Can an Immoveable Be the Object of a Commercial Operation ?

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Introduction.

"An immoveable cannot be the object of a commercial operation." How often have the members of the Quebec legal profession heard this rule expressed!

It is no idle maxim. Its application has a profound effect on certain key areas of the law, and while it may afford a safeguard in some instances, in others it will effectively prevent the exercise of legitimate rights.

Its most important effect is to exclude the application of the exception permitting evidence to be made by testimony in commercial matters (article 1233, par. 1, C.C.). Thus a person dealing in real estate, who may be a trader by reason of being a speculative builder, or just a plain speculator, may find himself enjoying the protection of the civil rules of evidence, even though he would otherwise be considered a trader, making it impossible for his opponent to make proof against him in the absence of a writing.[1]

Because of its long existence in our law, the rule has until recently, been accepted without occasioning much debate. A careful examination of our jurisprudence will disclose, however, that its application has been substantially narrowed by exceptions to the rule created by

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[1] Other effects of the rule which excludes speculators in real estate from the operation of the commercial rules include the applicability of the general thirty year prescription of article 2242 C.C. instead of the short five year commercial prescription of article 2260, par. 4, C.C., joint instead of joint and several liability (article 1105 C.C.), the necessity for a putting in default (articles 1067 and 1069 C.C.), the exclusion of a jury trial (article 421 C.C.P.).

the judges and doctrine; and in more recent times, a new trend of thinking has developed which has seriously questioned the very soundness of the rule.

1. The rule and its origin.

The rule, then, is that an immoveable cannot be the object of a commercial operation.[2]

It is well known that real estate is frequently subjected to speculation to the highest degree by speculators in land and builders of housing projects, not to mention the acquisition and use of land by commercial interests for the purpose of carrying on their businesses thereon, such as stores and factories. In view of this, what is the justification for stating that land operations are always civil by nature? The reason given is that immoveables are incapable of *circulation*.[3]

In order the better to understand the significance of this term, we must look at a definition of commerciality and the elements that

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[2] Quebec authorities : Perrault, *Traité de Droit Commercial*, I (1936), nos. 314 et seq., pp. 325 et seq., no 493(b), p. 488, II (1936), nos. 774 et seq., pp. 202 et seq., no. 988(b), p. 446; Langelier, *De la Preuve* (1894), nos. 495 and 496, pp. 213-214; LeDain, *The real estate broker* (1957-58) 4 McGill L.J. 219 at 225; Letarte, *Problèmes Juridiques de l'agent d'immeubles* (1949) 9 R. du B. 105 at 107; *Corbeil* v. *Marleau* (1896) 10 S.C. 6 (Mathieu, J.); *St. Genevievė Shopping Centre Ltd.* v. *Dalfen's Limited* [1964] .S.C. 554 (Batshaw, J.); *The Bell Telephone Company of Canada* v. *Dame Lefrançois* [1952] Q.B. 101; *Malo* v. *Dame Laliberté* [1958] R.L. 321 (Brossard, J.); *Chandler* v. *Federal Alcohol Distillery, Limited* (1930) 49 K.B. 47; *Côté* v. *Cantin* (1902) 21 S.C. 432 (Cimon, J.); *J. L. Vachon & Fils Ltée* v. *Corbeil* (1929) 35 R.L. n.s. 453 (Walsh, J.); *Sobinsky* v. *Allard* (1907) 16 K.B. 530; *Troster* v. *British Rubber Co. of Canada, Ltd.* [1943] K.B. 248 at 255; *Girard* v. *Trudel* (1876) 21 L.C.J. 295 (C.A.); *Laurentide Realties Company Limited* v. *Haz* [1958] S.C. 57 (Challies, J.); *Ernest Pitt & Co.* v. *Payne* (1925) 31 R.L.n.s. 308 (Surveyer, J.); *Dame Patenaude* v. *Hamel* (1923) 35 K.B. 333; *Dudemaine* v. *Pelletier* (1915) 21 R.J. 306 (Court of Review); *Laflamme* v. *Dandurand* (1904) 26 S.C. 499 (Lavergne, J.); *Freudenthal* v. *Bigras* (1929) 47 K.B. 340; *Baillie* v. *Nolton* (1897) 12 S.C. 534 (Lynch, J.); *Trudeau* v. *Rochon* (1895) 8 S.C. 387 (Pagnuelo, J.); *Langlois* v. *Berthiaume* (1913) 19 R.L.n.s. 367 (Court of Review); *Bachand* v. *Duehesne* (1919) 56 S.C. 132 (Court of Review); *Racicot* v. *Eaves* (1937) 75 S.C. 74 (Chase-Casgrain, J.). *Contra*: *Gamma Realty Ltd.* v. *Brummer* [1962] S.C., p. 607 (Prévost, J.); *Colonia Development Corporation* v. *Belliveau* [1965] Q.B. 161 at 163-167 (notes of Owen, J.). *Dubitante* : Mignault, *Le Droit Civil Canadien* VI (1902), p. 63, VIII (1909), p. 81, footnote (1). See also *Gagnon* v. *Richardson* [1963] R.L. 156 (Brossard, J.).

[3] See, in particular, Perrault (*op. cit.*), I, No. 316 at p. 328; Thaller, *Traité élémentaire de droit commercial*, 6th ed. (1922), no. 23, p. 21; Lacour et Bouteron *Précis de droit commercial*, 2nd ed., I (1921), no. 35, p. 29; *The Bell Telephone Company of Canada* v. *Dame Lefrançois* [1952] Q.B. 101 at 110 (notes of Bissonnette, J.).

make up a commercial operation. Mignault was pessimistic about the possibility of formulating such a definition: [4]

> Je crois qu'on ne saurait en donner une définition satisfaisante, et de fait la plupart des auteurs se contentent d'indiquer ce qu'ils appellent les caractères distinctifs de l'acte de commerce, mais ne tentent pas de la définir. On ne s'entend même pas sur tous ces caractères distinctifs, de sorte que la base d'une définition manque.

However, Perrault seems to have been successful, and his resulting definition reads as follows: [5]

> C'est un contrat à titre onéreux, consenti dans le but de spéculer ou de réaliser un bénéfice et contribuant à la circulation des biens mobiliers.

He also give the elements of a commercial operation.[6] There is *entremise* — the trader is intending to acquire only transitory rights in the object of the contract, that is, he is buying the thing with a view to passing it on to another instead of keeping it for himself. There is also *speculation*: this is the profit motive in commercial operations, the aim being to make a profit on the circulation of goods. It is the connecting link between two agreements — thus a trader buys a thing at a certain price in order to resell it at a higher price to make a profit. It is to be noted that for the element of speculation to be present, the intention to make a profit must exist at the time of the acquisition, the resale of a thing which one originally bought for one's own use not constituting speculation, even if a profit is realized. It is also to be noted that the failure to make a profit is irrelevant.

The other element of commerciality is the one that concerns us here, namely that of *circulation*, which merely rounds out and is the inevitable result of the presence of the other two. It signifies that commercial operations involve distribution, whether of goods, instruments of credit or otherwise, from person to person.

So the statement is made that immoveables are civil because of being incapable of circulation. While this may be true in the literal physical sense that a piece of real estate cannot be picked up and handed over by the seller to the buyer, surely the criterion of circulation is not referring to *delivery* but to *mutations of ownership*.[7a] Even if delivery were considered as being the criterion, then cannot it be said that as the handing over of the title deeds constitutes an

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[4] *Op. cit.*, *VI*, pp. 62-63.

[5] *Op. cit.*, I, no. 295, p. 307.

[6] *Op. cit.*, I, nos. 306 et seq., pp. 314 et seq.

[7a] Léon Mazeaud, *Cours de Droit Commercial* (1960-61), pp. 119-122, esp. at pp. 121-122.

essential element in the delivery of immoveables,[7b] circulation of real estate takes place by virtue of circulation of the deeds?

It is respectfully submitted that the justification for considering immoveables to be exclusively civil on the ground of their not being susceptible to circulation was simply an afterthought, that the true reason lies deep in history and tradition, for which we must look back to France.

