

## NOTES

### Another Step Towards Immoveables Being Objects of Commercial Operations

“An immoveable cannot be the object of a commercial operation.” Although the courts and writers have created exceptions narrowing the application of this rule and recent judgments have shown tendencies to entirely disregard it in the face of the reality that real estate developers deal in land in the same way as ordinary traders entering into commercial operations,<sup>1</sup> it cannot, nonetheless, be denied that the principle is still basically a part of the law of Quebec. This is so despite the fact that there is, in Quebec, no text of law providing for it.

What then is the reason for the rule? In my article on the subject, written in 1965,<sup>2</sup> I mentioned that the reason given is that immoveables are said to be incapable of *circulation*, this being, along with *speculation* and *entremise*, one of the elements characterizing a commercial operation.<sup>3</sup> I went on to suggest, however, that not only do immoveables actually *circulate* (through mutations of ownership and delivery by the handing over of title deeds),<sup>4</sup> but that the true source of the principle lay in history and tradition.<sup>5</sup>

In the earlier part of the feudal period in France, there was no trade, the towns had withered away, and feudal law, being a system of land law in which contract had no place, reigned supreme. When trade was reborn, it was centred in towns built by the merchants who obtained independence from the local lords and created their own commercial law.

When royal power and legislation came once more to the fore during the decline of the feudal system, the French kings enacted laws in the commercial sphere. They did not, however, succeed in bringing unity to the civil law (this unification had to await

<sup>1</sup> *Gamma Realty Ltd. v. Brummer*, [1962] C.S. 607 (Prévost, J.), *Colonia Development Corporation v. Belliveau*, [1965] B.R. 161 (notes of Owen, J., at p. 166).

<sup>2</sup> *Can an immoveable be the object of a commercial operation?*, (1965), 11 McGill L.J. 310.

<sup>3</sup> *Ibid.*, p. 312.

<sup>4</sup> *Ibid.*, pp. 312-313.

<sup>5</sup> *Ibid.*, pp. 313 *et seq.*

the codification of 1804), with the consequence that the civil and commercial law remain separate in France to this day, regulated respectively by the Civil Code and the *Code de Commerce* and administered by separate civil and commercial courts. Because land fell within the realm of the civil law, operations concerning immoveables were excluded from the jurisdiction of the commercial courts. Thus article 631 of the *Code de Commerce* states that the commercial courts have jurisdiction over *actes de commerce*, and until recently, article 632 declared that

La loi répute actes de commerce:

Tout achat de *denrées et marchandises* pour les revendre, soit en nature, soit après les avoir travaillées et mises en oeuvre, ou même pour en louer simplement l'usage.<sup>6</sup>

While the foregoing text did not expressly exclude immoveables, its very presence, coupled with the force of tradition arising from the feudal system of land tenure, and the effect of separate civil and commercial courts explains why immoveables have always been regarded in France as only susceptible of being objects of civil operations.

In Quebec, there has never been the same degree of justification for the principle. The *Code de Commerce*, with its reference to *denrées et marchandises*, is not part of our law, we do not have separate civil and commercial courts, and there was never the same divorce between transactions involving land and commercial operations. It may be that the only reason why we have applied the rule that immoveables cannot be the object of commercial operations is that we tend to turn to French doctrine for guidance when seeking a solution to a Quebec legal problem, and the French authors were naturally writing about French and not Quebec law.

In the conclusion to my article,<sup>7</sup> I suggested that our courts abolish the principle, since it never really belonged to our law, since questions as to the advisability of retaining it were being raised in France, and since there was no justification for extending the protection of the civil rules to a trader just because he happened to be dealing in real estate and not moveables.

Considerable added weight has now been given to the movement to abolish the principle by a 1967 amendment to the *Code de Commerce*,<sup>8</sup> by virtue of which the second paragraph of article 632, being the one that referred to "*denrées et marchandises*", has been

---

<sup>6</sup> Italics added.

<sup>7</sup> *Loc. cit.*, p. 333.

<sup>8</sup> Enacted July 13, 1967, and came into force on Jan. 1, 1968.

replaced by several new paragraphs, so that the article as revised now reads as follows:

Art. 632. La loi répute actes de commerce:

Tout achat de biens meubles pour les revendre, soit en nature, soit après les avoir travaillés et mis en oeuvre;

*Tout achat de biens immeubles en vue de les revendre;*

Toutes opérations d'intermédiaire pour l'achat, la souscription ou la vente d'immeubles, de fonds de commerce, d'actions ou parts de sociétés immobilières;

Toute entreprise de location de meubles;

Toute entreprise de manufactures, de commission, de transport par terre ou par eau;

Toute entreprise de fournitures, d'agence, bureaux d'affaires, établissements de ventes à l'encan, de spectacles publics;

Toute opération de change, banque et courtage;

Toutes les opérations de banques publiques;

Toutes obligations entre négociants, marchands et banquiers;

Entre toutes personnes, les lettres de change.<sup>9</sup>

Thus the inappropriateness of the rule that an immovable cannot be the object of a commercial operation has finally been officially acknowledged by the French legislature.<sup>10</sup> In Quebec, this principle has never had the benefit of recognition by legislation.

The way would now appear to be clear for the courts of Quebec to declare that immovables may be the objects of commercial operations.

John W. DURNFORD.\*

---

<sup>9</sup> Italics added.

<sup>10</sup> See the comment by Alfred Jauffret, (1967), 20 Rev. trim. dr. comm. 748.

\* Professor of Law, McGill University.