LA

THE LAW OF LANDLORD AND TENANT IN THE PROVINCE OF QUEBEC

EXCLUSIVE OF FARM LEASES

BY

F. LONGUEVILLE SNOW

SECOND EDITION

Montreal

JOHN LOVELL & SON, LIMITED

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PREFACE

Over twenty years have elapsed since the author's first edition of this work. The favorable reception accorded that edition; the many cases since decided, and the enactment of a revised Code of Procedure, are factors which the author deemed sufficient justification for the issue of a new and greatly enlarged edition.

F. L. S.

Montreal, January, 1917.

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CHAPTER I.

Contract of Lease.

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1. CONTRACT OF LEASE OF THINGS AND WORK COMBINED.

The contract of lease or hire has for its object either things or work, or both combined.[1] Where a person leases to another a boiler and engine fixed to the landlord's realty, with a place to store wood in, this constitutes a lease of an immoveable even where the lease stipulates for one price for the use of the boiler and engine, and for the salary of the landlord's son whose services were leased to the tenant in the same contract of lease.[2] See further *post* p. 36 "The price or rent."

2. DEFINITION OF CONTRACT OF LEASE.

The lease of real estate is a contract by which one of the parties, called in the Code the lessor, but who in this treatise will be designated, where possible, as the landlord, grants to the other, called the lessee in the Code, but who in this treatise will be designated, where possible, as the tenant, the mere enjoyment of certain real estate during a certain time, for a rent or price which the latter obliges himself to pay.[3]

3. RULES APPLICABLE TO LEASE OF HOUSES AND LEASE OF FARMS.

The lease or hire of houses and the lease or hire of farms or rural estates are subject to the rules common to contracts of lease and hire, and also to particular rules applicable only to the one or the other of them.[4]

4. WHAT THINGS MAY BE THE SUBJECT OF LEASE AND HIRE.

All corporeal things may be leased or hired, except such as are excluded by their special destination.[5]

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[1] Art. 1600 C. Code.

[2] *Lanoie v. Sylvestre*, Q. R. 24, S. C. 233 (C. R. 1903).

[3] See Art. 1601 C. Code. The present treatise deals with the lease of houses, warehouses, shops and manufactories, and not with the lease of farm and rural estates.

[4] Art. 1607 C. Code.

[5] Art. 1605 C. C.

Things which are *extra commercium* cannot be leased.[1] Incorporeal things may be leased or hired, except such as are inseparably attached to the person. If attached to a corporeal thing, as a right of servitude, they can only be leased with such thing.[2]

Whereas the sale of a thing which does not belong to the seller is null, with a few exceptions,[3] the weight of authority is in favor of the opinion that the lease of property which does not belong to the lessor is valid.[4] A sale involves the handing over by the vendor to the purchaser, of the property right in the thing sold, which he cannot do if he does not own the property right; whereas in the contract of lease and hire the contract is merely productive of obligations; and it is considered that neither in law nor in reason is there anything to prevent one from contracting an obligation relating to another's property; non-execution of the obligation merely resulting in liability of the lessor to damages toward the lessee. But where it is a question of lease by sufferance, Article 1608 of the Civil Code limits its application to the "owner" of the property occupied by sufferance, and our Courts have given a restricted meaning to that word.[5]

5. NATURE OF CONTRACT OF LEASE AND HIRE.

A contract of lease is synallagmatic and consequently imposes reciprocal obligations. Thus where a landlord rents a house to a tenant for seven years, upon the condition that the latter build an addition to the

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[1] Guillouard I, n. 167.

[2] Art. 1606 C. Code.

[3] Art. 1487 C. Code.

[4] Baudry-Lacantinerie Vol. I. n. 125; citing S. 1903, 4, 15. Troplong I. n. 98; Duranton 17 n. 34; Colmet de Santerre VII. n. 159 *bis. II.*; Guillouard I. nos. 51 and 52; Fuzier-Herman, Art. 1709 n. 35. *Contra* Duvergier I. n. 82; Championniere et Rigaud, IV. n. 3097; Laurent, XXV. n. 56. See per Blanchet J. diss. in *Letang v. Donohue*, Q. R. 6 Q. B. at p. 172. See *Baillargeon v. Robillard*, Q. R., 17 K. B. 334, 335.

[5] See *Letang v. Donohue*, Q. R. 6 Q. B. 160, affirming C. R., which reversed 8 S. C. 496. See *infra* pp. 6-7.

premises to the satisfaction of the former, and the landlord refuses to continue the lease, on the ground that the addition was not built to his satisfaction, he cannot retain the improvement without indemnifying the tenant. The agreement remaining unexecuted, the parties thereto fall under the common law, which obliges the landlord to pay for the value of such improvements if he retains them.[1]

Lease is an onerous contract.[2]

6. INTERPRETATION OF LEASES.

Where the meaning of a lease is doubtful, it is to be construed against the landlord and in favor of the tenant.[3]

See further as to interpretation of leases "Mixed Contracts of Lease with Promise of Sale," *infra* p. 11.

7. ACCEPTANCE OF CONDITIONS AND CLOSING OF CONTRACT.

In order to constitute a contract of any kind, the consent, legally given, of both parties, to the same thing, is required.[4] There must be a meeting of minds of the parties as to the terms and conditions on which

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[1] *Lee Chu v. Deslauriers*, Q. R. 30 S. C. 494 (C. R. 1906).

[2] Guillouard I. n. 9.

[3] *Vezina v. Piche*, Q. R. 13 S. C. 213 at p. 221; Dalloz *Louage* n. 147; *Roumageon v. Chene*, Q. R. 41 S. C. at p. 184; Baudry-Lacantinerie I., n. 47. See Art. 1019 C. Code.

The following clauses in a lease in typewritten form: "The lessee hereby agrees to give three months' notice (in writing), that is on the 1st day Feb., to the lessor in case of his desire to lease said premises upon expiration of the present lease, failing such, there will be a tacit understanding between said lessee and lessor that the lease continue in force for a further period as mentioned herein, at same terms and conditions," and another clause added by handwriting, as follows:—"Lessee has option of two further years from May 1st, 1915, for consideration of $1,440, payable $60 on the first of every month, first payment becoming due and payable on June 1st, 1915," are contradictory, and the tenant could leave at the end of the first year, without giving the written notice to the landlord as required by the first clause. *Howard v. Calkins*, K. B. Nov. 6th, 1916, reversing Q. R. 50 S. C. 147 (C. R. 1916), and restoring S. C. Archer J.