By the ninth century, the Mediterranean having fallen under the control of Islam, which cut off the old trading routes by which Gaul had been linked to the outside world, trade and commerce had largely come to an end.[8] Gaul had become an agricultural community; the towns became depopulated, withered away, and municipal organization in its true meaning disappeared.[9]

With the advent of the feudal system, life became localized and immobilized, with the country divided up into small independent territorial units governed by nobles who ruled like kings. Each territory was self sufficient and there was virtually no communication (and consequently no trade) with the outside world — isolation was the order of the day.[10]

Of special significance to us is that the legal system reflected the way of life of that era. For one thing, the system was one of land tenures, that set forth the reciprocal rights and duties of lords and vassals in a self sufficient society based on services rather than on money and trade. The laws were unwritten customary laws which varied from locality to locality, and the laws of contract were conspicuous by their absence. This is reflected in the Coutume de Paris,

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[7b] See, *inter alta*, Marler, *The Law of Real Property* (1932) no. 489, p. 225; Mignault, *op. cit., VII*, (1906), pp. 67-68; Faribault, *Traité de Droit Civil du Québec*, XI (1961), no. 218, p. 190; *Lebel* v. *Les Commissaires d'Ecoles pour la Municipalité de la Ville de Montmorency* [1955] S.C.R. 298.

[8] Pirenne, *Les villes du moyen âge* (1927), pp. 14-43.

[9] Chénon, *Histoire générale du droit français public et privé des origines à 1815*, I (1926), no. 106, p. 224; Declareuil, *Histoire générale du droit français des origines à 1789* (1925), p. 74 (at the top) and pp. 97 (at the bottom) to 98 (at the top); Foignet, *Manuel élémentaire d'histoire du droit français*, 11th ed., (1926), p. 40; Pirenne, *op. cit.*, pp. 53 and 70; Perrot *Les institutions publiques et privées de l'Ancienne France jusqu'en 1789* (1935), pp. 262-263; Olivier-Martin, *Histoire du droit français* (1948), no. 116, p. 159; Timbal, *Histoire des Institutions Publiques et des Faits Sociaux* (1961), no. 392, p. 185. See also Dareste de la Chavanne, *Histoire de l'Administration en France*, II, (1848), p. 195.

[10] Laurent, *Le Droit Civil International*, I (1881), no. 196, pp. 269-270; Lyon-Caen et Renault, *Traité de Droit Commercial*, 5th ed., I (1921), no. 17, pp. 15-16; Hamel et Lagarde, *Traité de droit commercial*, I (1954), no. 13, p. 22.

where there is no title of obligations.[11] Another aspect of feudal law is that justice was still administered by judicial duels and the *ordalies.*

In the earlier part of the feudal period, what remained of the former towns were administered as integral parts of feudal fiefs. There was no distinction between town and country. The former towns were governed by the seigneur or his agent, and there remained no municipal organization that would give rise to municipal autonomy.[12] The result was that all inhabitants were subject to feudal justice and more or less the same feudal obligations.[13]

A subsequent rebirth of trade took place, probably caused to a great extent by the Crusades.[14] With it came the revival of the towns.[15] The carrying on of trade and living under a feudal regime were simply not compatible. It was therefore inevitable for a clash to occur. The bourgeois in the towns wanted freedom to come and go instead of being attached to land, together with the right to have their own laws and courts to enforce them. In short, they wanted local autonomy.[16] The freeing of the towns and the granting of a certain degree of local self-government got under way towards the end of the eleventh century, the first being Cambrai in 1077. Those feudal obligations which were incompatible with town living had

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[11] See, *inter alia,* Olivier-Martin, *La Coutume de Paris* (1925), p. 80; Walter S. Johnson, Q.C., *Chapters in the History of French Law* (1957), p. 263; W. B. Munro, *The Genesis of Roman Law in America* (1908-09) 22 Harvard Law Rev. 579.

[12] Esmein, *Cours élémentaire du droit français,* 15th ed. (1925), p. 287; Tisset and Ourliac, *Manuel d'histoire du droit français* (1949), no. 231, p. 155; Perrot, *op. cit.,* p. 263; Olivier-Martin, *Histoire du droit français* (1948), no. 115, pp. 157-158; Declareuil, *op. cit.,* pp. 280 et seq.; Brissaud, *Manuel d'Histoire du droit français,* I, (1898), p. 687; Timbal, *op. cit.,* no. 392, p. 185; Dumas, *Manuel d'Histoire du droit français,* p. 127; see also Petit-Dutaillis, *Les Communes Françaises* (1947), pp. 18-20.

[13] Olivier-Martin, *Histoire du droit français* (1948) no. 115 at p. 158.

[14] See, *inter alia,* Dupin, *Profession d'Avocat,* I (1832), pp. 412-413.

[15] Pirenne, *op. cit.,* pp. 116 et seq.; Thaller, *op. cit.,* no. 43, p. 38; Foignet, *op. cit.,* pp. 93-94; Chénon, *op. cit.,* I, pp. 623-624; Olivier-Martin, *Histoire du droit français* (1948), no. 116, p. 159; no. 124, p. 170; Timbal, *op. cit.,* no. 392, p. 185; Dumas, *op. cit.,* p. 128; Mundy and Riesenberg, *The Medieval Town* (1958) pp. 26-41. See also Tisset et Ourliac, *op. cit.,* no. 231, pp. 155-156; Brissaud, *op. cit.,* I, p. 691; Petit-Dutaillis, *op. cit.,* pp. 107 et seq.

[16] Pirenne, *op. cit.,* pp. 150-151; Perrot, *op. cit.,* pp. 263-264. See also Regnault, *op. cit.,* p. 141; Olivier-Martin, *Histoire du droit français* (1948), nos. 116 and 117, pp. 159-162; Ferguson, *The Development of Law during the Middle Ages, especially in France and England* (1901-02) 1 Canadian Law Review 200; Timbal, *op. cit.,* no. 392, pp. 185-186.

been thrown off by the end of the twelfth century,[17] and the free towns were administered by the merchants.[18]

Traders travelled around and attended fairs in various places. A body of commercial usages grew up by which the merchants effected the prompt settlement of their own disputes.[19] These usages had a largely international character — they were uniform because of the fact that the merchants travelled from country to country and were not subject to any national authorities.[20]

Side by side in the same territory, then, existed two mutually exclusive entities: the feudal system with its own laws, and the towns, where the merchants lived and carried on trade and commerce under their own commercial rules.

After the Kings of France had regained national power and authority, their legislation supplanted the merchants' own law making powers and the international character of commercial law was replaced by separate national legislative enactments.[21] It is interesting to note that instead of bringing unity into the law of France by fusing the commercial and civil systems, they continued and confirmed the already existing duality, so that even today France has its separate Civil Code and Code de Commerce, and its civil and commercial courts. In contrast, in England the Law Merchant became absorbed into the Common Law in the eighteenth century as a result of the work of judges such as Lord Mansfield. One reason for the divergent lines of development may have been that while the English legal system became essentially uniform throughout England by the latter part of the thirteenth century as a result of the growth of the

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[17] Pirenne, *op. cit.*, p. 173.

[18] Houin, *Cours de droit privé commercial* (1961-62), p. 7.

[19] Perrault, *op. cit.*, I, no. 42, p. 50; Escarra, *Manuel de droit commercial*, I (1947) nos. 16 et seq., pp. 8 et seq.; Ripert, *Traité élémentaire de droit commercial*, 5th ed., I (1963) nos. 19 et seq., pp. 11 et seq.; Hamel et Lagarde, *op. cit.*, I, no. 14, pp. 23-24, no. 17, p. 26; Thaller, *op. cit.*, no. 43 at p. 39; Lacour et Bouteron, *Précis de droit commercial*, 2nd ed., I (1921), no. 10, pp. 6-8; Register, *Notes on the history of commerce and commercial law* (1913) 33 Canadian Law Times 1078 at 1090 et seq.; Bewes, *The romance of the law merchant* (1923), pp. 8-9, 12 et seq.; Houin, *op. cit.*, p. 8.

[20] The weakness of governmental power in the feudal era meant that there was little or no regulation of trade, and commerce was of an international character, unaffected by national boundaries : Marguerite Boulet, *Histoire du commerce*, II (Le commerce de l'Ancien Monde jusqu'à la fin du XVe siècle), 1950, pp. 234-238.

