

ARTICOLE

CHARGE – FIXED AND FLOATING: AGNEW
AND ANOTHER V. COMMISSIONER OF
INLAND REVENUE, PRIVY COUNCIL (NEW
ZEALAND), 5 JUNE 2001 (THE “BRUMARK”
CASE) CHARGE AND HYPOTHEC AS
FUNCTIONAL EQUIVALENTS

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Abstract: Our endeavour is dedicated to a few security devices. The first part of the current work is called “Words of Introduction”. The second portion takes into account a Privy Council case: *Agnew and Another v. Commissioner of Inland Revenue, Privy Council (New Zealand), 5 June 2001 (the Brumark case)*. The third part briefly focuses on charge and mortgage. The fourth portion, in a succinct manner, describes the hypothec. The fifth and final part shows that charge and hypothec are functional equivalents.

Key-words: charge, hypothec, mortgage, functional equivalents.

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I. Words of Introduction

The current paper, as its title points out, focuses on fixed and floating charges. Furthermore, the title of this work suggests that attention will be paid to a Privy Council¹ case: *Agnew and Another v. Commissioner of Inland Revenue*² (i.e., the *Brumark* case).

¹ The Privy Council is, in Britain, the principal council of the sovereign, composed of the cabinet ministers and other persons chosen by royal appointment to serve as privy councillors. See, B. A. GARNER (editor in chief), *Black’s Law Dictionary*, ninth edition, West, 2009, p. 1320. The Judicial Committee of the Privy Council is a United Kingdom tribunal; it was created in 1833, with jurisdiction to hear certain admiralty and ecclesiastical appeals, and certain appeals from the Commonwealth. See, B. A. GARNER (editor in chief), *op. cit.*, p. 922. The Commonwealth is a loose association of countries that recognize one sovereign. See, B. A. GARNER (editor in chief), *op. cit.*, p. 315. In Great Britain, the term “British” was eliminated from “British Commonwealth”. See, B. A. GARNER (editor in chief), *op. cit.*, p. 315. Now, one simply speaks of “the Commonwealth”. Today, the Commonwealth encompasses 54 countries. See, G. CUNIBERTI, *Grands systèmes de droit contemporains*, 2^e édition, LGDJ, Paris, p. 70, no. 111. In 2003, New Zealand abandoned the possibility to appeal to the Judicial Committee of the Privy Council. See, G. CUNIBERTI, *op. cit.*, p. 71, no. 113, footnote no. 8.

² See, *Agnew and Another v. Commissioner of Inland Revenue*, Privy Council (New Zealand), 5 June 2001, [2001] 3 WLR 454, in V. MARTIN-ROYLE, *Security Interests*, in S. VAN ERP, B. AKKERMANS (editors), *Cases, Materials and Text on National, Supranational and International Property Law*, Hart Publishing, Oxford and Portland, 2012, p. 462-463.

The subtitle, it may be noticed, contains the expression “*functional equivalents*”. Perhaps, some explaining would be desirable. Konrad Zweigert and Hein Kötz wrote that the basic methodological principle of all comparative law³ is that of functionality⁴.

Indeed, we are in the presence of the so-called equivalence functionalism, and of the recognition of functional equivalents⁵. When we have in mind the notion of “*functional equivalents*”⁶, we actually consider that

³ John W. HEAD believes that it is important to note that the term “*comparative law*” is somewhat of a misnomer (i.e., an inaccurate name). See, J. W. HEAD, *Great Legal Traditions. Civil Law, Common Law, and Chinese Law in Historical and Operational Perspective*, Carolina Academic Press, Durham, North Carolina, 2011, p. 21.

Alan WATSON perceived that more than one comparative lawyer has observed that “*comparative law*” is a strange phrase. See, A. WATSON, *Legal Transplants. An Approach to Comparative Law*, second edition, University of Georgia Press, Athens, Georgia, 1993, p. 1. WATSON goes on to say that there is no “*comparative*” branch of law in the sense in which lawyers call one branch of law “*Family Law*”. See, A. WATSON, *op. cit.*, p. 1.

ZWEIGERT and KÖTZ think that the words “*comparative law*” suggest an intellectual activity with law as its object and comparison as its process. See, K. ZWEIGERT, H. KÖTZ, *An Introduction to Comparative Law* (T. WEIR, translator), third edition, Oxford University Press, 2011 (reprinted), p. 2. “*Comparative law*” has an extra dimension, i.e., internationalism. See, K. ZWEIGERT, H. KÖTZ, *op. cit.* (T. WEIR, translator), p. 2. Indeed, comparative law’s internationalism means that different legal systems of the world must be compared, or specific legal institutions belonging to at least two different legal systems must be taken into account.

⁴ See, K. ZWEIGERT, H. KÖTZ, *An Introduction to Comparative Law* (T. WEIR, translator), third edition, Oxford University Press, 2011 (reprinted), p. 34.