[4] Art. 984 C. C.

the lease is entered into.[1] Thus where negotiations have been carried on by correspondence for the lease of premises, between the owner and the agents of a company, without a final understanding, and the last letter is from the owner, containing new conditions and proposals, a telegram from the agents in these words: "Will meet you at store, Saturday 2 p.m. Authority to sign lease," is not an acceptance of such conditions and proposals and does not amount to a closing of the contract.[2]

Where a party writes a letter to the owner of premises, stating the conditions on which he desires to lease them and to subscribe a notarial lease in consequence, and no reply is made to him by the owner, but two drafts of a notarial lease are successively submitted to him which he refuses to sign on the ground that they are not made in conformity with his offer, no lease can be said to have come into existence. Hence, if the party had taken possession of the premises at the time of writing his letter and remained in occupation until the impossibility of an agreement with the owner had become manifest, the rental at the rate proposed by him having been paid and accepted for that period, he could abandon them and would not be liable in damages for breach of contract.[3]

8. PRESUMED LEASES—LEASE BY SUFFERANCE—TACIT RENEWAL.

Although three things are requisite to form a valid contract of lease, viz.:—the consent of the parties, the object and the price, yet a valid contract can exist by presumption of law.

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[1] There must be an agreement as to the property to be leased, the rent and the duration of the lease. *Joseph v. Chouillou*, Q. R. 5 Q. B. at p. 263, citing Aubry et Rau, *Louage*, paragraph 362; 1 Guillouard, no. 35; Dalloz, *suppl. Louage*, no. 57.

[2] *Robichon v. The E. P. Charlton Co., Ltd.*, Q. R. 39 S. C. 22 (C. R.).

[3] *Robillard v. Galeries Parisiennes Ltee.*, Q. R. 46 S. C. 233 (C. R. 1914), reversing.

For instance, a lease is presumed by law to exist where the tenant is occupying the premises by the mere sufferance of the owner, whether express or implied, and the tenant is bound to pay the annual value of the property.[1] Such a holding is regarded as an annual lease terminating on the first day of May of each year if the property be a house, and on the first day of October if it be a farm or rural estate. It is also subject to tacit renewal and to all the rules of law applicable to leases. Persons so holding are liable to ejectment for non-payment of rent for a period exceeding three months, and for any other cause for which a lease may be rescinded.[2]

Where a landlord alleges in his action a verbal lease and also use and occupation of the premises by the tenant sued, and failure by the latter to pay a quarter's rent, he can, if he fails to prove the verbal lease, recover the value of the use and occupation, which he can prove by witnesses, and has all the recourses open to a landlord in an action against his tenant,[3] And this is the case even where the tenant admits the existence of the verbal lease but for a different amount.[4] Even where a landlord bases his action on a verbal lease alone he can, upon failure to prove the verbal lease, invoke Art. 1608 C. Code, where there has been use and occupation, and can make proof of the value of the use and occupation.[5]

The term "owner" in statutes has always been a difficult subject of interpretation respecting the scope to be given to it. This difficulty presented itself in *Letang* v.

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[1] *Parent v. Oisel*, S. C. 1883, 9 Q. L. R. 135, confirmed in Review; Art. 1608 C. Code.

[2] Art. 1608 C. Code.

[3] *Hanover v. Wilke*, Q. B. 1865, 1 L. C. J. 37; Arts. 1608, 1233 (3).

[4] *Viger v. Beliveau*, 7 L. C. J. 199.

[5] *Superior v. Withell*, Q. R. 14 K. B. 396 (1902), Tellier J. *ad. hoc.* dissenting; and see per Lacoste C. J. in *Laliberte v. Langelier*, Q. R. 9 Q. B. at p. 404; and per Carroll J. in *Balthazar v. Quilliam*, Q. R. 23 K. B. at p. 47 (1913).

Donohue[1] where it was held that the word "owner" in article 1608 C. Code does not mean a person who has merely the right to the fruits of the property without possession. Whether a person can lease to another property which does not belong to him is a subject of controversy in France and is dealt with elsewhere.[2]

Article 1608 only establishes a presumption. Occupation by permission or tolerance causes a lease to be presumed. But if such occupation can be explained otherwise, the presumption of lease disappears.[3]

Thus where D., having obtained a loan from L., transferred to him all the rents and revenues of certain real estate until the loan should be fully paid, and L. then appointed D. his attorney for the administration of the property, D. having occupied part of the premises himself, the relation of landlord and tenant was held not to exist between the parties, and L. had no remedy against D. by way of attachment for rent, and in ejectment.[4] Where the possession of property is in litigation it cannot be said who is the owner, and it cannot be said that the occupant is holding on the sufferance of the owner.[5]

Where a landlord permits a tenant to remain on after the expiration of his lease, but merely from day to day, the property being about to be expropriated, such occupancy is not of the kind contemplated in Art. 1608 C. Code.[6]

Where a person for a number of years occupies a house as agent of his brother, without paying rent, and

[1] Q. R. 6 Q. B. 160, affirming C. R. which reversed S. C. 8 S. C. 496.

[2] See *supra* p. 3.

[3] *Morgan v. Provost*, Q. R. 25 K. B. 425 (1916). See also *Cantin v. Berube*, 37 Can. S. C. R. 627, where occupation was begun and continued under a promise of sale; *Massawippi Valley Ry. Co. v. Reed*, 33 Can. S. C. R. 457, Railway lands; *Breakey v. Carter*, Supreme Ct. Cassel's Dig. 2nd Edit. 463, Riparian lands.

[4] *Letang v. Donohue*, Q. R. 6 Q. B. 160; and see *Morgan v. Provost*, Q. R. 25 K. B. 425 (1916).

[5] See per Carroll J. in *Bathazar v. Quilliam*, Q. R. 23 K. B. 46 (1913).

[6] *Cite de Montreal v. Poulin*, Q. R. 26 S. C. 367 (C. R. 1904); and see *Morgan v. Provost*, Q. R. 25 K. B. 425 (1916).

keeps up the premises at his own expense, and consents to the sale of the house, in which sale he is interested, he cannot be considered a tenant, but is only an occupant at the will of his brother, and he cannot oppose the taking possession by the purchaser at the date stipulated in the deed of sale.[1]

A lease is presumed to result where a former lease for a definite period having expired, the tenant remains on the premises, without opposition or notice from the landlord, more than eight days after the expiration of the lease. Such a lease is called a tacit renewal, the position and conduct of the parties being regarded as amounting to a consent to a new lease upon the same terms as the old one, excepting that, in regard to duration, the law presumes that the parties do not wish to bind themselves definitely for a longer period than one year.[2]

A lease by tacit renewal is not a verbal lease.[3]

9. PROMISE OF LEASE.

The law relating to promise of sale[4] is also in many respects applicable by analogy to promise of lease.[5]

A simple promise of lease made in writing by a landlord, but unaccepted by the tenant, is not a lease which can be enforced by the latter.[6] But where an *agreement* is drawn up and signed by the owner of property authorizing the other party to the agreement to have a lease drawn up for such owner, and stating the ren-

1 *Morgan v. Provost*, Q. R. 25 K. B. 425 (1916).

