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STOPPAGE IN TRANSITU IN THE PROVINCE OF QUEBEC

In English Law: Where a sale has been made on credit, and the buyer becomes insolvent while the goods are in the hands of a carrier in transit and before they have come into the possession of the buyer, the vendor may, notwithstanding a completed sale, resiliate the sale and prevent delivery. The right is commonly justified on the principle that it is inequitable that one man's goods should be applied to pay another's debt. Theoretically, that is not an accurate statement; for the sale is complete, and the goods belong to the buyer. If they belong during transit to the vendor, as e.g., where he ships to his own order or to his own agents, he controls their disposition in any event; and his modified shipping or delivery instructions do not amount to a technical stoppage in transit resiliating the sale and depriving the buyer of a vested right.

> The right of stoppage *in transitu* is a right to interfere, and prevent the buyer from taking actual possession, which he would otherwise have a right to take, and to undo the effect of an unconditional delivery to an agent to forward. This power does not exist except in the case of insolvency.[1]

The carrier must deliver the goods to, or according to the directions of the seller.[2] The unpaid vendor may exercise his right either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other bailee or custodier in whose possession they are.[3] A seizure is not necessary. The expenses of the redelivery must be borne by the seller.[4]

If the transit has in fact ended and the carrier restores the goods to the vendor, the buyer may sue the carrier in

[1] BLACKBURN, ON SALE, *"Stoppage in transit"*.
[2] The English *Sale of Goods Act, 1893* (Imp.), c. 71, s. 48.
[3] Notice by telephone, followed by telegram—*Re Textile Trimmings, Ltd.*, [1923] 3 D.L.R. 730 (Ont.)
[4] The English *Sale of Goods Act, 1893* (Imp.), c. 71, s. 46.

damages.[5] Where the carrier delivers to the buyer after a valid notice, the vendor may recover damages from the carrier,[6] and may recover the goods or their value from the trustee of the buyer in bankruptcy.[7]

There is no limit of time to make the demand. Goods are deemed to be in course of transit from the time when they are delivered to a carrier by land or water, or other bailee or custodier for the purpose of transmission to the buyer, until the buyer or his agent in that behalf, takes delivery of them from the carrier, bailee or custodier.[8]

But for that special rule, the common law rule would govern — that the unpaid vendor ceases to have any control over the goods when he delivers to a carrier or other bailee for transmission to the buyer, without reserving his right of disposal of the goods.[9] The effect of section 45 is that the placing of the goods on board ship for carriage from, say, England to Canada, even if the freight is paid by and the ship is the agent of the buyer, does not put an end to the transit. It is at an end only when the buyer takes delivery from the ship, bailee or custodier when transit is at an end.

To decide when transit is at an end raises very difficult questions. The English Act is explicit that if the goods are rejected by the buyer, and the carrier or other bailee or custodier continues in possession of them, the transit is not deemed to be at an end, even if the seller has refused to receive them back.[10]

[5] *Taylor* v. *G. E. Railway Co.*, [1901] 1 K.B. 774; 70 L.J. K.B. 499.

[6] See *e.g.*, *Rogers* v. *Mississippi and Dominion S.S. Co.* (1888), 14 Q.L.R. 99 at p. 106 : "In England, a carrier who, disregarding the vendor's notice . . . . . , delivers the goods to the vendee, is personally liable to the vendor for his loss, and in view of the judgment in *Inglis* v. *Usherwood* (1801), 1 East. 515, it seems to me more than probable that the English courts would maintain that such liability would be incurred by a carrier, disregarding such notice in this country".

[7] SMITH, MERCANTILE LAW, "*Stoppage in transitu*".

[8] The English *Sale of Goods Act, 1893* (Imp.), c. 71, s. 45. The Ontario *Sale of Goods Act, 1920*, c. 40, s. 44(1) is similar.

[9] As explained *In re M. Hecht, Ex p. Parr, Hylands & Co.* (1931), 13 C.B.R. 34 (Que.); HALSBURY, LAWS OF ENGLAND, 1st ed., Vol. XXV, 244. That is also the general rule in Quebec, as explained in *Re S. Medine & Co.*, [1923] 3 D.L.R. 795, at p. 797 : "Since the purchasers paid the transportation company, that company became their agent. It was not the agent of the vendors, for they no longer had anything whatever to do with the goods once they were delivered to the company. . . . . Even if the . . vendors were free to choose one of several carriers, in which case they acted as agents of the purchaser, as soon as they made their choice, the carrier selected being paid by the purchasers, it became the agent of those who were bound to pay it, so that delivery to this agent was a manual delivery (*livraison manuelle*) to the principal whose agent it was . . . . ." And see the note and decisions re delivery, under proof of the foreign law, *infra*.

[10] *Sale of Goods Act, 1893* (Imp.), c. 71, s. 45. *Florsheim Shoe Co.* v.

But if the buyer or his agent in that behalf obtains delivery of the goods before arrival at the appointed destination, the transit is at an end.[11] The buyer may require the goods to be delivered to him at some stage of the transit other than the arranged destination; in which case the transit is at an end.[12] But the transit is not at an end where the buyer demands delivery at some stage of the transit short of destination and the carrier rightly refuses to comply; *aliter* if he wrongly refuses.[13] A seizure by a creditor of the buyer does not defeat the vendor's right.[14] The carrier cannot prolong the vendor's right by wrongfully refusing delivery to the buyer.[15] But when goods are bought to be afterwards dispatched as the buyer shall direct, and it is not part of the bargain that the goods shall be sent to any particular place, the transit only ends when the goods reach the place finally named by the buyer as their destination.[16]

English and Quebec Law Contrasted and Compared: We have no disposition in Quebec law of the nature of stoppage *in transitu* of the English law.[17] The most that we can say is that the English stoppage *in transitu* is the common law equivalent of the Quebec right of resiliation, which effects a revendication, under article 1543 C.C. Certain striking differences and resemblances exist.

Under both laws, resiliation of sale takes place.[18] Under both laws, termination of the right depends upon delivery.[19] Under English law, the right persists during transit even in the hands of a carrier who is the buyer's agent, and up to the instant before the buyer takes physical possession from the carrier, bailee or other custodier. Under Quebec law, the vendor's

Boston Shoe Co., Ltd. (1913), 9 D.L.R. 602 at p. 606: ". . . . . if then Boston Shoe Co. had refused to accept delivery . . . . . I would not hesitate to say that the goods could be stopped *in transitu*." And see the remarks of Badgley J. dissenting, in *Brown* v. *Hawksworth* (1869), 14 L.C.J. 114 at p. 120, as to effect of rejection of goods by a buyer who finds himself insolvent and places the goods in customs for the benefit of the vendor.

[11] *Sale of Goods Act, 1893* (Imp.), c. 71, s. 45.

[12] See *e.g., L. & N. W. Railway Co.* v. *Bartlett* (1861), 31 L.J. Ex. 92; *Fraser* v. *Witt* (1868), L.R. 7 Eq. 64.

[13] SMITH, MERCANTILE LAW, "*Stoppage in transitu*".

[14] *Ibid., Smith* v. *Goss,* (1808) 1 Camp. 282.

[15] SMITH, MERCANTILE LAW, *loc. cit.*, citing *Bird* v. *Brown* (1850), 19 L.J. Ex. 154.

[16] *Ex. p. Watson, In re Love* (1887), 5 Ch. D. 35.

[17] *In re M. Hecht, Ex. p. Parr, Hylands & Co.* (1931) 13 C.B.R. 34 at p. 36 (Que.); *Acme Glove Works, Ltd.* v. *Canada S.S. Lines,* [1924] 4 D.L.R. 448, Duclos J., confirmed in [1925] 4 D.L.R. 494, Q.R. 38 K.B. 487, Allard J. dissenting.

[18] *In re Assaly Bros., Ex. p. H. Tompkin & Co.* (1926), 7 C.B.R. 511 (Que.); *In re M. Hecht, Ex. p. Parr, Hylands & Co.* (1931), 13 C.B.R. 34 (Que.)

[19] *In re M. Hecht, supra.*

right of resiliation exists during transit,[20] and follows into the physical possession of the buyer, provided the right is exercised (in the case of insolvency) within thirty days of delivery;[21] otherwise, without limit of time, provided the goods are identifiable and in possession of the buyer. Under English law, there is no limit of time for making the demand, provided the goods can be said still to be in transit.[22] The rights differ, also, as respects the remedy for enforcing them.

