RECOGNITION OF NON-POSSESSORY SECURITY INTERESTS IN QUEBEC PRIVATE INTERNATIONAL LAW

par Jeffrey Talpis*

L'auteur du présent rapport analyse la valeur et l'efficacité au Québec, des sûretés mobilières sans dépossession, créées à l'étranger. Le droit comparé révèle des différences importantes dans les droits internes concernant ce domaine. Le droit domestique québécois n'admet pas les sûretés mobilières sans dépossession, à part quelques exceptions. Par contre, les états et provinces de common law tout autour de nous sont très favorables à de telles sûretés. Les différences au niveau du droit interne créent de nombreux problèmes dans la pratique quotidienne du droit commercial international.

Une situation typique serait la possibilité de reconnaître au Québec les droits d'un créancier qui détient un "Chattel Mortgage" créé à l'étranger, vu que le droit interne québécois n'admet pas cette sorte de sûreté. Les problèmes se présentent soit dans la relation créancier-débiteur quand ce dernier transporte le bien au Québec, soit dans la relation entre le créancier qui détient le "Chattel Mortgage" et les créanciers chirographaires ou privilégiés du possesseur, ou enfin entre le créancier détenteur du "Chattel Mortgage" et les acheteurs de bonne foi du bien meuble qui se trouve au Québec.

L'auteur du rapport examine, étudie et critique la solution traditionnelle du droit québécois qui maintient que la valeur et l'efficacité de la sûreté mobilière sans dépossession soit régie par la loi du contrat, généralement la loi étrangère en vertu de la loi d'autonomie. L'auteur défend la thèse à l'effet que ces questions relèvent plutôt du domaine du statut réel régi par la loi de la situation du bien meuble. Cette position exige la détermination du "lex situs" quand le meuble se déplace d'un pays à l'autre, et l'auteur en a proposé des règles qui s'accordent parfaitement avec le droit positif dans ses solutions, si ce n'est pas dans les motivations.

En dernier lieu, l'auteur fait l'examen des règles proposées en droit interne et en droit international privé par l'Office de Révision du Code Civil.

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PLAN

PART I

THE REASONS FOR THE CONFLICTS

A civilian system of law embedded in a common law sea, part of one federal system with ten separate sovereign jurisdictions and a neighbour to another with fifty independent states, high population mobility, case of movement of moveable property, common-place intranational and international commercial transactions all combine to provide the legislator and courts of our Province of Quebec with a re-occurring problem in the administration of justice - how to choose between conflicting laws which may be asserted as determinative of the validity and effect in Quebec to be given to non-possessory security interests created abroad.

When we speak of security interests created abroad, we would normally, but not exclusively be referring to security interests created in one of our neighbouring common law jurisdictions, be it one of the remaining provinces of Canada or a State of the United States. These latter common law jurisdictions have shown a greater favor to the use of non-possessory security then we in Quebec have and as a result conflict of law arise when the moveable subject to a non-possessory lien is removed to Quebec. To truly appreciate the real and potential conflict that are thereby created, permit me to very briefly summarize the principles of our domestic or internal law in this area.

Contrary to the legal systems of our neighbours moveable property in Quebec is not susceptible of hypothecation[1] and they are few privileges or liens. Not only can a creditor not acquire by agreement with his debtor a real right in moveable property which will entitle him to follow it into the hands of third parties in satisfaction of his claim, but he cannot even acquire a right to be paid by preference out of the proceeds of moveable property which remains in the possession of his debtor and is seized in the latter's hand. In other words Quebec law contrary to common law jurisdictions does not allow a chattel mortgage or a hypothec on moveable property. Nor can privileges being rights of preference conferred by law on certain creditors because of the nature of their claim be created by contract, that is by *any* creditor. The only way *any* creditor

1. Article 2022 of the Quebec Civil Code provides "Moveables are not susceptible of hypothecation; except as provided in the titles of Merchant Shipping and of Bottomry add Respondentia."

regardless of the origin of his claim can obtain a privilege on the moveable property of his debtor is to take a pledge of such property as security for his debt which requires that the debtor give up possession of the thing pledged by putting it into the hands of the creditor[2]. The reason for this position of Quebec law is that possession is supposed to be the basic concept around which the whole system of rights in moveables is organized. Possession theoretically evidences ownership and if moveables are to circulate freely, there must be a limit of the *droit de suite* and hidden charges as privileges liens or hypothecs. Possession is supposed to be the foundation of credit in our law and it was felt we would be hindering legitimate business by preventing non-possessory security interests.

As such only exceptionally has the provincial legislature seen fit to permit creditors to obtain security of moveables while still allowing their debtors possession of their property for their own use. In 1962, articles 1979 e) to k) were added to the Civil Code permitting a debtor who is a "commercant" to secure a loan by pledging machinery and equipment pertaining to his business and retaining possession of the moveable property constituting the security. Registration replaces the possession as constructive notice not only to third party acquirors but to ordinary creditors of the creditor and debtor. While the debtor conserves the ownership and possession of the property, the creditor in case of default can demand to be put into possession of the objects pledged, force a sale thereof, and be paid as a ranking priviledged creditor (2001 C.c.). There was also introduced at the same time the pledge of Agricultural and forest property (1979a) to c) having similar dispositions to the commercial pledge. The *Special Corporate Powers Act*[3], provides another exceptional situation, a statutory one, where moveables may be secured while the debtor retains possession of the security. Under this Provincial statute a company may guarantee the repayment of bonds which it must be authorized to issue by securing its moveables present and future, while retaining possession contrary to the civilian requirement. The deed constituting same must be authentic and be registered, after which it gives a right of preference ranking after the other privileges under articles 1994 a) to 1944 c) of the Civil Code.

By far, the most important non-possessory security interest in our law both from the juridical and economical point of view is the

2. Article 1969 C.c. which deals with pledge or pawning provides for the privilege but article 1970 states "The privilege subsists only while the thing pawned remains in the hands of the creditor or of the person appointed by the parties to hold it."

3. *Special Corporate Powers Act*, R.S.Q. 1964, c. 275, art. 22 to 28.

security under article 88 of the *Federal Bank Act*[4] a Federal Statute. Not only does the Bank obtain security without depriving the owner of possession, but it is able to secure a revolving line credit by a kind of floating charge over all the property, existing or after acquired, which answers a given description and is found in designated places. The security exists on the raw materials, work in process, finished goods of a manufacturer, even on accounts receivable of the sale of inventory. To be opposable to third parties of all categories, a notice of intent to constitute the security must be registered at the Agency of the Bank of Canada. When properly created the Bank has a right of ownership *"sui generis"* different than civilian ownership. In the case of default, the Bank enters into possession and proceeds to sell the security after having fulfilled the formalities of sections 83.3 and 82.4.