2 Art. 1609 C. Code; see *infra* "Termination of the Lease—Tacit Renewal," Ch. VI., Sec. 5, as to the nature of leases by tacit renewal.

3 *Pelletier v. Boyce*, Q. R. 21 S. C. 513.

4 Arts. 1476-1478 C. Code.

5 Poth. 390; 1 Duv. 43; Marc. C. N. Art. 1714 *et seq*; 1 Troplong 123; 25 Laurent 40 *et seq.*; Baudry-Lacantinerie, I, no. 42. See *Evans v. Champagne*, C. R. 1895, 7 Que. 189.

6 Art. 1476 C. Code; *Loranger v. Clement*, C. R. 187[2], 1 L. N. 326; Baudry-Lacantinerie I. no. 45. *Joseph v. Chouillou*, Q. R. 5 Q. B. at p. 260, 261.

Lease with promise of extended lease if six months' notice given by tenant—Notice not given within that period—Promise of lease *ipso facto* falls to the ground. *Joseph v. Chouillou*, Q. R. 5 Q. B. 259.

tal, the number of the house and duration of the lease, such agreement is a complete contract of lease, the formal lease to be drawn up and signed later being merely intended to furnish evidence of the contract.[1] Where the tenant remains in occupation of the premises after the cancellation of a former lease by insolvency, a new lease would not be constituted by a written promise on the part of the landlord to renew the old lease, where such promise was unaccepted by the tenant.[2]

10. SPECIFIC PERFORMANCE OF CONTRACT.

It has always been a doubtful question in the Province of Quebec how far specific performance will lie to compel a person to perform specifically an obligation undertaken by him. Article 1065 of the Civil Code provides, in effect, that every obligation is resolvable in damages, but in cases which permit of it, the creditor may demand the specific performance of the obligation. Our Courts will not usually decree specific performance where the question depends solely on the personal action of the individual in respect of civil obligations, but they will enforce performance where it can be done vicariously. As already stated[3] there is a close analogy in many respects between the law of sales and the law of lease and hire. Now, Article 1476 of the Civil Code, dealing with sale, says "a simple promise of sale is not equivalent to a sale, but the creditor may demand that the debtor shall execute a deed of sale in his favor according to the terms of the promise, and, in default of so doing, that the judgment shall be equivalent to such deed and have all its legal effects; or he may recover damages according to the rules contained in the title

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[1] *Phelan v. Turner*, C. R. 1895, 7 Que. 487; *Joseph v. Chouillou*, Q. R. 5 Q. B. at p. 261, citing 1 Guillouard n. 41.

[2] *Loranger v. Clement*, C. R. 1878, 1 L. N. 326.

[3] *Supra* p. 8.

"Of obligations." In *Walsh* v. *Brooke*[1] it was held by the Court of Review (reversing) that Art. 1476 was applicable by analogy to the case of an action instituted by a landlord to have his tenant ordered to sign a notarial lease as agreed, and in default of the latter so doing, to have it ordered that the judgment of the Court shall serve as such lease. Article 1476 comes from Pothier, who was of opinion that the same principle applied to the case of the contract of lease and hire.[2] Although in this case the lease was for less than a year, yet the advantages secured by a notarial lease were such that the landlord had sufficient interest at stake to warrant his demand for specific performance.

Article 1641 C. Code gives the tenant the right to sue for specific performaace of the landlord's obligations to make the repairs and ameliorations stipulated in the lease or to which he is obliged by law, by obtaining authority te make the same at the expense of the landlord, where the latter defaults. But this does not extend to the erection of works (especially outside the premises leased), required to procure a covenanted state of things. For instance, where the landlord has undertaken in the lease to have the premises kept suitably heated, this does not give the tenant a right of action to compel the landlord to build a furnace, for that purpose, in a cellar under the leased premises, on the ground that the heating is insufficient.[3]

Where there is a synallagmatic or reciprocal promise of lease and hire, as stated above, this is equivalent to a lease, and the relation of landlord and tenant immediately arises. The execution of such a promise may be enforced *manu militari*.[4] There is a difference

[1] Q. R. 21 S. C. 394 (C. R. 1902), reversing S. C.

[2] *Ibid* p. 403-404.

[3] *Lapointe* v *Vincent*, Q. R. 35 S. C. 485.

[4] Baudry-Lacantinerie I. p. 29; citing Merlin, Duvergier, Guillouard; Fuzier-Herman. *Morgan* v. *Dubois*, C. R. 1888, 32 L. C. J. 204.

Regarding an injunction under the Quebec law as a specific performance of a contract *not* to do particular things, see *Wills* v *Central*

of opinion in France as to whether such enforcement would apply to the case of a unilateral promise of lease which has been accepted by the promisee, or whether the latter's remedy resolves itself into one of damages in case of refusal to execute by the promisor.[1]

11. MIXED CONTRACTS OF LEASE WITH PROMISE OF SALE—INTERPRETATION OF CONTRACTS OF LEASE.

Much difficulty surrounds the determination of the question whether a contract is one of lease with promise of sale or whether it is in all essentials a contract of sale. The question is not always to be determined by the fact that the instrument is denominated a lease, or conditional lease. Where the meaning is doubtful, the real nature of the contract will determine its character.[2] But where the meaning of the parties to a contract is clear the words of the contract must be construed literally.[3]

Where the meaning of a lease is doubtful, it is to be interpreted in favor of the tenant.[4]

Where property is stated to be leased for a certain sum, payable by instalments, the last instalment coinciding with the expiration of the lease, at which time the owner of the property undertakes to convey the same

Rly. Co. of Canada, P. C. 1914, 19 D. L. R. 174, affirming Q. R. 23 K. B. 126, but on the ground that an injunction would not have been issued in such a case even under the English law.

[1] *Ibid* n. 45. Baudry-Lacantinerie adheres to the view that the execution of such a promise is not susceptible of being followed *manu militari*. *Contra*, Fuzier-Herman, Art. 1709 n. 74.

[2] *Carey v. Carey*, Q. R., 42 S. C. 471, at p. 477 (C. R. 1912), reversing 44 S. C. 11.
De Chantal v. Ranger, Q. R. 10 S. C. 145 (S. C. 1896).
Art. 1013 C. Code. "When the meaning of the parties in a contract is doubtful, their common intention must be determined by interpretation rather than by adherence to the literal meaning of the words of the contract."

[3] *Crevier v. Lamoureux*, Q. R. 38 S. C. 172 (C. R. 1909) reversing. See per Charbonneau J. at p. 177.