[21] Escarra, *op. cit.*, I, no. 26, pp. 12-13; Houin, *op. cit.*, pp. 7-10. Hamel et Lagarde, *op. cit.*, no. 17, p. 26, suggest that the Middle Ages offer an example to be followed for the present-day efforts at the unification of commercial law.

Common Law, the French kings were never able to achieve the same uniformity in France — indeed, the local systems of customary law endured until Napoleon brought into force that Code that was named after him in 1804.[22] Consequently, when the French kings came to legislate on commercial law, there was no uniform body of civil law with which to fuse it. The civil and commercial systems have accordingly always remained separate in France.[23]

It was by the Edict of November 1563 [24] issued by Charles IX that commercial courts were set up for the City of Paris. It is to be noted that the jurisdiction of these courts was limited to merchandise (real estate being thereby excluded):

> Connoistront lesdits juge et consuls des marchands, de tous procès et différens qui seront ci-après mûs entre marchands *pour fait de marchandises seulement*... soit que lesdits différens procèdent d'obligations, rédules, récépissez, lettres de change ou crédit, réponses, assurances, transports de dettes et novations d'icelles, comptes, calcul ou erreur en iceux, compagnies, sociétez ou association déja faites, ou qui seront faites ci-après.[25]

This aspect of the jurisdiction of the commercial courts would not seem to have been altered by the Ordonnance du Commerce of 1673.[26]

Then we come to the Code de Commerce of 1808 and discover that articles 631 and 632 read as follows:

> Art. 631. Les tribunaux de commerce connaîtront:
>
> 1. des contestations relatives aux engagements et transactions entre négocianst, marchands et banquiers;
> 2. des contestations entre associés, pour raison d'un société de commerce;
> 3. de celles relatives aux actes de commerce entre toutes personnes.
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> Toutefois, les parties pourront, au moment où elles contractent, convenir de soumettre à des arbitres les contestations ci-dessus énumérées, lorsqu'elles viendront à se produire.
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> Art. 632. La loi répute actes de commerce:

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[22] See, *inter alia*, Hazeltine, *Some aspeets of French legal history* (1927) 43 L.Q.R. 212 at 225.

[23] The phenomenom of royal legislation being enacted in the commercial field a century earlier than in the civil field is mentioned in Ripert, *op. cit.*, I, no 23, p. 13.

[24] Isambert et al., *Recueil Général des Anciennes Lois Françaises*, XIV (1829), no. 69, pp. 153-158. See Lefas, *De l'origine des juridictions consulaires des marchands de France* (1924) 3 Rev. Hist. de Droit Français et Etranger 83, for a history of the consular jurisdictions, and Minier, *Précis historique du droit français* (1854) pp. 705-706.

[25] The italics are mine.

[26] See Title XII of the Ordonnance, Isambert et al (*op. cit.*), XIX (1829) at pp. 105 et seq.

> Tout achat de *denrées et marchandises*[27] pour les revendre, soit en nature, soit après les avoir travaillées et mises en oeuvre, ou même pour en louer simplement l'usage;
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> Toute entreprise de manufactures, de commission, de transport par terre ou par eau;
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> Toute entreprise de fournitures, d'agence, bureaux d'affaires, établissements de ventes à l'encan, de spectacles publics;
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> Toute opération de change, banque et courtage;
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> Toutes les opérations de banques publiques;
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> Toutes obligations entre négociants, marchands et banquiers;
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> Entre toutes personnes, les lettres de change.

The words *denrées et marchandises* have been emphasized in French works, and while immoveables are not expressly excluded from being objects of actes de commerce, it is not surprising that the result in France has been that immoveables are excluded so far as *actes de commerce* are concerned.[28] Indeed we are told that formerly "On disait... *faire la marchandise*, pour signifier *faire le commerce*".[29] It is to be noted, however, that some of the same French authors who state that immoveables are always civil suggest that this is a result of tradition arising, in part at least, from the connection between the organization of society and the system of land tenure, and the need for extending greater protection to transactions in land, which reasons have lost part of their validity.[30]

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[27] The italics are mine.

[28] Perrault, *op. cit.*, I, no. 314, pp. 325-6; Escarra, *op. cit.*, I, no. 111, pp. 67-68; Julliot de la Morandière, *Droit Commercial*, I (1958), no. 23, pp. 31-32; Thaller, *op. cit.*, no. 23, pp. 21-22; Hamel et Lagarde, *op. cit.*, I, nos. 180 et seq., pp. 211 et seq.; Jean, Edouard Escarra, Jean Rault, *Traité Théorique et Pratique de Droit Commercial*, Vol. I, *Les contrats commerciaux* by Jean Hémard (1953), no. 17, p. 8; Lyon-Caen et Renault, *Traité de Droit Commercial*, 5th ed., I (1921), nos. 109-112, pp. 125-133; Lyon-Caen et Renault, *Manuel de Droit Commercial*, 13th ed. (1922) no. 22 at pp. 30 eet seq.; no. 22 bis, p. 33; Lacour et Bouteron, *op. cit.*, I (1921), nos. 35 and 37, pp. 29-30, 31; Ripert, *op. cit.*, I (1963), no. 315, pp. 157-158; Massé, *Le Droit Commercial*, II (1861), nos. 1382 et seq., pp. 513 et seq.; Pardessus, *Cours de droit commercial*, 2nd ad. I (1842), no. 8, p. 4; Boitel et Foignet, *Manuel élémentaire de droit commercial terrestre*, 7th ed. (1924), pp. 13 and 21; Delamarre et Poitvin, *Traité théorique et pratique de droit commercial*, 2nd ed., IV (1861), p. 5; II (1861), p. 27; Houin, *op. cit.*, pp. 47-49; Bedarride, *Des sociétés*, 2nd ed., I (1872), nos. 88 et seq., pp. 172 et seq.; Mazeaud, *op. cit.*, pp. 119-122.

[29] Delamarre et Poitvin, *op. cit.*, II, p. 27, footnote 1.

[30] See, in particuar, Julliot de la Morandière, *op. cit.*, I, no. 23, pp. 31-32; Escarra, *op. cit.*, no. 111, pp. 67-68; no. 134, pp. 80-81; Hamel et Lagarde, *op. cit.*, I, no. 180, pp. 211 et seq.; Mazeaud, *op. cit.*, pp. 119-122.

The foregoing brief historical background shows why immoveables have always been considered to be civil — first by reason of the old tradition of land being considered as something separate and apart, which concept finds its origin in the feudal system, secondly by reason of language of the Code de Commerce, and thirdly by reason of the separate systems of courts with their own respective jurisdictions, which factor may well have tended to prevent a gradual merging of immoveable transactions with those involving moveables.

In the light of this, it is not difficult to understand why, in France, immoveables are excluded from commercial operations. Then when we consider that we in Quebec have always turned to French doctrine for guidance in the civil law, it is not surprising that we have also tended to do the same in that field of commercial law which is concerned with the distinctions between civil and commercial matters, even though the points of resemblance between our respective systems of law are lesser in the commercial field than they are in the civil, Quebec having neither a Code de Commerce, nor separate commercial courts. Consequently, when some of the modern French writers (as seen above) question the logic of the rule that immoveables should be restricted to civil matters, then *a fortiori* it is time for the legal profession in Quebec to do likewise. Indeed, as we shall see, there are already signs of a new trend.[31]

Thus the rule of Quebec law is that regardless of what elements of commerciality there may be in a contract, and regardless also of the qualities of the parties, that is, even if they are traders, if the object of the contract is an immoveable, the contract will be regarded as civil, and both parties will enjoy the protection of and suffer from the limitations of the rules governing civil matters, especially that which requires a writing for proof to be made, thus rendering unproveable and consequently unenforceable a purely verbal agreement.

This rule has, however, been tempered in its application by exceptions, which we shall now examine.

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[31] It is interesting to note that Perrault, writing in 1947 (*Le droit commercial québecois : 1923-1947*, (1948) 26 C.B.R. 137) expressed the view that it was time to abolish the commercial distinctions in Quebec law altogether, and referred in particular to the commonness of speculation in real estate (p. 143). The problem of the two sets of laws, civil and commercial, as they exist in France, is discussed by Jean Escarra, in *A propos de la révision du Code de Commerce* (1948) 1 Rev. trim. dr. comm. 3.

