formality to be accomplished in the actual *lex situs* concerns the acquisition of the right, and if the right has been

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179. ZAPHIRIOU, *op. cit.*, p. 174. "Once the chattel has acquired a new situs in country Y, the content of the right which was validly created on transferred country X will be governed by the law of country Y.

179a. 1938, 76 C.S. 329.

179b *Op. cit.*

180. Most of the Common Law provinces and states have enacted statutes with respect to such competency, providing for example, that foreign conditional sales contracts must be registered or filed within the jurisdiction (the actual *situs*) before they can affect third persons. Some statutes state the registration requirement generally, and it has been left to the courts to determine whether it was meant to include foreign conditional sales contracts or only domestic ones. See ZAPHIRIOU, *op. cit.*, p. 188, LALIVE, *op. cit.*, pp. 154-156 ; whereas other statutes specifically mentioned the rules for the exercice in the jurisdiction, of the rights acquired or reserved under a foreign jurisdiction.

validly acquired in virtue of a former *lex situs*, I submit that the court should allow exercise of the right in the actual *situs*, even though the formality has not been accomplished. Where Quebec is the actual *lex situs* consider the following examples to illustrate these propositions :

Example (i) :

A debt of a person domiciled in country X was transferred in that country without any signification upon him. But none is requisite under the law of country X. When the debtor changes his domicile to Quebec, has the transferee title when he has not signified in accordance with article 1571 *C.C.* ? Solutions : yes, because (i) the right was validly acquired under the old *lex situs* and (ii) the rule of signification in Quebec relates to the acquisition in Quebec, not to the exercise of the right.

Example (ii)

A domiciled in Quebec transfers to B domiciled in Ontario a corporeal moveable situated in Ontario by way of donation *inter vivos*. No formality is required under Ontario law. The *situs* change to Quebec according to which law registration is required for the transfer to affect third persons. The judge analyzing this formality should conclude that it concerns the exercise of the right acquired under the gift.

There is a related problem in connection with the exercise of property rights, which I would like to discuss at this time. Precisely, it concerns the effects in the actual *situs* of *the non-compliance with formalities requisite under the old lex situs* to perfect reservations of title in conditional vendors, or to create valid chattel mortgages.[181]

Recognition or non-recognition of the exercise of these rights in the actual *situs* must depend, as hereinabove suggested, upon the nature and purpose of the formality which was not effected in the old *situs*. The following distinctions should be made : where non-

181. See LALIVE, *op. cit.*, p. 154, et seq., and see Footnote no. 3 for list of reference : MORRIS, *Transfer of Chattels in the Conflict of Laws*, 22 B.Y.I.L. 233, ch. 4, p. 238, et seq., and especially with respect to Canadian law, see CASTEL, *Conflict of Laws*, Toronto, (1968) at p. 638, et seq. ; J.S. ZIEGAL, *Conditional Sales and the Conflict of Laws*, *op. cit.*, at p. 284, and authorities referred to, and *Uniformity of Legislation in Canada : The Conditional Sales Experience*, (1961) 39 Can. Bar Rev. 161 ; FALCONBRIDGE, *Contract and Conveyance in the Conflict of Laws*, (1934) 2 D.L.R., *op. cit.*, pp. 31-43 ; *In Re Meredith*, *op. cit.* ; *In Re Modern Cloak* case, *op. cit.* ; *In Re Satisfaction Stores*, (1929) 2 D.L.R. 435 ; *In Re Hudson Fashion Shoppe*, *op. cit.* ; *Bonin* v. *Robertson*, 2 Terr. L. Rev. 21 ; *Jones* v. *Twolley*, (1908) 1 Alta. L. Rev. 267 ; *Malony* v. *McInnes*, (1955) 37 Man. P.R. 131 ; *Sawyer* v. *Boyce*, (1908) 1 Sask. 8 W.L.R. 230, at p. 234 ; *Hannah* v. *Pearlman*, (1954) 1 D.L.R. 282, Comment Ziegal (1954) 32 Can. Bar Rev. 900 ; *Singer Sewing Machine* v. *McLeod*, (1885) 20 N.S.R. 341 ; *Traders Finance* v. *Dawson Implements* (1958) 26 W.W.R. (N.S.) 561, Comment Holmes, 1 U.B.C. L.R. 297 ; *Clive* v. *Russel*, (1909) 10 W.L.R. 666 ; *Cormier* v. *Coster*, (1914) 19 D.L.R. 701 (N.S.) ; *I.A.C.* v. *Laflamme*, (1950) 2 D.L.R. 822 (Ont.) ; *Commercial Corp. Securities* v. *Nichols* (1933) 3 D.L.R. 56, Comment Falconbridge, 11 Can. Bar Rev. 352 ; *Black* v. *Moore*, (1900) N.B. Eq. Rep. 98 ; *Dominion Bridge Co.* v. *British American Nickel Corp. Ltd.*, (1925) 2 D.L.R. 138 ; *National Cash Register* v. *Lovett*, [1901] N.S.R. 540 ; *Century Credit Corp.* v. *Richard*, (1962) 34 D.L.R. (2nd) 294.