⁵ See, R. MICHAELS, *The Functional Method of Comparative Law*, in M. REIMANN, R. ZIMMERMANN (editors), *The Oxford Handbook of Comparative Law*, Oxford University Press, 2008, p. 356-357. ZWEIGERT and KÖTZ make use of the expression “*functionally equivalent*”. See, K. ZWEIGERT, H. KÖTZ, *op. cit.* (T. WEIR, translator), p. 36. It is quite obvious that ZWEIGERT and KÖTZ embrace what is known as equivalence functionalism and the concept of functional equivalents.

⁶ It must be said that equivalence functionalism is not the sole method of comparative law. There are, of course, other possible approaches, such as the common core method or, if we may call it so, the factual method. See, U. A. MATTEI, T. RUSKOLA, A. GIDI, *Schlesinger’s Comparative Law. Cases – Text – Materials*, seventh edition, Foundation Press, 2009, p. 99 (“[t]he common core seeks to describe commonalities among legal systems hidden below apparent differences

in, say, two different legal systems we are faced with the same problems, and these problems are solved by different means (i.e., different legal mechanisms), but similar results are reached⁷.

II. *Agnew and Another v. Commissioner of Inland Revenue, Privy Council (New Zealand), 5 June 2001 (the Brumark case)*

In *Agnew and Another v. Commissioner of Inland Revenue*⁸ the following facts showed themselves: Brumark Investments Ltd granted a charge over the uncollected book debts⁹ of a company. Brumark had the right to collect the debts and use the proceeds in the ordinary course of its business. Subsequently, Brumark became insolvent. The only assets available for distribution to creditors were the proceeds of the book debts.

In *Agnew (i.e., in Brumark)*, the issue was whether the charge over the book debts was a fixed charge or a floating charge¹⁰. If the charge was a fixed charge, the proceeds would have been payable to Westpac Banking

[;] [i]ts hypothesis is that the degree of agreement between legal systems facing the same factual situation is higher than what might appear if one limits the analysis to the black letters of the law”).

⁷ See, K. ZWEIGERT, H. KÖTZ, *op. cit.* (T. WEIR, translator), p. 34.

⁸ See, *Agnew and Another v. Commissioner of Inland Revenue*, Privy Council (New Zealand), 5 June 2001, [2001] 3 WLR 454, in V. MARTIN-ROYLE, *Security Interests*, in S. VAN ERP, B. AKKERMANS (editors), *op. cit.*, p. 462.

⁹ Book debts are sums of money. See, [https://uk.practicallaw.thomsonreuters.com/6-107-7533?transitionType=Default&contextData=\(sc.Default\)&firstPage=true#:~:text=A%20book%20debt%20is%20a, it%20is%20in%20fact%20entered](https://uk.practicallaw.thomsonreuters.com/6-107-7533?transitionType=Default&contextData=(sc.Default)&firstPage=true#:~:text=A%20book%20debt%20is%20a, it%20is%20in%20fact%20entered) (Last accessed: June 26, 2021).

¹⁰ See, *Agnew and Another v. Commissioner of Inland Revenue*, Privy Council (New Zealand), 5 June 2001, [2001] 3 WLR 454, in V. MARTIN-ROYLE, *Security Interests*, in S. VAN ERP, B. AKKERMANS (editors), *op. cit.*, p. 462.

Corporation as the holder of the charge¹¹. If the charge was a floating charge, the proceeds would have been payable to the employees and the Commissioner of Inland Revenue as preferential creditors¹².

In *Brumark*, it seems to us, Westpac Banking was the chargee¹³. Brumark Investments was the chargor.

The Privy Council, in its judgment, said, *inter alia*, the following:

¹¹ See, *Agnew and Another v. Commissioner of Inland Revenue*, Privy Council (New Zealand), 5 June 2001, [2001] 3 WLR 454, in V. MARTIN-ROYLE, *Security Interests*, in S. VAN ERP, B. AKKERMANS (editors), *op. cit.*, p. 462.

¹² See, *Agnew and Another v. Commissioner of Inland Revenue*, Privy Council (New Zealand), 5 June 2001, [2001] 3 WLR 454, in V. MARTIN-ROYLE, *Security Interests*, in S. VAN ERP, B. AKKERMANS (editors), *op. cit.*, p. 462.

¹³ Westpac Banking was the holder of the charge. The chargee is, indeed, the holder of a charge. See, B. A. GARNER (editor in chief), *op. cit.*, p. 266.

“Any attempt in the present context to separate the ownership of the debts from the ownership of their proceeds (even if conceptually possible) makes no commercial sense”¹⁴.

“A fixed charge gives the holder of the charge an immediate proprietary interest in the assets subject to the charge which binds all those into whose hands the assets may come with notice of the charge. Unless it obtained the consent of the holder of the charge, therefore, the company would be unable to deal with its assets without committing a breach of the terms of the charge”¹⁵.

“The floating charge is capable of affording the creditor, by a single instrument, an effective and comprehensive security upon the entire undertaking of the debtor company and its assets from time to time, while at the same time leaving the company free to deal with its assets and pay its trade creditors in the ordinary course of business without reference to the holder of the charge”¹⁶.

“If the chargor is free to deal with the charged assets and so withdraw them from the ambit of the charge without the consent of the chargee, then the charge is a floating charge. But the test can equally well be expressed from the chargee’s point of view. If the charged assets are not under its control so that it can prevent their dissipation without its consent, then the charge cannot be a fixed charge”¹⁷.