2. Exceptions to the rule.

(a) *where the immoveable is an accessory to a larger operation.*

It has long been accepted that where a transaction, such as a sale, has as its principal object moveables under such circumstances that the sale is a commercial one (e.g. a merchant selling his stock in trade to another merchant), the inclusion in the transaction of an immoveable will not affect the commercial nature of the sale, provided that the immoveable is merely an accessory. This is true whether we are concerned with the sale itself [32] or some other related aspect, such as the claim of the real estate agent who is demanding payment of his commission for bringing about the sale, in the face of a denial by the vendor that he ever engaged the agent and in the absence of a writing to prove it.[33] The same rule will apply to a lease of a business, where the business itself is of greater value than the building.[34]

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[32] Perrault, *op. cit.*, I, nos. 324 et seq., pp. 339 et seq.; Ripert, *op. cit.*, no. 315 at p. 158; Hamel et Lagarde, *op. cit.*, no. 184, pp. 218-219; *Massé* v. *McEvilla* (1895) 4 Q.B. 197 (in which the *fonds de commerce* and building were respectively estimated to be worth $3-4,000 and under $2,000).

[33] LeDain, *The Real Estate Broker* (1957-58) 4 McGill L.J. 219 at 225; Letarte, *Problèmes juridiques de l'agent d'immeubles* (1949) 9 R. du B. 105 at 107; *Handfield* v. *Binette* [1947] S.C. 384 (Fortier, J.) (a sale of a tavern business for $34,000, of which $27,000 was for the business and $7,000 was for the building); *St-Amour* v. *Dame Toupin* (unreported judgment of Marier, J., December 23, 1952, S.C. Montreal, no. 318,961), involving a sale of a tavern business for $91,000, of which $75-80,000 was for the business and about $7,000 for the immoveable. In *Pekola* v. *Bloom* (1928) 34 R.L.n.s. 154 (Bond, J.) (involving the sale of a candy store) and in *Pouliot* v. *Lavoie* [1952] R.L. 111 (Marquis, J.) (involving the sale of a restaurant), no breakdown was given as to the respective values of the *fonds de commerce* and of the immoveables, but it would seem reasonable to assume that the businesses were worth more than the buildings. (In *Financial Trust Co. Ltd.* v. *Steiman* [1947] R.L. 171 (Bertrand, J.), which concerned the sale of a tavern business where no immoveable was involved, the matter was held to be commercial). In *Hamelin* v. *Hervieux* [1947] S.C. 201 (Loranger, J.), the sale "de toute sa propriété, y compris la boulangerie" (quoted from p. 202 of the report) was held, by inference, to be civil, as testimony was excluded. It is likely that in this instance the immoveable was worth more than the *fonds de commerce*, which is to be expected in a business like a bakery where the *fonds de commerce* might tend to be modest in relation to the building (since bakery products rapidly become stale). I therefore respectfully disagree with LeDain's listing of this judgment as being *contra* to the propositon that the mandate to sell a business may be proved by testimony (see footnote 23 on p. 225 of his above-mentioned article). (In contrast to this last-mentionned judgment, in *Laventure* v. *Vaillancourt* (1936) 42 R.J. 276 (Duranleau, J.), the sale of a "boulangerie, maison privée, four, pétrin, automobile, etc." (quoted from p. 281 of the report), was simply accepted as being commercial).

[34] Perrault, *op. cit.*, II, no. 774, p. 202; Hémard (I of Escarra et al), *op. cit.*, no. 17, p. 8; *Cobetto* v. *Bélanger Bowling Alley and Restaurant Limited* [1955] S.C.

It is essential to the operation of the theory of the accessory that the immoveable constitute the lesser part of the transaction. If the value of the immoveable outweighs that of the stock in trade, the sale will be civil.[35]

Perrault,[36] without commenting on the significance of it, cites a passage from Massé [37] where that author not only states that where a sale is made for a single price the nature of the contract will depend on what is the principal object of the contract (i.e. the moveables or the immoveables), but also declares that should separate prices be given for the two objects of the sale, then only that part of the sale that relates to the moveables will be commercial, even though only a single contract have been entered into. It is emphatically submitted that this is not logical. Indeed, it was rejected by the Court of Appeal in *Massé* v. *McEvilla*,[38] where it was pointed out that the true test is whether the building would have been bought without the *fonds de commerce*. If it is established that the immoveable would not have been bought alone, that it was only an accessory to the principal object of the sale (the *fonds de commerce*), then the fixing by the parties of separate prices would seem to be irrelevant, provided, of course, it is not done in such a way as to constitute two separate agreements. The setting of the respective prices by the vendor and buyer would actually assist in the determination as to what was the principal object of the transaction.

It is well established then, that by reason of the theory of the accessory, an immoveable may be considered as an object of a commercial operation. We now come to another exceptional category of instances where an immoveable can be considered as commercial. This additional category, while well established in particular instances, has not been as clearly defined as the first.

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301 (Challies, J.) (involving the lease of a restaurant). See also the decision of the Tribunal Civil de Lille, June 3, 1949, Gaz. Pal. 1949.2.141; D. 1949, som. 43 (*Scrive* v. *époux Tondeur*) cited in Ripert, *op. cit.*, I, no. 315 at p. 158, by Jauffret (1949) 2 Rev. Trim. de Droit Commercial, 619, and by Hémard (1949) 2 Rev. Trim. de Droit Commercial, 687. See, as well, the decision of the Court of Appeal of Montpellier, October 10, 1951, Gaz. Pal. 1951.2.234 (*Soc. Grand Hotel des Ambassadeurs* v. *époux Ricard*) and Cour de Cassation, November 19, 1924, D. 1926, 138 (*Epoux Neuzy* v. *Dame veuve Leblanc*).

[35] *Malo* v. *Dame Laliberté* [1958] R.L. 321 (Brossard, J.).

[36] *Op. cit.*, I, no. 325 at p. 340.

[37] *Op. cit.*, II (1861), no. 1382 at p. 516.

[38] (1895) 4 Q.B. 197 at 200.

(b) *where the immoveable is not really the object of the operation.*

A typical situation involving this exception is where a merchant who owns a store decides to expand the same by adding an extension. To do this, he engages a builder. One might be tempted to say that because an immoveable is involved, the contract of construction can only be civil. The contrary, however, was held by the Court of Appeal in *Blais* v. *Paradis* [39] where there was a dispute between a storekeeper and a builder as to the terms of the contract for the enlargement of a shop, and the question arose as to whether proof by testimony could be made. As to the contract being commercial for the merchant, Mr. Justice Létourneau expressed himself as follows in the two separate passages here reproduced: [40]

> Elle le sera à coup sûr pour le propriétaire, si sa pensée, son intention évidente, a été de servir ainsi son commerce; car, bien qu'en thèse générale l'acte de commerce doive se rattacher plutôt à des choses mobilières [41] — moins chez nous peut-être qu'en France où il faut compter avec la restriction d'un texte, [42] —, il est reconnu qu'à la faveur de la théorie dite « de l'accessoire », l'on peut parfois rattacher un immeuble au commerce, faire d'une opération concernant un immeuble, un acte de commerce; lorsque, comme dans l'espèce, l'intention manifeste du propriétaire a été uniquement ou tout au moins principalement, de servir un commerce. (p. 497).
>
> Dans l'espèce, il ne peut y avoir de doute qu'en entreprenant cet agrandissement de son magasin, l'appelant ait eu principalement en vue d'aider ou de mieux servir son commerce en s'aménageant à nouveau. (p. 498).

The foregoing discloses that the justification for the labelling of the construction contract commercial for the merchant lay in the theory of the accessory. A trader is entering into a commercial contract when expanding his premises even when an immoveable is involved, the construction of the extension being an accessory to his business.