[4] *Vezina v. Piche*, Q. R. 13 S. C. 213, at p. 221 citing *Dalloz, Rep vo. Louage* n. 147. See Baudry-Lacantinerie, I., n. 47, in same sense. See Art. 1019 C. Code.

to the tenant as purchaser, the sum agreed upon including at the same time both the rental during the lease and the price of the sale to follow, this establishes the relation of landlord and tenant, and gives to the landlord the advantages of summary procedure and other remedies which the law accords to him.[1]

A deed by which the owner of an immoveable lets it for five years to a person who will become owner on payment of certain sums, and who undertakes to pay all taxes, assessments and insurance, with a stipulation that should he make default for 60 days in paying any annual instalment he should lose every advantage, is only, in spite of its title of "agreement for sale and lease," a sale of the immoveable renewable on certain conditions, and the special proceedings by a landlord against his tenant are not available.[2]

In *Carey* v. *Carey*,[3] decided by the Court of Review at Quebec in 1912, it was held, reversing the judgment of the Superior Court, that a so-called deed of lease made for a period of six years, whereby the so-called lessee binds himself to pay to the so-called lessor $100 a year, with interest on a named capital sum, containing a stipulation that the lessee may at any time purchase the property for a fixed sum (*e. g.* $610) or the balance of such sum, credit being given for the instalments of $100 paid in, is a deed of sale and not a contract of lease, and failure to pay one or more of the annual instalments does not give the creditor the right to take an action in ejectment and in attachment before the expiry of the term (*e. g.*, six years).

In *Du Chantal* v. *Ranger*[4] decided by Mathieu J. in 1896, the instrument in question was denominated a conditional lease. The consideration was the payment by the so-called tenant of the sum of $275.18 in

[1] *Crevier v. Lamoureux*, Q. R. 38 S. C. 172, (C. R. 1909).
[2] *Irving v. Montchamps*, 3 Q. P. R. 430 (S.C.)
[3] Q. R. 42, S. C. 471, reversing 42 S. C. 11.
[4] Q. R. 10 S. C. 145 (1896 S.C.).

two annual instalments of equal amount, and the payment of assessments and certain charges attaching to the property. If the so-called tenant paid these amounts he would be entitled to a deed of sale of the property, the so-called rent being the consideration for the price of sale. So long as he paid the instalments as agreed he would occupy the property as tenant, but in the case of default the lease was to become void, and the other party to the contract was to be discharged from all obligations to the so-called tenant. It was held that this agreement constituted a sale and not a lease, there being no rental determined upon to give it the character of a lease—there were, in fact, all the essentials of a contract of sale.

In *Picaud* v. *Renaud*,[1] decided by the Superior Court in 1899, and confirmed in Review the same year, the plaintiff promised to sell a property to the defendant for $1,000 upon which $50 had been paid. The balance was to be paid over a period of nineteen years in annual instalments of $25, payable half-yearly with interest. The plaintiff was to give defendant a deed of sale when the latter had paid him $500, but if the defendant defaulted in two payments he was to forfeit all right to the promise of sale as well as all instalments paid. In the same deed, the plaintiff leased the same property to defendant for an annual rent of $57 (which represented the interest on $950 at 6 per cent.); which rent was to diminish in proportion to the sums paid on the sale price. It was held that this deed constituted a sale and the plaintiff had no recourse by way of *saisie gagerie* against the defendant, there being no stipulation for rent distinct from the price of sale, the so-called rent being merely the interest on the capital sum.

In *Kieffer* v. *Ecclesiastiques du Seminaire des Missions Etrangeres*,[2] the respondents were sued by appellant for damages to his adjoining land, claimed to be caused

[1] Q. R. 15 S. C. 358 (S. C. 1899).
[2] Privy Council 1902. Reported Q. R. 13 K. B. 89.

by the tenant of the respondents, as the result of changing the level of the land and causing a back flow of water. By deed of 9th November, 1893, the Seminary leased to B., for the term of a year from the previous 1st November, certain parts of their land (being those on which the works complained of were executed), at a rent of $2,500. The Seminary agreed to sell and B. agreed to purchase the same land within the year, for a price named, payable within five years from the 1st November, 1893. The other terms of the deed were those of an ordinary building agreement. Bellew was to erect houses with liberty to sell them from time to time, and the purchase moneys were to be paid to the Seminary, in part payment of the price of the land, with certain stipulations as to the character of the houses to be erected, amounts of purchase money, and so forth. The term of one year thus created was unexpired at the date of the commencement of the action. It appears that B. did not fulfil his contract within the year, and the arrangement between the parties was renewed with some variation for a further term, by the deed of the 31st December, 1894, executed *pendente lite*.

The deed of the 9th November, 1893, contained no stipulation for the execution by B. of the particular works which caused the nuisance complained of, and no express authority to him for the execution thereof. Nor was there any evidence that the nuisance was necessarily consequent on the execution by B. of the authorized building operations. On the contrary, it would seem that it might have been obviated by cutting sufficient drains to carry off the water from the high ground. Their Lordships were of opinion that the legal questions in the case must be answered on the assumption that B. was in possession of the land as tenant, and executed the works for his own benefit as intending purchaser and not as mandatory of or by direction of the Seminary.

An agreement by which the owners of a quarry give a party the right to extract stone from it during a fixed period, at places to be indicated by them, and in consideration of a sum to be paid according to measurement of the stone, is not a lease of a portion of the quarry but a sale of the stone to be extracted. Hence no relation of landlord and tenant arises out of such an agreement.[1]

A lease of property with promise of sale, delivery and right of retention of the property, which provides that on default of payment of any of the notes given as consideration of the contract, the landlord could retake possession of the property, and that the tenant would lose all that he had paid to the landlord, and that the landlord "should return the notes unmatured at the time of their maturity, that is to say, that the landlord would only be obliged to retire them and return them to the tenant at the time of their maturity," gives to the landlord a right of action against the lessee to recover the amount of the notes due at such time, the amount of which would represent the value of the enjoyment of possession of the property during the running of the lease; and in such a case the landlord need only deliver up the notes not yet due at the time of taking possession.[2]

12. EMPHYTEUTIC LEASE.

Although it is not intended to treat in this work of emphyteusis, yet as it is sometimes difficult to distinguish when a lease is emphyteutic or not, it will be necessary to point out the chief grounds of distinction.

Emphyteusis, or emphyteutic lease, is a contract by which the proprietor of an immoveable *conveys* it for a time to another, the tenant subjecting himself to *make improvements*, to pay the landlord an annual

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[1] *Hendershot v. Lionais*, Q. R. 27 S. C. 292 (S. C. 1905).