Faced with those very limited possibilities of non-possessory security interests in our law, lenders have devised a variety of forms to obtain valid security interests without transfer of possession. Their main object is the transfer of ownership to the creditor. Techniques commonly used take the form of a sale with a right of redemption, sale with looseback or a conditional sale contract, whereby the creditor buys the object to be used as security, and sells it back to the debtor reserving title until the balance of sale, actually the debt, interest and charges have been paid by the debtor who in the meantime retains possession. What is common to these security devices is the removal of the moveable property from the patrimony of the borrower to that of the creditor. This obviously is an excellent protection for the lender, although our courts have at times taken a very strict view of this indirect melted to get around articles 1969, 1970 and 2022 C.c. They have occasionally held the security to be invalid as against third parties, especially where there was a subsisting obligation, as distinguished from "option" on the part of the borrower to repay the amount he received when he sold the moveable to the creditor.

While the above represents the present state of our law, it shall not so remain for long. The Office of Revision of the Civil Code of the Province of Quebec shall imminanty deposite with the legislative authority the future Civil Code of our Province. For enactment in the area of real security on moveables, the Commissioners have proposed basic changes which would bring Quebec rules into line with the North American legal system and business practice in General bringing a certain amount of uniformity in this area of the law. In the first place, the Commissioners propose that all forms of

4. *Federal Bank Act*, S.R.C. 1970, c. B-1, Section 88.

real security (pledge, hypothecs and privileges) and all contractual techniques having similar purposes (conditional sales, sales, subject to redemption etc...) be permitted and be included under the single concept of hypothec. This naturally requires the repeal of the rule of article 2022 C.c. prohibiting hypothecs on moveables. In the second place, to avoid the danger that the widespread use of hypothecs on moveable property would slow down the free circulation of goods, the commissioners have proposed a modern computerized system of publication to enable third parties to verify whether hypothecs exist. Consultation will normally be required, but by exception when transacting with a trader dealing in similar articles, such a dealer disposes of hypothecated goods in favour of a third persons in good faith and the hypothec is extinguished[5]. While there is little doubt that enactment by Quebec legislature of the recommendations of the committee on real security, would eliminate many conflict of law relating to the validity of the security interest, at least through out North America, there would nonetheless be difficulties as regards publicity, perfection and effect in the different jurisdiction vis-à-vis different categories of persons. Leaving aside the *lege feranda*, let us examine the solutions of our law to the problems which arise as a result of the difference in Quebec law and that of other jurisdictions.

To illustrate: John borrows some money from George by contract concluded in New York, and as security grants a chattel mortgage over certain moveables in his possession situated at his place of business in New York. The contract provides *inter alia* that the debtor may not remove the goods without the permission of the creditor. Notwithstanding people and property do not stay put and let us assume John brings the moveable to Quebec where he may do nothing with the object, or it may be seized by creditor of John or George in Quebec or it may become subject to a privilege under our law, or John may re-sell it to a dealer in similar articles, who could pass it on to a third party who might obtains a commercial or civil pledge. Were John to stop his payments to George and George or his assignee or creditors trace the moveable to Quebec, which law will determine the validity of the non-possessory security interest, and if valid what effect shall it have in Quebec vis-à-vis the parties to the original transaction, seizing creditors, be they ordinary or referred and subsequent acquirers in good or bad faith. A similar situation exists where the debtor has received possession of the moveable from a vendor under a conditional sales contract, who in the normal

5. Article 215 of the Reugert of the Report on security of moveables 1975.

course would assign the contract to a finance company. The reservation of title is really a stronger non-possessory security interest than the chattel mortgage and of course similar events with respect to the property in Quebec could happen and thereby create conflicts.

In both of these situations which are involved. Which law should determine the validity of the non-possessory security interest? are we to apply the conflict rule for property or contract? and given the characterization or "validity", should we dissociate the law governing the "effect" of the interest from that governing its "validity"? What about competing claims? As Quebec law has adopted the classical method for resolving conflicts of law, the applicable law will determine on the basis of a qualification of the legal issue adopted by our legislator, and application of the law selected by the appropriate conflict rule.

PART II

DETERMINATION OF THE PROPER LAW OF THE CONTRACT AND THE LAW GOVERNING MOVEABLE PROPERTY ISSUES *(STATUT REEL MOBILIER UT SINGULI)*

The proper law of the contract, i.e. the law governing the substance of an *acte juridique* its interpretation the rights and the obligations of a party to the contract will be determined by the law *d'autonomie* that is the law chosen expressly or implicity by the parties, with a presumption in favour of the *lex loci contractus,* which creates serious difficulties in contracts by correspondence. Article 8 C.c. provides the rule:

> "Deeds are construed according to the laws of the country where they were passed, unless there is some law to the contrary, or the parties have agreed other wise or from other circumstances it appears that the intention of the parties was to be governed by the law of another place; in any of which cases, effect is given to such law, or such intention expressed or presumed."

The conflict rule moveables treated individually is controversial. In spite of the apparent clarity of the choice of law principle in the Civil Code "moveable property is governed by the

law of the domicile of its owner (art. 6.2 C.c.), the legal community is not in agreement that this represents the correct rule for moveables treated individually. To some, no distinction is to be made between moveables in a universality and moveables *ut singuli*; the *lex domicilii* remains applicable to both. To others, the rule for moveables *ut singuli* is the *lex situs*, which the great majority of our judges have completedly avoided the determination of the conflict rule by characterizing, property issues as contractual whenever real rights are acquired in moveables by contract.

In fact there is no doubt in the opinion of this author that the true rule for moveables *ut singuli* is 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* it would likewise have found that the *lege lata*, the *lex situs* governs.

It is true that a normal reading of article 6, paragraph 2 of the Civil Code leads to the impression that the *lex domicilii* of the owner is applicable in every case where the law of Quebec cannot be applied as a result of one of the exceptions. However, the exceptions are hardly exceptions; they are rules of private international law quite independent of moveable property (e.g. jurisdiction of our Courts, policy, procedure, etc...), article 6 paragraph 2 provides the rule:

> "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, to privilege and rights of lien, contestation as to possession the jurisdiction of our courts and procedure, to the mode of execution and the rights of the Crown and also in any other cases specially provided for by this code."

Even on the grammatical interpretation level, it is possible to argue that Quebec law applies to these "exceptions" because of the principal of territorial sovereignty. Quebec law is applicable because it is in the particular issue the *lex causae*. The thing, court of act concerning which there may be a conflict is "in" Quebec. This explains the application of Quebec law to "the distinction and nature of property, rights of privilege, or contestation as to possession, because at the relevant time the moveable property is physically situated in Quebec. Furthermore these questions are only examples of the situations that fall under the property classification. They reveal the mere general underlying rule that moveables *ut singuli* situated in Quebec must be governed by

Quebec law, the law of their *situs*. On the basis of reciprocity, and by analogy to the jurisprudential and doctrinal bilaterilisation of the rule in article 6 paragraph 1 for immoveables[6] a foreign *lex situs* would govern property right in moveables if situated at the relevant time in the foreign jurisdiction.

