

# ASSIGNMENT OF BOOK DEBTS: PROTECTION OF THIRD PARTIES IN QUEBEC

LAURIE MILLER\*

LAZAR SARNA†

Montreal

---

## Introduction

While the new Draft Quebec Civil Code may be said to contain important ideas for improving the state of the law in some areas, there are unfortunately other areas which remain relatively untouched by the sweeping legislative proposals. One such area is the grey but commercially vital law of assignment of book debts: articles 424-437<sup>1</sup>

---

\* Laurie Miller, B.C.L., LL.B., of the Bar of the Province of Québec, Montréal.

† Lazar Sarna, B.C.L., LL.M. of the Bar of the Province of Québec, Montréal.

<sup>1</sup> Report on the Quebec Civil Code (1978). Vol. I, pp. 398 *et seq.* Art. 424: "A sale of a debt includes all the accessories such as interest accrued and security."

425: "A salary or support may not constitute the object of a sale, unless it is exigible."

426: "The vendor of a debt guarantees that the debt exists and is owed him, even if the sale is made without warranty, unless the purchaser buys at his risk and peril or was aware of the uncertain nature of the debt."

427: "When the vendor guarantees the solvency of the debtor by a simple clause of warranty, the warranty applies only to the solvency at the time of the sale and to the extent of the price received."

428: "Sale of all or part of a debt may not render the debtor's obligations more onerous."

429: "The sale of a debt secured by immovable property is governed by Article 391."

430: "Subject to the rules governing publication of rights, a sale has no effect with regard to third parties and to the debtor unless the debtor has received a copy of the deed of sale, or evidence of the sale which can be set up against the vendor, or unless he has agreed to the sale."

431: "If the debtor, notwithstanding his diligence, cannot be found in Québec, the sale has effect with regard to third parties and to the debtor upon publication of a single notice of sale in accordance with Article 139 of the Code of Civil Procedure."

432: "Subject to the rules governing publication of rights, the sale of a universality of debts, present or future, has effect as regards third parties upon the deposit in the central register of moveable rights of a copy of the deed of sale, or any evidence of the sale which can be set up against the vendor."

However, the sale has no effect with regard to the debtor unless the requirements of Articles 430 or 431 have been complied with."

433: "Notwithstanding Articles 430, 431 and 432, payment made in good faith by the debtor or by a surety to the ostensible creditor is valid."

434: "When a copy of the deed of sale or of any evidence of the sale which may be set up against a vendor is delivered only upon service of the action brought against the debtor, no legal costs may be charged against the debtor if he pays within the delays for appearance."

435: "The sale has no effect against a surety unless the requirements of Articles 430, 431 and 432 have been met with regard to him."

436: "As long as the sale has no effect with regard to the debtor, he benefits from any payment made to the vendor or from any other mode of extinction of the obligation."

437: "Articles 424 to 436 apply to all transfers of debts by gratuitous title."

of Book V of the Draft Civil Code dealing with the "Sale of Debts" repeat in substance articles 1570-1578 of the present Civil Code (C.C.). The repetition is an unfortunate one since the law of assignment of debts is, in many respects replete with unresolved problems, especially insofar as the rights of third parties are concerned.

Generally, the assignment of book debts is a contract involving three parties; two of them active and one passive.<sup>2</sup> The active participants are the original creditor, known as the "assignor" who transfers the claim to a new creditor, the "assignee". The passive member of the trio, the debtor or body of debtors, is or are obligated to pay the debt to the assignee once given due notification of the assignment. All the basic contractual requirements of the Civil Code must be met in order to effect an assignment; namely: capable parties, their consent validly given, a legal cause or consideration and an object. Insofar as consent is concerned it must be manifested by a writing unless the object is a bill of exchange.<sup>3</sup>

Any right of action in general may be assigned. The debt may be present or future, exigible or executory, conditional or subject to a term, as long as it is licit and not purely personal to the debtor; for example, an alimentary debt cannot be assigned.

The principal effect of the assignment is to transfer the assignor's title to the "assignee". In order for this transfer to be valid and

---

<sup>2</sup> Art. 1571d, added by S.Q., 1950-51, c. 42: "The sale of the whole, of a portion or of a particular category of debts or book accounts, present or future, of a person, firm or corporation carrying on a commercial business, may be registered in the office of each registration division where the vendor has a place of business." (Am., S.Q., 1968, c. 81 "Such registration shall avail, for all purposes, in lieu of the signification and delivery required by article 1571, except as regards debts or book accounts paid or otherwise discharged before the publication of a notice of such registration, in French in a daily newspaper published in that language in the judicial district where the vendor has his principal place of business in the Province of Quebec and in English in a daily newspaper published in that language in the same district; if there is no daily newspaper published in the French or the English language, as the case may be, in the said district, the publication may be made in a daily newspaper published in the French or the English language, as the case may be, in the locality nearest to such district where such a newspaper is published.")