The Right of Stoppage in Transit Not a Lien: In English law, the right of stoppage in transit does not make the sale a conditional sale, in the sense that the vendor retains a lien. The sale is unconditional. Benjamin lays down that the right of stoppage in transit "does not depend on the fact that the seller, having had a lien and parted with it, may get it back again if he can stop the goods in transit, but is a right arising out of his relation to the goods *qua* seller, which is greater than a lien."[23] Blackburn says that "the right of stoppage *in transitu* is a right to interfere and prevent the buyer from taking actual possession, which he would otherwise have a right to take, and to undo the effect of an unconditional delivery." If one may paraphrase those statements, we could say that the right is something extrinsic to the unconditional sale; being extrinsic, it is an arbitrary rule imposed by the legislator for the benefit of trade, creating an entirely new right which takes existence with its exercise by the vendor.

In several Quebec cases where the English right of stoppage *in transitu* was in issue, it was urged that this right was a lien governed by Quebec law under article 6 C.C., so that the vendor had the same right as, or no greater rights than, the holder of a vendor's lien under Quebec law. That view has been rejected:

> On the whole, I am inclined to think that the right of stoppage *in transitu* is not a mere lien, *droit de gage*, which, by Civil Code, article 6, is, as to us, confined in its operation to the country in which it originated, but rather a right accruing to the vendor from the inherent defect in the title of a vendee who has not on his part fulfilled the primary obligation . . . . . of paying the price; not that such vendee

[20] *In re M. Hecht, supra*, distinguishing *Rogers* v. *Mississippi and Dominion S.S. Co.* (1888), 14 Q.L.R. 99; MIGNAULT, LE DROIT CIVIL CANADIEN, Vol. I, p. 95; *Acme Glove Works, Ltd.* v. *Canada S.S. Lines*, [1924] 4 D.L.R. 448, [1925] 4 D.L.R. 494; Q.R. 38 K.B. 487.

[21] *In re M. Hecht, supra*, by Rule 169, Bankruptcy Act, the day of the delivery does not count as one of the 30 days — *In re M. Hecht, supra*, at p. 38.

[22] *In re M. Hecht, supra*; *Rogers* v. *Mississippi and Dominion S.S. Co.* (1888), 14 Q.L.R. 99, at p. 110; *Bank of Toronto* v. *Hingston & al.* (1868), 12 L.C.J. 216.

[23] BENJAMIN, SALE, c. IV, s. 1.

> is not technically the owner of the goods sold to him, but he is an owner not entitled to possess.[24]

That the right is not a lien under English law seems clear. But to say that it accrues to the vendor from an inherent defect in the title of the buyer who is technically an owner but not entitled to possess, seems a contradiction in terms as the matter is understood in English law, and disregards the arbitrary nature of the English rule which takes effect though the buyer is owner and the sale unconditional; in fact it seems that the English arbitrary rule is sought to be explained by the altogether unfortunate theory (or theories) of Quebec law to account for the right of resiliation.[25]

The lien hypothesis was also rejected in a later case, where the nature of the right of stoppage *in transitu* was more clearly seen :

> The nature of the right . . . . . under the English law . . . . . does not depend upon the title to the goods; the sale is complete and transfers the title of the goods to the purchaser irrespective of their delivery or possession. The right claimed . . . . . is one by virtue of which, notwithstanding the complete sale, the vendor has the right to resiliate.[26]

Nor can article 6 C.C. create, as regards moveables brought into Quebec, a privilege and a recourse to which they were not subject before arrival here.[27]

Retrospect of Quebec Law : It seems to have been assumed for many years that the English right of stoppage *in transitu* was, if not almost identical with our right of resiliation, at least its equivalent, and, for those reasons to be applied as part of our law. Notice of the right of stoppage was given in Quebec in respect of Quebec as of other sales, and apparently carriers complied.

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[24] *Rogers* v. *Mississippi and Dominion S.S. Co.* (1888), 14 Q.L.R. 99, at 106. And as to right of pledge in goods in transit — *Rose* v. *European Canadian Trading Co.* (1915), 21 R.L. n.s. 194.

[25] *Q.V., supra.*

[26] *In re Assaly Bros., Ex p. H. Tompkin & Co.* (1926), 7 C.B.R. 511 at p. 512 (Que.). And in *Rose* v. *European Trading Co.* (1915), 21 R.L. N.S. 194 (Rev.), at p. 199, Greenshields J. said : "The right of stoppage *in transitu* is entirely separate and distinct from any right or lien of the unpaid vendor; that right arises only upon the insolvency of the buyer. . . . . In order that the right may arise, there is, and must be, a completed sale between the seller and the buyer . . . . . ;" *Abinovitch* v. *Ehrenbach* (1911), Q.R. 41 S.C. 55 (Rev.)

[27] *The Rhode Island Locomotive Works* v. *The South Eastern Railway Co.* (1886), 31 L.C.J. 86 (K.B.); *Hollinger* v. *Wettstein* (1927), 33 R. de J. 71, 8 C.B.R. 174; Falconbridge, *Contract and Conveyance in the Conflict of Laws*, [1934] 2 D.L.R. 1 at pp. 27-8.

Thus, in *Campbell* v. *Jones*,[28] goods were shipped from Montreal to Toronto by the plaintiff on the defendant's boat. While the goods were in transit, the consignee having stopped payment, the plaintiff notified the defendant not to deliver the goods to the consignee. In spite of the notice, the goods were delivered. Hence this action for damages, which was maintained — because the goods were delivered "after the defendant had been duly notified to stop the said goods *in transitu*, and not to deliver . . . . . ; and that, by reason thereof, the defendant is liable in law to account for the value . . . . . ."

Long after the Code, it was customary to speak of the right of resiliation under article 1543 C.C. as the right of stoppage *in transitu*;[29] even to concede and enforce a right of stoppage arising under a contract made abroad, though (so far as the

[28] (1858), 3 L.C.J. 6. Relied on in *Rogers* v. *Mississippi and Dominion S.S. Co.* (1888), 14 Q.L.R. 99 at p. 106; and at p. 105, citing Wotherspoon on the *Insolvent Act of 1875*, as saying — "The right of stoppage *in transitu* remains intact", and adding — "thus assuming the existence of such right in this province, or, at least, that it would be recognized here in favour of foreign creditors"; and at p. 108, citing Abbott, on the *Insolvent Act of 1864*: "By the law as it now stands, the right of revendication has a character almost identical with that of the English stoppage *in transitu*." Relied on also in *Abinovitch* v. *Ehrenbach* (1911), Q.R. 41 S.C. 55.

In *Acme Glove Works, Ltd.* v. *Canada S.S. Co., Ltd.* (1925), Q.R. 38 K.B. 487 at p. 502, Allard J. in his dissenting opinion says of *Campbell* v. *Jones*: "This case seems on all points analogous to the present one. The judge who decided it in 1858, was certainly not inspired by the English Act which was not yet in force. *He obviously based himself on our civil law;*" and at p. 502 also, Allard J. says of the opinion of Greenshields J. in *Rose* v. *European Trading Co.* (1915), 21 R.L. N.S. 194 (Rev.), that "he admits that under our law the right of stoppage *in transitu* exists and is absolutely different from the right of the unpaid vendor (*i.e.*, to resiliate under art. 1543 C.C., or to revendicate under arts. 1998-1999 C.C.), and that this right is based on principles of justice and equity and discharges the vendor from the obligation to deliver goods to an insolvent debtor." The same view was laid down in Review in *Abinovitch* v. *Ehrenbach* (1911), Q.R. 41 S.C. 55, where it was held that the vendor s right of stoppage *in transitu* flowed from arts. 1492 and 1497 C.C. and could be exercised without the necessity of are vendication or other judicial proceeding. And see *Hawksworth* v. *Elliott & Brown* (1866), 10 L.C.J. 197, reversed in *Brown* v. *Hawksworth* (1869), 14 L.C.J. 114, Badgley J. dissenting. *In re Thomson, Whitehead & Co.* v. *Darling & Greenwood* (1877), 9 R.L. 379; *The Bank of Toronto* v. *Hingston* (1868), 12 L.C.J. 216 — "That the property of foreign creditors should in such a case (while still in the hands of the carrier), before the goods have come into the actual possession of the insolvents, at the place of their final destination, go into the bankrupt estate, would be a case of extreme hardship, and had I any doubt as to the vendor s right to stop and obtain delivery of the goods, I should feel disposed to give them the benefit of the doubt. But I have no doubt. The goods are still in bulk, and have never come into the stock or actual possession of the defendants, and the unpaid vendor's right of stoppage *in transitu, or whatever it may be called*, undoubtedly still exists." *McNider* v. *Beaulieu* (1890), 14 L.N. 59.