compliance with the formality has the consequences, under the old *lex situs*, that the title is not validly acquired or reserved, then the actual *situs* should not permit the exercise of the right, because the formality is part and parcel of the very acquisition thereof. Where, on the other hand, non-compliance with the formality simply meant, under the old *lex situs*, that the right could not be exercised in that jurisdiction against third persons, then the actual *situs* should recognize and allow the exercise of this right, subject to, as above-mentioned, any rules of the actual *situs* with respect to its exercise.[182] The distinctions ought to apply in the following manner :

> *Example (iii) :*
>
> At the time of the execution of a conditional sales contract reserving title in the conditional vendor, the moveable was situated in the Province of Ontario, which law was also the proper law of the contract. The registration of the contract requisite under Ontario law was not effected. The conditional buyer removed the moveable to Quebec. The conditional vendor now seeks to exercise his proprietary right in Quebec. *Ceteris paribus*, the Quebec judge must look to the law of Ontario as the old *lex situs*. If, under that law, the formality was connected only with the exercise of the right in the jurisdiction, he should recognize the exercise thereof in Quebec. If, on the other hand, it concerned the acquisition of the right, he should consider that the right is not validly acquired or reserved, and deny recognition of its exercise in Quebec, even though Quebec law for similar domestic contracts requires no such publicity.[183]

The solution thus depends upon the nature of the formality under the old *lex situs* (that at the time of the contract). Where this is Quebec law, consider the following applications :

> *Example (iv) :*
>
> An ordinary debt owed by a debtor domiciled in Quebec is transferred by a contract of sale executed in Ontario. No signification upon or acceptance by the debtor is effected. The debtor later changes domicile to Ontario. Does the transferee, according to the Quebec court, have title to the debt ? Solution : seeing that signification or acceptance is intimate to the acquisition of the right, it was not acquired under the old *situs* — i.e., Quebec, and the transferee therefore has no title.

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182. This distinction was not relevant under static conflicts, for whether the formality concerned the acquisition or exercise of the right, it was governed by the *lex situs*. I disagree with LALIVE, *op. cit.*, p. 165, who implies that failure to complete all the formalities under the old *situs* means that there is an incomplete set of facts and necessarily no recognition of the right in the actual *situs* : In my view, this depends upon the nature and purpose of the particular formality.

183. *Contra* LALIVE, *op. cit.* : he implies at page 169 that it is a question of policy for the Quebec judge. Since our law does not require formalities, foreign conditional sales contracts, where the formalities of publicity have not been properly affected, should nevertheless be recognized in Quebec.

Example (v):

There has been a gift *inter vivos* of a corporeal moveable situated at the time of the contract in Quebec. The act was not registered. The *situs* of the moveable changes to Ontario. The Quebec court must consider the donee owner in Ontario because registration in Quebec, the old *situs*, only relates, with respect to moveables to the exercise of the right of ownership (even this is doubtful, seeing that possession presume title in corporeal moveables).