The decision, in stating that the storeowner had entered into a commercial contract, was a sound one. It is respectfully submitted, however, that while it is true to say that the contract entered into by the merchant was accessorial to his business, which fact gives rise to

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[39] (1933) 54 K.B. 495. This was a 3-2 decision. The notes of only one of the dissenting judges are reported, those of Bernier, J., and he is in agreement with the majority that the presence of an immoveable did not affect the commercial nature of the transaction. The decision was confirmed unanimously by the Supreme Court, [1933] S.C.R. 452. See also Perrault, *op. cit.*, I, no. 326 at pp. 343-4.

[40] From pages 497 and 498 of the report.

[41] Carpentier, Rép. Vo *Acte de commerce*, nos. 90, 94 et 95.

[42] Art. 632 C. com.

a presumption of commerciality,[43] the ground of the theory of the accessory was not the soundest that could have been used for justifying the commerciality of the operation insofar as the immoveable was concerned. For one thing, the theory of the accessory by which an operation involving an immoveable can take on a commercial character, is based on the premise that the accessory is of lesser value than the principal.[44] In this instance, it would mean that the extension to the store would have to cost less than the value of the already existing business. This would rule out expansions that were large in relation to the enterprizes as then operating. This is an untenable proposition, as traders who are more ambitious than others should not be considered as entering into a civil contract while the corresponding contracts for the less ambitious would be commercial.

Another illustration of the unsuitability of the accessory theory for this type of instance is well illustrated by the case of *The Bell Telephone Company of Canada* v. *Dame Lefrançois*,[45] which might at first glance seem to conflict with the earlier Court of Appeal decision in *Blais* v. *Paradis*, but does not in fact do so.

Bell Telephone wished to lay a cable between the City of Montreal and St. Jean. In order to do so, it had to obtain servitudes from the owners under whose properties the cable would be laid. Dame Lefrançois was one of such owners. She sued for damages caused by the burying of the cable, and asked for a trial by jury, which under article 421 C.C.P. could only be had if the agreement was of a commercial nature. The argument used by her can be easily anticipated, and was adopted by Mr. Justice Bertrand, dissenting in appeal. It is as follows: that while an immoveable was involved, the contract was commercial for Bell Telephone because it was entered into for the purpose of furthering its business, and so the theory of the accessory to the company's business made the matter commercial.

Mr. Justice Bertrand cited in support of his opinion the earlier Court of Appeal decision in *Blais* v. *Paradis*. He quoted a passage from the notes of Mr. Justice Létourneau, including the following

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[43] Perrault, *op. cit.*, I, nos. 360 et seq., pp. 381 et seq. and the authorities therein listed, to which should be added *Globe Slicing Machine Co. Ltd.* v. *Ethier* [1948] S.C. 257 (A. I. Smith, J.); *Lajoie* v. *Thomas* [1949] K.B. 767.

[44] This is well illustrated by the contrasting judgments in *Massé* v. *McEvilla* (1895) 4 Q.B. 197 (where the agreement was held to be commercial, the *fonds de commerce* being of a greater value than the immoveable), and *Malo* v. *Dame Laliberté* [1958] R.L. 321 (Brossard, J.), in which the greater value of the immoveable rendered the contract civil.

[45] [1952] Q.B. 101.

paragraph taken by that judge from the *Manuel de Droit Commercial* of Lyon-Caen & Renault: [46]

> La *théorie de l'accessoire* ne doit pas faire reconnaître le caractère commercial à des actes qui, d'après le loi, sont essentiellement civils. Ainsi, l'achat ou la location d'un immeuble pour y exercer un commerce sont des actes civils. Il serait irrationnel de déclarer civile la spéculation portant directement sur un immeuble (no. 22) et commerciale celle qui ne s'y rattache qu'accessoirement. Il ne faudrait pas conclure de là que les contrats passés par un commerçant qui fait construire une maison pour l'exercice de son commerce, ne sont pas commerciaux pour lui. Ces contrats ne sont pas relatifs à la propriété immobilière et ils sont passés réellement pour les hesoins du commerce.

Is not the key to our problem contained in the above-quoted paragraph, if it is given a different interpretation to the one put on it by Mr. Justice Bertrand ?

Firstly, we note that the theory of the accessory will not confer a commercial nature on a contract which is essentially civil. Therefore, a purchase or a lease of an immoveable, even if for the purpose of carrying on business therein, will be civil.[47] On the other hand, contracts entered into by a trader for the construction of a building for his business are commercial for him. Why? It is because, in the words of Lyon-Caen and Renault quoted above, such contracts "... ne sont pas relatifs à la propriété *immobilière* ..."

What have we here? It would seem to be the following: the civil or commercial nature of the contract will not just depend on whether an immoveable is involved. The question is to know what is the *object* of the contract. Where a building is *purchased*, or a *servitude* (being a real right in an immoveable) is granted, then the *object* of the transaction is an immoveable and the contract will be civil. But where a contractor is engaged to construct a building, while the end result may be an immoveable, the *object* of the contract is not an immoveable — it consists of the *services* of the contractor, namely the erection.[48] [49]

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[46] 13th ed. (1922), no. 38 bis at p. 51.

[47] We have already seen this under our heading 1. *The rule and its origin.*

[48] Lacour et Bouteron, *op. cit.*, I (1921), no. 69 at p. 52. See also Julliot de la Morandière, *op. cit.*, I (1958), no. 25 at p. 35; no. 37 at p. 40.

[49] It has been well established that a building contractor is a trader and his operations are commercial, provided, of course, that he is speculating on the materials or labour : Perrault, *op. cit.*, I, nos. 319 and 320, pp. 330-331; *Colonia Development Corporation* v. *Belliveau* [1965] Q.B. 161; *Gravel* v. *Déziel* [1965] S.C. 257 (Martel, J.); *Panneton* v. *Brunet* (1924) 36 K.B. 290; *Duphily* v. *Charbonneau* [1945] R.L. 461 (Décary, J.); *Boileau* v. *F. J. Bastien, Inc.* [1951] R.L. 304 (Archambault, J.); *Pagé* v. *Connolly* (1909) 35 S.C. 121 (McCorkill, J.); *Blais* v. *Paradis* (1933) 54 K.B. 495 (remarks of Létourneau, J. at pp. 497, 499);

This approach easily explains the different results arrived at by the Court of Appeal in *Blais* v. *Paradis* and in *Bell Telephone* v. *Dame Lefrançois*. The *object* in the first case consisted of *services* on the part of a builder; in the second case of a servitude, that is, of an *immoveable right*. This is the real justification for holding, as did the Court of Appeal in *Bell Telephone* v. *Dame Lefrançois*, that the contract of servitude was civil. If *Blais* v. *Paradis* had related to the *purchase* of a new extension, then it is submitted that that decision would have been quite different.

Another situation where the rule that immoveables are civil is sometimes mistakenly applied is where we are faced with real estate agencies. At least one judgment[50] holds real estate agencies to be civil in nature, and Perrault cites this decision in support of the proposition that immoveables are always civil.[51] Other judgments hold the operations of such agencies to be commercial,[52] and Perrault's view of these decisions is that they are ill-founded.[53]

Where a partnership is formed for the buying and selling of real estate, its operations are, under the traditional rule, civil. However, what we are frequently involved with are real estate partnerships that do not *buy* or *sell* real estate: what they are doing is *selling their services* in finding buyers for those who desire to sell their houses. The agents are not dealing in real estate for their own account, but are providing the services for the bringing together of others who will do the buying and selling, and this would seem to bring into operation article 1735 C.C.[54] of which the first paragraph is as follows:

Art. 1735. Le courtier est celui qui exerce le commerce ou la profession de négocier entre les parties les achats et ventes ou autres opérations licites.	Art. 1735. A broker is one who exercises the trade and calling of negotiating between parties the business of buying and selling or any otber lawful transactions.

Dame Pelletier v. *Duchaine* (1933) 71 S.C. 217 (Laliberté, J.); *Leblanc* v. *Dame Côté* [1943] S.C. 351 (Boulanger, J.); *Gaudreault* v. *Beauchamp* (1940) 68 K.B. 353; *Boivin* v. *Paquet* (1914) 46 S.C. 461 (Dorion, J.); *Amyot* v. *Pageau* (1918) 53 S.C. 414 (Weir, J.); *Perras* v. *Marotta* (1923) 29 R.L.n.s. 155 (Lafontaine, J.); *McRae* v. *MacFarlane*, M.L.R. (1891) 7 S.C. 288 (Court of Review); *McGrath* v. *Lloyd* (1856) 1 L.C.J. 17.