“To constitute a charge on book debts [as] a fixed charge, it is sufficient to prohibit the company from realising the debts itself, whether by assignment or collection”¹⁸.

According to Vincent Sagaert, in the *Brumark* case, the Privy Council decided that everything revolves around the control over the charged assets¹⁹.

¹⁴ *Agnew and Another v. Commissioner of Inland Revenue*, Privy Council (New Zealand), 5 June 2001, [2001] 3 WLR 454, in V. MARTIN-ROYLE, *Security Interests*, in S. VAN ERP, B. AKKERMANS (editors), *op. cit.*, p. 463.

¹⁵ *Agnew and Another v. Commissioner of Inland Revenue*, Privy Council (New Zealand), 5 June 2001, [2001] 3 WLR 454, in V. MARTIN-ROYLE, *Security Interests*, in S. VAN ERP, B. AKKERMANS (editors), *op. cit.*, p. 462.

¹⁶ *Agnew and Another v. Commissioner of Inland Revenue*, Privy Council (New Zealand), 5 June 2001, [2001] 3 WLR 454, in V. MARTIN-ROYLE, *Security Interests*, in S. VAN ERP, B. AKKERMANS (editors), *op. cit.*, p. 462.

If the chargee has control, the charge will be a fixed one²⁰. If, on the other hand, the chargor remains in control, the charge must be a floating one²¹.

Another author is convinced that the essence of a floating charge is that it is not a charge over a specific asset, but over a fluctuating body of assets, which the company granting the charge (*i.e.*, the chargor) may continue to use in the ordinary course of its business²². So, in the case of a floating charge, the chargor may use the assets (*i.e.*, it is free to use them); control belongs to the chargor. We are further told that the essence of a fixed charge is that it is a charge on a particular asset, or class of assets, that the chargor cannot deal with free from the charge without the consent of the chargee; the fixed charge attaches immediately to the asset, and the chargee has control²³. In regard to a fixed charge, control is in the hands of the chargee.

¹⁷ *Agnew and Another v. Commissioner of Inland Revenue*, Privy Council (New Zealand), 5 June 2001, [2001] 3 WLR 454, in V. MARTIN-ROYLE, *Security Interests*, in S. VAN ERP, B. AKKERMANS (editors), *op. cit.*, p. 462-463.

¹⁸ *Agnew and Another v. Commissioner of Inland Revenue*, Privy Council (New Zealand), 5 June 2001, [2001] 3 WLR 454, in V. MARTIN-ROYLE, *Security Interests*, in S. VAN ERP, B. AKKERMANS (editors), *op. cit.*, p. 463.

¹⁹ See, V. MARTIN-ROYLE, *Security Interests*, in S. VAN ERP, B. AKKERMANS (editors), *op. cit.*, p. 464.

²⁰ See, V. MARTIN-ROYLE, *Security Interests*, in S. VAN ERP, B. AKKERMANS (editors), *op. cit.*, p. 464.

²¹ See, V. MARTIN-ROYLE, *Security Interests*, in S. VAN ERP, B. AKKERMANS (editors), *op. cit.*, p. 464.

²² See, C. MARTIN-ROYLE, *Floating charges – not necessarily what they say on the tin*, *Insolvency and Corporate Restructuring Jones Day*, February 2008, p. 73.

²³ See, C. MARTIN-ROYLE, *op. cit.*, p. 73.

III. Charge and mortgage – brief remarks.

In English law there are four types of security interests: (1) the pledge, (2) the lien, (3) the mortgage, and (4) the charge²⁴.

A pledge and a contractual lien depend on the delivery of possession to the creditor²⁵. Yet, there is a difference between these two security interests. In the case of a pledge, the owner delivers possession to the creditor as security²⁶. In regard to a lien, the creditor retains possession of goods previously delivered to him for some other purpose²⁷.

The charge and the mortgage do not depend on the delivery of possession²⁸.

Indeed, a charge is a security right which does not require that the chargee take possession of the charged asset²⁹. A charge can have, as its object,

²⁴ See, B. MCFARLANE, N. HOPKINS, S. NIELD, *Land Law. Text, Cases, and Materials*, fourth edition, Oxford University Press, 2018, p. 1032.

See, also, *Re Cosslett (Contractors) Ltd*, Court of Appeal, 29 July 1997, in V. MARTIN-ROYLE, *Security Interests*, in S. VAN ERP, B. AKKERMANS (editors), *op. cit.*, p. 428 (“[t]here are only four kinds of consensual security known to English law: (i) pledge; (ii) contractual lien; (iii) equitable charge and (iv) mortgage”).

²⁵ See, *Re Cosslett (Contractors) Ltd*, Court of Appeal, 29 July 1997, in V. MARTIN-ROYLE, *Security Interests*, in S. VAN ERP, B. AKKERMANS (editors), *op. cit.*, p. 428.

²⁶ See, *Re Cosslett (Contractors) Ltd*, Court of Appeal, 29 July 1997, in V. MARTIN-ROYLE, *Security Interests*, in S. VAN ERP, B. AKKERMANS (editors), *op. cit.*, p. 428.