While the text of the law might be obscure and ambiguous, the intent of our codifiers was not so. Of the nineteen authors cited by our codifiers, twelve of them properly distinguished between moveables *ut singuli* and moveables *ut universi*, applying the *lex situs* to the former and limiting the *lex domicilii* to the latter. The remaining jurists cited favor the *lex domicilii* without distinguishing between their application *ut universi* or *ut singuli*. However, the examples given by them reveal that they were only concerned with successions to moveables (*ut universi*)[7].

To the weak grammatical and strong historical arguments in favour of the *lex situs* we might add a number of reasons traditionnally advanced for justifying the rule which in facts is in force in most countries of the world, as in the jurisdictions of all our neighbours, and has been proposed by our commissioners for the Revision of the Quebec Civil Code[8]. *Lex situs* at times has often been justified as a rule of public order, or based on a volontary submission of the owner (when volontarily he sends his property to a foreign jurisdiction), or upon the public international law principle of territorial sovereignty of the country of the *situs*; that is, the jurisdiction of the *situs* controls the property in fact, and for this reason in law. Closely related to this last mentioned argument is the idea that the *situs* has the effective control over the moveable because the officers of the country of the *situs* will in the final analysis be called upon to enforce property rights - i.e. attach seize, or sell it. It seems to me without intending to discredit any of the reasons put forward for the application of the *situs*, that the *lex situs* must govern as being the place where the center of gravity of the attributes of ownership are generally localized.

Whatever the justification, it is in the opinion of this author and the vast majority of Quebec doctrine that the present rule for moveables *ut singuli* is in fact the law of the place where it is situated, *lex situs*.

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6. "The laws of Lower Canada govern the moveable property situate within its limits."

7. See J. TALPIS, "The Law Governing the Domain of the *"statut réel"* in Contracts for the Transfert Inter-Vivos of Moveable Property *Ut Singuli* in Quebec Private International Law", (1971) 73 *R. du N.* 275, 506 it seq.

8. Article 33 of the Project.

Our courts as herein above mentioned, have generally avoided the determination of the connecting factor for the *statut réel mobilier*. Instead of trying to interpret paragraph 2 of article 6 C.c., they with rare exception charactherized such property questions as: the validity of privileges and chattel mortgage, the validity and effect of clause of the reservation of title, and effects of transfers by non-owners as contractual matters governed by the law of the contract (article 8 C.c.)[9] and thereby avoided the determination of the moveable property conflict rule and the problems raised where the moveable is displaced from one jurisdiction to another. Notwithstanding this erroneous judicial interpretation, the solutions reached in almost all of the Quebec cases, even though poorly motivated, can well be explained by the *lex situs*, subject to the application of the correct *lex situs* in the presence of a dynamic conflict.

PART III

RECOGNITION IN QUEBEC OF THE NON-POSSESSORY SECURITY INTEREST CREATED ABROAD

CHAPTER 1
DELIMITATION OF THE SUBJECT MATTER

Section 1: "The non-possessory security interest"

The non-possessory security interest is one where the creditor does not retain possession of the moveable secured. Rather possession is transmitted to the debtor or is left with him in order to permit him the use, and perhaps the disposition of the good charged, secured or pledged. As mentioned in the introduction of the present report the only non-possessory security interests permitted in Quebec law are the various privileges, commercial, agricultural and forest pledges, the security under article 88 of the *Bank Act* and the

9. By analogy and following the judicial attitude, the validity of TRUST executed in N.Y. over moveables therein situated was held to the valid in accordance will the law of New York (althought it wouldn't be by Quebec law) because of article 8 C.c. which designated New York Law. *The Estate of the Late Warren Clements* v. *Sous-ministre du Revenu du Québec*, C.P. Montréal, no 500-02-001302-764, January 4, 1978 (retenu pour publication dans 1978 R.D.F.Q.).

floating charge under the *Special Corporate Powers Act*, I guess one should add the assignment of book debts, lease rights and other accounts receivable as collateral security for a debt. Other techniques are used as well and must be likewise considered as security interests although they give the holder of these interests the status of owner rather than secured creditor, these being the conditional sales contracts, sales with rights of redemption, sales subject to lease with option to repurchase etc. Neighbouring jurisdictions are more liberal in permitting for example, chattel mortgages i.e. hypothecation of moveables. Whatever the form, whatever the motivation of the parties to the transaction, they are security interests and shall be discussed as such without further distinctions.

Section 2: "Corporeal or incorporeal moveables"

Technically and juridically, non-possessory security interests can likewise exist in incorporeals. For example, a debtor who transfers his accounts receivable, a balance of sale, his book debts or assigns rentals to a creditor as security for a loan usually obtains legal possession of same by the contract and only upon default by the debtor does the secured creditor enter into the actual *de facto* possession of the debtor's rights to claim payment etc... Following the implied guideliness of the general reporter I shall be insisting upon security interests in corporeal moveables, or tangible chattels.

Section 3: "Created abroad"

Most security transactions are consummated in the jurisdiction where the moveable is located by parties who reside and are domiciled there. In addition, the parties usually contemplate that the moveable will be used there by the debtor. Under these circumstances there is no problem in determining the place where the security interest has been created. The presence and residence of the parties, the *situs* of the moveable, and the consummation of the contract are so closely identified with such jurisdiction that there is no problem deciding the meaning of "created abroad". However at times the moveable is not situated in the jurisdiction whose law governs the law of the contract as chosen expressly or implicitly, or the parties contemplate that the property will be used in a state, province or country other than that in which it is located at the time the security interest is perfected. Furthermore the negotiations may take place across state or provincial lines between parties who reside in different jurisdictions. Fixing the place of creation is all the

more difficult where incorporeals, accounts receivable for example, owing by debtors domiciled in different provinces, states or countries are assigned to a sole creditor as a non-possessory security transaction. Under all of these circumstances what do we mean by "created abroad"? Is the security interest created abroad because the foreign law is the law of the contract under article 8 C.c., or is it because the moveable is situated in the foreign jurisdiction, irrespective of the law of contract? Distinctions shall be made in the following chapter. The difficult lies in determining the respective spheres of property and contract as it relates to the validity of the security interest and its effect in Quebec.