Recent articles which have considered the assignment of book debts include the following: P.P. Côté, *Aspects généraux du financement de l'entreprise*, [1977] C.P. du N. 241; J.W. Croine, *Corporate Financing*, Part II, in S.A. Martin, *Readings in Canadian Business Finance* (1969), p. 123; Y. Lerner, *Corporate Financing I*, Isaac Pitblado Lectures on Continuing Legal Education, Manitoba Bar Association (1975), pp. 49-63; L. Payette, *Nantissement de comptes à recevoir et de créances commerciales* (1968-69), 71 R. du N. 399; L. Sarna, *Assignment of Book Accounts, Assignor's Warranties and Standing to Sue* (1978), 46 Can. Bar Rev. 626; D.F. Sullivan, *Current Methods of Corporate Financing*, Corporate Management Tax Conference, Canadian Association of Tax Studies (1974), p. 1.

<sup>3</sup> Governed by the Bills of Exchange Act, R.S.C., 1970, c. B-5, as am.

therefore binding upon all the parties, certain requirements must be met.

a) *Between assignor and assignee.*

Article 1570 C.C. underlines the requirement of a writing between the seller and buyer of the claim. This writing may be under private signature or by authentic deed. If authentic, the title is perfected between these parties upon completion of the deed, if under private signature, delivery is necessary in order to perfect the title.

b) *Between the assignee and third parties.*

Article 1571 C.C. states in part that the assignee's title is not opposable against third parties until either signification of the act of sale and delivery of a copy of it to the debtor or acceptance by the debtor. Third parties include anyone who may be affected by the transaction taking place between the assignor and the assignee. This may include among others the debtor, a subsequent acquirer of the debt, or a seizing creditor of the assignor. However with regard to the general sale of book debts, article 1571d C.C. contains a special rule. The signification and service of article 1571 C.C. may be replaced by registration of the act of sale in the office of each registration division where the vendor has a place of business. Once registered, the sale is theoretically opposable to third parties. Should the debtor pay his original creditor after registration, he will not be obliged to pay a second time to the assignee unless newspaper publication of a notice of registration has been effected.

The Draft Civil Code does seek to provide a degree of protection against double payment for the benefit of the debtor and his guarantor where they make *bona fide* payment to the "ostensible creditor" notwithstanding due assignment. Nevertheless the following discussion highlights a wide range of practices which affect third parties generally and which remain untouched by the protective measures envisaged by the Draft Code.

### *I. Protection of Third Parties.*

The most vital form of protection for third parties in the face of a general assignment of book debts is publicity of the act of assignment itself. In Quebec, as we have seen, this publicity currently may take the form of personal service, registration, or newspaper publication respecting the debtor; and these modalities are said not only to make aware all interested parties of the existence of the assignment, but also to determine such important rules as perfection of the transfer, opposability of title to the debtor and subsequent assignees, standing to sue and the right to discharge the debt. Another form of protection

lies in the requirement that the assignee be delivered of title especially for the purpose of pledge;<sup>4</sup> delivery has the limited effect of publicizing the transfer, but constitutes a more tangible means of determining who is the actual holder of title.<sup>5</sup> Finally, another form of protection is the application of the notion of renunciation of rights to assigned debts, especially with respect to competing assignees.

Seeing the rather vast area covered by the question of protection, we intend summarily to deal with the mechanisms mentioned above with regard to the assigned debtor, subsequent assignees, trustees in bankruptcy and creditors of the assignor.

## II. *Assigned Debtor as a Third Party.*

### a) *Protection against double payment.*

The overriding concern of the legislator respecting the protection of the assigned debtor as a third party has been to diminish or eliminate the possibility of double payment or misdirected payment to the parties to the assignment.<sup>6</sup> Accordingly, while the general transfer of debts is perfected between the assignor and assignee by completion of authentic title or delivery of title under private signature, the assigned debtor as a third party is not bound to make payment to the assignee unless and until he has been served with a copy or extract of the assignment or has accepted it.<sup>7</sup> Where for example an assignee insurance company purports to advise a debtor of the assignment of his debt by sending him two statements of claim and an unsigned copy of the assignment, the court will hold that a valid assignment has not taken place and that the original creditor still has standing to sue on the debt.<sup>8</sup> Prior to signification, the assigned debtor may non-suit the assignee who purports to sue as owner of the debt, and may obtain a full discharge from the assignor.<sup>9</sup>

### b) *Formalities of publicity.*

In practice, the assigned debtor who is personally served with a deed of assignment is of course more fully cognizant of the fact of an assignment than a debtor who has been "served" by way of registra-

<sup>4</sup> Although the execution of an authentic document substitutes for delivery: arts. 1580, 1966 C.C.