²⁷ See, *Re Cosslett (Contractors) Ltd*, Court of Appeal, 29 July 1997, in V. MARTIN-ROYLE, *Security Interests*, in S. VAN ERP, B. AKKERMANS (editors), *op. cit.*, p. 428.

²⁸ See, *Re Cosslett (Contractors) Ltd*, Court of Appeal, 29 July 1997, in V. MARTIN-ROYLE, *Security Interests*, in S. VAN ERP, B. AKKERMANS (editors), *op. cit.*, p. 428.

²⁹ See, V. MARTIN-ROYLE, *Security Interests*, in S. VAN ERP, B. AKKERMANS (editors), *op. cit.*, p. 449.

movable or immovable assets³⁰. The charge is a creature of equity³¹. Of course, a distinction must be made between fixed and floating charges³². The categorization of fixed and floating charges has been the source of much litigation³³. Perhaps, we are now able to state that the standard to be used when we wish to distinguish between a fixed charge and a floating one is this: control over the charged asset. For instance, in *Re Spectrum Plus Ltd*³⁴, we are taught or told that under a floating charge, the chargee does not have the same power to control the security for its own benefit. A floating charge may be converted to a fixed charge by a process called “crystallization”³⁵. This crystallization takes place when the company is unable to deal with its assets in the ordinary course of its business³⁶ or when an agreed event occurs³⁷.

³⁰ See, V. MARTIN-ROYLE, *Security Interests*, in S. VAN ERP, B. AKKERMANS (editors), *op. cit.*, p. 449.

³¹ See, B. MCFARLANE, N. HOPKINS, S. NIELD, *op. cit.*, p. 1041.

Equity is the work of the Court of Chancery. This court was run by the Chancellor. See, A. TAMBA, *Intentional Torts. O cercetare a Common Law-ului american. Common Law, Equity, Torts Law*, Hamangiu, București, 2015, p. 34-35, no. 9. Another creature or creation of equity is the trust. Some believe that the trust is the most important creation of equity. See, R. DAVID, C. JAUFFRET-SPINOSI, *Les grands systèmes de droit contemporains*, 11^e édition, Dalloz, Paris, 2002, p. 258, no. 258 (“[l]a notion de trust ... est une notion fondamentale du droit anglais et la création la plus importante de l’equity”).

³² See, V. MARTIN-ROYLE, *Security Interests*, in S. VAN ERP, B. AKKERMANS (editors), *op. cit.*, p. 454.

³³ See, B. MCFARLANE, N. HOPKINS, S. NIELD, *op. cit.*, p. 1041.

³⁴ See, *Re Spectrum Plus Ltd* [2005] 2 AC 680, HL, in B. MCFARLANE, N. HOPKINS, S. NIELD, *op. cit.*, p. 1041.

³⁵ See, B. MCFARLANE, N. HOPKINS, S. NIELD, *op. cit.*, p. 1041.

³⁶ See, B. MCFARLANE, N. HOPKINS, S. NIELD, *op. cit.*, p. 1041.

³⁷ See, B. MCFARLANE, N. HOPKINS, S. NIELD, *op. cit.*, p. 1041. See, also, V. MARTIN-ROYLE, *Security Interests*, in S. VAN ERP, B. AKKERMANS (editors), *op. cit.*, p. 454 (when a certain specified event happens, the floating charge becomes a fixed charge).

When one creates a mortgage, the person who creates the mortgage is termed the mortgagor and the person in whose favor it is created is called the mortgagee³⁸. In *Santley v. Wilde*, it was established that a mortgage is a conveyance of land or an assignment of chattels³⁹ as a security for the payment of a debt or the discharge of some other obligation⁴⁰. *Santley v. Wilde*⁴¹ is important, because, in our view, the case highlights that a mortgage can have, as its object, a movable or an immovable asset⁴². Nowadays, *Santley*⁴³ cannot be read in the sense that a mortgage depends on or requires the delivery of possession; *Re Cosslett (Contractors) Ltd*⁴⁴ was crystal clear: a mortgage does not depend on the delivery of possession. What a mortgage⁴⁵ does is this: it transfers the mortgagor’s title to the mortgagee. In English law, the mortgagee becomes the owner of the thing which is subjected to the mortgage⁴⁶. The

³⁸ See, M. P. THOMPSON, M. GEORGE, *Thompson’s Modern Land Law*, sixth edition, Oxford University Press, 2017, p. 426.

³⁹ A chattel is personal property (i.e., any movable thing). See, B. A. GARNER (editor in chief), *op. cit.*, p. 268 and p. 1337.

⁴⁰ See, *Santley v. Wilde*, Court of Appeal, 4 August 1899, in V. MARTIN-ROYLE, *Security Interests*, in S. VAN ERP, B. AKKERMANS (editors), *op. cit.*, p. 516.

⁴¹ See, *Santley v. Wilde*, Court of Appeal, 4 August 1899, in V. MARTIN-ROYLE, *Security Interests*, in S. VAN ERP, B. AKKERMANS (editors), *op. cit.*, p. 516.