SUMMARY

Rather than consider the conflicts arising upon a change of *situs* as a separate problem in Quebec private international law, the demonstration above presented considers them simply a matter of dissection of the *lex situs*, a late stage characterization by the *lex fori*. As I have shown, some proprietary questions must be governed by the old *lex situs* (which is that at the time of the contract, not reception of possession), while others are governed by the actual *lex situs* (that at the time of a contestation e.g., seizure). Nor do these divisions of competency change the operation of the *lex situs*, hereinabove considered under my theory of delegations. Depending upon the proprietary issue, the applicable *lex situs* will determine whether there shall be a delegation of competency to the proper law of the contract or any other law, and the effect of that delegation.

CHAPTER THREE
POSSIBILITY OF EXCEPTING THE APPLICATION OF THE LEX SITUS

SECTION ONE: By resort to the Application of Renvoi[1]

Does reference by the Quebec judge to the *lex situs*, as the connecting factor for the "statut réel mobilier", imply reference to the whole body of law with respect thereto, i.e., internal as well as private international law rules? In the realm of the "statut réel mobilier" there is no precedent to this effect in Quebec law. It is true that a

1. Beyond the scope of this study is consideration of general arguments, theoretical and practical, in favour of or against renvoi acceptance in any of its forms, i.e., simple or double renvoi. Discussion shall thus be restricted to renvoi as it may apply to the "Statut réel mobilier".

renvoi was stated to apply in the *Ross* v. *Ross* [2] case at the Appeal court level, in connection with the formal validity of a holograph will, though in the light of the Supreme Court's insistance that the rule as to the formal validity of an act (art. 7 *C.C.*) is "facultative", the opinion on the basis of renvoi may be *obiter*. In addition, in the *Neugent* case, it was pointed out by Mr. Justice Surveyor (*ad hoc*, dissenting) that if there was a contestation as to ownership of the bonds, then New York law (referred to) would refer to the law of Quebec in virtue of the private international rule which he considered applicable in that state, to the effect that the law of the place to which the owner of a moveable submits his property, (voluntarily or involuntarily) governs. However, since he considered the problem as a contestation as to possession, these remarks must be likewise *obiter dicta*. As such, it is unlikely that renvoi in any of its forms is applicable under Quebec law.[3]

Most Common law jurists *do* consider that renvoi should apply in cases involving the transfer of moveables *inter vivos*.[4] The reason for their acceptance of renvoi, in this respect, relates to the theoretical justification of the *lex situs* rule. Having based the choice of the conflict rule on the *effective control of the lex situs*, it is but one logical step further to adopt whatever law to which the *lex situs* refers. This reasoning does not apply to Quebec law, for my researches have led me to believe that the *lex situs* rule is based upon grounds not restricted to the effective control of the *situs* (*supra* ch. 1). As such, it loses support, at least *de lege lata*. The other theoretical justification given by these jurists, noteably Lalive, is that renvoi fulfils the need for security in property relations. This is not necessarily so, as the following illustration reveals :

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2. *Op. cit.*

3. *In favour of renvoi* : There is implicit admission of renvoi with respect to the formal validity of a will in *Bellefleur* v. *Lavalée*, [1957] R.L. 193 ; Castel states in *Private International Law*, *op. cit.*, "The result of this (i.e., *Ross* v. *Ross*) decision is that in Quebec at least the reference to the foreign law will be a total one and the renvoi will be accepted". LAFLEUR, *op. cit.*, at p. 10 ; JOHNSON, *op. cit.*, at p. 14 ; CARON, *Le renvoi en droit international privé* (1958-9) 9 Thémis 89 ; SIROIS, *De la forme des testaments*, at p. 366 ; renvoi discussed in *Rosencrantz* v. *Union Contractors Ltd.*, (1960) 23 D.L.R. 473, 31 W.L.R. 597, note Castel 39 Can. Bar Rev. 93. As generally rejecting renvoi : MIGNEAULT, *op. cit.*, vol. I, pp. 56-65, 104-116 ; A. GÉRIN-LAJOIE, *La Théorie du Renvoi*, [1923] R. du D. 296 ; RIVARD J., in *King* v. *National Trust*, *op. cit.*, 54 B.R. 351, at p. 369; CASTEL, *Propos . . ., op. cit.*, 191, at p. 199, but doubtful in *Conflict of Laws*, *op. cit.*, pp. 98-99 ; TRUDEL, *op. cit.*, vol. I, p. 30 ; Jules DESCHÊNES, *La Théorie du renvoi en droit international privé*, (1963) Mélanges Bissonnette, at p. 265.