[2] *Richards v. Octeau*, Q. R. 47 S. C. 259 (C. R. 1914, reversing).

rent, and to such other charges as may be agreed upon.[1] Prior to the Civil Code it appears that the making of improvements was not a distinguishing feature of emphyteusis.[2]

The duration of emphyteusis cannot exceed ninety-nine years and must be for more than nine.[3] Therefore, if a lease made since the Code be for a period of more than nine years, in order to determine whether it be emphyteutic or not, the principal test will be—does it contain a stipulation obliging the tenant to improve the property leased? If it does not, the lease will not be regarded as an emphyteusis, although there may be some other clauses therein that might lend some color to an opposite interpretation.[4] If it does contain such a stipulation the lease will be regarded as an emphyteusis, although it be drawn up in such a way as to give it the appearance of an ordinary lease for a long period.[5]

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[1] Art. 567 C. Code.

[2] *Larue v. Chateau Frontenac Co.*, Q. R. 41 S. C. 193 (1911). See *Cossit v. Lemieux*, 25 L. C. J. 317 (1881), commented upon in *Credit Foncier v. Young*, 9 Q. L. R. 317 (1889). But see *Dufresne v. Lamontagne*, 8 L. C. J. 197 (1864).

[3] Art. 568 C. Code.

[4] *Credit Foncier Franco-Canadien v. Young*, S. C. 1889, 9 Q. L. R. 317. *Price v. Leblond*, 30 S. C. R. 539 (1900); *Price v. Leblond* (1901), 8 Rev. de Jur. 190; *Larue v. Chateau Frontenac Co.*, Q. R. 41, S. C. 193 (1911).

A lease of a lot for a term of 99 years with no other conditions than "to pay the rent and taxes, maintain the fences and refrain from cutting down the trees," is not emphyteutic, especially if it contains a provision that either party may terminate it on giving to the other twelve months' notice. Such a lease cannot, therefore, give the lessee a right to bring an *action negatoire*, nor to formulate accessory conclusions for indemnity in such action. *Larue v. Chateau Frontenac*, Q. R. 41 S. C. 193 (1911).

[5] *Fraser v. Brunette*, Q. B. 1890, 19 R. L. 306; *Poitras v. Berger*, Q. B. 1879, 10 R. L. 214; *Lepine v. Bldg. Society*, Q. B. 1876, 20 L. C. J. 300. But see *G. N. W. Tel. Co. v. Montreal Tel. Co.*, M. L. R. 6 Q. B. 257, as to lease of telegraph system for 97 years; and *Marret v. Robitaille*, 9 R. L. 420.

It is to be noted that in *Lepine v. Bldg. Society* the lease with promise of sale stipulated for improvements.

The emphyteutic lease carries with it alienation; so long as it lasts, the tenant enjoys all the rights attached to the quality of a proprietor.[1] It is not subject to tacit renewal.[2]

The rights and obligations of the landlord and the tenant under an emphyteutic lease are governed by special rules,[3] and actions between the parties are not subject to the summary procedure provided by Art. 1150 *et seq.* C. P.[4]; nor has the landlord the privilege for the payment of rent which he has under an ordinary lease.[5]

13. FORM OF CONTRACT OF LEASE.

A lease may be either verbal,[6] or presumed,[7] notarial, authentic or by private writing.

A notarial lease (*i.e.*, lease by authentic deed) secures such obvious advantages that it is often desirable, even where the lease is of short duration, to have it executed in that form. For instance, Article 2005 of the Civil Code declares that where the lease is in authentic form the privilege of the lessor extends to all rent that is due or to become due, where it is not a question of insolvency. Also a notarial lease makes complete proof in itself as to its contents.[8] But proof may be made against an authentic lease. For instance, if the authentic lease stipulates for a rental of $15 a month, where the tenant during nearly three years paid rent at the rate of $29 a month, and accepted receipts for the money paid as said rental, such receipts, as well as the admissions of defendant, constitute a commencement of proof in writing sufficient to contradict the terms of the authentic lease, and the

[1] Art. 569 C. Code.
[2] Art. 579 C. Code.
[3] Arts. 573 to 578 C. Code.
[4] *Lepine v. Bldg. Society*, Q. B. 1876, 20 L. C. J. 300.
[5] *Elliot v. Eastern Townships Bank*, Q. B. 1882, 2 Dorion, Q. B. 172.
[6] Art. 1657 C. Code.
[7] Arts. 1608-1609 C. Code.
[8] Art. 1207 C. Code.

evidence of the landlord was sufficient to complete the proof.[1] An authentic lease may be contradicted and set aside as false in whole or in part, upon an improbation in the manner provided in the Code of Civil Procedure and in no other manner.[2]

14. PROOF OF CONTRACT.

The general rules of evidence are applicable in matters of lease.

A notarial lease makes complete proof in itself as to its contents,[3] and can only be set aside on grounds of its falsity.[4] See further *supra* as to notarial lease.

A lease by private writing, acknowledged by the party against whom it is set up, or legally held to be acknowledged or proved, has the same effect in making proof between the parties thereto as a notarial lease.[5] A lease by private writing which is not denied in the manner indicated by Art. 208 of the Code of Procedure, *viz.*, by affidavit establishing the facts alleged, will be held to be admitted by the party against whom it is set up.[6]

Testimony cannot, in any case, be received to contradict or vary the terms of a valid written instrument,[7] but if such evidence is admitted without objection at the trial, it cannot subsequently be set aside in a Court of Appeal.[8]

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[1] *Beauchamp v. Beauchamp*, Q. R. 14 S. C. 427, affirmed in Review 31 Oct. 1898.
[2] Art. 1211 C. Code.
[3] Art. 1207 C. Code.
[4] Art. 1211 C. Code.
[5] Art. 1222 C. Code.
[6] *Thurston v. Hughes*, Q. R. 16 S. C. 473.
[7] Art. 1234, C. Code.
The Supreme Court in *Bury v. Murray*, 1894, 24 Can. S. C. R., 77, has adopted the opinion laid down by Mr. Langelier in his work on Evidence, viz:—that not even a commencement of proof in writing (provided it does not amount to a full admission) will serve to contradict or vary the terms of a valid written instrument (see discussion on this question in Vol I., Revue Legale [new series], pp. 166, 355, 435); but *see Lamoureux v. Molleur*, Supreme Court, 8th March, 1886, Cassel's Dig. 2nd Edit. p. 74.
[8] *Schwersenski v. Vineberg*, Supreme Court, 19 Can. S. C. R. 243.

As already stated above,[1] the terms of a notarial lease may be contradicted where admissions of the tenant constitute a commencement of proof in writing sufficient to contradict them, and the evidence of the landlord completes the proof.