⁴² See, V. MARTIN-ROYLE, *Security Interests*, in S. VAN ERP, B. AKKERMANS (editors), *op. cit.*, p. 532 (a mortgage can cover both movables and immovables).

⁴³ *Santley v. Wilde*, Court of Appeal, 4 August 1899, in V. MARTIN-ROYLE, *Security Interests*, in S. VAN ERP, B. AKKERMANS (editors), *op. cit.*, p. 516.

⁴⁴ *Re Cosslett (Contractors) Ltd*, Court of Appeal, 29 July 1997, in V. MARTIN-ROYLE, *Security Interests*, in S. VAN ERP, B. AKKERMANS (editors), *op. cit.*, p. 428.

⁴⁵ According to one author, at its root, a mortgage is security for a loan. See, M. DIXON, *Modern Land Law*, eleventh edition, Routledge, 2018, p. 410.

⁴⁶ See, V. MARTIN-ROYLE, *Security Interests*, in S. VAN ERP, B. AKKERMANS (editors), *op. cit.*, p. 517.

mortgagor retains a right of redemption: the right to claim the asset or, in better words, to claim the ownership upon full payment of the secured debt⁴⁷.

Kevin Gray and Susan Francis Gray indicate that the terms “*mortgage*” and “*charge*” are today used interchangeably, both signifying a security interest created by a borrower (mortgagor or chargor) in favour of a lender (mortgagee or chargee)⁴⁸. We doubt that “*mortgage*” and “*charge*” are some sort of synonyms. In *Re Cosslett (Contractors) Ltd*⁴⁹, it is announced that the difference between a charge and a mortgage is the following: a mortgage involves a transfer of ownership to the creditor, whereas a charge does not. Truly, when one is confronted with a charge, he or she would do well to remember: in the situation of a charge, in contrast to a mortgage, there is no transfer of an ownership interest⁵⁰.

IV. Hypothec – a succinct presentation.

In France⁵¹, the hypothec was defined as a security over an immovable that does not require the dispossession of the debtor, and such hypothec may

⁴⁷ See, V. MARTIN-ROYLE, *Security Interests*, in S. VAN ERP, B. AKKERMANS (editors), *op. cit.*, p. 517.

⁴⁸ See, K. GRAY, S. F. GRAY, *Elements of Land Law*, fifth edition, Oxford University Press, 2009, p. 694, no. 6.1.2.

⁴⁹ See, *Re Cosslett (Contractors) Ltd*, Court of Appeal, 29 July 1997, in V. MARTIN-ROYLE, *Security Interests*, in S. VAN ERP, B. AKKERMANS (editors), *op. cit.*, p. 428.

⁵⁰ See, B. MCFARLANE, N. HOPKINS, S. NIELD, *op. cit.*, p. 1041.

⁵¹ Laurent AYNÈS and Pierre CROCQ write that it is often said that the queen of securities on immovables is the hypothec. See, L. AYNÈS, P. CROCQ, *Droit civil. Droit des sûretés*, 11^e édition, LGDJ, Paris, 2017, p. 357, no. 630.

be born by a contract, a legal text, or a judicial decision⁵²; the creditor to whom a hypothec belongs has two prerogatives: (1) the right to “follow” the immovable in whatever hands it may pass (*i.e.*, *droit de suite*), and (2) the right of priority or of preference (*i.e.*, *droit de préférence*)⁵³. In all truth, the French hypothec has three sources⁵⁴: it may be born by a contract⁵⁵; it may be created by legislation (*i.e.*, *loi*)⁵⁶; it may be ordered by the judge⁵⁷.

In Québec⁵⁸, the hypothec is capable of embracing movable or immovable property (art. 2660 of the Civil Code of Québec)⁵⁹. In *Bélaïr et Masseau ltée (Syndic de)*⁶⁰, the court mentioned a hypothec on a movable thing (*i.e.*, *hypothèque mobilière*).

In Romania, the hypothec can have, as its object, a movable or immovable thing (art. 2343 of the Civil Code of Romania)⁶¹. Under the

⁵² See, Ph. SIMLER, Ph. DELEBECQUE, *Droit civil. Les sûretés. La publicité foncière*, 7^e édition, Dalloz, Paris, 2016, p. 395-396, no. 385.

⁵³ See, Ph. SIMLER, Ph. DELEBECQUE, *op. cit.*, p. 396, no. 385.

⁵⁴ See, M. MIGNOT, *Droit des sûretés et de la publicité foncière*, 3^e édition, LGDJ, Paris, 2017, p. 443, no. 1167.

⁵⁵ See, M. MIGNOT, *op. cit.*, p. 443, no. 1167.

⁵⁶ See, M. MIGNOT, *op. cit.*, p. 443, no. 1167.

⁵⁷ See, M. MIGNOT, *op. cit.*, p. 443, no. 1167.

⁵⁸ Québec is a mixed system of Civil Law and Common Law. See, V. V. Palmer, *Mixed legal systems*, in M. BUSSANI, U. MATTEI (editors), *The Cambridge Companion to Comparative Law*, Cambridge University Press, 2012, p. 379-380.

