

Immobilisation by destination of moveable industrial machinery

James Marunczak *

The demarcation line between a moveable and a moveable rendered immovable by reason of its destination is not always well-defined. Various criteria relevant to such a distinction have recurrently appeared in Quebec jurisprudence and have been considered anew by Fournier J. in the recently reported Superior Court decision of *In re Amedee Leclerc Inc.; Thibault v. De Coster*.¹

The events precipitating the litigation may be briefly described. The plaintiff Thibault had made a loan to Amedee Leclerc Inc. and secured it by a hypothec on a saw-mill which the company owned. The company subsequently went into liquidation and the plaintiff applied for a declaration that by reason of a dation en paiement clause in the deed of hypothec he was entitled to the saw-mill and certain moveables on the premises of the saw-mill which he claimed had been rendered immovable by reason of their destination. Thus, it fell to the learned Judge to ascertain which of the moveables had been rendered immovable; consequently, it became necessary to determine the meaning and import of the term *à perpétuelle demeure* of articles 379 and 380 C.C.

The connotations which can be extended to *à perpétuelle demeure* and the ratiocinations on which they rest have been thoroughly and exhaustively presented in the judgments of Taschreau J.² and Kellock J.³ in the 1957 Supreme Court of Canada decision in *City of Sherbrooke et al v. Commissaires d'Ecoles de Sherbrooke et al.*⁴ Mr. Justice Puddicombe, in the recently reported *Bowling Jacques-Cartier Ltée. v. City of Jacques-Cartier*⁵ decision, concluded after analyzing the Supreme Court and Appeal Court judgments arising out of the *City of Sherbrooke case*⁶ that there would seem to be two theories

* Of the Junior Board of Editors, McGill Law Journal; second year law student.

¹ [1965] S.C. 266.

² Fauteux and Abbott JJ., concurring.

³ Nolan J., concurring.

⁴ [1957] S.C.R. 476.

⁵ [1965] S.C. 39.

⁶ The Appeal Court decision *Comm. d'Ecoles v. Cité de Sherbrooke* is reported at [1956] Q.B. 639.

concerning the coloring which can be given to *à perpétuelle demeure*; the learned Judge has conveniently termed them the *time theory* and the *completion theory*.⁷

According to the *time theory*⁸ the relevant and pertinent criterion is one of time and *à perpétuelle demeure* is to be interpreted as signifying "indefinitely" as distinct from "transiently". Thus, in distinguishing between moveables and immoveables by destination the distinction must be made on an appreciation of whether the *moveable* has been placed on an immoveable permanently as opposed to transiently.

The *completion theory*⁹ contemplates a situation where if a proprietor of a building suitable for an industrial process places in it machinery for the purpose of carrying on the *process* permanently and not merely temporarily such machinery is considered to have been placed *à perpétuelle demeure* and becomes immobilized under article 379 C.C. whether or not any part of it falls within the first paragraph of article 380 C.C. Also, it is of no significance, with respect to the destination of the machinery and thus its characterization as moveable or immoveable, whether the same building could be equally well devoted to some other industrial purpose; nor will the immoveable nature of the machinery be altered merely by some happening that results in the abandonment of the intention to carry on permanently. Furthermore the word *attached* in article 380 C.C. does not mean physically attached but rather joined, united, annexed or appropriated — *affecté* — to the immoveable.

In *Thibault v. De Coster*, Fournier J. first concludes that the codifiers did not intend immobilization of moveables, such as the moveable implements of a saw-mill, to be effected exclusively through a physical or material attachment to the immoveable; this conclusion is an echo returning from the judgment in the *City of Sherbrooke case*. The learned Judge arrives at this conclusion by juxtaposing the verbs *placer* and *attacher* and noting that the codifiers used the verb *placer* in enunciating the general rule of article 379 C.C. in contrast to the verb *attacher* of article 380 C.C. Concluding that they did not simply want to use diversified expressions he finds that they must

⁷ [1965] S.C. 39, at page 49.

⁸ The time theory was enunciated in the Court of Appeal in the *City of Sherbrooke case* by McDougall, Martineau and Gagné JJ., and was cited with approval and further developed by Taschereau J., in the Supreme Court.

⁹ As developed by Kellock J. in the Supreme Court decision in the *City of Sherbrooke case*.

have expressed different thoughts in the two articles. Drawing support from Pothier, the learned Judge then concludes that the term *placé à perpétuelle demeure* applies to the placing of moveables which serve to complete the building according to its nature without the necessity of physical attachment. This statement is highly reminiscent of Mr. Justice Kellock's words in the *City of Sherbrooke case*.

The learned Judge then proceeds to say that article 379 C.C., with respect to moveable property serving the exploitation of a factory, can be given the extensive interpretation of the doctrine and jurisprudence of France :

En toute déférence pour le postulat contraire, il apparaît au tribunal que l'on peut donner chez nous à l'article 379 C.C., concernant les biens meubles servant à l'exploitation d'une usine, l'interprétation extensive de la doctrine et de la jurisprudence françaises.¹⁰

Further, he cites with approval the 1936 Superior Court decision of *Diamond Shoe and Turcotte v. Côté*¹¹ in which it was held that the second paragraph of article 379 C.C. is but the transposition of the same disposition that is found in article 524 of the Code Napoléon; he concludes consequently, that there is no reason for a difference in interpretation between the French and Quebec articles.

Le paragraphe 2 de l'article 379 C.C. n'est que la transposition de la même disposition que l'on trouve à l'article 524 du Code Napoléon; il n'y a donc pas de raison pour en différencier l'interprétation.¹²

These contentions can be interestingly juxtaposed with certain statements of the Supreme Court in the *City of Sherbrooke case*. There in the notes of Taschereau J., is to be found the statement that in France there are two ways by which a moveable object can be rendered immovable by destination. The first of these is through article 524 of the Code Napoléon which provides for the so-called doctrine of industrial and agricultural immobilization whereby a moveable placed on an immovable for its service even without any physical attachment or without any necessity of permanency can be immobilized by destination. The second of these is where it is physically attached to the immovable à *perpétuelle demeure*.

Taschereau J., found that the second of these immobilization techniques exists unequivocally in Quebec law and that the first technique of industrial and agricultural immobilization exists in Que-

¹⁰ [1965] S.C. 266, at p. 272.

¹¹ (1936) 74 S.C. 264.

¹² [1965] S.C. 266, at p. 273.

bec law provided the moveable is placed permanently, that is, with the intention to keep it there so long as it remains useful, but not excluding the possibility of replacement or even removal in the future.

It is quite conceivable and indeed very desirable that the extremely liberal criteria utilized in the *Thibault decision* in deciding whether moveables had been rendered immoveable by reason of their destination be a precursor and forerunner of the contemplated textual revisions of the Civil Code now in progress. A revision of articles 380 and 379 C.C. incorporating the *Thibault* criteria would amount to including the provisions of articles 524 Code Napoléon and thus the theories of industrial and agricultural mobilization permitting moveable property to be rendered immoveable by reason that it was placed by the proprietor *pour le service et l'exploitation de son fonds*.

Using his criteria Fournier J. concluded that the moveables which fell within the limits of immoveables by destination were all those which were accessories of the plant, all those which contributed to the production provided they were useful and necessary for the exploitation of the plant.