<sup>5</sup> Although the physical delivery of title documents may not constitute actual delivery of the incorporeal right, but see R. Comtois, *Clauses de transport de loyer* (1962). 10 R. du N. 489.

<sup>6</sup> *Barrie Carriage Company Ltd v. Watt* (1921), 59 C.S. 440, at p. 443.

<sup>7</sup> Arts. 1570, 1571 C.C.; *Lamy v. Rouleau*, [1927] S.C.R. 288, at p. 294.

<sup>8</sup> *Roussel Mintz v. Richer*, C.P., J.E. 79-947, Sept. 24th, 1979.

<sup>9</sup> *Sherwin-Williams Co. v. Boiler Inspection & Ins.*, [1950] S.C.R. 187; art. 1572 C.C.

tion and publication of notice of registration of the assignment.<sup>10</sup> In order to protect those debtors who have simply failed to consult the registry office, the Code currently provides that payment or other mode of discharge made to the assignor following registration but prior to publication acts as due acquittance of the debt.<sup>11</sup> Ostensibly, the legislative premise is that debtors are more likely to take notice of a newspaper publication than an entry at a registry office, even if registration is effected in the district where the debts arose.<sup>12</sup> It should be noted that if after the registration of an assignment the debtor moves to another registration division, the assignee must reregister in this new division. Failure to do so will mean the rejection of the assignee's action.<sup>13</sup>

No doubt a balance has been struck between the necessity of personally informing a category of debtors and the need to permit the business community to effect wholesale assignments without complication or excessive expense. The outcome of the balance is to impose upon the assigned debtor the burden of making himself aware of published notices with the attendant penalty of a possible double payment if he fails to spot the notice.

Whatever the virtue of newspaper publication as a realistic substitute for personal service, the legislator has seen fit to permit the substitution of personal service by registration where the assignment deals with the whole, portion or category of debts or book accounts.<sup>14</sup> Consequently, the debtor if he has not accepted the assignment, may plead compensation against the assignee respecting debts due by the assignor prior to publication<sup>15</sup> and possibly raise all other grounds of extinction of debt mentioned in article 1138 C.C.<sup>16</sup> occurring prior to publication.

### c) *Debtors under bills of exchange.*

One might however think there is at least one category of debtor who should not be coerced into accepting a burden of searching registry office entries and newspaper notices prior to making pay-

---

<sup>10</sup> Art. 1571d C.C.

<sup>11</sup> As opposed to the Special Corporate Powers Act, R.S.Q., 1964, c. 275, ss. 22-26, now L.R.Q., 1977, c. P-16, requiring *both* registration and publication as a precondition to opposability.

<sup>12</sup> *In Re Immeubles Westgate Inc.*, [1976] C.S. 893; but see *In re Pomerleau Sand and Gravel Co Ltd*, [1976] C.S. 1309, at p. 1311 regarding registration at "la place d'affaires qui donne naissance à la créance cédée".

<sup>13</sup> *Comcap Factors Inc. c. Faucher & Fils, Ltée*, J.E. 79-680.

<sup>14</sup> See also art. 1966 C.C. respecting pledge.

<sup>15</sup> Art. 1192 C.C., but subject to art. 1196 C.C.

<sup>16</sup> *Laing v. Kern*, [1960] B.R. 571, at p. 575.

ment, namely the drawer or last endorser upon a bill of exchange. The Bill of Exchange Act sets out an elaborate scheme of rights and obligations flowing from delivery and negotiation which determines the liability of the parties from the bill itself and no other contract. The Act itself expressly denies the notion that a bill of exchange operates as an assignment of funds. The courts have nevertheless held that an assignee may sue an endorser or drawer as the assigned debtor; if the assignee alleges possession of the bill and the execution of an assignment by a holder, without the necessity of the holder's endorsement. The possibility of double payment by a drawer or endorser is however not increased by the extension of the civil rules of assignment to bills of exchange; a drawer or endorser is not obliged to make payment to any claimant unless the negotiable instrument is presented or produced upon suit. Payment to a holder by the drawer-debtor will discharge the bill if the holder has in his possession the negotiable instrument; the drawer cannot be simultaneously liable to an alleged assignee of the holder since the assignee does not have delivery or possession of the instrument, thereby causing a defect in the assignment.