⁵⁹ See, J.-L. BAUDOIN, Y. Renaud, *Code civil du Québec Annoté*, tome 2, 15^e édition, Wilson & Lafleur, Montréal, 2012, p. 3768.

⁶⁰ See, *Bélaïr et Masseau ltée (Syndic de)*, (C.S., 2006-10-18), in J.-L. BAUDOIN, Y. RENAUD, *op. cit.*, p. 3770.

⁶¹ See, S. I. VIDU, *Garanțiile executării obligațiilor*, in L. POP, I.-Fl. POPA, S. I. VIDU, *Drept civil. Obligațiile*, ediția a II-a, Universul Juridic, București, 2020, p. 635, no. 567; P. VASILESCU, *Drept civil. Obligații*, ediția a 2-a, Hamangiu, București, 2017, p. 169; R. RIZOIU, *Curs de garanții civile*, Hamangiu, București, 2020, p. 343, no. 153.

Romanian Civil Code of 1864, the hypothec was a property right on immovables; in this regard, the Romanian courts were quite clear⁶².

A hypothec has a few main traits: (1) it is a property right; (2) it has an accessory nature⁶³; (3) it is indivisible⁶⁴; (4) it does not demand the dispossession of the debtor or hypothecor⁶⁵; (5) if the hypothec is a contractual one, it has a formal nature⁶⁶. Three of these traits, we believe, deserve a closer look; those features are (1) the accessory nature of the hypothec, (2) its indivisibility, and (3) its formal nature.

The hypothec is the accessory of a credit right⁶⁷. Hypothec’s accessory nature generates a few consequences: the secured credit right must be valid⁶⁸; if the secured credit right is transferred, the hypothec will also be

⁶² See, *Apel Buc. II, Oct. 17/73. Dr. 77/73*, in C. Hamangiu, N. GEORGEAN, *Codul civil adnotat*, vol. IV, All Beck, *Restitutio*, București, 2002, p. 247.

⁶³ See, M. BOURASSIN, V. BRÉMOND, *Droit des sûretés*, 7^e édition, Sirey, Paris, 2020, p. 770, no. 1099; V. MARTIN-ROYLE, *Security Interests*, in S. VAN ERP, B. AKKERMANS (editors), *op. cit.*, p. 539; H. et L. MAZEAUD, J. MAZEAUD, Fr. Chabas, *Leçons de droit civil*, tome III, premier volume, *Sûretés. Publicité foncière*, 7^e édition (par Y. Picod), Montchrestien, Paris, 1999, p. 285, no. 231; Y. Picod, *Droit des sûretés*, 3^e édition, PUF, Paris, 2008, p. 398, no. 298.

⁶⁴ See, M. BOURASSIN, V. BRÉMOND, *op. cit.*, p. 770, no. 1099; Y. PICOD, *op. cit.*, p. 398, no. 298.

⁶⁵ See, M. BOURASSIN, V. BRÉMOND, *op. cit.*, p. 770, no. 1099; L. AYNÈS, P. CROCQ, *Droit civil. Droit des sûretés*, 11^e édition, LGDJ, Paris, 2017, p. 357, no. 630.

⁶⁶ See, V. MARTIN-ROYLE, *Security Interests*, in S. VAN ERP, B. AKKERMANS (editors), *op. cit.*, p. 536.

⁶⁷ See, M. BOURASSIN, V. BRÉMOND, *op. cit.*, p. 770, no. 1103.

Some authors talk about credit rights and real rights. They tell us that both are part of a person’s patrimony. See, S. LITVINOFF, R. J. SCALISE Jr., *The Law of Obligations in the Louisiana Jurisprudence. A Coursebook*, sixth edition, LSU Paul M. Hebert Law Center, Baton Rouge, 2008, p. 6.

⁶⁸ See, M. BOURASSIN, V. BRÉMOND, *op. cit.*, p. 770, no. 1103.

transferred⁶⁹;70 a hypothec will extinguish when the credit right extinguishes⁷¹. It should be said that, in Romania, a hypothec on an immovable must be registered in the Land Register [art. 2377 (1) of the Romanian Civil Code]. Thus, when the secured credit right extinguishes, such a hypothec does not extinguish automatically; the hypothec needs to be “erased” from the Land Register [art. 2428 (1) and (2) (a) of the Civil Code of Romania].

The indivisible nature of the hypothec may be expressed by the following words: *Hypotheca est tota in toto et tota in qualibet parte*⁷². The indivisibility of the hypothec means that, if, *e.g.*, the immovable submitted to the hypothec is divided by a partition, the hypothec itself is not divided⁷³. The indivisibility also means that should the secured debt become divisible (*e.g.*, the debtor dies and he is inherited by two or more persons), the hypothec is not divided.

The formal nature of the hypothec signifies that a contract of hypothec requires a document in writing⁷⁴. In Romania, if the hypothec is created in regard to an immovable, the document must be a notarial deed [art. 2378 (1)

⁶⁹ See, V. MARTIN-ROYLE, *Security Interests*, in S. VAN ERP, B. AKKERMANS (editors), *op. cit.*, p. 539. See, also, D. LEGEAIS, *Droit des sûretés et garanties du crédit*, 13^e édition, LGDJ, Paris, 2019, p. 405, no. 547.