[29] Thus *Florsheim Shoe Co.* v. *Boston Shoe Co., Ltd.* (1913), 9 D.L.R. 602 at p. 604, where the right of resiliation was referred to as "what is commonly known as the 'stoppage *in transitu*' under article 1543 C.C."; and throughout the judgment the phrase is used; as also *In re Hamer* (*Royal Silk Dress and Waist Co.*) (1921), 1 C.B.R. 446.

report shows) the foreign law was not proved or alluded to: the goods were still in transit and the vendor entitled to repossession, upon a mere notice, without the necessity of legal proceedings.[30]

This traditional view was expressly voiced in *Abinovitch* v. *Ehrenbach* by the Court of Review,[31] confirming the court below:

> Whether the English doctrine of stoppage *in transitu* has, or has not, been recognized by our courts as being the law of this province, there can be no doubt that, under the provisions of articles 1492 and 1497 C.C., the unpaid vendor has substantially the same right, and may recover goods, either by judicial proceedings or with the consent of the forwarding agent or carrier, so long as the goods have not actually come into the power and possession of the buyer who has become insolvent. The English authorities on the subject in defining the duration of the transit would therefore apply.[32]

Stoppage in Transitu Not Part of Quebec Law: The ruling decision now is to the effect that the English law of stoppage *in transitu* is not a part of our law.

In *Acme Glove Works, Ltd.* v. *Canada S.S. Lines, Ltd.*,[33] the facts were these. The Acme Company, under a contract completed in Montreal, shipped goods to a buyer in Alberta, *via* Canada Steamship Lines to Fort William, and thence to destination by the Canadian Pacific Railway. The goods left Montreal on July 30, reached Fort William on August 6, and were turned over to the railway on August 7 or 8. On August 5, the Acme Company notified Canada Steamship Company to return the goods to Montreal. But when this instruction reached Fort William the goods had already left that port in the cars of the Railway; and reached the buyer on August 13. The price not being paid, the Acme Company sued Canada Steamship Lines in damages for failure to stop delivery. The action was dismissed.

It is inexact to say, it was held, that the doctrine of stoppage *in transitu*, as known in England under the *Sale of Goods Act, 1893*, or in France under the *Code de Commerce*, is part of the law of Quebec.[34] The right of the unpaid vendor to stop the

[30] *Rose* v. *European Canadian Trading Co.* (1915), 21 R.L. N.S. 194. *Cf. Re S. Medine & Co.*, [1923] 3 D.L.R. 795; *Re Florsheim Shoe Co.* v. *Boston Shoe Co., Ltd.* (1913), 9 D.L.R. 602.

[31] (1911), Q.R. 41 S.C. 55 at p. 64; and in *Rose* v. *European Canadian Trading Co.* (1915), 21 R.L. N.S. 194 (Rev.)

[32] Correctly summarized in the head note: that the right may be exercised without the necessity of revendication or other judicial proceeding.

[33] [1924] 4 D.L.R. 448, Duclos J., confirmed on appeal, [1925] 4 D.L.R. 494, Q.R. 38 K.B. 487, Allard J. dissenting; the French authorities reviewed.

[34] And see *In re M. Hecht, Ex p. Parr, Hylands & Co.* (1931), 13 C.B.R. 34 at p. 36: "We have no disposition in our law of the nature of the stoppage *in transitu* of the English law." *(Footnote continued on p. 184)*

delivery of goods in transit is undoubted; but the right to be effective, and at once to bind and relieve the carrier, must be exercised in accordance with recognized procedure in Quebec. A mere notice to the carrier was insufficient. The only remedy available was, according to circumstances, the action by conservatory seizure to resiliate, under article 1543 C.C., or the action in revendication under articles 1998-9 C.C.

> If (in the circumstances of this case) the carrier, complying with plaintiff's request, had refused to deliver the goods to the consignee at destination, it might have involved itself in a litigation in which it had no interest.
>
> The carrier is not obliged to assume this risk, unless some express provision of the law enables it to do so and protects it in so doing.

Foreign Right of Stoppage in Transit Recognized in Quebec: When by the foreign law of the contract the vendor has a right of stoppage *in transitu*, Quebec courts will enforce that right. The foreign law must be alleged and proved. Article 6 C.C. does not apply to prevent the exercise of the right of stoppage *in transitu* in the case of goods shipped in England, when the right accrues under the law of England.[35]

The Foreign Law Must Be Alleged and Proved: Where the foreign right of stoppage *in transitu* is to be relied on, care should be taken to allege and prove the foreign law. Otherwise,

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I simply note here, without occasion to digest them: Sec. 46 of the English *Sale of Goods Act, 1893* — expense of redelivery is on the vendor; *Acme Glove Works, Ltd.* v. *Canada S.S. Lines, Ltd.*, [1925] 4 D.L.R. 494 Q.R. 38 K.B. 487 — the necessity of tender of all copies of bill of lading; *In re M. Hecht, Ex p. Parr, Hylands & Co.* (1931), 13 C.B.R. 34 — custodian and trustee ordered to deliver to vendor all copies of bills of lading or other documents of title; *Re S. Medine & Co.*, [1923] 3 D.L.R. 795 — petition that the trustee be ordered to return the goods together with the warehouse receipts. *Rogers* v. *Mississippi and Dominion S.S. Co.* (1888), 14 Q.L.R. 99 — tendering freight due; *In re Hamer (Royal Silk Dress and Waist Co.)* (1921), 11 C.B.R. 446 — tendering customs and storage charges; *Re Textile Trimmings, Ltd.*, [1923] 3 D.L.R. 730 (Ont.) — consignor entitled to delivery on payment of freight and customs duties; *In re Brupbacher Silk Mills, Ltd., Ex p. Crompton & Knowles Loom Works* (1933), 14 C.B.R. 310 — customs duties, stipulation that freight and duties payable by buyer; *In re Hamer (Royal Silk Dress and Waist Co.), supra* — making warehouseman party to the petition to exercise right of stoppage in transit; *Acme Glove Works, Ltd.* v. *Canada S.S. Lines, Ltd.* (1925), Q.R. 38 K.B. 487 at p. 497 — making the railway a party to the action in resiliation or revendication.

[35] *Rogers* v. *Mississippi and Dominion S.S. Co.* (1888), 14 Q.L.R. 99. *In re Hamer (Royal Silk Dress and Waist Co.)* (1921), 1 C.B.R. 446 (here the doctrine is implicit rather than expressed). And see *Rogers* v. *Mississippi and Dominion S.S. Co.* (1888), 14 Q.L.R. 99 at p. 106: "If the goods had been in this case delivered to a railway company at Portland, or at Halifax, where the principles of the English law prevail, in order to their being forwarded here, as is often the case, I do not suppose there can be doubt that the stoppage *in transitu* could have been in those cities effected." *Cf. In re Assaly Brothers, Ex p. H. Tompkin & Co.* (1926), 7 C.B.R. 511; *In re M. Hecht, Ex. p. Parr, Hylands & Co.* (1931), 13 C.B.R. 34.

the identity rule comes into operation, and the Quebec law as to resiliation, delivery, and the delay of thirty days, will be applied. The English law as to stoppage, including the indicia and limits of transit and delivery, will not, in absence of proof, be applied as being practically, or the equivalent of, our law.[36]

Delivery, and Stoppage in Transit: There is a vagueness and uncertainty in Quebec decisions as to what is delivery to the buyer, and as to when the buyer has possession. One cause of this uncertainty is found in the history of our attempt to conciliate our rules as to resiliation of sale while the goods are still in the possession of the buyer, with the rule of the English law that the vendor may stop goods in transit which continues until the goods reach the possession of the buyer.

If the reader will turn back to an earlier section of this article containing a retrospect of Quebec law, he will see that, prior to the decision in *Acme Glove Works, Ltd.* v. *Canada S. S. Lines, Ltd.*,[37] there was authority to the effect that either the English right of stoppage in transit was part of our law, or that, whether it was or was not, the unpaid vendor had substantially the same right under articles 1492 and 1497 C.C.; and authority on both sides of the question whether the Quebec right of revendication is a right similar to that of the English stoppage in transit. Where it was tacitly assumed that the principles of the English right of stoppage in transit was part of our law, then it was said that "there is no question that delivery in England must be determined by the laws of England"[38]—so that, without the English law being alleged or proved, English authorities were the guide to decision. And where it was expressly held that the unpaid foreign (English) vendor's right of stoppage was substantially the same as that of the unpaid vendor under articles 1492 and 1497 C.C., "the English authorities on the subject in defining the duration of the transit would there-

[36] *In re Hecht, Ex p. Parr, Hylands & Co.* (1931), 13 C.B.R. 34 at p. 36; *In re Assaly Brothers, Ex p. H. Tompkin & Co.* (1926), 7 C.B.R. 511 at p. 513; and see *Wurtele* v. *The Montreal Ocean S.S. Co. and Fisher* (1875) unreported, quoted in *Rogers* v. *Mississippi and Dominion S.S. Co.* (1888), 14 Q.L.R. 99 at p. 105. *Cf.* the result in *Re S. Medine & Co.*, [1923] 3 D.L.R. 795; *Re Florsheim Shoe Co.* v. *Boston Shoe Co., Ltd.* (1913), 9 D.L.R. 602, both of which might have resulted differently if the foreign law had been alleged and proved.