The distinction between a holder and an assignee of a bill was recently the subject of review by the Supreme Court in *Aldercrest Developments Ltd v. Hamilton Co-axial*.<sup>17</sup> In this case, A signed a demand note payable to the order of B. The cause for the note was a debt owed by A to B. Without endorsing the note, B assigned it to C in order to guarantee a debt owed by B to C. B subsequently forgave A's debt and later went bankrupt. C then sued A upon the note. Since the bill was payable "to order" and B was not an endorser, the Supreme Court held that A could not be a holder of the note and was therefore only an assignee. Accordingly, C was found to have no more rights than B, the assignor; since B had forgiven A's debt, there was no consideration for the note and the defense of failure of consideration was opposable to C.<sup>18</sup>

#### d) *Hypothecary debtors.*

It must be added that where privileges or hypothecs are the objects of the assignment,<sup>19</sup> the formalities of article 2127 C.C. must be complied with, including personal but apparently not published service upon the debtor of a duplicate of the certificate of registration

<sup>17</sup> [1974] R.C.S. 793.

<sup>18</sup> For a more recent discussion of the *Aldercrest* case see *Banque Royale du Canada v. Lyonnais*, J.E. 79-361.

<sup>19</sup> That is, if we equate "extinct" (s'éteint) with "discharged" (acquittés) in art. 1571d C.C.; *Taylor v. Mongeau et al.* (1941), 79 C.S. 148, at p. 150.

of the real right.<sup>20</sup> One would readily assume that failure to conform to these formalities especially registration of the assignment would render the assignment inopposable to the debtor. After all, an hypothecary debtor might be led as a matter of precaution to consult the registry office entries prior to seeking a discharge of the debt and radiation of the encumbrance, and therein have the advantage of discovering the registration of an assignment. The courts however have seemingly denied the hypothecary debtor this protection of inopposability by ruling in *Banque Canadienne Nationale v. Lachance*<sup>21</sup> that such debtor who has received simple service of the transfer cannot invoke the failure to register the transfer and serve the registration certificate against the assignee when the latter seeks payment. The Court of Appeal in the *Lachance* decision in fact recognized that the assignee who had not registered his transfer was not capable of filing a *mainlevée* or acquittance of the hypothec even if he were paid.<sup>22</sup> The practical problems arising from the decision are evident. When we further consider that registration of an assignment of hypothec is necessary to make it opposable to another assignee of the same right, one is led to question the validity of requiring the debtor to pay to an unregistered assignee.<sup>23</sup> Even where registrable rights are concerned, the courts have unfortunately placed all debtors on the same footing by permitting the assignee to employ the technique of registration of the assignment (but not necessarily as an entry on the Index of Immoveables) and newspaper publication.

e) *Standing to sue.*

Aside from the extraordinary circumstances and rule resulting from the *Lachance* case, the courts have sought to avoid forcing the debtor to make payment to a party who is not capable of providing a discharge. The debtor may accordingly non-suit plaintiff-assignor, who has consented to an assignment of the debt as collateral security, if the assignee has not been impleaded as *mise-en-cause* or otherwise consented to be bound by the terms of the judgment as regards due payment to plaintiff. This rule is not applicable where the assignment entails an absolute and definitive alienation without further interest in the claim by the assignor, who would then be unable to act as plaintiff to enforce the claim.<sup>24</sup>

<sup>20</sup> *Sous-Min. de Revenu v. J.A.D. Inc. et al.*, [1976] C.S. 1425, at p. 1427; *Lalonde v. Garand* (1892), 2 C.S. 339; *Jankauskas v. Société Nationale de Fiducie et al.*, [1963] R.L. 146; *Barrie Carriage Company Ltd v. Watt* (1921), 59 C.S. 440, at p. 443.

<sup>21</sup> (1933), 54 B.R. 344, at pp. 347-348.

<sup>22</sup> See also, *Banque Canadienne Nationale v. Paquet*, J.E. 78-796.

<sup>23</sup> See generally, Marler, *The Law of Real Property* (1932), No. 820.