Section 4: "Recognition in Quebec"

The removal of the corporeal moveable so secured from one jurisdiction to another may be due to various reasons. It may occur within the framework of an export transaction where the exporter uses the non-possessory security interest as a mean of securing his claim for the purchase price, or a private debtor may transfer his residence from one country to another taking his goods with him. In all of these situations the initiative for the removal of the goods lies with the debtor who is in possession of the secured property. In some cases the creditor will be informed about the location in others not. I propose to limit discussion to situations where the corporeal[10] moveable charged is removed to the Province of Quebec, either directly or after passing through other jurisdictions where new acts (liens, seizure, new interests, etc...) with respect to the already secured moveable, might have been effected. One theoretically could also consider situations where the moveable is removed to Quebec and then at the time of a contestation is located outside its jurisdiction. The Quebec *non-situs* court could possibly take jurisdiction if the owner was domiciled in Quebec, however the value of a Quebec judgment in this regard would depend upon the attitude of the court of the *situs*.

10. As regards incorporeals the problems are slightly different see *infra*.

CHAPTER 2

THE LAW GOVERNING THE RELATIONSHIP BETWEEN THE PARTIES TO THE NON-POSSESSORY SECURITY INTEREST TRANSACTION CREATED ABROAD

Section 1: The attitude of our courts-judicial decisions

As a general proposition, the judicial decisions reveal an overwhelming disposition on the part of our courts to refer to the proper law of the contract to determine the validity and effect of a non-possessory security interest between the immediate parties to the security transaction. As they have done with other seemingly "property" matters they have sidestepped article 6.2 C.c. and the domain of the *Statut mobilier ut singuli* by invoking article 8 C.c. which deals with the choice of law rules governing contracts[11]. In all the reported decisions the *lex situs*, the place of contracting and the proper law of the contract refer to the same foreign law, and to this extent the confusion between the contractual and the property aspects of the security transaction were harmless.

(A) Clauses reserving title to vendors while surrending possession to the purchaser:

As between the immediate parties, our courts have consistantly looked to the law of the contract to determine the validity and effect, of clauses reserving title to the vendor under conditional sales contracts of moveables situated in a foreign country at the time of the contract, but in Quebec at the time of a contestation (attachment or seizure). The interested reader should examine the early cases of *Banque d'Hochelaga* v. *The Waterous Engine Works Co.*[12]; *in Re Brupbacker Silk Mills Limited, ex parte Crompton and Knowles Loom Work*[13] and *Williams* v. *Nadon*[14]. In the last mentioned case, a piano was sold in Ontario to an Ontarian domiciliary under a contract which reserved title to the vendor also an Ontario domiciliary. The piano was brought from Ontario, *situs* at the time of the contract to Quebec the actual *situs* where upon an action in revendication, the court simply applied the law of Ontario; as

11. For discussion see: J. TALPIS, *loc. cit.*, note 7, 275, 356, 501 it seq.

12. *Banque d'Hochelaga* v. *The Waterous Engine Works Co.*, (1897) 27 S.C.R. 406.

13. *In Re Brupbacker Silk Mills Limited, ex parte Crompton and Knowles Loom Work*, 4 C.B.R. 310.

14. *Williams* v. *Nadon*, (1907) 32 S.C. 250.

Mathieu J. stated: "Ce contrat doit être interprété et apprécié suivant la loi d'Ontario." More recently our lower court (superior court) in the case of *General Motors Acceptance Corporation of Canada Limited* v. *Beaudry*[15] looked in principle to the law of the contract (Ontario) to determine the validity and effect of the reservation of title clause in a conditional sales contract of an automobile situated in Ontario to a Quebec resident consumer who subsequently removed the vehicle to Quebec. Curiously, the court reached the conclusion that the non-possessory security interest was invalid as the parties failed to comply with the Quebec Consumer Protection Act which it deemed to be of public order under the circumstances. Non-compliance with the said Act meant in accordance with article 117, that title passed to the Consumer, the sale being given the effect of a sale on term. It is to be hoped that the judgment will be ignored or overruled as it would seem something more than "a Quebec residency" of the purchaser be used as the criteria for requiring the application of the Act.

(B) Chattel mortgages:

On three occasions our court had to determine the effect to be given to chattel mortgages created in Ontario and New York over property situated there at the time of the conclusion of the contract and seized by the creditor or his assignee when it was found in Quebec. In all instances there was no mention of the law governing property rights only the law of the contract. In the earliest of these decisions *Faubert* v. *Brown*, a chattel mortgage was entered into between the parties in the State of New York over certain animals, and properly registered according to the law of New York. Under the terms of the contract, in the event of default by the debtor, the creditor had the right to repossess the moveables, sell them and apply the proceeds towards repayment of the debt. The debtor without the consent of the mortgagee removed the mortgaged chattels to Quebec, whereupon the mortgagee seized the goods. The creditor's claim was upheld by Mr. Justice Duranleau. The defendant argued that it would be contrary to public policy for the court to recognize the mortgage in Quebec, seeing that moveables are not subject to hypothecation (articles 2.02. 2 C.c.). However the learned judge did not accept the argument and contented himself simply with applying the law of the contract to appreciate the validity and effect of the non-possessory security interest.

15. *General Motors Acceptance Corporation of Canada Limited* v. *Beaudry*, September 27, 1977, unreported.

Stating that:

> "En droit international privé, il est reconnu que la nature et les effets d'un contrat doivent être appréciés à la lumière de la loi du lieu où le contrat est passé."[16]

Similar recognition of the chattel mortgage created abroad, where the moveable is later removed to Quebec with no new act affecting the moveable in Quebec is seen in the case of *United Acceptance Corp. Ltd.* v. *Guay and Macdonald*[17]. The only other decision in point is the very recent judgment of the *Bank of Nova Scotia* v. *Latour*[18] where the Quebec court recognized a chattel mortgage entered into between the parties in Ontario, *situs* of the moveable at the time of the contract but situated in Quebec at the time of the seizure. The court implies the contractual charactherization in justifying the reference to Ontario law.

It is to be noted that in all of these instances our courts were not faced with competing claims from opposing preferred or ordinary creditors in Quebec or abroad, nor did they have to decide on how to domesticize the exercise in Quebec of the chattel mortgage or the reservation of title.

(C) Privileges:

In this respect the leading decision of *Rhode Island Locomotive Co.* v. *South Eastern Railway Co.*[19] must be mentioned. The case involved the possibility of a vendor of moveables exercising the privileges of an unpaid vendor in Quebec law as a result of contract governed by the laws of Rhode Island. Once again the court looks to the law of the contract. As no such privilege was available under such law, one could not be created by the moveable finding its way to Quebec where one exists. As judge Taschereau stated:

> "Ces lois (R.I.) doivent régler les droits et obligations des parties en cette cause, attendu que la vente des dites locomotives et leur livraison ont été faites dans les limites de cet état: *que l'article 8 de notre Code n'a pas créé sur des meubles apportés dans le Bas Canada un privilège et un recours auxquels ils n'étaient pas sujet avant d'y arriver.*"

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16. *Faubert* v. *Brown*, (1938) 76 S.C. 330.
17. *United Acceptance Corp. Ltd.* v. *Guay and Macdonald*, (1960) B.R. 827.
18. *Bank of Nova Scotia* v. *Latour*, December 19, 1977 (Provincial Court).
19. *Rhode Island Locomotive Co.* v. *South Eastern Railway Co.*, (1887) 31 L.C.U. 86.