[37] [1925] 4 D.L.R. 494; Q.R. 38 K.B. 487 (Allard J. dissenting), confirming [1924] 4 D.L.R. 448.

[38] *Bank of Toronto* v. *Hingston & al.* (1868), 12 L.C.J. 216 at p. 218, relied on in *Abinovitch* v. *Ehrenbach* (1911), Q.R. 41 S.C. 55. And see *Campbell* v. *Jones* (1858), 3 L.C.J. 6; *Rogers* v. *Mississippi and Dominion S.S. Co.* (1888), 14 Q.L.R. 99; *McNider* v. *Beaulieu & Allan* (1890), 16 Q.L.R. 295, 14 L.N. 59; *In re Thomson, Whitehead & Co.* v. *Darling & Greenwood* (1877), 9 R.L. 379; *Rose* v. *European Canadian Trading Co.* (1915), 21 R.L. N.S. 194.

fore apply",[39] again without the English law being alleged or proved. In only one of the early cases was the English law regarded as requiring allegation and proof and the action dismissed for lack of it.[40]

Now it seems obvious that if there is a difference between English law and Quebec law as to the meaning and indicia of delivery, or as to the meaning and duration of transit, then, if the English doctrine of stoppage *in transitu* is not part of or to be assimilated to our law, it should, if it is to be relied on, be alleged and proved, or Quebec law in default be applied.

That there is a difference has already been demonstrated.[41] For our purpose here, it may briefly be said, the English right of stoppage *in transitu* is a right, during transit, to prevent the buyer taking actual possession which he would otherwise have a right to take, and to undo the effect of an unconditional delivery to a carrier; the Quebec right of resiliation is a right which exists during transit and follows into the physical possession of the buyer. Under both laws, termination of the right depends upon delivery.[42] In the English doctrine of stoppage *in transitu* there is not effective delivery into the possession of the buyer while the goods are in transit. In Quebec law, there may be effective delivery to the buyer by delivery to the carrier, according to circumstances. And in either law, the transit may be ended, or delivery to the buyer be conceded, though the goods are still in the customs or in bond, again according to circumstances.

With so much for preamble, it is of interest to ascertain the processes of reasoning by which Quebec courts have concluded that transit has or has not ended, and the foreign vendor's right to recover his goods been accordingly conceded or denied.

Several of our earlier decisions, as already noted, assumed that the English doctrine of stoppage *in transitu* was operative in Quebec. The natural corollary of that assumption was that English criteria as to the effect of delivery upon the transit were also acceptable. If the English law were found to be in harmony with what was considered our law, so much the better. Thus, where goods were sold in England, and were there delivered

[39] *Abinovitch* v. *Ehrenbach* (1911), Q.R. 41 S.C. 55.

[40] *Wurtele* v. *The Montreal Ocean S.S. Co. & Fisher* (1875), unreported, but quoted in part in *Rogers* v. *Mississippi and Dominion S.S. Co.* (1888), 14 Q.L.R. 99, where, nevertheless, the English vendor's right to stop was upheld upon a restrictive interpretation of "delivery" under Quebec law.

[41] *Supra*, English and Quebec law contrasted and compared; the right of stoppage not a lien.

[42] *In re M. Hecht, Ex p. Parr, Hylands & Co.* (1931), 13 C.B.R. 34.

to the Quebec buyer's shipping agent who forwarded them to the buyer in Montreal who had become insolvent before arrival of the goods, the vendors had a right of stoppage *in transitu* while the goods were still in the hands of the railway company (which carried them from Portland to Montreal) undelivered, though more than fifteen days had elapsed since the delivery in England.[43]

> That the property of foreign creditors should in such a case, before the goods have come into the actual possession of the insolvents, at the place of their final destination, go into the bankrupt estate, would be a case of extreme hardship. . . . . The goods are still in bulk, and have never come into the stock or actual possession of the defendants, and the unpaid vendor's right of stoppage *in transitu*, or whatever it may be called, undoubtedly still exists. It was contended at argument by the plaintiff, that delivery to the shipping agents (of the buyers) was delivery to the defendants themselves to all intents and purposes, and defeated the rights of the unpaid vendors. But there is no question that *delivery in England must be determined by the laws of England*, and by those laws such a delivery is not a delivery to defeat the right of the unpaid vendor. Looked at also by our own law, the agents were not such to take actual and final delivery of the goods, but merely to transport and forward them;[44] so that whether viewed by the laws of England or the laws of Lower Canada, no such actual or constructive delivery has taken place as to defeat the right of the unpaid vendors.

The next decision in point of time was rendered by a majority of the Court of Appeal.[45] The facts were very similar. Goods were bought in England, were delivered to the buyer's forwarding agents in England and by them shipped on a through bill of lading, *via* Portland, addressed to the buyer in Montreal who was insolvent when they arrived. The goods were placed in the customs by the buyer's custom house broker, and at his instance for the protection of the vendor, the buyer recognizing his insolvency; and the English vendor sought to recover possession. The majority in appeal held that the delivery was complete at Liverpool, from which moment the goods were at

[43] *The Bank of Toronto* v. *Hingston* (1868), 12 L.C.J. 216. And see *Hawksworth* v. *Elliott & Brown* (1866), 10 L.C.J. 197 — that the delivery contemplated by sec. 12 of the Insolvent Act, 1864, is an actual, complete, and final one, and, consequently, that the delivery of goods to a purchaser's shipping agent in England, for transmission to the purchaser in Canada, and the entering of the goods in bond here, by the purchaser's custom house broker, is not such a delivery as will defeat the vendor's remedy, under articles 176 and 177, Custom of Paris; reversed in *Brown* v. *Hawksworth* (1869), 14 L.C.J. 114, Badgley J. dissenting.

[44] And see *Rose* v. *European Canadian Trading Co.* (1915), 21 R.L. N.S. 194 (Rev.), where this doctrine was applied.

[45] *Brown* v. *Hawksworth* (1869), 14 L.C.J. 114; distinguished in *Abinovitch* v. *Ehrenbach* (1911), Q.R. 41 S.C. 55 at p. 62.

the buyer's risk and insured by it;[46] that, in any event, the delivery was complete at Montreal when the buyer's custom broker entered the goods in the customs in the buyer's name; and that a revendication made more than fifteen days after the entry in the customs was too late.

Badgley J. dissented :[47]

> As relating to the question of delivery, common to both laws, because the French revendication and the English stoppage *in transitu* had a common intent, the English authorities are very valuable for establishing what delivery is. The general rule is that goods are deemed in transit so long as they remain in the possession of some middle man, such as the shipping agent, warehouseman, carrier, etc., and whilst they are in any place of deposit connected with their transmission or delivery to the purchaser as their owner; it is this ownership and dominion which constitute the delivery of both laws, and which is involved in the Insolvent provision. . . . . As already observed *delivery* is a word of relation and *divestment* in its nature, and means the actual passing of something from the possession of its owner into the possession of another, involving ownership in the latter. . . . . ."

Badgley J. went on to point out that the buyer had, in good faith, declined to take over the actual possession, and had warehoused the goods in bond to protect the vendor. It is proved, he said, that no actual delivery was received by the defendants, and the goods never became assets or part of their estate.[48]

[46] That was also held in *In re M. Hecht, Ex p. Parr, Hylands & Co.* (1931), 13 C.B.R. 34.

[47] And with him, Monk J.

[48] This dissenting view of Badgley J. was followed in *Rogers* v. *Mississippi and Dominion S.S. Co.* (1888), 14 Q.L.R. 99, and approved in *Abinovitch* v. *Ehrenbach* (1911), Q.R. 41 S.C. 55. And see *In re Thomson, Whitehead & Co.* v. *Darling & Greenwood* (1877), 9 R.L. 379.