<sup>24</sup> *Place Quebec Inc. v. Desmarais et al.*, [1975] C.A. 910 citing *Sirois v. Hovington*, [1969] B.R. 97; see *Stone Electric Inc. v. Community Development Ltd et*

f) *Payment to subsequent assignees.*

Finally, mention may be made of the protection accorded to the debtor vis-à-vis assignees subsequent to the first assignee. It may occur that the debtor is faced with conflicting and simultaneous claims by the first and subsequent assignees or assignee and trustee. The debtor who is sued by one assignee is, of course, best advised to implead the competing assignee in order to have the court determine the rightful creditor. The more serious problem arises where the debtor has made payment to an assignee and is subsequently met with a demand for duplicate payment by a subsequent assignee. In the common law jurisdictions, equity dictates that payment by the debtor to the assignee who notified him first discharges the debt notwithstanding the priority of execution and registration of assignment of the unpaid assignor.<sup>25</sup> Under Quebec law, the debtor must determine for himself which of the competing assignees has fulfilled all formalities first, namely registration under article 1571d C.C., or registration and service under article 2127 C.C. or registration and publication under the Special Corporate Powers Act. Since there is no operative rule of equity in this province, and since article 1145 C.C. cannot be used to claim a discharge, the debtor cannot be protected against the possibility of double payment simply by paying the first assignee who notifies him, and not the first assignee who has conformed to all formalities.<sup>26</sup>

### III. *The Subsequent Assignee as a Third Party.*

The problem facing the subsequent assignee may be posed as follows: will first preference of payment be given to a purchaser for value without notice or knowledge that the debts purchased have previously been assigned or, what protection is available to an assignee who later discovers the assigned debts have been previously transferred to another party? We have already touched on the issue of conflicting assignees with respect to payment by and discharge of the debtor. It will be helpful to elaborate on the common law rule in this regard before embarking on the civilian approach.

---

*al.*, [1972] C.S. 397 and jurisprudence therein cited; *Lemaire v. Tourville*, [1952] C.S. 221; but see the invocation of mandate in *Juneau v. Gingras* (1935), 39 R.P. 239; more recently *Desrosiers et Frères Inc. v. Thibault*, J.E. 79-739.

<sup>25</sup> *Bank of Montreal v. Union Gas Co. of Canada Limited* (1976), 7 D.L.R. (3d) 25, at p. 30; *Snyder's Ltd v. Furniture Finance Corporation Ltd* (1930), 66 O.L.R. 79 (C.A.); *Dearle v. Hall* (1823), 3 Russ. 1; *Re Maritime Radio Corp Ltd*, [1927] 2 D.L.R. 450, at p. 457; *Pettit and Johnston v. Foster Wheeler Ltd*, [1950] 2 D.L.R. 43.

<sup>26</sup> *I.e.*, *Banque Canadienne Nationale v. Paquet*, *supra*, footnote 22.

a) *Equity and statutory rules in common law jurisdictions.*

The rule of equity set out in the classic decision of *Dearle v. Hall*<sup>27</sup> provides that the subsequent assignee who first gives notice to the debtor is entitled to preferred payment as against the first assignee, even if the latter registered his assignment first. On the other hand, the subsequent assignee who is aware of the previous assignment cannot purport to acquire a superior equitable title in virtue of his prior notice to the debtor, although registration of the first assignment does not act as constructive notice to the subsequent assignee.<sup>28</sup> Mention must also be made of the statutory rule contained in most provincial statutes regulating assignments of book debts which prescribes registration as necessary to prevent the assignment from being held void as against a creditor and subsequent purchaser who claims from the assignor in good faith, for valuable consideration and without notice, and whose own assignment has been registered or is valid without registration.<sup>29</sup>

Common law jurisdictions, by combination of statute and equitable principles ensure the subsequent assignee some degree of protection by publicizing previous assignments through registration, and by awarding to the more diligent of conflicting assignees the right to collect from the debtor upon giving prior notice. Needless to say, the assignee of a book debt which is the object of a previously executed floating charge may obtain payment without regard to the previous charge as long as it has not crystallized.<sup>30</sup>

b) *Purchaser for value without notice in Quebec.*

In Quebec however, the rules protecting the subsequent assignee follow a different course. Generally, article 1027 C.C. sanctions the title of the subsequent purchaser of moveables provided he has actual possession and is in good faith. Using the terms of article 1570 and following C.C., a subsequent assignee may obtain preferred treatment as against the anterior assignee by being the first to serve the debtor<sup>31</sup> or to register under article 1571d C.C., or the first to register and furnish a certificate or registration to the debtor under article 2127

---

<sup>27</sup> *Supra*, footnote 25.

<sup>28</sup> See Ziegel, *Legal Problems of Wholesale Financing of Durable Goods in Canada* (1963), 41 Can. Bar Rev. 54, at p. 66 citing *Snyder's Ltd v. Furniture Finance Corp. Ltd.*, *supra*, footnote 25; *Canadian Bank of Commerce v. Memor.* [1925] S.C.R. 302, at p. 311 equating lack of notice with good faith.

<sup>29</sup> For a modern discussion of this topic, see D.W. McLauchlan, *Priorities-Equitable Tracing Rights and Assignments of Book Debts* (1980), 96 L.Q. Rev. 90.