(D) Security in Book Debts:

In the only reported decision, the recent judgment of *The New England Merchant National Bank of Boston* v. *Beacon Plastics Ltd.*[20] the court clearly dissociated the property aspect from the contractual issue as regards an assignment of a debt owed by a Quebec debtor as security for repayment of a loan concluded abroad between foreigners. While the proper law governed the contractual relations between assignor & assignee, the property transfer vis-à-vis the book debtor was not perfected until the perfection of the formalities at the *situs*.

(E) Summary:

To summarize, our courts have never had to make the distinction between the property and contract aspects of the non-possessory security interests in corporeal moveables, seeing that in all instances the law of the contract coincided with the *lex situs* at the time of the contract: however an automatic application of the law of the contract could lead to some indesirable results where the *lex situs* (6.2) and *Loi d'autonomie* (8 C.c.) are different. It would mean for example that a non-possessory pledge of moveables (other than commercial or agricultural) situated in Quebec would have to be recognized if the law of the contract so permitted, alternately one could simply choose Vermont law (which permits chattel mortgages) to govern the contract and create *ipso facto* a chattel mortgages over moveables in Quebec.

This task of distinguishing the contractual aspects of a security interest and its property aspects has been taken up by the doctrine. Johnson, along with his treatise "Conflict of laws", and Professor Paul Crépeau, the author of this report insists that the property aspects of contracts must in the final analysis be determined by the *lex situs*. Unquestionably this rigid delimitation also could lead to undesirable results which I suggest can be alleviated only partially under the existing conflict rules.

Section 2: The thesis suggested

(A) As regards security in corporeal moveables:

Where *situs* and the proper law of the contract do not coincide or where it is contemplated that the property to be secured is to be used in a jurisdiction other than the *situs* at the time of completion of the

20. *The New England Merchant National Bank of Boston* v. *Beacon Plastics Ltd.*, C.S. Montreal, no 727866, October 3, 1977 (Judge Colas).

contract, a choice of law must be made under the current method of solving conflicts[21].

While our courts never had to decide upon the matter the author of this report submitted and defended in his doctoral thesis, the proposition that under Quebec Private International Law principles, in a contract which has the effect of transfering ownership of moveables or creating real rights therein, the contractual effects of the contract will be governed by the proper law of the contract and the proprietary effects by the *lex situs*.

Applying this definition to the topic under study would require that the validity of a non-possessory security interest in a moveable, be it a conditional sales contract or a chattel mortgage depends on the law of the *situs* of the moveable, i.e. it is a question for the *statut réel mobilier "ut singuli"* and not of "contract" as our courts have held[22].

This governing *lex situs* applies exclusively to determine the validity of the non-possessory security interest. There can be no question of a "cumul" of the law of the contract and the law of the *situs* for this would mean the application of the most restrictive law. On the contrary, I suggest that a valid security interest transaction could be concluded in Quebec, between Quebec domiciliaries creating a non-possessory pledge over a moveable situated in a foreign jurisdiction which permits same, inspite of its illegality under Quebec domestic rules. For the same reasons, a contract governed by a foreign law, by which the owner of a moveable actually situated in Quebec grants a right of pledge over it would have no effect in Quebec if the thing pledged had not been delivered to the creditor or to someone appointed by the parties to hold it, although this condition might not be required by the law of the owner's domicile, or by the foreign law of the contract.

While classical characterization according to the principal object requires that the validity of the security interest be determined by *lex situs*, other laws must intervene to assure full validity: the law of the domicile of the parties must be followed to

21. See, for a statement of the problem, Jacob S. ZIEGEL, "The Recognition of Extra-Provincial Security Interests in Moveables", published in the *Meredith Memorial Lectures on Security*, in moveable property Wilson & Lafleur, Montreal, 1967, pp. 70 to 72.

22. Walter JOHNSON, *Conflict of Laws*, 2nd Ed., Wilson & Lafleur, Montreal, 1962, pp. 509 to 532. Jeffrey TALPIS, "The Law Governing the *Statut Réel* in Contracts for the Transfer of Moveables *Ut Singuli* in Quebec Private International Law", (1972) 13 *C. de D.* 305-400.

assure the capacity of the parties to the contract[23], while the law of the place of execution will determine its formal validity[24] and the proper law of the contract will determine whether the essential elements such as cause consent and licity of object are present so as to give it its *vinculum juris.*

When the moveable subject to the non-possessory security interest is removed across Provincial boundaries to the Province of Quebec, with or without the creditor's consent, it is no longer sufficient to say the *lex situs* applies to determine the validity of the security interest. Is the applicable *lex situs* that at the time of reception of possession of same by the debtor? or that at the time of a contestation? Most foreign jurists consider the potentially resulting dynamic conflict as a real problem and in connection with general theories of acquired rights, juridical situations completed vested rights they generally ask to which 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? Generally speaking the judicial decisions in Quebec ignore these dynamic conflicts upon a change of *situs* because they have characterized the validity of contractual security interests as "contractual". As a consequence whereof, the change of *situs* of the moveable to Quebec are scattered remarks however to the effect that rights acquired under a foreign law ought to be respected by the *lex fori*[25]. In my opinion dynamic conflicts is a false problem, being nothing more than an interpretation of the conflict rule. It is simply charactherization at a subsequent stage. This delimitation between successive *leges sitae* should be made by taking into account the reasons behind the choice of the connecting factor *"situs"*, its charactheristic traits: "territoriality and generality", and the predominant policies under our law.

As a consequence whereof I would suggest the following rules:

i) The law that governs the juridical condition of the moveable in futuram is the actual lex situs.

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

23. See art. 6, par. 4 C.c.

24. Art. 7 C.c.

25. See J. TALPIS, *loc. cit.*, note 22, 378 it seq.

while the actual *"statut"* being general, applies indiscriminately both to the moveable previously situated there as to the one recently introduced. The moveable will then be subject to the new *"statut"* in so far as the type of real rights the moveable may in the future be the object of, the content of these rights, and the mode of acquisition, transmission, and extinction thereof.

ii) The law that governs prior rights over the moveable is a combined competency:

a) the old *lex situs*, that at the time of the completion of the contract must govern the validity of the acquisition of a real right in the moveable. 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 acquired rights or the protection of titles for the sake of international commerce. Furthermore the old *lex situs* must be that at the time of the completion of the contract and not that at the time of reception of possession (although in practice they often coincide).

b) the exercice of the real right *jus ad rem* in the moveable governed by the actual *lex situs*.