In the older Ontario cases the transit did not end though the goods were entered by the consignee, so long as the duty was not paid : *Graham* v. *Smith* (1876), 27 U.C.C.P. 1; *Howell* v. *Alport* (1862), 12 U.C.C.P. 375; *Ascher* v. *G.T.R.* (1875), 36 U.C.Q.B. 609; *Lewis* v. *Mason* (1875), 36 U.C.Q.B. 590. These judgments were overruled by the Supreme Court of Canada in *Wiley, Hicks & Wing* v. *Smith* (1877), 2 S.C.R. 1, confirming the Ontario Court of Appeal (and referred to in *In re Assaly Brothers, Ex p. H. Tompkin & Co.* (1926), 7 C.B.R. 511), where the goods on arrival were entered and bonded in the consignee's name, the *transitus* was at an end; and following that decision, it was held in *Re Textile Trimmings, Ltd.*, [1923] 3 D.L.R. 730 (Ont.), that goods arriving in customs and delivered to the consignee by mistake, though returned by the latter on its insolvency to the carrier and warehoused, will be deemed delivered to the consignee so that the transit ends; though in *Re Alcock, Ingram & Co., Ltd.*, [1924] 1 D.L.R. 388 (Ont. App.), it was held that a trustee in bankruptcy who by innocent misrepresentation induces a manufacturer to withdraw a stoppage *in transitu* of goods shipped to the debtor, cannot afterwards rely on the withdrawal. The effect of a partial delivery, parts of a machine distinguished from part of a consignment of goods, noticed in *Re Textile Trimmings, Ltd.*, [1923] 3 D.L.R. 730 (Ont.); and *In re Assaly Brothers, Ex p. H. Tompkin & Co.* (1926), 7 C.B.R. 511 at p. 512 — "A purchaser may have different places where he keeps his goods"; *Wiley, Hicks & Wing* v. *Smith* (1877), 2 S.C.R. 1, referred to.

The next decision came in 1877.[49] Goods had been bought in England, and were delivered there to the Quebec buyer's shipping agent and by the latter shipped to Montreal where they were placed in the customs, the buyer having meanwhile become insolvent. The vendor sought to revendicate, and the trustee pleaded complete delivery at Liverpool and the expiry of delays. The revendication was granted, on the principle, the Court said, that delivery, within the intent of article 1543 C.C.,[50] meant delivery into a store and into the hands of the insolvents, and not a deposit in the customs (*dans un magazin et entre les mains des faillis, et non leur mise à la douane*).

It was next held, in 1888, that the delivery mentioned in article 1543 C.C. means actual delivery into the possession of the purchaser and not such constructive delivery as results from putting the goods in the hands of a carrier.[51] The order, sent from Quebec, was accepted in England, so that the contract was completed there. The carrier was the buyer's agent to whom the vendor delivered the goods at Liverpool. The goods arrived at Quebec and, as freight and duty were not paid, were put in bond by the carrier. Before arrival, the buyer had become insolvent. The vendor notified the carrier to stop delivery and sued in revendication. It was agreed that to prove the law of England, the court could refer to English decisions and authorities.

The issue was clear. The vendor asserted that the law of England governed, whereby he had a right of stoppage *in transitu;* and that he had as well a right to resiliate under article 1543 C.C. It was replied that the English right of stoppage *in transitu* could not be invoked in Quebec as it was a right of lien governed by Quebec law under article 6 C.C.; and that the delay for resiliation had expired.

The effect of the decision was that the English right of stoppage *in transitu* is not a right of lien in English law; that the contract was made in England and English law which had

[49] *In re Thomson, Whitehead & Co.* v. *Darling & Greenwood* (1877), 9 R.L. 379. In *McNider* v. *Beaulieu* (1890), 14 L.N. 59, it was held that goods, while still in the customs, and not transferred out in accordance with the law regulating the matter, are still in possession of the vendor. The report does not show where the shipment originated, or whether the delivery abroad was made to the buyer's agent.

[50] The reference to article 1543 C.C., instead of to section 82 of the Insolvent Act of 1875, is evidently, a mistake, as article 1543 did not then contain the word "delivery"— as noted by Andrews J. in *Rogers* v. *Mississippi and Dominion S.S. Co.* (1888), 14 Q.L.R. 99 at p. 109.

[51] *Rogers* v. *Mississippi and Dominion S.S. Co.* (1888), 14 Q.L.R. 99; and at p. 109, the dissenting opinion of Badgley J. in *Brown* v. *Hawksworth* (1869), 14 L.C.J. 114, expressly approved.

been alleged and proved would apply; and that (following the dissenting opinion of Badgley J. in *Brown* v. *Hawksworth*[52]) there was not a delivery ending the transit until and unless the goods reached the actual and physical possession of the buyer :

> Obliged to admit the rights of an unpaid vendor, who has made an actual delivery into the warehouse of the vendee, provided he seek his remedy within fifteen days (under article 1543 C.C., as it then read) after such actual delivery, the intervenants would deny such rights to the unpaid vendor, whose goods have never come into the warehouse or actual possession of the vendee at all, if, for more than fifteen days, they have been in the hands of a carrier.

Abinovitch v. *Ehrenbach*,[53] decided in 1911, calls for special notice. One Rosenthal, trading in Montreal, bought in England certain goods from Ehrenbach who shipped them through his agents, Wingate and Johnston, Liverpool, to the agent of the latter in Montreal, Mills & Son, with instructions to deliver to Rosenthal on payment of freight and charges which, in fact, were not paid. The goods, therefore, remained in the hands of Mills & Son for the vendors. Meanwhile, Rosenthal became insolvent, and Mills & Son, with the consent of Rosenthal's trustee, returned or delivered the goods to the order of the vendor. Abinovitch sued to recover the goods or their value from Ehrenbach, alleging that prior to the insolvency Rosenthal had sold them to him. The defence *inter alia* was that Wingate and Johnston, and Mills & Son, were at all times Ehrenbach's agents; Rosenthal had never had delivery and could not transfer to Abinovitch greater rights than he had, or defeat the rights of the unpaid vendor.

It was held in both courts that neither the plaintiff nor Rosenthal had ever had delivery and possession; and in Review that delivery to Wingate and Johnston, and by the latter to Mills & Son, neither of them agents of the buyer,[54] was not a constructive delivery to Rosenthal. The contention that the vendors had got back the goods on a consent, without the intervention of a petition or action, and therefore illegally, was rejected in Review; on the ground that, as distinct from the rights of resiliation and revendication (Articles 1543, and 1998-9 C.C.), the unpaid vendor had a right under articles 1492 and 1497 C.C.,

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[52] (1869), 14 L.C.J. 114.

[53] (1911), Q.R. 41 S.C. 55 (Rev.), confirming. It does not appear from the report that English law was alleged and proved as governing the case.

[54] This distinction approved in *Florsheim Shoe Co.* v. *Boston Shoe Co., Ltd.* (1913), 9 D.L.R. 602 at p. 606.

substantially that of the English right of stoppage *in transitu*,[55] to recover the goods, either by judicial proceedings or with the consent of the forwarding agent or carrier, so long as the goods have not come actually into the power and possession of the buyer who has become insolvent. "The English authorities on the subject in defining the duration of the transit would therefore apply."[56]

The next decision is *Florsheim Shoe Co.* v. *Boston Shoe Co., Ltd.*[57] The Boston Shoe Company was ordered to be wound up on December 19, 1912. On December 23, the Florsheim Shoe Company (of Chicago) petitioned that the provisional liquidator deliver two consignments of shoes, shipped from Chicago on July 2 and November 14, respectively, on the ground that actual delivery was never taken by the Boston Shoe Company and that the goods were still in a bonded warehouse. The defence was that the goods were duly delivered to the Boston Shoe Company in the ordinary course of business and were stored on its account in the bonded warehouse, the warehouse and other charges having been debited to and paid by it many months before its insolvency; that delivery was made to it so soon as the goods were held by the bonded warehouse subject to its order, and from the moment that the warehouse and other charges were debited to or paid by it; and that the delay of thirty days from delivery under artice 1543 C.C. had lapsed.

The goods were sold F.O.B. Chicago, and the freight was paid by the buyer which took possession through its custom-house brokers who were also the warehousemen, who passed the customs entry for the buyer and in its name, paid the charges necessary to pass the entry, and warehoused the goods for the buyer. The buyer also insured the goods in its own name. The warehousemen testified that the goods were at the disposal of the buyer which could have taken possession at any time provided the duties were paid. Now, "the petitioner wants to exercise what is commonly known as the 'stoppage *in transitu*' under article 1543 C.C.", the court said.

[55] And the same position was taken in *Rose* v. *European Canadian Trading Co.* (1915), 21 R.L. N.S. 194 at p. 200 — "But apart entirely from the English jurisprudence upon the subject, we have the express enactment of our Code, in the articles 1496, 1497, 1492 and 1493."

[56] "There are numerous English authorities to the effect that if the intention of the shipping agent is not to keep the goods for, but to forward them to, the buyer, the goods are to be considered as still in transit, and that before the agent or carrier can be considered as an agent charged with the keeping of the goods for the purchaser, there must be an agreement to that effect between the buyer and the agent or carrier."

[57] (1913), 9 D.L.R. 602. The American law was not, so far as the report shows, alleged or proved as governing the case.