[50] *Girard* v. *Trudel* (1876) 21 L.C.J. 295 (C.A.).

[51] *Op. cit.*, I, no. 321, p. 331; II, no. 988(*b*), p. 446.

[52] *Lamontagne* v. *Lafontaine* (1918) 53 S.C. 326 (Court of Review); *La Banque d'Hochelaga* v. *Messier* (1920) 58 S.C. 471 (Monet, J.); *Paquette* v. *Boisvert* [1958] Q.B. 150.

[53] *Op. cit.*, I, p. 332, footnote (1); II, no. 988(*b*), p. 446.

[54] See *Paquette* v. *Boisvert* [1958] Q.B. 150 at 154 (notes of Pratte, J.).

What we have effected here is a reconciliation between the traditional rule that transactions involving immoveables are always civil and those decisions that hold the operations of real estate agencies to be commercial. The *object* of such a partnership is not the buying and selling of immoveables, but the *selling of services* in the finding of buyers and sellers.

Consequently, while the theory of the accessory is a valid exceptional category whereby immoveables may be considered as commercial, this category should be restricted to those instances where the object of the transaction is a combination of moveables and an immoveable (or immoveables), and where the value of the former outweighs that of the latter. Where the direct object of the transaction is not an immoveable, but something else, such as the lease and hire of services, then the civil or commercial nature of the contract should be determined without reference to the presence of the immoveable.

3. A new trend and outlook; and leases.

We have seen that the traditional rule is that an immoveable cannot be the object of a commercial operation. We have also observed that while on a quite frequent number of occasions the courts have held that transactions involving immoveables can be commercial, such decisions can be explained as fitting into categories which constitute exceptions to the rule, thus leaving the old rule intact.

When, however, one considers the artificial nature of the rule that immoveables are always civil and the adverse remarks made concerning this principle by some of the more modern authors in France where this tradition arose and where the Code de Commerce gives some justification for it, and when one also realizes how outdated the rule is in this era of real estate development and speculation, it was inevitable that attacks on the validity of the rule would be made sooner or later.

The first such attack was launched by Mr. Justice Prévost in *Gamma Realty Ltd.* v. *Brummer*.[55] Brummer was a speculative builder who was building houses with a view to selling them at a profit. He entered into a verbal agreement with Gamma Realty Ltd. whereby that agency was to find a buyer for the houses then being built. Plaintiff agency found a prospective buyer who signed an offer to purchase which the defendant Brummer accepted. The sale never went

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[55][1962] S.C. 607. See also *Gagnon* v. *Richardson* [1963] R.L. 156 (Brossard, J.).

through. When Gamma Realty Ltd. came to prove the existence of their mandate from Brummer, objection was made to the use of testimony.

Mr. Justice Prévost quoted from the passage in Perrault [56] where the problem of the immoveable is discussed, where that author shows that in specific instances an operation can be commercial even though in certain respects it may concern an immoveable. The key section in this passage taken by the learned judge from Perrault would seem to be paragraph number 320: [57]

> Que décider si une personne achète des terrains pour les revendre après y avoir élevé des constructions ? S'il s'agit d'un entrepreneur faisant ces sortes d'opérations, à titre professionnel, il pourra, je crois, acquérir la qualité de commerçant. Sa spéculation porte moins sur le terrain que sur l'achat et la revente des matériaux ainsi que sur la main-d'oeuvre. Et il posera des opérations commerciales au cours de la construction. Mais celle-ci terminée, la vente de l'immeuble lui-même, terrain et maison, constituera un contrat civil.

In the foregoing, we see that Perrault agrees that a building contractor is carrying on commercial operations, because he is dealing primarily in materials and labour. He is careful to point out, however, that the sale of the land and completed building will be civil. This accords with the traditional rule that where the object of the contract is an immoveable, the transaction will be civil. But the significant thing to note is that this is the point at which Mr. Justice Prévost broke with the old principle: [58]

> La plupart des arrêts cités par Perrault remontent à la fin du XIXe siècle, alors qu'il n'y avait que peu ou pas d'entrepreneurs construisant des immeubles en série pour les revendre à profit, ni de spéculateurs achetant des terrains pour les lotir et les revendre comme ce genre de commerce existe de nos jours. Il semble au tribunal que toute personne qui gagne sa vie de cette façon pose essentiellement des actes de commerce et est un commerçant pour fins de preuve.
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> Brummer étant un commerçant, la demanderesse pouvait donc prouver par témoins la convention par laquelle il aurait accepté de payer une commission de $500 à un agent d'immeubles. L'objection du défendeur sur ce point est donc rejetée.

Here, we have a clear break with tradition. This is not a holding that can be explained away as falling into one of the exceptional categories. The sale of a lot of land with the completed house on it does not involve a sale of moveables, which rules out the theory of the acces-

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[56] *Op. cit.*, I, nos. 319 et seq., pp. 330 et seq.

[57] *Ibid.*, at p. 331.

[58] [1962] S.C. at pp. 610-611.

sory. Moreover, the object of the contract is directly an immoveable; we are not faced with a contract of lease and hire of services.[59]

We are, therefore, led to the inevitable conclusion that this judgment of *Gamma Realty Ltd.* v. *Brummer* really holds that an immoveable can, on its own merits, be the object of a commercial operation. Is this decision, as time goes by, to be considered as a vagary in the jurisprudence, as an exception that will not be followed? This is an unlikely fate for it, when we consider the artificiality of the old rule and of the extent of modern speculative enterprise in real estate and construction.[60]

Indeed, favourable and recent comments along the same lines have recently been made by Mr. Justice Owen in the Court of Appeal judgment of *Colonia Development Corporation* v. *Belliveau*.[61] Colonia was having twenty-four houses built with a view to selling them for a profit. It had engaged a contractor by the name of Turcot et Lefort Limitée to do the actual building, and the latter had entered into a sub-contract with plaintiff Belliveau for the plumbing and heating work. Before the completion of the houses, a flood damaged the heating systems of several of them. Belliveau carried out the necessary repairs, and then sued for their cost.

When Belliveau came to prove that he had been asked to do the repairs by Colonia's secretary-treasurer, he was met with the defence that testimony was not allowed to prove the agreement. Chief Justice Tremblay (with whom Bissonnette, Taschereau and Badeaux, JJ. concurred), held Colonia to be a trader: [62]

> Celle-ci faisait construire vingt-quatre maisons par un entrepreneur non pas dans le but de les occuper ou de les louer mais de les vendre au plus tôt. A cette fin, elle gardait un vendeur sur les lieux. Elle aussi, tout comme l'entrepreneur, spéculait sur les matériaux et la main-d'oeuvre.
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> Je suis d'avis que la défenderesse était une commerçante et que la preuve testimoniale est admise contre elle.

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[59] It is acknowledged that this statement may not appear to coincide entirely with the decisions in *Gagnon* v. *Latouche* [1963] S.C. 417 (Marquis, J.) and *Dame Zori Seiwerth* v. *Gaea Corporation* (unreported judgment of Deslauriers, J., August 6, 1964, S.C. Montreal 535736). These judgments were rendered in relation to article 1688 C.C. and the problem as to whether the speculative owner-builder is subject to that article. They suggest that an owner-builder does not enter into a contract that is one of sale alone; that there is also involved a *contrat d'entreprise* (which comes under the title of lease and hire in the Civil Code). However, it is submitted that this does not affect the fact that once the construction has been terminated, it is a contract of sale that is entered into.

[60] The holding in *Gamma Realty Ltd.* v. *Brummer* is supported by Hamel et Lagarde, *op. cit.*, I, no. 183 at p. 217.

[61] [1965] Q.B. 161.

[62] *Ibid*, at p. 163.