4. LALIVE, *op. cit.*, pp. 120-122 and references therein cited.

Example :

A, domiciled in Quebec, on a voyage to state Y, purchases from B, a used car dealer, an automobile which had been stolen from C, domiciled in state Z. Under the domestic law of Y, A obtains a clear title and it was on the basis of his knowledge of the domestic law of Y that he purchased the automobile. The case comes before the Quebec court, which has to determine title to the automobile. Application of the *lex situs* and renvoi rule leads to application of the Private International Law of the State Y. State Y has no conflict rules, but refers, in the final analysis, to the law of the country which has the dominant interest. The solution would be thus resolved if the case were before the court of state Y *ex post facto*. Renvoi, in this case does not fulfil, but destroys any security in property relations.[5]

The strongest argument put forward for the acceptance of renvoi relates to the possibility of recognition at the *situs* of non *situs* Quebec court judgements. If we are to accept the contention of those who consider that one of the conditions for the recognition of a foreign judgement be that the foreign court applied the same law as our court would have on the same issue,[6] there is very real practical advantage in accepting renvoi. To illustrate, assume that the foreign *lex situs*, e.g., France, has the same rules for the recognition of foreign judgement as Quebec. It should then only recognize a judgement of Quebec, where the court applied in the final analysis the same law as the French court would have on the same issue, jurisdictional competence aside. As such, the Quebec court which applies the internal law of the *lex situs*, when the court of the *situs* would apply another law either in virtue of a different conflict rule or a different interpretation of the same conflict rule, would not likely have its judgement recognized at the *situs*. The fact is, that in no Quebec judgement to my knowledge, has the Quebec court demanded as a condition for the recognition of a foreign judgement a legislative competency. As such, this practical argument for accepting renvoi is questionable. Furthermore, since all the jurisdictions surrounding Quebec and practically all other jurisdictions, adopt the *lex situs* rule, even if renvoi applied, the *lex situs* referred to by the non-*situs* Quebec court would normally refer to its own internal law.

As a consequence, there is no practical advantage to be gained by

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5. The possibility of solving conflicts in the manner of state Y is very real (see *infra*, Part Two) and CASTEL, *Conflict of Laws, op. cit.*, at p. 122 et seq.

6. CRÉPEAU, P.A., *La Reconnaissance Judiciaire des jugements de divorce étrangers dans le droit international privé de la Province de Québec*, (1959) R. du B. 310, at p. 321. Note also the condition suggested, although *obiter dicta* by judge Colas in *Karim* v. *Ali*, Jan. 29, 1971, Supreme Court, Montreal, #750-441.

acceptance of a theory laden with juridical illogicity [7] for the "Statut réel mobilier" *ut singuli*. The direction by the Quebec court to the *lex situs* must then be to its internal or domestic law. Nor is this reference inconsistent with the possible reference, in virtue of such internal provisions, to the proper law of the contract or to another law in certain situations (*supra*, my theory of delegation of competency).