The judgment gave delivery of the second shipment — "the winding-up order having been given on the 19th of December, the petitioner is well founded as to the second lot of five cases, as they were delivered on the 26th or the 28th of November,[58] and consequently within the thirty days of the insolvency. . . . ."

> But the petitioners pretend that they are entitled to the first lot as well, because the word 'delivery' in (article 1543 C.C.) means actual delivery, in the actual possession, and in the store of the Boston Shoe Co., and not a constructive delivery, such as the one that was made in the bonded warehouse of the *mis-en-cause* (the customs broker): and they say that the possession of the customs was the possession of the Chicago Company, or, at least, the customs had possession for both parties, and they (petitioner) could stop these goods *in transitu*. . .[59]
>
> The petitioner has referred to a number of cases in England, where it has been held that the goods can be stopped *in transitu*, if they are in possession of the customs, and some decisions, either in Upper Canada or here, where the same principle has been held. I come to the conclusion, however, that *the present case has to be determined by the principles found in our own Code*,[60] particularly in the articles which I have cited, although, I think, that the principle laid down by the decisions referred to . . . . . does not clash with the conclusion to which I have arrived. . . . . .
>
> I would certainly follow these decisions if the same circumstances existed in the present case; for instance, if the goods were still in the possession of the Grand Trunk Railway or the Canadian Pacific Railway, or if the Boston Shoe Co. had refused to accept delivery when the goods arrived in Montreal, and these goods had been put in the warehouse of the *mis-en-cause* by the Chicago Company or representatives, I would not hesitate to say that the goods could be stopped *in transitu*. Or else, it might happen that the Chicago Company would have arranged with the Boston Shoe Company that the goods would have to be put in a bonded warehouse until they had been paid for; then again the delivery would not have taken place. But . . . . . it seems to me that the Boston Shoe Company had taken delivery . . . . . ."

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[58] Whether by this delivery is meant the putting on board at Chicago or the placing in warehouse in Montreal is not clear; for elsewhere the judgment says the goods were shipped on November 14 (p. 602), and again that they were shipped "at the end of November" (p. 604).

[59] Here the court quoted the articles of the Code regarding delivery:

1492—"Delivery is the transfer of a thing sold into the power and possession of the buyer."

1493—"The obligation of the seller to deliver is satisfied when he puts the buyer in actual possession of the thing, or consents to such possession being taken by him, and all hindrances thereto are removed."

1495—"The expenses of delivery are at the charge of the seller and those of removing the thing are at the charge of the buyer, unless it is otherwise stipulated."

1496—"The seller is not obliged to deliver the thing if the buyer does not pay the price, unless a term has been granted for the payment of it."

And for convenience, I add here article 1497 — "Neither is the seller obliged to deliver the thing when a delay for payment has been granted, if the buyer since the sale have become insolvent, so that the seller is in imminent danger of losing the price, unless the buyer gives security for the payment at the expiration of the term."

[60] Followed in *Re S. Medine & Co.*, [1923] 3 D.L.R. 795 at p. 798.

The judgment, therefore, refused delivery of the first or July shipment — because more than thirty days had elapsed.

Summarized in a few words, the effect of the decision seems to be this: that if the goods cannot be said to have been delivered to the buyer within the meaning of that word in articles 1492-1496 C.C. (the foreign law not having been alleged and proved), stoppage in transit will be accorded, though the delays of article 1543 C.C. have elapsed; whereas if they have been delivered within the meaning of these articles, the delay of thirty days begins to run from the delivery; delivery into the store of the buyer is not necessary to start the delay running. One difficulty raised by the judgment, if stoppage *in transitu* is not part of our law, is the use of that phrase at all; for the Quebec right, on that hypothesis, is not a stoppage *in transitu* but a resiliation of sale, within thirty days of delivery in case of insolvency, or without limit of time if the goods are still in the possession of the buyer — whether the goods are moving to him or have reached his store. Whereas, if, as seems to be assumed by the judgment, the English right of stoppage *in transitu* is part of our law, then the English doctrine and practice governing the ending of transit should be included as the basis of decision, rather than our law as to delivery; for what we deem an effective delivery which starts the delays running, may not be an end of transit as viewed in English law.

What is or is not "actual possession", and how it may differ from delivery, was again discussed by the Court of Review, in *Rose* v. *European Trading Co.*[61] W, in Chicago, sold to the E.T.Co., a Montreal firm, certain furs which were shipped from Chicago by the Western Express Company. Arriving in Montreal, they were in the possession of the Dominion Express Company which was instructed by the E.T.Co. to deliver them to Rose who had made advances. The Dominion Express Company refused delivery to Rose who brought this conservatory seizure, alleging the possession of the Express Company, and that the furs had been pledged to him to secure his advances to the E.T.Co. W intervened and alleged that the sale was not on credit, and that the E.T.Co. was insolvent, and asked that the goods be returned to it as unpaid vendor. Rose's claim that the goods were pledged to him was dismissed, as, in Quebec law, the right of pledge subsists only while the thing pledged remains in the hands of the creditor or pledgee, or of the person appointed by the parties to hold it.[62]

[61] (1915), 21 R.L. N.S. 194. The report does not show that the Illinois law was alleged or proved as governing the case.

[62] Art. 1970 C.C.

As to the delivery and possession, the Court of Review said this: The E.T.Co. had not had delivery. Delivery is the transfer of a thing sold into the power and possession of the buyer.[63] Possession is the detention or enjoyment of a thing or of a right, which a person holds or exercises himself, or which is held or exercised in his name by another.[64] In his action, Rose has alleged possession by the Dominion Express Company. The E.T.Co. has never had the "detention" of the goods; hence it has never had possession; it has not had delivery, because delivery was essential to possession; and it has not had possession because detention was essential to possession. Nor has it had possession vicariously, because neither Express Company was in any sense its agent:

> The jurisprudence in Quebec is to the effect that the simple placing of the goods on board the carrier, at the place where the sale was made, or the warehousing of the goods without the participation of the buyer, does not constitute delivery to the buyer, in the sense of our law.[65] There is more. It is proved that the carrier had a claim for unpaid carriage charges, and so had a privilege (gage) against the goods. By article 1679 C.C., the carrier has a right to retain the thing transported until he is paid for the carriage or freight of it.[66] The right of retention implies possession by him who has the right, and there cannot be two possessors of the same thing. If either Express Company had possession, neither the E.T.Co. nor (Rose) could have possession at the same time. As the E.T.Co. had not possession, it could not transfer possession to (Rose).
>
> GREENSHIELDS J.—It can be stated, I think, with certainty, that the delivery of the goods by the seller to a carrier, even if that carrier is chosen by the buyer, and may be for the purposes of the carrying of the goods the agent of the buyer, that is not a delivery in law to the buyer which would defeat the seller's right of stoppage in case of the buyer's insolvency. The delivery must not be to an agent for the purpose of carrying, but to an agent for the purpose of a final delivery of the goods, and then the possession of that agent is the possession of the buyer, his principal. . . . . I am of opinion that there never

[63] Art. 1492 C.C.

[64] Art. 2192 C.C.

[65] In support of this ruling, the court cited — *Rogers* v. *Mississippi & Dominion S.S. Co.* (1888), 14 Q.L.R. 99; *Hawksworth* v. *Elliott & Brown* (1866), 10 L.C.J. 197, without noticing the reversal of this decision in (1869), 14 L.C.J. 114; *Bank of Toronto* v. *Hingston* (1868), 12 L.C.J. 216; *In re Thomson, Whitehead & Co.* v. *Darling & Greenwood* (1877), 9 R.L. 379 — in a word, all the older decisions which, as we have already seen, assumed that the English doctrine was part of our law; MACLAUGHLIN, ON SHIPPING, 553; and concluding with the language of English decisions, that "the goods (*in transitu*) were still in the custody of a third person intermediate between the seller who parted with them, and the buyer who has not acquired actual possession," a doctrine already expressly laid down in *Bank of Toronto* v. *Hingston, supra.*

[66] And see *Rogers* v. *Mississippi & Dominion S.S. Co.* (1888), 14 Q.L.R. 99; and the comment thereon in *Re S. Medine & Co.*, [1923] 3 D.L.R. 795 at pp. 797-8.