Applying the above rules to the recognition in Quebec of the non-possessory security interest created abroad, *as between the parties* to the security transaction *where no new dealings or acts* - using these terms in the broadest sense to include both consensual and non-consensual transactions have occurred in Quebec the new and actual *situs*, I reach the following conclusions as to the state of our law:

i) The *lex situs* at the time of the conclusion of the non-possessory security interest will determine its validity and effects. Whereas *situs* at the time of contract is perhaps not the most practical solution in many instances, e.g. where the security is to be used in a jurisdiction elsewhere than where it may be situate at the time of contract, juridically it is justifiable[26]. The inapplicability of the law of the actual *situs*, that at the time of a contestation was to determine the validity of the security interest has been clearly upheld and repeatedly stated by our courts (notwithstanding the inaccurate contractual qualifications). Admittedly it is very difficult to separate the contractual and property aspects of the transaction. For example the right to foreclose will be referred to the

26. See J. TALPIS, "Search for a Choice of Law Rule to Govern the Domain of the *Statut Réel* in Contracts for the Transfer Inter-Vivos of Moveables *Ut Singuli* in Quebec Private International Law", (1973) *R.J.T.* 11 it seq.

lex situs at the conclusion of the contract, while the right to claim the difference owing after "judicial sale" will be determined by the proper law of the contract[27].

ii) The law of the *situs* of the moveable at any given time will govern the exercise of the security interest i.e. the actual *lex situs* will determine the requisite publicity if any permitting the creditor to exercise his right. Should the *situs* at the time of contestation be Quebec publicity is rarely required and if this be the case, no limitation in the exercise of the creditor's right is imposed. The intervention of the law of Quebec as the *situs* to which the secured moveable is removed will therefore be exceptional. A fine line has to be drawn between the exercise of the security in Quebec, which must be determined by Quebec law, and the effects of the security interest created abroad which will be governed by the foreign law. For example, even assuming one can easily separate the property and contractual effects of the right to repossess under a conditional sales contract created abroad Quebec rules should not apply to subject the vendor's right to repossess the moveables which have found their way to Quebec, to rules different than those which he had a legitimate right to count upon under the foreign *lex situs* or contractual law. Policy also justifies these rules. The parties to an international security transaction can easily arrange their affairs to well establish and perfect the security interest. The right they created abroad should be respected in Quebec as there is a clear policy of protecting acquired rights in our law at least inter parties. And I fully agree with the implication of Judge Duranleau in *Faubert v. Brown* that while a non-possessory security interest may be against public order on a domestic level, it is not manifestly against public order requiring the non-application of the foreign law under which it was validly created.

There is another problem to which I should like to draw your attention. Suppose the secured creditor has failed to comply with the formalities requisite under the old *lex situs* to perfect reservations of title in conditional vendors, or to create valid chattel mortgages or other security interests. How will this omission affect his rights in Quebec? The registration acts of the common law provinces usually provide that an imperfected security agreement is void as against subsequent purchasers and mortgagees creditors, and trustees in bankruptcy. Are these rules to be given extra-territorial effect or do

27. *German Savings Bank* v. *Tetreault*, (1904) 27 S.C. 447.

they only apply to dealings with the goods which occur in the jurisdiction whose registration requirements have not been complied with? No Quebec decision is directly in point.

I would suggest that recognition or non-recognition of these rights in the actual *situs* must depend upon the nature and purpose of the formality which was not perfected in the old *lex situs*. Where non-compliance with the formality had the consequence under the old *lex situs* that the security interest is not perfected, then the law of the actual *situs*, Quebec 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 the foreign jurisdiction against third persons, then the actual *situs* (Quebec) should recognize and allow the exercise of this right in Quebec, subject to any rules of the actual *situs* with respect to its exercise.

(B) Security as regards interests in incorporeal moveables:

Assignment of book debts as security for a loan may be specific e.g. a builder a contractor assigns to a bank as security for a loan the contract price payable to him upon completion of the contract, or the assignment might be general and cover all the book debts of the assignor present and future. In some cases the security interest created will be possessory i.e. the lender will have the right to exact payment from the book debtors directly. In other instances, it will be non-possessory; the assignor will continue to have the rights to receive payment and only upon default of his loan will the creditor signify the transfer upon the book debtors. Another non-possessory situation is where the assignment is perfected upon the book debtors i.e. signified, but the assignor is appointed mandatary of the assignee-lender to collect the amounts receivable. These contracts often provide that this mandate is revoked upon default of the assignor and upon simple notice to the book debtors payment is to be made directly to the creditors. It is to be noted that where book debts or accounts, present or future of a person firm, or corporation carrying on a commercial business are pledged, the execution of the contract in authentic form or the delivering of it of under private signature shall avail for all purposes in lien of giving possession. Thus in this situation possession (article 1966 C.c.) is determined by the contract between the creditor and debtor.

Valid creation of the security interest in these incorporeals, possessory or otherwise takes different forms in different countries. When can we say that this type of non-possessory security interest is created abroad? when the assignor is domiciled, residant or has a place of business outside Quebec? when the law of the contract is not the law of Quebec? by analogy to non-possessory security interests created on corporeal moveables, a *situs* is to be given to the book debt, and created abroad can only refer to the situation where the book debtor resides or is domiciled outside of Quebec. This law, the *fictitous situs* will determine the moment of transfer of ownership of the book debt vis-à-vis the book debtor. Thus where there are book debtors scattered all over the country and the assignor is domiciled in Quebec, the security interest will be validly created vis-à-vis the book debtors where the requisite formalities at their domicile have been perfected.

A recent case supports the above proposition. While the assignment of book debts as security was not created abroad (seeing that the book debtor was a Quebec residant), the fictitions *situs* rule was used and the law of the *situs* of the debt assigned (Quebec), determined the perfection of the assignment vis-à-vis the book debtor. In this case, the *New England Merchants National Bank of Boston* v. *Beacon Plastics Ltd.*[28], a Massachussetts Corporation, for the purpose of giving security to the New England Bank for the repayment of monies loaned to it, executed an assignment of book debts in favour of the Bank which contract was governed as between the parties by Massachussetts law. The assignment of book debts included book debts owing to the Massachussetts company by the Quebec domiciliary.

The court clearly distinguishes the contractual aspects of the security transaction from the property aspects:

> "These can be little doubt that the relations between the Bank and the corporation were intended to be governed by the law of Massachussetts to the extent that Massachussetts law might be applicable. There the assignment was governed by Massachussetts law as regards the intruisic validity between the parties concerned i.e. the bank and corporation; however the conditions of the assignment as it affected a Quebec Company domiciled and doing business only in Quebec and which was not a party to the agreements between the Bank and Corporation are governed by the proper law

28. *The New England Merchant National Bank of Boston* v. *Beacon Plastics Ltd.*, C.S. Montreal, no 727866, October 3, 1977 (Judge Colas).

of the debts which is its *situs*. The *situs* of the ordinary debt is the place where it can be received on the debtor resides."