<sup>30</sup> *Great Lake Petroleum Co. v. Border Cities Oil Ltd.*, [1934] 2 D.L.R. 743, at p. 745.

<sup>31</sup> Art. 1571 C.C.

C.C. if the matter concerns an hypothecary claim, or to register and publish under section 26 of the Special Corporate Powers Act if the assignment is made under a trust deed.<sup>32</sup> Knowledge or notice by the subsequent assignee of a previous unregistered assignment will not prejudice the preferential treatment of the subsequent purchaser as long as he has given value and has not committed a fraud on the creditors of the assignor.<sup>33</sup>

We may conclude that under the civil law, the formalities of publicity, and not rules of equity, take precedence in protecting the title of subsequent purchasers. General assignees of book accounts face the burden of searching registry office entries in the office of each registration division where the vendor has a place of business or where the place of business coincides with the place where the debt arose.<sup>34</sup> This burden is however insignificant in light of the certainty of secure title where the necessary formalities have been fulfilled.

It may be furthermore added that the subsequent assignee, otherwise last to comply with the formalities outlined, may avail himself of the renunciation to priority by the first assignee and exercise his full rights against the debtor.<sup>35</sup>

#### IV. *Trustee in Bankruptcy of the Assignor as a Third Party.*

##### a) *Alignment of article 1571 C.C. and section 72 of the Bankruptcy Act.*

The trustee in bankruptcy has traditionally been regarded as having a dual status: the statutory assignee of the bankrupt, having no greater property rights against third parties than the bankrupt;<sup>36</sup> and at the same time, a representative of the creditors to the bankruptcy capable of avoiding transaction. With respect to assignments entered into between the bankrupt-assignor and assignee prior to the bankruptcy, the trustee has historically been considered a "third party" in virtue of article 1571 C.C. prior to the entry into force of the Ban-

<sup>32</sup> *Supra*, footnote 11; *Papineau v. Guay* (1934), 56 B.R. 435.

<sup>33</sup> Art. 2085 C.C.: *Lalonde v. Garand*, *supra*, footnote 20, at p. 340; *Leland v. Imperial Insurance Office* (1939), 46 R.L. 217, at p. 220, assuming that the debtor did not accept the first assignment.

<sup>34</sup> *In re Pomerleau*, *supra*, footnote 12, *Jankauskas v. Société Nationale de Fiducie et al.*, *supra*, footnote 20, decided prior to the amendment of art. 1571d C.C.

<sup>35</sup> *Calor Ltd v. Kwiat et al.*, [1975] C.A. 858: renunciation must be express; but see *C.I.B.C. v. General Factors Limited* (1969), 12 C.B.R. n.s. 130; *Canada Cold Storage Co. Ltd v. Banque Provinciale du Canada*, [1971] C.S. 859, at pp. 860-861.

<sup>36</sup> Bankruptcy Act, R.S.C., 1970, c. B-3, s. 50(5); *Associates Finance Ltd v. Petropoulos* (1973), 18 C.B.R. n.s. 113, at p. 116.

krupcty Act, and is still considered as such.<sup>37</sup> In order to further confirm and protect the position of the trustee as a third party, section 72 of the Act provides that unpaid assignments made prior to the effective date of bankruptcy are not opposable (are void) to the trustee unless they have been duly registered according to the laws of the province where they were made. The combined effect of articles 1571 C.C. and section 72 of the Act is to prevent an assignee from receiving payment from the assigned debtors if he has failed prior to the bankruptcy to register the general assignment of book accounts under article 1571d C.C. or register and publish the assignment under a trust deed under section 26 of the Special Corporate Powers Act.<sup>38</sup>

b) *Other lines of protection.*

The trustee in bankruptcy has several lines of attack in attempting to set aside a purported assignment. He may, of course, seek to nullify the assignment purely on the grounds of section 73 of the Act, namely that the deed constitutes a fraudulent preference.<sup>39</sup> In this respect, the courts have been divided on the basis of fact as to whether transfers of funds by banks from the current to the loan account of the bankrupt within three months prior to the bankruptcy constitutes a "payment" at all,<sup>40</sup> or simply a book-keeping entry.<sup>41</sup>

Another line of attack against an assignment is the argument or renunciation by the assignee of his right by either the act of permitting the bankrupt-assignor to deal with the assigned debtors,<sup>42</sup> or the act of permitting the assignor to grant specific assignments of the same debts previously included in the first assignment.<sup>43</sup> Finally, the trustee in bankruptcy may successfully claim the ownership of property which has been the subject of a duly-registered assignment where he can demonstrate that the assignment merely constitutes a "gage" and not a definitive alienation of property,<sup>44</sup> or that the assignment

---

<sup>37</sup> *In re Civano Construction Co.*, [1962] C.S. 45, at pp. 50-52; *Re Coutu Perras v. Lajoie et al.*, [1942] C.S. 295.