> was a delivery . . . . . to the buyer, or to any one representing the buyer. . . . . The plaintiff . . . . . had no greater rights than the buyer, the defendant, and if the defendant . . . . ., insolvent as he was, had made a demand for the delivery of these goods, ... the seller could have refused.[67]

The doctrine as to delivery of that decision was completely ignored in our next decision, *Re S. Medine & Co.*[68] Goods were bought in France by Medine in September, 1922, and arrived in Montreal on October 14. Medine authorized his customs broker to pay the freight due the carrier, the cartage and the duty. The goods were placed in a customs warehouse, leaving Medine free to redeem them on paying the customs entries. He became insolvent on January 23, 1923, and this petition was presented only in March. The vendor petitioned for the cancellation of the sale and the return to him of the goods, alleging that he was within the delays — i.e., in effect, that Medine had not had delivery. The trustee contested, alleging that the goods had been placed in a warehouse chosen by Medine whose brokers had paid the freight and entries and other charges, so that Medine had taken delivery of the goods "which are now held for (his) account in the said warehouse", and the thirty day delay had lapsed. On these facts, the court said, there remains only the demand in resiliation based on default of payment, as provided for by articles 1543, 1998 and 1999 C.C.—

> Under our law the contract of sale is completed by the mere consent of the parties as to the object and the price. . . . . The delivery of these goods to a carrier for transportation to the purchasers in Montreal had no effect on the purchasers' right of ownership. They were bound to pay the freight . . . . . They not only did this, but they also paid the cost of cartage . . . . . as well as the cost of storage. They had absolute control over the goods . . . . . It was the government of this country . . . . . which imposed the customs duties. . . . . Since the purchasers paid the transportation company, that company became their agent. It was not the agent of the vendors, for they no longer had anything whatever to do with the goods once they were delivered to the company (the carrier). The goods no longer belonged to the vendors . . . . . Even if the vendors were free to choose one of several carriers, in which case they acted as agents of the purchasers, as soon as they had made their choice, the carrier selected being paid by the purchasers, it became the agent of those who were bound to pay it, so that delivery to this agent was a manual delivery (livraison manuelle) to the principle whose agent it was just as though, having bought the goods from a merchant in the place where the buyer lived,

[67] In *In re Hamer* (*Royal Silk Dress and Waist Co.*) (1921), 1 C.B.R. 447, per the Registrar, uncontested; goods still in the bonded warehouse, warehousing and customs still unpaid at the buyer's insolvency: "the assignor in bankruptcy has never taken delivery . . . . . ."

[68] [1923] 3 D.L.R. 795.

the latter were to send a carter to bring them to his shop. In the present case, if the carrier was not the general agent of the purchasers, it became their special agent for the delivery of the goods in question.

If the argument is advanced that there was a contract between the vendors and the carrier which created obligations between them, the carrier had discharged its obligations and had lost all control over the goods at the moment it delivered them at the wharf at Montreal to (the customs brokers), the purchaser's agents, who paid the freight and took possession of the goods to transfer them to the warehouse. The carrier did not put them in storage. Customs duties are a matter between the purchasers and the government of their country.

The distinction which is drawn between what is known in English law as 'constructive delivery' and manual delivery (livraison manuelle) if it really exists, does not in any case have to be taken into consideration here, because there was manual delivery to the agents of the purchasers. What is called 'constructive delivery' may be taken to mean the delivery contemplated by article 1493 C.C. which distinguishes from delivery the situation which exists when all obstacles which might prevent the purchaser from taking possession of the thing he has bought are removed. . . . . The petition is dismissed.[69]

In so far as the next decision, *Acme Glove Works, Ltd.* v. *Canada S.S. Co., Ltd.*,[70] touches this question of delivery at all, it adds confusion to the issue. Goods bought in Montreal were shipped by the vendor *via* the Canada S.S. Company to the buyer in Edmonton. From Fort William they were to be carried by railway. The bill of lading was as usual in triplicate, the carrier retaining one, the shipper receiving two, of which it mailed one to the buyer — though it was not in proof that it was by him received. The goods had scarcely reached Fort William when the vendor learned that the buyer was in trouble and notified the Canada S.S. Company to stop delivery. Through some mischance the goods reached the buyer in Edmonton who later became insolvent, and the vendor sued this action in damages. The defendant did not attempt to deny negligence, but pleaded simply that it was not bound to obey the stop-delivery order.

Not one of the cases we have reviewed is mentioned in the report of the majority judgment. Drawing from the French *Code de Commerce*, which is not part of our law, a distinction between an ordinary shipping receipt and a bill of lading, the court said :

[69] *Rogers* v. *Mississippi and Dominion S.S. Co.* (1888), 14 Q.L.R. 99, distinguished, as the action there was taken against the carrier whose freight was unpaid; *Florsheim Shoe Co.* v. *Boston Shoe Co., Ltd.* (1913), 9 D.L.R. 602, "the facts . . . . . more closely resemble those of the present case", followed; Quebec law, not English law, to be applied.

[70] (1925), Q.R. 38 K.B. 487, [1925] 4 D.L.R. 494, confirming [1924] 4 D.L.R. 448; Allard J. (dissenting), Howard and Létourneau JJ.

The shipping contract, which could have remained as a mandate and as such have been revoked if it had been in the form of a way-bill or shipping receipt, or in such other form that the shipper could produce all copies of the undertaking by the carrier, partakes in this case of the nature of a stipulation 'for the benefit of a third party'[71] whose acceptance — which may be tacit — results from his detention of the title and his right to use it. The right of the consignee, in the one case suspended (i.e., where there is only a way-bill or shipping receipt), becomes in the second case definitive and incommutable (i.e., where a bill of lading in three parts is issued, of which one is sent to the consignee).

The shipper, presumed to be owner until he has ceded or transferred his bill of lading to a third party, divests himself of that quality in favour of him whom he names (as consignee) in the bill of lading and whom he qualifies with a copy thereof; . . . . . this doctrine is expressly recognized by the doctrine and jurisprudence in France.

From that moment . . . . . it is for the consignee named in the bill of lading that the carrier henceforth acts. In principle, the oblitions of the carrier are not governed by the stipulations between the shipper and the consignee; yet it is repugnant to affirm that the carrier who has expressly bound himself toward a named consignee to carry goods which are in fact his property, continues to be the exclusive agent of the shipper.

We must then hold that, contrary to the absolute rule in England and to the general rule in France, we have not in Quebec law the stoppage *in transitu*, understood as meaning the absolute right of the shipper to oblige the carrier to return to him goods in transit to a named consignee. The shipper may, nevertheless, in exercising against his buyer the recourse given him by articles 1497, 1543, 1998 and 1999 C.C., bind the carrier by making him a party to the action; he may likewise exercise against the carrier all the recourse of a principal against his agent if he (the shipper)[72] alone is named in the contract or if, in the case of a bill of lading, he returns to the carrier all the copies or parts thereof. . . . . *Res perit domino*, and as the goods in issue were shipped 'F.O.B.Montreal', we must[73] take it as settled law that the appellant became an ordinary creditor.

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[71] Art. 1029 C.C.

[72] *I.e.*, I assume, if the shipper has shipped the goods to his own order.

[73] Following *Brace, McKay & Co., Lt.* v. *Shmidt* (1920), Q.R. 31 K.B. 1. It was, unfortunate, to say the least, to confuse the doctrine *res perit domino*, applicable in the case of f.o.b. contracts, as the criterium of *delivery* under articles 1492, 1497 and 1543 C.C. For even under the English doctrine of stoppage *in transitu*, the title and the risk pass to the buyer upon delivery to the carrier, HALSBURY, LAWS OF ENGLAND, 1st ed., Vol. XXV, p. 244; *In re M. Hecht, Ex p. Parr, Hylands & Co.* (1931), 13 C.B.R. 34); and in Quebec law, the title and the risk pass to the buyer from the moment that the goods are appropriated to the contract even in the warehouse of the vendor, in the absence of a contrary intention, and before delivery to the carrier. If the rule *res perit domino* governs, then the *delivery* may date and the thirty days begin to run from that appropriation, which is absurd as an interpretation of delivery within the meaning of the articles of the C.C. above cited.

Again, in *In re Assaly Brothers, Ex p. H. Tompkin & Company*,[74] a contract of sale was made in England; the goods were shipped on July 29, arriving at Montreal on September 8; the buyer paid the freight and through its customs broker had the goods warehoused in the name of one, Saad, who had bought them from the buyer; a receiving order was served on the buyer on September 14; and on September 16 the vendor notified the warehouse not to deliver to Saad. The goods remained in the warehouse until November 20, when the vendor petitioned for recovery, alleging the right of stoppage *in transitu*, non-payment, and the bankruptcy of the buyer. The judgment contains a curious inconsistency :

> The contract was made in England. . . . . The right claimed by petitioners of stoppage *in transitu* is one by virtue of which, notwithstanding the complete sale, the vendor has still the right to resiliate it and claim the goods if the purchaser becomes insolvent before the delivery of the goods to him so long as they are *in transitu*. The question is whether in this cause the goods . . . . . were still *in transitu* when the vendor gave notice to the (warehouse company) not to deliver the goods, which was on September 16.