Mr. Justice Owen went somewhat further and made comments of a more general nature:[63]

> In my opinion it should no longer be held that if a contract is with respect to an immoveable then such contract is *per se* a civil matter. At one time it may have been the accepted view that gentlemen dealt with land and that such transactions were on a higher level and distinct from those entered into by persons lower in the social scale who were engaged in trade and dealt in moveables. Today, however, there is no justification for such a distinction. A person who buys and sells or otherwise deals with immoveables for the purpose of private gaiu or profit is just as much a trader or a *commerçant* as the person who does the same thing with respect to moveables.
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> Instead of merely looking at a contract and, on seeing that it relates to an immoveable, declaring that such contract is *per se* civil, it is now necessary in my opinion to look behind such a contract and consider the parties and their purpose in entering into the agreement. Applying this test to the present case I am of the opinion that defendant Colonia Development Corporation with respect to the alleged contract was a trader or *commerçant*. Its purpose was not to live in the house when completed but to sell it for a profit. Accordingly I am of the opinion that plaintiff was entitled to offer proof by testimony against defendant with respect to the alleged contract relating to work done and materials furnished for the house belonging to defendant.

Thus Mr. Justice Owen of the Court of Appeal has expressed himself in favour of abolishing the old rule. The matter cannot be considered as conclusively settled yet, however, for while immoveables were involved, the *object* of the transaction was a contract of lease and hire of services — Belliveau was engaged to do repair work. Until the Court of Appeal or the Supreme Court has expressed itself on the subject when faced with a contract such as the outright sale of an immoveable, the point will still be open to question.

It is interesting to note that the Hon. Mr. Justice Nadeau and Professor Ducharme, in their recently published book on evidence[64] agree that it is no longer logical to exclude immoveables from commercial operations:

> On constate aussi dans la jurisprudence une très grande résistance à considérer comme commerciale l'entreprise ayant pour objet de spéculer sur l'achat et la vente ou la location des immeubles. Si, autrefois, il était logique d'exclure du domaine du commerce les opérations qui avaient pour objet des immeubles, cette exclusion, à notre avis, n'a plus, de nos jours, sa raison d'être.

Now that the first steps have been taken in *Gamma Realty Ltd.* v. *Brummer* and in *Colonia Development Corporation* v. *Belliveau* to having immoveables considered as being eligible for being objects of a commercial operation, the question can be asked as to what objection

[63] *Ibid.*, at p. 166.

[64] *Traité de Droit Civil du Québec*, IX (1965) no. 511 at p. 409.

there can be to such a reform. The view used formerly to be held that immoveables, being then the principal form of wealth, should receive greater protection. It was no doubt considered desirable to give more protection to the wealth of landowning families than to traders who voluntarily incurred risks with a view to making money. There were, as well, the added factors that trade had to be able to move with greater speed and simplicity than ordinary civil acts relating to land, and in any event real estate was not traded in on anything like the same scale as it now is.

Nowadays, we find that land is no longer the principal source of family wealth and that rapid speculative turnovers by traders in real estate are frequent. Moreover — and this is what really gives the coup de grâce to the theory that the protection of the civil rules should always be applied to real estate — under the mixed operations principle the owner of an immoveable is protected anyway if he is a civil party who is not performing a commercial operation; it is only when a *commercial operation* is being performed that the transaction involving the immoveable will be considered to be commercial, and then only for the commercial party.

For example, Dr. Jones, who owns a house in which he lives as his as his home, will benefit from the protection of the civil rules of evidence with respect to that property; proof of an alleged undertaking to sell it would not be able to be made against him without a writing or an admission on his part — testimony would not be allowed against him in the absence of at least a commencement de preuve par écrit. Dr. Jones, though, could use testimony to prove an undertaking to buy his property made by somebody desirous of acquiring the house with a view to speculating on the property instead of living in the house himself.

Where real estate is owned by a commercial enterprise that bought it to further its business, or by a speculative builder who makes a practice of buying land and building on it with a view to reselling at a profit, this type of owner will be subject to the commercial rules. But will be subject to the civil rules a person who offers to buy one of the houses built by such an owner, provided the purchaser is buying to make of it his home.

All that we are doing here is taking the already well established mixed operations theory [65] and extending its application to immoveable property, instead of observing the rigid old rule that immoveables are always civil regardless of the qualities of the parties, their inten-

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[65] The mixed operations theory has been applied in: *Blais* v. *Paradis* (1933) 54 K.B. 495, confirmed by [1933] S.C.R. 452; *Panneton* v. *Brunet* (1924) 36 K.B. 290; *Pellerin* v. *Vincent* (1908) 33 S.C. 51 (Court of Review); *Naud* v. *Dolbec*

tions and the circumstances. The result of the application of this mixed operations theory is that the trader who is speculating in real estate will have the commercial rules invoked against him (so that testimony can be used to prove an undertaking made by him), which is quite right as he has voluntarily assumed the risks arising from being in business, and the fact that he is dealing in land rather than in moveables should make no difference, whereas a civil party who enters into a transaction affecting real estate without the intention of speculating will receive the protection afforded by the civil rules. In other words, by virtue of the mixed operations theory those persons

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[1959] S.C. 120 (Langlais, J.); *Click* v. *Acme Waterproof Mfg. Co.* [1963] R.L. 382 (Associate Chief Judge Leduc, Magistrate's Court); *Angers* v. *Dillon* (1899) 15 S.C. 435 (Court of Review) in which it was held that it is the nature of the claim from the creditor's point of view which determines whether the civil prescription of thirty years or the commercial prescription of five years will apply; *Bachand* v. *Duchesne* (1919) 56 S.C. 132 (Court of Review); *Boivin* v. *Paquet* (1914) 46 S.C. 461 (Dorion, J.); *Duphily* v. *Charbonneau* [1945] R.L. 461 (Décary, J.); *Gravel* v. *Deziel* [1965] S.C. 257 at 261-262 (Martel, J.). *Contra*: *Darling* v. *Brown* (1878) 1 S.C.R. 360 (the notes of Fournier, J. at pp. 391-394, where he attacked the mixed operations theory; his views do not seem to have been followed and were effectively answered by Perrault *op. cit.*, I, no. 387, pp. 403 et seq., esp. at p. 405). See also Nadeau et Ducharme (*op. cit.*), IX, no. 514, pp. 410-411, and no. 518, pp. 414-416. The mixed operations theory was actually applied to a lease of a store in *Blain* v. *Chèvrefils* (1919) 55 S.C. 173 (Court of Review), and by the Cour de Cassation, December 5, 1961, D. 1962, 88 (*Epoux Verrechia* v. *S.A.R.L. Chasseau*); February 14, 1956 J.C.P., 1956. 2.9375 (*Dame Valette* v. *Lardeau et Sté Beau-Rivage*). It was also applied, though it is respectfully submitted, in reverse, in another lease case, *Blondeau* v. *Corporation des Abattoirs Régionaux de Québec* [1950] S.C. 70 (A.I. Smith, J.). (It must be acknowledged, *en passant*, that it is an unsettled question as to whether contracts of employment constitute mixed operations, that is, commercial for the employer and civil for the employee, or commercial for both. Perrault expressed himself in favour of the application of the mixed operations theory to contracts of engagement, (*op. cit.*), I, no. 361 at p. 383, II, nos. 1159-1161, pp. 627-629. It was applied in or was compatible with: *Richer* v. *Perusse* [1950] S.C. 108 (André Demers, J.); *Cousineau* v. *Beauvais* (1890) 20 R.L. 319 (Mathieu, J.); *Brown* v. *Security Life Assurance Co.* (1914) 46 S.C. 276 (Court of Review); *Abeles* v. *Turgeon* (1914) 23 K.B. 533; *Lajoie* v. *Thomas* [1949] K.B. 767. The employment contract was considered commercial for the employee in *Graff Brushes Ltd.* v. *Marvin* [1962] S.C. 72 (André Demers, J.); *Legge* v. *The Laurentian Railway Company* (1879) 24 L.C.J. 98 (C.A.); *Charbonneau* v. *The Publishers' Press Limited* (1912) 42 S.C. 97 (Bruneau, J.); *National Paper Box Ltd.* v. *Marois* (1934) 57 K.B. 170; *Yves Germain Inc.* v. *Leclerc* [1962] S.C. 305 (Dorion, A.C.J.); *Bédard* v. *Bérubé* [1958] S.C. 248 (Lesage, J.); see also *Dominion Life Assurance Co.* v. *Beaulieu* (1939) 77 S.C. 426 (White, J.). Even if the view were to prevail that contracts of engagement of employees are not mixed contracts but are commercial for both, there would seem to be no indication or reason why the rest of the fields of mixed operations should not continue to be applicable.)

owning real estate who should be protected will continue to receive protection, while traders will cease to receive protection to which they are not entitled.