Under a notarial lease with clause prohibiting the subletting of the premises without the landlord's consent, nothing short of a commencement of proof in writing will avail to determine whether the landlord had permitted the tenant to sublet.[2] However, in an action for rent due under a notarial lease, the tenant can plead that he had not obtained possession of the premises leased, at the period stated in the lease, and that in consequence he has suffered damages which should be deducted from the rent due his landlord.[3]

Proof may be made by testimony of all facts concerning commercial matters (Art. 1233 Civil Code), but the lease of immoveable property is exclusively a civil contract, even where the immoveable concerned is used for commercial purposes.[4]

A verbal lease can only be proved by testimony where the price of the lease is less than $50, unless there is a commencement of proof in writing, or unless its existence is admitted by the adverse party.[5]

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[1] *Beauchamp v. Beauchamp*, Q. R. 14 S. C. 427, affirmed in Review 31 October, 1898.

[2] *Foley v. Charles*, 15 L. C. R. 248, in the Superior Court; and see *Anderson v. Baths*, Q. B., 1888, 15 Q. L. R. 196.

[3] *Belleau v. Regina*, 12 L. C. R. 40.

[4] *Corbeil v. Marleau*, Q. R. 10 S. C. 6 (1896); *Cote v. Cantin*, Q. R. 21 S. C. 432.

[5] Arts. 1233-1246 C. Code.

Art. 1243 C. Code. Admissions are extra-judicial or judicial. They cannot be divided against the party making them. Nevertheless, an admission may be divided in the following cases, according to the circumstances, and in the discretion of the Court:—

1. When it contains facts which are foreign to the issue.
2. When the part of the admission objected to is improbable or is invalidated by indications of fraud or of bad faith or by contrary evidence.
3. When the facts contained in the admission have no connection with each other.

Art. 1244 C. Code. "An extra judicial admission must be proved

A commencement of proof in writing may be found in the admissions of a party examined as a witness under oath.[1] A defendant, who, in answer to an action on a verbal lease, pleads a claim of damages as set off, admits the existence of the lease.[2]

Admissions by a party cannot be divided, except in the cases stated in Art. 1243 Civil Code.[3] The Court of Appeal, in *Sobinsky* v. *Allard*,[4] had occasion to reverse the judgment of the Court below, on an appreciation of what constituted grounds of divisibility.

The admissions, by a party, of a verbal lease of premises and of occupation thereof, are not a commencement of proof in writing of special conditions attached to it.[5]

The foregoing rule as to the inadmissibility of testimony to prove a verbal lease of more than $50 unless there is a commencement of proof in writing, applies to third parties as well as to parties to the lease.[6] An admission can be invoked only against the person making it,[7] hence a confession of judgment by the tenant in an action against him by the landlord does not make proof of a verbal lease against a third party to the case.[8] Where

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by writing or the oath of the party against whom it is set up, except in the cases in which, according to the rules declared in this chapter, proof by testimony is admissible."

Art. 1245 C. Code. "A judicial admission is complete proof against the party making it. It cannot be revoked unless it is proved to have been made through an error of fact."

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[1] *Saunders v. Deom*, C. R. 1871, 15 L. C. J. 265.

[2] *Walsh v. Howard*, Q. B. 1886, 12 Q. L. R. 295.

[3] *Sobinsky v. Allard*, Q. R. 16 K. B. 531 (1907).
Query, can the admissions by an agent have the same value as proof in writing, or as a commencement of proof in writing, as if made by the principal? (*Ibid*).

[4] *Supra*.

[5] *The Men's Wear, Ltd. v. Arnold*, Q. R. 34 S. C. 225 (C. R. 1908).

[6] *Laliberte v. Langelier*, Q. R. 9 Q. B. 398 (1900).

[7] *Ibid*. p. 404.

[8] *Ibid*. But see *Mongrain v. Canadian Carbonate Co.*, Q. R. 46 S. C. 534 at p. 537 (1914).

a third party, in a case where the annual rental of the property exceeded $50 and thus excluded parol evidence, alleged that the lease was by the month and for a sum below $50, such allegation would not amount to a commencement of proof in writing sufficient to let in testimony.[1]

In the case of a person occupying by sufferance of the owner, under Art. 1608 C. Code, proof may be made by testimony of the value of the lease, irrespective of the amount involved.[2]

The notary before whom a lease is passed cannot be examined to ascertain what passed between the parties thereto, nor to vary or contradict it in any way.[3]

15. DURATION OF LEASE.

According to article 1601 C. Code, a lease may be for a *certain time*, which allows the parties to the lease to stipulate for a period, however restricted or extended. But there is this limitation; the duration of the lease must not extend beyond ninety-nine years, or the lives of three persons consecutively.[4] A lease for 99 years, without any obligation on the part of the tenant to make improvements, is an ordinary lease, and not an emphy-

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[1] *Ibid.*

[2] Art. 1233 C. Code.

[3] *Lemoine v. Bellefeuille*, S. C. 1882, 5 L. N. 426; *Dubuc v. Kidson*, Supreme Court, 23 June, 1884. Cassel's Dig. 2nd Edit. p 782. But in *Ritchie v. Wragg*, the evidence of an advocate in whose office the lease was passed, was held admissible to prove whether the landlord had knowledge or not that the house leased was to be used for immoral purposes (Q. B. 1865, 1 L. C. L. J. 59).

And see *Clarke v. Clarke* S. C., 1851, 2 L. C. R. 11.

[4] If an emphyteutic lease cannot exceed ninety-nine years (Art. 568 C. Code), *a fortiori* an ordinary lease of real estate cannot exceed that period (3 Mourlon 733; 1 Troplong, *Louage*, 27; 25 Laurent 38). Article 389 C. Code provides that "No ground rent or other rent, affecting real estate, can be created for a period exceeding ninety-nine years, or the lives of three persons consecutively."

teusis.[1] The tenant under such a lease cannot exercise a possessory action,[2] or an action to suppress a servitude (*action negatoire*)[3] his remedies, in case of disturbance, do not extend beyond those indicated in Article 1618 C. Code.

Nevertheless, leases for more than nine years are sometimes regarded, in cases of administration, as a species of alienation; (See *infra* p. 24.)

Where there is occupancy of the premises by the mere sufferance of the owner, this holding is regarded as an annual lease terminating on the first day of May of each year, if the property be a house.[4]

When the lease of a house omits to specify the time for its duration, it is held to be annual, terminating on the first day of May of each year, when the rent is at so much a year; for a month, when it is at so much a month; for a day when it is at so much a day. If the rate of the rent for a certain time be not shown,

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[1] *Larue v. The Chateau Frontenac Co.*, Q. R. 41 S. C. 193. (S. C. 1911); Baudry-Lacantinerie, I. p. 53; *Great North-Western Tel. Co. v. Montreal Tel. Co.*, 30 Can. S. C. R. 170.