As the judgment goes on to hold that the English law did not apply because it was not proved, it is difficult to see how "the question" could be "whether in this cause the goods were still *in transitu* on September 16" : for the implication is that the ending of the transit as viewed in English law may mark the instant of the manual delivery (*livraison manuelle*) to the buyer in Quebec law; and while transit in English law continues until the goods reach the possession of the buyer at destination, certain of our cases have held, as we have seen, that the buyer had possession at the point of shipment :

> The goods were delivered in England by petitioners to a public carrier to be delivered to the purchaser. The effect of that delivery created certain legal relations between petitioners and the transportation company.[75] When the goods arrived at Montreal on September 8, they were delivered by that carrier to a party hired by the purchaser to receive them, and that party transferred them to the (warehouse which) received the goods for the purchaser and not for the (carrier) nor for the vendor, and placed them in its building and on its books

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[74] (1926), 7 C.B.R. 511.

[75] *Cf. Acme Glove Works, Ltd.* v. *Canada S.S. Lines, Ltd.*, Q.R. 38 K.B. 487, [1925] 4 D.L.R. 494 — "From that moment (i.e., when the shipper has sent the buyer a copy of the bill of lading) . . . . . it is for the consignee named in the bill of lading that the carrier henceforth acts"; and *cf.* also the conflicting opinions on this point in the cases above reviewed.

> in the name of the purchaser.[76] The (warehouse) having received possession . . . . . from the purchaser has from that moment a personal claim against him and a privilege on the goods for customs duties, but has no provisional claim against the vendor. . . . . The (warehouse) becomes the lessor of the space occupied by the goods and that space belongs to the purchaser. A purchaser may have different places where he keeps his goods. They need not all be at his store.[77] . . . . . The court being of opinion that there was a delivery to the purchaser (i.e., on arrival, September 8), and the petition . . . . . was made more than thirty days after delivery, (article 1543 C.C.) is not available to the petitioners.

Yet, in 1931, our next judgment held that delivery to the ship in England was delivery to the debtor.[78] Goods were sold in England, upon an order accepted there on February 10, 1930, and shipped in two lots, on April 14 and June 3. The first lot upon arrival in Montreal was put in bond in the buyer's name, and later, at his request, on May 31, in the name of I. L. & I. Co.,[79] which on June 5 paid the freight and all the charges on the goods. The second lot arrived on June 3, and was also put in bond in the same way. On July 2, a receiving order was granted declaring the buyer insolvent. The vendor petitioned for return of the goods, alleging non-payment, the insolvency, that the goods were still in bond and had never been delivered to the buyer, and that under English law "which applies to the contract as well as by the civil law" of Quebec, it was entitled to cancellation of sale and the return of the goods.

The defence *inter alia* was that, as to the first lot, there had been delivery on April 14 (to the ship in England), and more than thirty days had since elapsed; that the English law had not been proved;[80] and that the goods were in bond "and

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[76] *Cf.* s. 45, *Sale of Goods Act of 1893*, (Imp.), c. 71 — "Goods are deemed to be in course of transit from the time when they are delivered to a carrier by land or water, or other bailee or custodier for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee or custodier." It will be observed from this comparison that the English doctrine as to the ending of transit has influenced the Quebec theory of manual delivery.

[77] *Wiley, Wicks & Wing* v. *Smith* (1877), 2 S.C.R. 1, (Ont.), relied on. *Cf. In re Thomson, Whitehead & Co.* v. *Darling & Greenwood* (1877), 9 R.L. 379 — delivery within the intent of art. 1543 C.C. meant delivery into the store of the insolvents and not their placing in the customs; and the decisions above reviewed to the effect that delivery to the carrier in England was manual delivery (*livraison manuelle*) to the buyer.

[78] *In re M. Hecht, Ex p. Parr, Hylands & Co.* (1931), 13 C.B.R. 34.

[79] *Cf. McNider* v. *Beaulieu* (1890), 14 L.N. 59, 16 Q.L.R. 295 — goods in the customs remain in the possession of the vendor, and cannot be pledged by the buyer for advances; *Abinovitch* v. *Ehrenbach* (1911), Q.R. 41 S.C. 55 — the unpaid vendor may resume possession in transit . . . . . notwithstanding any sale or transfer by the buyer to a third party. *Cf. Young* v. *Lambert* (1870), 18 R.J.R.Q. 475, 548; 6 Moore N.S. 406 (P.C.)

no right would accrue to petitioners to cancel . . . . . under English law." The judgment in part reads :

> In this case the freight of the goods on board the ship was paid by the buyer . . . . . The ship carrier being paid by the buyer, it became its agent to get the goods in the same manner as if the purchaser had sent his own cart to get the same, so that the delivery to the ship became a delivery to the buyer. . . . . The right of the vendor to demand the annulment for non-payment being limited to thirty days from the delivery . . . . . on April 14, on the ship which was a delivery to the buyer, ... more than thirty days have elapsed, and the petition is too late.

The above recital of the evolution of our jurisprudence is its own commentary. The decisions affecting so important a matter should be clarified by legislation to bring Quebec law into harmony with that of the English law — of England, the English provinces, and the United States, at least. They exhibit this further defect of our law — that the foreign law of stoppage *in transitu*, the general principles of which must be known even to Quebec judges, must be alleged and proved at great expense in each case that arises : the court should be free, and be bound as part of its duty to do justice, to refer *proprio motu* to the foreign law on this subject.

In the present state of the decisions, also, two cautions emerge : either that the foreign shipper is safe under Quebec law only if he treats every Quebec buyer as a potential insolvent and always ships to his own order or through and to his own brokers; or that in each appropriate case where there is doubt the foreign doctrine of stoppage *in transitu* be pleaded and proved.

On the question of delivery the decisions reviewed are chaotic. Confusing the incidence of delivery with the passing of the risk, as we have seen, has been one cause of error. Likening delivery to a ship on the other side of the world to a delivery between neighbours in the same village, is another cause of error, mediaeval and out of tune with modern conditions. To say that there has been manual delivery to a Quebec buyer when a vendor in Australia places the goods on board ship, while they are still under the foreign law and though they may never be unloaded at the named destination, and though the buyer cannot take possession until he pays the freight, and though an order to stop delivery may be given to the ship before it enters the jurisdiction of our courts, seems on the face of it unreasonable. Suppose,

[80] "The consequence is, the court held, "that it is only the Canadian law which applies to this case."

e.g., goods are shipped from Liverpool *via* Portland to a buyer in Quebec; and that they are stopped *in transitu* in Portland. What becomes of the doctrine of manual delivery at Liverpool? Has there been delivery by the transfer of the goods sold into the power and possession of the buyer under article 1492 C.C.? And how unfair to assume that there has been manual delivery to a ship in Australia, when the whole thirty days allowed in case of insolvency may be already absorbed in the transit.

Moreover, the right of resiliation is a right given to the vendor. If he has a right, it is unreasonable to take it away from him by reason of delays in transit for which he is not responsible, but which the buyer contemplated as necessary. The right is based upon the equitable principle that the vendor shall not lose what he has not been paid for, to the advantage of a debtor who has paid nothing and who when he gave his order knew, or had reason to know, that he was on the verge of insolvency.

The English law, therefore, rightly favours stoppage by the vendor of goods of a bankrupt in transit, and stretches the period of transit until the goods have come actually into the possession of the buyer or of his agent who takes delivery for him from the carrier. Though the carrier may have completed the carriage, the goods may still be deemed in transit though now in the hands of the customs, or of a warehouse in bond. But whether in such case the transit shall be deemed ended, will depend upon whether, though the goods are in the customs or in bond, they can be said to be nevertheless in the control or possession of the buyer.

Many difficulties and contradictions flowing from the decisions above examined disappear, if we adopt the reasonable view:

1. That delivery to the carrier in a foreign port, while it passes the risk to the buyer, is not a manual delivery by transfer into the power and possession of the buyer in Quebec.

2. That at least until the goods arrive at the Quebec port and are unloaded, freight and all carriage charges paid, the buyer in Quebec has not had the transfer of the goods into his "power and possession".

3. That goods shipped to the order of the vendor or through and to his agents, or placed in the customs by him or by the shipper to their respective order, are apart from this discussion — they have not been delivered by transfer into the power and possession of the buyer.

4. That it is straining the interpretation of delivery in an opposite sense, to say that delivery is complete only when the goods have been deposited in the store of the buyer, or in his warehouse after duty paid.

5. That goods have been transferred, and that there has been manual delivery, from the moment that the buyer, personally or through his customs broker or other agent, receives the goods from the carrier at the Quebec port of entry and acquits the carriage charges so that the carrier is divested of interest or claim. From that moment there has been delivery by a transfer into the buyer's power and possession — whether he instantly pays the duty, or whether he warehouses the goods in bond in his own or his broker's name pending payment of the duty.

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