Until such time as the Court of Appeal or the Supreme Court[66] clearly and decisively puts to rest the old rule that immoveables can only be civil, it would be interesting to consider making an additional breach in the application of the rule by way of creating another exception. We have already seen that an operation which involves an immoveable but of which the direct object is not really the immoveable itself (e.g. a *contrat d'entreprise* whereby the services of a builder are leased for the erection of a building), will be commercial if the elements of commerciality are present. This exception will not affect the application of the rule to the *sale* of an immoveable (unless the immoveable is merely an accessory to a larger sale involving a *fonds de commerce*), or the granting of some other *real right* such as a servitude.

But what about a *lease* of a building, such as by a merchant for the purpose of carrying on business therein? It is true that the object of the contract is not as far removed from the immoveable involved as it is with a contract of construction (lease and hire of services). It must also be acknowledged that leases of immoveables have been traditionally, and recently, held to be civil, regardless of the purpose for which the lease was entered into.[67]

It would not seem inappropriate, however, at a time when the rule that immoveables are always civil is undergoing close scrutiny, to reconsider the question of leases of immoveables.

It is true that a lease of an immoveable relates closely to the immoveable — what could be more obvious! But while under a contract of sale the vendor "... *gives a thing* to the other ..." (article 1472 C.C.) i.e. transfers the very object itself to the buyer, and a servitude is a charge imposed on an immoveable (article 499 C.C.), such as to constitute a real right in the property itself, a lease is a contract

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[66] The question of the commercial or civil nature of a transaction does not seem often to come up for adjudication before the Supreme Court.

[67] Perrault, *op. cit.*, I, no. 321 at p. 332; II, nos. 774 et seq., pp. 202 et seq.; Lyon-Caen et Renault, *Traité de Droit Commercial* 5th ed. (1921), I, no. 121, p. 142; *St. Genevieve Shopping Centre Ltd.* v. *Dalfen's Limited* [1964] S.C. 554 (Batshaw, J.); *Corbeil* v. *Marleau* (1896) 10 S.C. 6 (Mathieu, J.).

by which the lessor grants to the lessee the *enjoyment* of a thing during a certain time (article 1601 C.C.). It might be argued, then, that the real *object* of the contract of lease, is the *obligation* on the part of the lessor to *furnish enjoyment.* This would involve an acceptance of the principle that a lease confers only a personal right and not a real right. There is a substantial body of jurisprudence on the matter which in turn has been fully commented on, and unfortunately there does not seem to be a unanimity of points of view.[68] This is not the place to conduct another study *à fonds* on this problem. If one were permitted to reason *a priori* on the matter, one might well be able to arrive at the conclusion that the mere fact that the law (article 2128 C.C.) protects a tenant against a subsequent acquirer of the leased property through the medium of registration does not make a lease a real right on the property. All that is done is to protect the lessee through the giving of notice by registration. The fact that the lessee has only a personal right would seem to be borne out by the principle that the lease is valid even where the lessor is not owner of the premises.[69] The tenant cannot have the lease resiliated so long as the lessor is furnishing him enjoyment. The true owner, on the other hand, who, it is submitted, is the only one having a real right in the property, may evict such a tenant at any time. However, the authorities on the matter are so complex and divided, that it must suffice to say that if one were able to accept the proposition that a lease confers a personal right only and not a real right, it would follow that the object of the contract was only a personal obligation to furnish enjoyment on the part of the lessor, with the result that the *object* of the lease was not an immoveable. The contract of lease would therefore not be tied to the rule that immoveables are always civil. Indeed,

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[68] See, *inter alia,* Faribault, *Traité de Droit Civil du Québec,* XII (1951), pp. 24-25, 27, 277-283; Mignault, *Le Droit Civil Canadien,* VII (1906), pp. 361-365; Snow's *Landlord and Tenant in the Province of Quebec,* 3rd ed. by Lovell Carroll (1934), pp. 10-11, pp. 392 et seq.; Dainow, *La Nature Juridique du Droit du Preneur à Bail dans la loi française et dans la loi de Québec* (1931); Lavallée, *Etudes sur le contrat de louage* (1931-32) 34 R. du N. 101 at 107-130; *De la Saisie Immobilière* (1927-28) 30 R. du N. 193 at 254-255; *Bail enregistré — opposition à fin de charge* (1935-36) 38 R. du N. 535; Giroux, *Le Décret et le bail d'immeubles* (1935-36) 38 R. du N. 258; Brassard, *Quelques réflexions en marge du décret* (1943-44) 46 R. du N. 361 at pp. 368 et seq.; Sirois, *Le décret purge-t-il le bail enregistré ?* (1904) 7 R. du N. 239; Baudoin, *Danger des charges secrètes* (1904) 7 R. du N. 271 at 277 et seq. The foregoing contain many references to the jurisprudence to which may be added *In re Palais des Sports de Montréal Ltée* [1960] Q.B. 1012 at 1017. See also Ginossar, *Droit réel, propriété et créance* (1960), especially at pp. 168 et seq.

[69] See, *inter alia, Paré* v. *Cowper* [1957] Q.B. 323; Mignault, *op. cit.,* VII, pp. 226-228; Snow, *op. cit.,* p. 59.

the French courts are now tending to hold leases of immoveables to be commercial where the circumstances are commercial.[70]

Conclusion.

That an immoveable cannot be the object of a commercial operation is a rule that originated in old French law, at a time when there was a sharp dividing line between the trade carried on in moveables by the merchants and the system of land tenure which was under the grip of the feudal system. Preserved thereafter in France by the weight of tradition, it was inevitably accepted into the law of Quebec.

Exceptions to the rule which were created, such as where the immoveable is only an accessory in a larger agreement dominated by moveables, or where the transaction while involving an immoveable, does not have it as its direct object, reduced the application of the rule. There are increasing signs, however, that the courts may be prepared to go the whole way and abolish the rule altogether. This would be a desirable result: the rule never really belonged in Quebec, questions as to the advisability of retaining it are being raised in France, from whence the rule came, and the rule no longer has any justification for its existence, if indeed it ever had any, for there is no justification for extending to a trader the protection of the civil rules (*inter alia*, those of evidence), just because he happens to be dealing in real estate rather than moveables. Moreover, the mixed operations theory will protect those who enter into a real estate transaction without the intention of speculating by shielding them with the civil rules while at the same time applying the commercial rules against the non-civil parties.

Here, then, is an outstanding opportunity for the Quebec courts to effect a measure of judicial reform, unfettered by any restraining text of the law.

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[70] Ripert (*op. cit.*), I, no. 315 at p. 158; Hamel et Lagarde, *op. cit.*, I, no. 218 at p. 219; Juliot de la Morandière, *op. cit.*, I, no. 37; p. 40; Paris, May 28, 1945, D. 1945, 341 (*Société métallurgique électrique des chemins de fer* v. *Agence de produits alimentaires* — a lease of commercial premises between traders); Cour de Cassation, February 8, 1961, D. 1961, 219 (*Epoux Ravel-Bouchet* v. *Epoux Argillet-Chadefaux* — contracts of lease entered into by a commercial enterprize are deemed to be made for the needs of its business and confer a commercial character on the premises leased regardless of the destination of the leased premises); Cour de Cassation, December 5, 1961, D. 1962, 88 (*Epoux Verrechia* v. *S.A.R.L. Chasseau* — the lease by an owner to a trader for the furtherance of his business, is commercial for the trader); Cour de Cassation, February 14, 1956, J.C.P., 1956. 2.9375 (*Dame Valette* v. *Lardeau et Sté Beau-Rivage* — similar holding to preceding one). See also Hébraud et Raynaud, *Jurisprudence française en matière de procédure civile* (1950) 48 Rev. Trim. de Droit Civil 386 at 388-389; and Cour d'Appel de Paris, February 4, 1963, D. 1963, 351 (*Boullaire* v. *Soc. de gestion immobilière et mobilière*).