The proposition is undoubtedly larsh upon creditors favours the book debtor, but he is the one that will want avalid discharge when he pays and must be protected under Quebec Policy. It certainly would be easier from the creditor's point of view to have the domicile or place of business of the assignor govern the validity of effect of the assignment[29] and the order of priorities where there an successive assignments especially where the assignor has book debtors all around the world.

CHAPTER 3

THE LAW GOVERNING THE RIGHTS OF THE CREDITOR OF THE NON-POSSESSORY SECURED INTEREST CREATED ABROAD AS AGAINST A THIRD PARTY WHO DEALS WITH THE MOVEABLE NOW IN QUEBEC AS THE PROPERTY OF THE DEBTOR

Section 1: Rights of the creditor as against a seizing ordinary unpreferred creditor of the debtor-possessor

Should the recognition of a foreign created non-possessory security interest be refused where the rights of the Quebec creditors would be prejudiced? Suppose a moveable has been pledged in a country where possession of it by the pledgee is not necessary. The moveable is brought to Quebec where it is seized by the creditors of the owner; the pledgee opposes the seizure, the seizing creditors answer that he has not possession and hence has no right in the thing under Quebec law. Which pretention is to be upheld?

Johnson considers that the Quebec creditors at the new *situs* who relied upon the possession of their debtor should not be prejudiced[30]. There is some merit to his pretention. On the one hand the secret lien has long been under judicial suspicion. There is a feeling that someone who deals with one the possession of property

29. As under the provisions of the *Special Corporate Powers Act*, R.S.Q. 1964, c. 275, Sections 24 and 26. See ZIEGEL, *loc. cit.*, note 21, 63 to 65.

30. W. JOHNSON, *op. cit.*, note 22, 532.

should not be made to suffer when the secured creditor by permitting the debtor to remain in control with all the indications of ownership has contributed to the possibility of the third party's loss. Furthermore, if third persons were always to suffer the loss when dealing with the debtor, legitimate business would be adversely affected because of a natural hesitation to transact business on the faith of possession.

On the other hand, there are the acquired rights of the secured creditor; the truth of the matter is that this situation is one where there is no new consensual or non-consensual transaction in the actual *situs* involving the goods secured. Under the above mentioned rules of dynamic conflicts, there should not be any application of the laws of the actual *situs*. As such, the ordinary unpreferred creditor cannot oppose the security interest created abroad. There is no case in point. The above mentioned decisions dealt solely with the relation between the original parties to the security transaction.

Policy favours this solution of preferring the secured creditor with his secret lien over the seizing ordinary creditor. In the first place it is questionable whether visual possession is so important a foundation of credit (which is the basis of affording protection to creditors at the *situs*). In the Province of Quebec, at least an equal basis of credit is a man's financial reputation, guaranties given by friends, associates, and/or collateral garanties. It is therefore not accurate to maintain that business would suffer if ordinary creditors were prejudiced at the expense of the foreign secured creditor. In the second place, Quebec domestic policy favours this solution seeing that we protect acquired rights or security of titles against ordinary creditors unless there is a competing innocent purchaser in good faith. In virtue of articles 1487, 773 of the Civil Code, the sale of something not belonging to an owner is null; he is not be deprived of his title without his free will and consent. Furthermore this policy protecting the owner's title, i.e. his acquired right is clearly reflected in the rules relating to the transfer of all moveables. For example in the case of a sale of a corporeal moveable, notwithstanding the failure to deliver the object of the contract, ownership is acquired by the buyer by consent alone (1025 C.c.). This is a protection of his acquired right which affects not only the vendor, but the creditors of the vendor as well (1027 C.c.). Viewed from another angle, the vendor who has reserved title and passed possession to the buyer has an acquired right of ownership in virtue of article 1027 C.c. (in reverse) available against the creditors of the buyer. In the former case the creditors of the vendor, in the latter,

the creditors of the buyer, are deceived by the possession of the thing in the hands of their debtor. The presumption of article 2268 C.c. is of no help. It does no more than shift the burden to prove title upon anyone claiming that the possessor is not really the owner of the moveable. Thus barring acquisite prescription, the acquired right persists.

In conclusion projecting these domestic policies on the international plane the Quebec courts should recognize the non-possessory security interest created abroad against a competing ordinary unpreferred creditor. No new act with respect to the goods takes place by a simple attachment or seizure, and policy requires that even on the international plane, we protect acquired rights except when they clash with the rights of an innocent purchaser.

Should the moveable be subject to more than one validly created security interest abroad, their ranking in Quebec must be made by Quebec law. This is but an instance of the exercise of a real right governed by the actual *lex situs* rather than a question of procedure as Johnson suggests[31]. No distinction between the *Statut* real and procedure is really necessary where proceedings are instigated against the moveable in Quebec. In other words to a certain degree we domesticize the foreign security interest in so far as its exercise in Quebec. In addition to determining the ranking of the interests, we would also apply the attributes for similar rights in Quebec by analogy e.g. the modalities of *"le droit de suite"*, without derogation of the effects of the foreign created security interest as established by that law. The line of effects and exercise is obviously thin.

Section 2: Rights of the previously secured creditor obtaining a new security interest on the moveable removed to Quebec in accordance with Quebec law.

A possessory or non-possessory security interest can be obtained by both a consensual or non-consensual act when the moveable enters Quebec territory. The basis for this view point, as above mentioned is that the law that governs the juridical condition of the moveable in *futuram* is the actual *lex situs*. From the movement the moveable changes *situs* to Quebec, our law will

31. *Id.*, 526.

determine which new security interest may be created and the mode of creation. The possessor may for example pledge the moveable giving possession to his Quebec creditor, obtain a Bank security, an agricultural or commercial pledge, or hypothecate it under the Special Corporation Powers Act.

What effect does the new real right have vis-à-vis the previously secured creditor? Does this mean that from the moment a new security interest is created in Quebec, the foreign created non-possessory security interest is rendered ineffective? Is the foreign security interest of which there can be no publicity in Quebec eliminated by the creation of a pledge in Quebec? Can a person bring a moveable property to Quebec subject to a foreign chattel mortgage and obtain a new pledge in Quebec?

There are no judicial decisions discussing the problem, but Johnson seems to imply that mortgages created abroad over moveables brought into Quebec would have to be recognized notwithstanding the creation of new real rights in Quebec, though our law would govern their ranking as the order of ranking is a question of procedure. As I have stated in the preceding paragraphs our law applies because it is a question of the exercise of a real rights.