<sup>38</sup> *In re Singer Ventilation and Air Conditioning Ltd.*, [1970] C.S. 476, reviewing the effect of the amendment of article 1571d C.C. on May 28th, 1968; *Côté v. Guardian Trust Company*, J.E. 81-438.

<sup>39</sup> *C.I.B.C. v. Hoffman*, [1975] C.A. 407.

<sup>40</sup> *Ross v. Royal Bank of Canada* (1966), 8 C.B.R. n.s. 303; *Re Sutcliffe & Sons* (1933), 14 C.B.R. 266.

<sup>41</sup> See a review of jurisprudence in *Re Alaska Construction Limited* (1973), 18 C.B.R. n.s. 221, at p. 223; *Hudson v. Toronto-Dominion Bank* (1976), 22 C.B.R. n.s. 55.

<sup>42</sup> *Hudson v. Toronto-Dominion Bank*, *ibid.*

<sup>43</sup> *C.I.B.C. v. General Factor Limited* (1960), 12 C.B.R. n.s. 130.

<sup>44</sup> *Laliberté v. Larue et al.*, [1933] S.C.R. 7; *Place Québec Inc. v. Desmarais*, *supra*, footnote 24.

constitutes in the common law provinces, an uncrystallized floating charge<sup>45</sup> or in the province of Quebec, a charge which has not become opposable by execution of formalities.<sup>46</sup>

#### V. Creditors of the Assignor as Third Parties.

The creditors of the assignor are entitled to satisfy their claims out of all his property, moveable and immoveable, present and future.<sup>47</sup> Such creditors are entitled to impeach the acts of their debtor in fraud of their rights,<sup>48</sup> and may act personally or through a trustee if bankruptcy has ensued. The law further declares that a judgment confirming the validity of a seizure by garnishment effects an assignment of the funds seized to the benefit of the seizing creditor.<sup>49</sup>

Now, although there is some jurisprudential divergence as to whether or not creditors of the assignor are "third parties" in virtue of article 1571 C.C.<sup>50</sup> it is evident that such creditors may be considered "tiers" once they are no longer mere "ayants-droits" of the assignor, but have distinct rights. As already mentioned, creditors of the assignor (apart from assignees under article 1570 C.C.) have distinct rights once they have validly seized in virtue of article 637 of the Code of Civil Procedure,<sup>51</sup> or are acting through the representation of a trustee following a bankruptcy.

A seizing creditor of the assignor may be considered as an assignee by fiction of law<sup>52</sup> and has all the rights as well as obligations of an assignee subject of course to prior rights of other parties who have obtained effective possession through service, registration or publication of the assignment.<sup>53</sup> In a similar manner, the common law jurisdictions provide that a properly registered general assignment of book debts being absolute in nature, will take priority over subse-

<sup>45</sup> As in *Great Lakes Petroleum v. Border Cities Oil*, [1934] 2 D.L.R. 743.

<sup>46</sup> *Jankauskas v. Société Nationale de Fiducie et al.*, *supra*, footnote 20. See also *Armoires de Cuisine de Montréal v. Banque de Nouvelle-Ecosse*, unreported, Meyer J., March 12, 1981, C.S.M. 500-11-003013-790.

<sup>47</sup> Art. 1980 C.C.

<sup>48</sup> Art. 1032 C.C.

<sup>49</sup> Art. 637 Code of Civil Procedure (C.C.P.).

<sup>50</sup> *Gauthier v. Sauvageau* (1871), 1 R.C. 248 dealing with a "syndic" as in *Dominion Bank v. Ayling* (1917), 26 B.R. 75; *Jacques v. Leway et al.*, [1952] B.R. 52, at pp. 56-58.

<sup>51</sup> *Aubrey et Rau*, *Droit civil* (6th ed., 1947), t. 5, p. 144; P.B. Mignault, *Droit civil canadien*, t. 7 (1906), p. 183; *Leland v. Imperial Insurance Office*, *supra*, footnote 33.

<sup>52</sup> Art. 637 C.C.P.; *Charbonneau v. Deslauriers* (1923), 61 C.S. 50.