SECTION TWO: By Resort to the Exception of Fraus omnia corrumpit

I agree with Professor Castel, who, in an excellent article, entitled : *"La fraude à la loi en droit international privé Québécois"*,[8] has shown that, in spite of the lack of a clear text, the exception of *fraus omnia corrumpit*, applicable under the old law, forms part of the positive law of Quebec. The Quebec court may thus disregard the apparently applicable foreign *lex situs*, where the change in the localization of the connecting factor, which led to this foreign *lex situs*, was inspired by a desire to avoid the application of Quebec law. Not only must the law defrauded be Quebec law for the Quebec court, but the domestic rules defrauded must be obligatory, not facultative.[9]

Basically, the courts have not as yet resorted to the use of the exception in the "Statut réel mobilier" because of their over-characterization of proprietary issues as contractual. There is, however, doctrinal support in the old law [10] and this suffices, in this instance, as an interpretation of the intent of the codifiers.

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7. E.g., it amounts to an abdication of sovereignty and frustrates the interests of the parties to the transaction (which is why it is generally excluded in the domain of formal and essential validity, interpretation and construction of a contract) : see BATIFFOL, *Traité*, *op. cit.*, p. 350 et seq., and CASTEL, *Conflits de règles de rattachement-Renvoi*, (1961) 39 Can. Bar Rev. 93.

8. *Op. cit.*

9. The conditions sought to be avoided by a change in localization of the connecting factor may be those relating to the acquisition of the right, or merely to its exercise in the jurisdiction — e.g., where the parties change the *situs* of a moveable from Quebec to Ontario to avoid registration of a donation *inter vivos*.

10. FROLAND, *Mémoires*, *op. cit.*, vol. I, no. 1729, p. 263 ; BOULLENOIS, *Traité*, *op. cit.*, vol. I, p. 794 ; POTHIER, *op. cit.*, vol. VII, *Traité de la communauté*, no. 18, p. 62 ; *contra*, however, BOUHIER, *Obs.*, *op. cit.*, ch. 26, no. 41, p. 719. The only instance of application to the "statut réel" which I have found in the old law involved the prohibition of transfer *inter partes* of gifts from husband to wife which was characterized as "statut réel" by Pothier : this learned jurist considered that when there was a fraudulent change of domicile from a "coutume", prohibiting such a gift to one permitting same, the court should disregard the change and apply the prohibiting law : In *Traité des donations entre mari et femme*, no. 21, p. 456.

SECTION THREE : By resort to the Exception of Public Order [11]

In the previous chapter, I continually referred to the necessity of retaining the exceptional character of this principle applicable under article 6.2 *C.C.* [12] with respect to the "statut réel", for moveables *ut singuli*. As such, "statuts" relating to the exercise of a proprietary right were held to be governed by the actual *situs*, not on the basis of public policy, but because the generality of the *situs* commanded this solution.

The concept varying, however, both in space and time, the real problems concern the standards of application of the exception. Should the Quebec judge interfere with the foreign *lex situs* on the basis that it contravenes Quebec' public policy relating to (a) internal matters, (b) international matters, or alternatively (c) the norms of public policy of the civilized world in the particular situation ? The solution, it is submitted, lies somewhere in a combination of all these policies, the resolution whereof is beyond the scope of this paper.

11. For general discussion of the exception in Quebec law, see P.A. CRÉPEAU, *Recueil de documents et arrêts en droit international privé, : Québec*, (1958), pp. 41-42 ; LAFLEUR, *op. cit.*, p. 46 et seq. ; JOHNSON, *op. cit.*, pp. 592-596 ; CASTEL, *Conflict of Laws, op. cit.*, pp. 182-185, *Private International Law*, p. 98.

12. In view of the clarity of the disposition, we do not require resort to the old law where, in any case, insofar as the "statut réel" was concerned, the public order concept was confused with territoriality : DELAUME, *op. cit.*, ch. IV, p. 114. Some statutists, however, reflected more deeply and made the distinction : BOUHIER, *Obs., op. cit.*, ch. XXIV, no. 127, p. 689 ; BOULLENOIS, *Démission de biens, op. cit.*, p. 111. Furthermore the exception was rarely, required, as conflicts were intra-provincial — i.e., between "coutumes" of the same country, not really international.