

there was a stipulation that Owler should not transfer his interest in the lease without the consent in writing of the lessor. Owler entered into possession in May, 1863, and continued in possession until February, 1864, when he sublet part of the premises to one Pierre Cérat. Mr. Desbarats died in October, 1864. In April, 1865, Owler sublet the rest of the house to one Dorion. After the death of Mr. Desbarats the property was, in 1866, sold by the heirs to the plaintiff. In the deed of sale it was stated that the vendors assigned over to the vendee any right to eject Owler that the heirs themselves possessed. They took care however, not to guarantee anything. It appears, therefore, that the two leases, which were made anterior to the sale, were known both to the vendor and to the vendee. For surely it cannot be pretended that the parties can plead ignorance of these transactions, in the face of the stipulation between them that the vendee should have whatever right the heirs had to eject Owler, and that this right was to be exercised at the vendee's own risk. Under these circumstances how does the law apply? By the common law the lessee is entitled to use the property leased for any purpose that he pleases, so long as he does not commit waste or render the position of the lessor less favourable than it was. Stipulations against subletting, and so forth, are made in favour of the lessor. In this instance the lease contained a clause that the lessee should not assign his lease, and it is an alleged violation of this stipulation that gives rise to the action of ejectment. What was the intention of the lessor in stipulating that his tenant should not assign the lease? He evidently meant that the lease was not to be assigned without his permission; but the moment that the stipulation was waived by the consent of the landlord, then the common law came in, and the parties stood in the same position as though the stipulation was not in the lease. The stipulation as to a consent in writing was a privilege stipulated in favour of the landlord; but he might say if he chose, that he did not want proof in writing. He was the party in whose favour consent was stipulated, and he might dispense with the necessity for such consent. See Dictionnaire

Dalloz, under the word *acquiescement*. I think that there is an *acquiescement* clearly shown in this case. The rent was paid to the knowledge of the proprietors. The heirs Desbarats had only the same right that Mr. Desbarats himself had. If he chose to say: "Never mind the consent in writing; pay me the rent, and it will be all right," this was a clear acquiescence. The rent has been paid for years with the perfect knowledge of the agents for the property. Mr. Desbarats never gave a written consent, but he gave a tacit consent which, to all intents and purposes, is equivalent. Under these circumstances, I regret that I cannot concur in the judgment about to be rendered.

BERTHELOT, J. I am of opinion that the proprietor did not consent to the sub-leasing of the premises. Mr. Stodart, the agent, denies that he had any power from the Desbarats' estate to consent to the sub-leasing. This case differs from that of *Cordner v. Mitchell*, for in that case there was something in writing which might be considered equivalent to a commencement of proof of a written consent; but here there is nothing of the kind. The plaintiff's action in ejectment should have been maintained.

BADGLEY, J. My opinion is that which I formed when I heard the case at the bar. It is necessary to keep in mind the dates. The landlord leased with a strict stipulation in writing that the tenant should not sublet. There is no rule of this kind in the common law to prohibit subletting. The lease was made to Owler on the 8th of October, 1862, for five years from the 1st of May, 1863. On the 17th Feb., 1864, Owler let the basement story of the house to a man named Cérat. We know that so long as Owler did not dispossess himself of the house the law protected the arrangement. Cérat was the tenant of Owler. There was no breach of the contract here, because Owler still remained in actual possession of the premises. Then on the 8th of April, 1865, Owler sub-let the whole remaining portion of the house to one Joseph Dorion, this arrangement to take effect on the 1st May, 1865. The fact of his sub-letting the whole of the premises deprived him of the protection of the law, because he had no longer foothold in