In *Amyot v. Dominion Cotton Mills Co.* there was a lease of a company's mills for 21 years, to another company, but there was no agreement to make improvements (see per Charbonneau J., Q. R. 38 S. C. at p. 472): Improvements of a permanent character were to be paid by the lessor: At the termination of the lease the lessees were to return to the lessors the leased properties or so much thereof as there remained unsold, in the same condition in which the same were received, reasonable wear and tear excepted; all ordinary repairs to be made by the lessees (See Q. R. 36 S. C. at p. 49): It was claimed by appellant that this constituted an emphyteutic lease. (See Q. R. 38 S. C. at p. 464) but the Courts appeared to consider that this did not affect the question of whether the lease was *ultra vires* the company. (See per Charbonneau J. dissenting in Review. Q. R. 38 S. C. at p. 464):

The Privy Council substantially upheld the opinion of Charbonneau J. and held that under 63-64 Vict. (Can.) c. 98, empowering a cotton company "to construct, acquire, operate and dispose of cotton and woollen manufactures of every description, the company had the power to lease all its mills to another company formed for the purpose of acquiring capital stock and a controlling influence in the cotton company, and its three principal competitors. (Privy Council 1912, 4 D. L. R. 306).

[2] Art. 1064 C. P.; *Larue v. Chateau Frontenac Co.*, Q. R. 41 S. C. at p. 202 (1911). See also Baudry-Lacantinerie, I., n. 1446.

[3] *Larue v. Chateau Frontenac Co.*, Q. R. 41 S. C. 202, 203 (1911).

[4] Art. 1608 C. Code.

the duration of the lease is regulated by the usage of the place.[1]

A lease for a stated number of years, at a fixed annual rental, payable monthly, with option on the part of the tenant to terminate the lease at the end of any year on giving three months' notice, is an annual lease as to the tenant.[2]

16. ALIENATION FOR RENT.

The alienation in perpetuity of immoveable property for an annual rent, is equivalent to a sale (Art. 1593 C. Code.)

17. WHO MAY LEASE OR TAKE PROPERTY ON LEASE. CAPACITY TO MAKE.

Capacity.

The capacity to enter into a contract of lease or hire is governed by the general rules relating to capacity to contract.[3] All persons are capable of contracting, except those whose incapacity is expressly declared by law.[4]

Those legally incapable of contracting are:

1. Minors in the cases and according to the provisions contained in the Civil Code;

2. Married women, except in the cases specified by law;

3. Those who, by special provisions of law, are prohibited from contracting by reason of their relation to each other, or of the object of the contract;

4. Persons insane or suffering a temporary derangement of intellect arising from disease, accident, drunkenness or other causes, or who by reason of weakness of understanding are unable to give a valid consent;

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[1] Art. 1642 C. Code; see chapter VI "Termination of the lease—Notice to quit."

[2] *Chartrand v. Ouimet*, Q. R. 17 S. C. 164 (S. C. 1899).

[3] Art. 1604 C. Code.

[4] Art. 985 C. Code.

5. Persons who are affected by civil degradation.[1]

The incapacity of minors and of persons interdicted for prodigality, is established in their favor. Parties capable of contracting cannot set up the incapacity of the minors or of the interdicted persons with whom they have contracted.[2]

Lease for period exceeding nine years.

The leasing of an immoveable is essentially an act of administration, both for the landlord as well as for the tenant.[3]

A lease for a period exceeding nine years is usually considered as a species of alienation,[4] consequently, those who by law have merely the right to administer property cannot usually pass a lease for more than that period. But a lease for less than that period is an act of simple administration, consequently, all those who have simply the administration of their property, or the property of others, can lease it for a period of less than nine years, although they cannot alienate it.[5] Trustees cannot evade the law by creating leases for nine years, with a stipulation that the tenant shall have a renewal on certain conditions for nine years longer; such leases are in effect, leases for eighteen years, and *ultra vires*.[6] But leases made by administrators for more than nine years, in excess of their powers, are not void, but merely reducible.[7]

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[1] Art. 986 C. Code.

[2] Art. 987 C. Code.

[3] *Baudry-Lacantinerie*, I. n. 60 113; Guillouard, I. n. 44.

[4] *President et Syndics de Laprairie v. Bissonnette*, C. R. 1888, M. L. R. 4 S. C. 414: But see Baudry-Lacantinerie, I. n. 91 *et seq.* as to this disputed subject.

[5] 1 Guillouard p. 56; Pothier, *Louage*, nos. 4 and 5. Arts. 322, 319, 568 C. Code; 5 Laurent, p. 456.

[6] *President et Syndics, etc., de Laprairie v. Bissonnette*, C. R. 1888; M. L. R. 4 S. C. 414.

[7] Baudry-Lacantinerie, I. n. 165; Guillouard, I. n. 46, 47; Cass. Dalloz, 65-1-249; Sirey, 94-1-445.

Minors.

An emancipated minor may, without assistance, grant leases for terms not exceeding nine years;[1] he may also hire a house, and the contract will not be reduced unless the price is excessive, the courts taking into consideration the fortune of the minor, the good or bad faith of the persons who have contracted with him, or the utility or inutility of the expenditure.[2]

A minor engaged in trade is reputed of full age for all acts relating to such trade.[3] Therefore, when a minor leases a shop for the purpose of carrying on his trade therein, he will, in that case, be regarded as an adult, and can be sued for rental of the premises.[4]

Pupil to Tutor.

Art. 290 of the Civil Code enacts that a tutor cannot take the property of his pupil on lease. This provision of law is to be construed strictly. It cannot be evaded by the tutor getting a tutor *ad hoc* appointed by a family council to pass a lease to him upon the advice of said family council duly homologated.[5]

Lease by person to whom judicial adviser has been appointed.

A person to whom a judicial adviser has been appointed, can also pass leases, not exceeding nine years, unless the judgment appointing the judicial adviser has specially delegated to him the leasing of such person's property.[6]

Married Woman separate as to property.

A married woman, separate as to property, whether such separation exist by virtue of a marriage contract or by judicial decree, has a right to administer her property; she can, therefore, pass a lease for a period not

[1] Art. 319, C. Code.

[2] Art. 322; 1 Troplong 147.

[3] Art. 323.

[4] *Vogel v. Pelletier*, Mag. Ct. 1889, 13 L. N. 107.

[5] *Belanger v. Beauchamp*, Q. R. 36 S. C. 1.

[6] Art. 351 C. Code. 1 Troplong 148; 2 Touillier n. 1378; 3 Duranton 799; 8 Demolombe 743; 1 Aubry & Rau section 140, p. 572; 5 Laurent 370; 1 Guillouard 58; Cass. 14 July, 1875; S. 75-1-463.

exceeding nine years without the authorization of her husband or of the Court,[1] and can also hire a house under the same conditions where she keeps a boarding house.[2]

Married Woman not Separate as to Property.