From a policy point of view, it would seem to me that the foreign security interest should be respected if valid by the *lex situs* at the time of the transaction. However the ranking of the interest is a more delicate matter.

Bearing in mind the two conflicting policies protection of titles and security in transactions, it would seem equitable and logical to class or rank the creditor having a non-possessory security interest created abroad after all the creditors having privileged rights listed in articles 1994 to 1994 c) of the Civil Code. To the objection that this enables the parties to establish new real moveable securities other than those listed in the Civil Code, I would argue that the legislature has already added to the list by granting the creditor a floating hypothec over moveables a right of preference ranking after those indicated in the Civil Code under article 24 of the Special Corporate Powers Act. Furthermore, as non-possessory security interests are real rights opposable to all, i.e. valid by their nature *ergo omnes,* Quebec Private International Law has already added to its trust of real securities on moveables.

Section 3: Rights of a creditor having a non-possessory security interest created abroad as against a purchaser in good faith of the moveables removed to Quebec

A vast number of cases have arisen in North America on the occasion of a transfer by a non-owner who is either a conditional buyer or a mortgager who has removed an object of which he has possession but not ownership (or full ownership) to a second jurisdiction i.e. the actual *situs* and has there dealt with it.

To illustrate:

Title is validly reserved in country X and the moveable is subsequently removed to Quebec where it is then sold to an innocent purchaser (it might first be sold to a dealer and then to a Quebec consumer). The validity of the transfer or actually the effect of the sale a non-domino is determined by the *statut réel,* the *lex situs* at the time of the transfer i.e. Quebec. This law would be applicable because of the rule above mentioned that the law that governs the juridical condition of the moveable in *futuram* must be the *lex situs* at the time of the new dealing. Depending on the nature of the transaction in Quebec, its effect might be either to divest the foreign owner of his rights completely i.e. eleminate the non-possessory security interest, condition his right of ownership to reimbursing the innocent purchaser the price he paid, or permit revendication unconditionally, barring acquisitive prescription (see articles 1487, 1488, 1489, 1490, 2268 C.c.)

Similarly, consider the effect of a chattel mortgage validity created over a moveable in country X. The possessor thereof removes the moveable to Quebec, probably contrary to the terms of his contract, and sells it to a third person directly or to a dealer in similar articles who passes it on to a consumer ignorant of the chattel mortgage. Once the moveable reaches Quebec the actual *lex situs*, our law, governs future dealings, and the situation is analagous to a sale by a non-owner; the possessor is owner but someone has a real right on his moveable. The innocent purchaser will be protected to the same extent as the person purchasing from conditional buyer under a conditional sale contract. Authority for applying the same effects to a sale by a possessor under a conditional sales contract and the sale by the possessor-owner whose property is encumbered with a secret charge can be found in article 1966a which states "articles 1488, 1489 and 2268 C.c. apply to the contract of pledge".

Policy also dictates this solution of protecting the innocent purchase at the expense of the creditor having a non-possessory security interest created abroad. We have seen that we protect the security of titles where there is no innocent purchaser; however in the presence of an innocent purchaser the security of transaction becomes the overriding policy (see articles 1487 it seq. 2268, 1027.2 C.c.).

In so far as transfers a non-domino to the assigned book debts the *situs* of the debt assigned must determine the effects to a purchaser in good faith.

PART IV

THE PROPOSALS OF THE COMMISSIONERS FOR THE REVISION OF THE CIVIL CODE OF THE PROVINCE OF QUEBEC

Enactment of the rules proposed by the Commission for the Revision of the Civil Code regarding security on moveable property would eliminate many of the theoretical and practical difficulties that the positive law presents.

Firstly, the conflict rule of the *Statut réel* is clarified, article 33 proposing that the *lex situs* be the conflict rule for moveables considered *ut singuli*; the law of the owner's domicile is to be restricted as it was intended by an original codifiers to the succession of moveables.

Secondly the practical difficulties of recognition of the validity of the interest where the law of the contract and that of the *situs* do not coincide will have been reduced substantially. While article 22 confirms the principe whereby the parties are free to select the law applicable to juridical acts of an international character and theoretically continuing the problems when the law chosen differs from the *situs* of the moveable - in the absence of express designation, the judge must apply the law of the state, which considering the nature of the act & the surrounders circumstances is most appropriate. It is to be assumed that for the contractual aspects of a security transaction our courts would likewise refer to law of the *situs*, eliminating thereby the law of the contract and the *lex situs* at the moment of creation do not coincide, in virtue of articles 40 and 41 there would be less chance of invalidation. Article 40 provides that a hypothec on moveable property not situated in Quebec may be

created and published according to the law of Quebec, so that the fact that Quebec be the law of the contract should not invalidate the security created at a foreign *situs*. While the recognition of the security in the foreign *situs* is a decision for the courts at the actual *situs*, it at least indicates a desire to avoid conflicts with respect to the validity of the security interest. For the same reasons, in accordance with article 41, "A security created outside Quebec on moveable property may be published in Quebec, even when the property encumbered is not situated there; such publication has no effect, however unless the property is brought into the province within 30 days of such publication."

Thirdly, required publicity in Quebec of the security interest created in Quebec or abroad (by publication) will eliminate many of the difficulties surrounding secret liens. Proposed articles 42 and 43 based on article 9-103(1) and 9-103(3) of the American Uniform Commercial Code suggest specific rules on publication of the security interest within and without Quebec. It is to be noted that paragraph 2 of article 42 maintains the validity of secret liens and thereby protects the security of titles as a rule in Quebec for 30 days as long as it is perfected outside Quebec. Failing publication in Quebec after the 30 days, the security would be extinguished, but until that time Quebec creditors are once more faced with hidden liens to be opposed to them. The article provides:

> "A security perfected outside Quebec, on moveable property which is subsequently brought into Quebec, is deemed to have been published in Quebec.
>
> Such a security must, however, be published in Quebec either before the day on which publication ceases according to the law of the place where the security was perfected, or before the expiry of thirty days following the day on which the property enters the province, whichever occurs first."

Finally, the proposed rule of publication of the security interest on moveable property at the domicile of the grantor rather than at the *situs* of the moveable is encouraging.

The article provides:

> "The following must be published at the place of the domicile of the grantor:
>
> 1. A security on incorporeal moveable property, except property the situation of which is fixed in Quebec by law, and property encumbered by a security which must be published, according to Quebec law, through giving possession to the creditor; and

2. a security on corporeal moveable property generally used in more than one State, and consisting of equipment used by its owner or leased to others.

If the grantor changes his domicile, the security must, however, be published in the place of his new domicile, either before the date on which publication ceases at the place of his former domicile, or before the expiry of thirty days from the date of the change of domicile, whichever occurs first.

Such security must, however, be published in Quebec if the law of the place where the grantor is domiciled makes no provision for publication of security on moveable property by registration."