⁷⁰ Perhaps, it would not hurt to note that, in Romania, a hypothec may be transferred independently or separately of the secured credit right [art. 2358 (1) of the Romanian Civil Code].

⁷¹ See, D. LEGEAIS, *op. cit.*, p. 405, no. 547.

⁷² See, Ch. ALBIGES, M.-P. DUMONT, *Droit des sûretés*, 7^e édition, Dalloz, Paris, 2019, p. 441, no. 589.

⁷³ See, *Civ. 3^e, 6 mars 1996*, in G. WIEDERKEHR, X. HENRY, A. TISSERAND-MARTIN, G. VENANDET, P. ANCEL, P. GUIOMARD, *Code civil annoté*, 118^e édition, Dalloz, Paris, 2018, p. 2751.

⁷⁴ See, V. MARTIN-ROYLE, *Security Interests*, in S. VAN ERP, B. AKKERMANS (editors), *op. cit.*, p. 538.

of the Romanian Civil Code]; if the hypothec concerns a movable, a written document suffices, but, obviously, a notarial deed may be used (art. 2388 of the Romanian Civil Code). In France, the agreement to create a hypothec demands a notarial deed (art. 2416 of the French Civil Code); on the other hand, the promise of hypothec (*i.e.*, *promesse d’hypothèque*) is not in need of a notarial deed⁷⁵.

In French law, the prohibition of forfeiture clauses (*i.e.*, *pacta commissoria*) has been abolished⁷⁶. A forfeiture clause (*i.e.*, *pacte commissoire*) is a clause that can be placed in the contract of hypothec, and, according to such a clause, the non-performance of the secured debt will render the hypothec owner of the thing submitted to the hypothec⁷⁷. This type of clause is lawful in respect to a hypothec (art. 2459 of the French Civil Code)⁷⁸. Of course, in France, art. 2458 of the Civil Code is called “prohibition of self-help” (*i.e.*, *prohibition de voie parée*)⁷⁹. Thus, a clause in which the parties agree that the creditor can sell the immovable, if the debtor is in default to comply with his obligations is void⁸⁰. The explanation for the rule of the prohibition of self-help is this: this kind of clause entails the risk that

⁷⁵ See, *Req. 5 nov 1860*, in G. WIEDERKEHR, X. HENRY, A. TISSERAND-MARTIN, G. VENANDET, P. ANCEL, P. GUIOMARD, *op. cit.*, p. 2761 (“[u]ne promesse d’hypothèque peut être faite par acte sous seing privé”).

⁷⁶ See, V. MARTIN-ROYLE, *Security Interests*, in S. VAN ERP, B. AKKERMANS (editors), *op. cit.*, p. 547.

⁷⁷ See, P. TAFFOREAU, *Droit des sûretés. Sûretés personnelles et réelles*, Bruylant, Bruxelles, p. 421, no. 950.

⁷⁸ See, P. TAFFOREAU, *op. cit.*, p. 421, no. 950.

⁷⁹ See, V. MARTIN-ROYLE, *Security Interests*, in S. VAN ERP, B. AKKERMANS (editors), *op. cit.*, p. 546.

⁸⁰ See, V. MARTIN-ROYLE, *Security Interests*, in S. VAN ERP, B. AKKERMANS (editors), *op. cit.*, p. 546.

the creditor would sell the thing against a sales price that is sufficient to pay his claim, but which is below the market value⁸¹. We must call attention to the view of one author: according to him, **the clause** of “*voie parée*” is forbidden, but **the convention** of “*voie parée*”, made after the contract of hypothec was born, is valid⁸².

French law accepts a device that may be termed “*rechargeable hypothec*”. *E.g.*, in order to acquire an immovable, a young couple takes a loan in the amount of 150.000 euros from bank A⁸³. The loan is secured by a rechargeable hypothec, created in favor of bank A⁸⁴. The maximum amount of money, that can be secured by the hypothec, is the sum of 200.000 euros⁸⁵. A few months later, the young couple takes a new loan, in the amount of 20.000 euros, from bank B⁸⁶. This loan is secured by the same hypothec, through an agreement of “*rechargement*” made between the borrowers and bank B, before a notary⁸⁷. This example, we think, is helpful in order to understand what the rechargeable hypothec is. Yet, it must be said that, today, the scope of the rechargeable hypothec is narrow⁸⁸. After Law no. 2014-1545 came into force, a rechargeable hypothec may no longer be created in order to

⁸¹ See, V. MARTIN-ROYLE, *Security Interests*, in S. VAN ERP, B. AKKERMANS (editors), *op. cit.*, p. 546.

⁸² See, P. TAFFOREAU, *op. cit.*, p. 420, no. 947(“[l]a clause de voie parée a toujours été interdite[;] [e]n revanche, la convention de voie parée, conclue postérieurement à l’acte de constitution d’hypothèque, est jugée valable ...”).