<sup>53</sup> As in *Lalonde v. Garand*, *supra*, footnote 20, and *Pinsonnault v. Coursol* (1909), 15 R.L. n.s. respecting seizure of an hypothecary right.

quently served garnishing orders, despite lack of notice of the assignment to the garnished debtor.<sup>54</sup>

### *Conclusions*

The protection of third party rights has been of paramount concern to the legislator and the courts where an assignor purports to transfer his title and rights to an assignee. It will be recalled that the common law rules prohibited the assignment of a legal chose in action because contractual rights were deemed to be personal to the parties, and it is only as recently as 1873 that the English legal system gave statutory sanctions to legal assignments on the same level as equitable assignments. The development of rules protecting third parties has since been based along both statutory formality and equitable lines with regard to such considerations as the undesirability of forcing the assigned debtor to make double payment, the laches of the prior assignee in enforcing his security, and the diligence and good faith of subsequent assignees for value.

Although there has been little borrowed from the common law system by the civil law,<sup>55</sup> it is apparent that the concerns of the civilian in the matter of assignments are similar, especially with regard to the charging of future property.<sup>56</sup>

The problems faced in Quebec prior to the enactment of the various provisions concerning general assignments of present and future property centered on the nature of the publicity to be given to interested parties, extent of formalities to be followed in publicizing the assignment, the rank of priority among conflicting assignees, creditors of the assignor and trustees in bankruptcy and the effect of good faith of the various interested parties in seeking to obtain and enforce their assignments. The civil law had already taken the position that fraud with respect to assignments would render such acts inopposable to the interested parties.<sup>57</sup> The Bankruptcy Act contained similar provisions for voiding assignments. As outlined in extenso, the legislator chose to impose a system of strict formalities of publicity as a basis for determining opposability and rank, perhaps to the exclusion of the equitable notions grounded in good faith and notice

---

<sup>54</sup> *Robin Hood Flour Mills Ltd v. Fuller Bakeries Ltd* (1963), 40 D.L.R. 207, at p. 214.

<sup>55</sup> But *Canadian Terrazzo and Marble Co. Ltd v. B. Kaplan Construction Co. Ltd et al.*, [1966] C.S. 505, at p. 507 evidently borrows from the common law jurisprudence to determine the question of legal standing in the face of an "absolute" assignment.

<sup>56</sup> Compare the underlying civilian antagonism to the assignment of future wages in *In Re Quintal* (1968), 11 C.B.R. n.s. 47, at p. 53 with the common law approach in *Associates Finance Ltd v. Petropoulos* (1974), 18 C.B.R. n.s. 113.

<sup>57</sup> Art. 1032 C.C. *et seq.*

respecting payment and previous assignments. The strict adherence to formality was a conservative attitude necessitated by the extraordinary concession to business practice provided by the legislator in modifying the historical necessity of requiring delivery of objects pledged,<sup>58</sup> not charging future property and notifying the debtor by none other than personal service.

Article 433 of the Draft Code<sup>59</sup> now purports to validate a payment made in good faith to the ostensible creditor notwithstanding prior service of a copy of assignment on the debtor or the deposit of the deed of sale in the central register of moveable rights. No such provision exists under the current law and one is therefore tempted to ask whether the new provision will provide the debtor with additional protection. Draft article 433 repeats in substance article 1145 of the present Civil Code;<sup>60</sup> in order to take advantage of that article, two inter-dependent requirements must be met: 1) the person who presents himself to the debtor as creditor must have evidence of his claim, 2) the debtor must believe this person to be his creditor. The ostensible creditor is the person who for all intents and purposes appears to be the actual creditor. If the debtor fails to ask for proof of his claim, the good faith of the debtor is put in question with the result that he may be unable to rely on the extraordinary provisions of article 1145 C.C.<sup>61</sup>

The rule of draft article 433 and article 1145 C.C. is one of equity which is easily justified but difficult to imagine in force in the case of a book debt, the assignment of which has been personally served.<sup>62</sup> Moreover since article 1145 C.C. deals specifically with payment, one may assume the rule therein contained always applied to the payment of an assigned book debt. Indeed nothing in the current law of the assignment of book debts specifically excludes the application of article 1145 C.C. and as such, the addition of draft article 433 offers no further protection to the debtor than he already has. On the other hand, the editors of the Draft Code are not to be criticized for proposing the removal of legal ambiguities, especially where such proposals provide relief to an otherwise inequitable situation.

---

<sup>58</sup> Art. 1966, 3rd para. C.C.

<sup>59</sup> See *supra*, footnote 1.

<sup>60</sup> Art. 1145 "Payment made in good faith to the ostensible creditor is valid, although it be afterwards established that he is not the rightful creditor."

<sup>61</sup> L. Faribault, *Traité de droit civil*, t. 8 bis (1959), p. 364.

<sup>62</sup> Perhaps the situation of multiple and simultaneous service by two or more assignees of the same debt is envisaged.