⁸³ See, M. BOURASSIN, V. BRÉMOND, *op. cit.*, p. 783, no. 1120.

⁸⁴ See, M. BOURASSIN, V. BRÉMOND, *op. cit.*, p. 783, no. 1120.

⁸⁵ See, M. BOURASSIN, V. BRÉMOND, *op. cit.*, p. 783, no. 1120.

⁸⁶ See, M. BOURASSIN, V. BRÉMOND, *op. cit.*, p. 783, no. 1120.

⁸⁷ See, M. BOURASSIN, V. BRÉMOND, *op. cit.*, p. 783-784, no. 1120.

⁸⁸ See, M. BOURASSIN, V. BRÉMOND, *op. cit.*, p. 784, no. 1120.

secure “non-professional” credit rights⁸⁹. Therefore, a young couple who want to acquire an immovable, in order to have a home, cannot secure the loan they need through a rechargeable hypothec.

V. Charge and hypothec – functional equivalents.

Continental lawyers often consider that a mortgage is similar or equivalent to a hypothec⁹⁰. Nevertheless, these devices are fundamentally different⁹¹. In *Re Cosslett (Contractors) Ltd*⁹², it is shown that a mortgage involves a transfer of ownership. Indeed, the mortgagee becomes the owner of the thing “exposed” to the mortgage⁹³. In respect to a hypothec, the hypothecee does have a property right⁹⁴, but this right is not ownership⁹⁵; it is a security property right (*i.e.*, *droit réel de garantie*)⁹⁶.

⁸⁹ See, M. BOURASSIN, V. BRÉMOND, *op. cit.*, p. 784, no. 1120.

⁹⁰ See, V. MARTIN-ROYLE, *Security Interests*, in S. VAN ERP, B. AKKERMANS (editors), *op. cit.*, p. 533.

⁹¹ See, V. MARTIN-ROYLE, *Security Interests*, in S. VAN ERP, B. AKKERMANS (editors), *op. cit.*, p. 534.

⁹² See, *Re Cosslett (Contractors) Ltd*, Court of Appeal, 29 July 1997, in V. MARTIN-ROYLE, *Security Interests*, in S. VAN ERP, B. AKKERMANS (editors), *op. cit.*, p. 428.

⁹³ See, V. MARTIN-ROYLE, *Security Interests*, in S. VAN ERP, B. AKKERMANS (editors), *op. cit.*, p. 517.

⁹⁴ See, M. BOURASSIN, V. BRÉMOND, *op. cit.*, p. 770, no. 1101.

⁹⁵ See, M. BOURASSIN, V. BRÉMOND, *op. cit.*, p. 770, no. 1101 (“[i]l ne s’agit pas du droit réel principal de propriété ...”).

⁹⁶ See, M. BOURASSIN, V. BRÉMOND, *op. cit.*, p. 770, no. 1101.

One Romanian author is of the opinion that a hypothec is not simply created⁹⁷; the hypothec, we are told, involves a transfer⁹⁸; most of the times, he believes, the right that is transferred is ownership⁹⁹. To put it simply, in professor Rizoiu’s view, the hypothec generates a transfer of ownership. As Vincent Sagaert would say, this view is, however, mistaken¹⁰⁰. One cannot take, as professor Rizoiu seems to do, ideas that work in the case of a Common Law mortgage and apply them to a Civil Law hypothec.

The functional equivalent of a hypothec is not a mortgage, but rather a charge on land¹⁰¹. This statement is acceptable, if one has in mind a hypothec on immovables, and a charge created in regard to immovables. Yet, perhaps it is possible to go further and say that charge and hypothec are functional equivalents. Charge and hypothec are different means or mechanisms; the charge is a creature of equity¹⁰², whereas the hypothec is not. Still, they generate similar results: they secure claims without transferring ownership to the creditor.

⁹⁷ See, R. RIZOIU, *Totul sau nimic: despre valoarea ipotecii*, in D. A. POPESCU (main editor), I.-Fl. POPA, S. GOLUB, L.-M. HAROSA (coeditors), *In Honorem Dan Chirică. Între dogmatica dreptului și rațiunea practică*, Hamangiu, București, 2018, p. 815.

⁹⁸ See, R. RIZOIU, *Totul sau nimic: despre valoarea ipotecii*, in D. A. POPESCU (main editor), I.-Fl. POPA, S. GOLUB, L.-M. HAROSA (coeditors), *op. cit.*, p. 815.

⁹⁹ See, R. RIZOIU, *Totul sau nimic: despre valoarea ipotecii*, in D. A. POPESCU (main editor), I.-Fl. POPA, S. GOLUB, L.-M. HAROSA (coeditors), *op. cit.*, p. 815.

¹⁰⁰ See, V. MARTIN-ROYLE, *Security Interests*, in S. VAN ERP, B. AKKERMANS (editors), *op. cit.*, p. 517.

¹⁰¹ See, V. MARTIN-ROYLE, *Security Interests*, in S. VAN ERP, B. AKKERMANS (editors), *op. cit.*, p. 534.

¹⁰² See, B. MCFARLANE, N. HOPKINS, S. NIELD, *op. cit.*, p. 1041.