A married woman not separate as to property—whether there be community or exclusion of community—cannot bind herself by lease without authorization, the administration of her property being with her husband.[3] If, however, her husband is absent, or in other

[1] C. Code, Arts. 177, 1318; 1 Guillouard 59; 17 Duranton 33; 3 Duvergier 37; 1 Troplong 149; 3 Mourlon 196;

[2] *Parizeau v. Huot*, Q. R. 19 S. C. 379. (In this case the wife kept a boarding house and it was held that she could hire a house for that purpose); 1 Troplong 149.

Where a property is occupied by a husband (whose wife is separate as to property) by the tolerance of the owner, in the absence of a special agreement, the wife cannot be held responsible for rent of the property occupied by the family during the insolvency of the husband (*Harwood v. Fowler*, C. R. 1889; M. L. R., 7 S. C. 363; and see Bordeaux, 22 June, 1849; J. P. 1851, Vol. 2, p. 466.

If a woman separated as to property is engaged in renting rooms she carries on a trade. Moreover, if she rents a house to occupy it with her children, she then does only an act of administration, and she is responsible. *Lechance v. Lebœuf*, 16 Que. P. R. 37 (1914).

But held that a wife separated as to property who is sued for something foreign to the mere administration of her own property, in this case for rent due under a lease executed by her alone, cannot enter into the litigation unless her husband has been made a party to assist her and give her authority. A motion for leave to make the husband of the woman so sued a party will be dismissed if he is not in the cause for the above purpose. *Hebert v. Arnold*, 12 Que. P. R. 180 (S. C. 1911).

[3] Arts. 1292, 1416, C. Code; 2 Bourjon, lib. 4, tit. 4, ch. 1, sec. 1, no. 3. If, in a notarial lease, a married woman qualifies herself as separate as to property, she can, nevertheless, when sued on the lease, plead that she is common as to property. *O'Connor v. Iglis* Q. B., 1891, 21 R. L. 315; 1 Troplong 149.

An action cannot be maintained against a wife common as to property with her husband, on a lease signed by her, where it is not alleged that she was a public trader at the time she signed the lease, or that the lease was signed in connection with any business or trade then carried on by her, or that she was authorized by her husband to sign the same.

The fact that the wife sublet to lodgers a portion of the leased premises was not an *acte de commerce*, and in so doing she must be presumed to have acted as the agent of her husband and for the benefit of the community of property existing between them. *Joseph v. McDonald*, Q. R. 11 S. C. 406 (1896).

exceptional cases,[1] a married woman may take the lease of a house as a habitation for herself and family, the rental of which must be proportionate to her means and station.[2] The administration of the wife's personal property being with the husband[3] in the case we are treating of, it follows that even he cannot alone pass a lease of such property for a period longer than nine years,[4] for the law considers such leases to be a species of alienation of the property. An emphyteutic lease by the husband of his wife's property without the assent of the wife, is null and void, and is therefore incapable of ratification.[5]

But leases made by the husband alone of his wife's property, which exceed nine years, are not void; on the contrary, so long as the community exists, the lease in excess of nine years will be allowed to run its full length; but if the community cease to exist during the period of such overtime lease, whether by the death of the husband or the separation of property of the wife, then she can demand the reduction of the lease to the period allowed by law. The tenant cannot demand the reduction; the right exists only in favor of the wife or her heirs.[6] Leases of property of the wife, for nine years or a shorter term, which have been made or renewed by the husband alone more than a year in advance of the expiration of the pending lease, do not bind the

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[1] *Short v. Kelly*, S. C. 1879; 2 L. N. 284.

In this case action was brought against a wife in her quality of curatrix to her husband, who was interdicted, on an obligation given by her in her said quality for the rent of the house in which she lived. Defendant pleaded that the obligation was null and void because a curatrix could not mortgage without authorization of justice—It was *held*, that though this were true, as she must be presumed to be common as to property and as she must live somewhere, she would be condemned to pay the capital of the obligation as so much rent due.

[2] 1 Guillouard 59; 1 Troplong 149; Baudry-Lacantinerie, I, p. 64.

[3] Art. 1298 C. Code.

[4] Art. 1299 C. Code.

[5] *Duggan v. Grenier*, Q. R. 29 S. C. 233.

[6] Art. 1299 C. Code; 2 Bourgon, lib. 4, tit. 4, ch. 1, sec. 1, nos. 8 and 9; Ferriere, Cout de Paris, Art. 227; *Guyot, verbo Mari*, p. 332.

wife, unless they come into operation before the dissolution of the community,[1] and the same applies to such leases made by the husband in fraud of the wife's rights.[2]

Long leases by Curators, Tutors, etc.

What has been said above as to leases by a husband of the property of his wife, of which he has the administration, is applicable to leases made by all persons who have the administration of the property of others.[3] For instance, leases of a minor's property for more than nine years, passed by his tutor, are not binding on the minor after the cessation of the curatorship; those for less than nine years, which have been made or renewed by the curator in anticipation, do not bind the minor unless they come into operation before the expiration of the tutorship.[4] And so in the case of leases made by curators to interdicted persons[5] and to vacant successions;[6] by those put in provisional possession of of an absentee's estate;[7] by beneficiary heirs.[8]

Married Woman as Trader.

A married woman, who has been either expressly or impliedly authorized to become a public trader, may, without the authorization of her husband, obligate herself for all that relates to her commerce, and in such case she also binds her husband, if there be community between them; she can therefore validly hire a shop or premises for the purpose of carrying on her business

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[1] 1300 C. Code.

[2] Pothier, *Puissance Maritale*, 92 to 95; 1 Troplong 151 *et seq.*

[3] Bourjon, vol. 2, p. 37, 4 *et seq;* 4 Pothier, no. 44; 3 Duvergier 39, 40, 41; 1 Troplong 149 *et seq;* Agnel, 27; 1 Mourlon 421; 3 Mourlon 148, 149; 25 Laurent 47 *et seq.;* 1 Guillouard, p. 58.

[4] 1 Guillouard, p. 58.

[5] Art. 343 Civ. Code.

[6] Arts. 90, 91 Civ. Code.

[7] Art. 96 C. Code.

[8] Art. 672.

therein.[1] And she can be sued for the rent, without the authorization of her husband.[2] She can also hire a house to carry on the business of keeping a boarding house.[3]

Usufructuary.

The usufructuary may lease his right of usufruct, but the lease expires with his usufruct; nevertheless, the tenant has a right, and may be compelled to continue his enjoyment during the rest of the year which had begun before the usufruct expired; subject to the payment of the rent to the proprietor.[4] And the foregoing is also applicable to dowagers.[5]

"Owner" under Article 1608 C. Code.

It has already been pointed out[6] that the word "owner" under Art. 1608 C. Code, does not apply to a person who has the right to receive all the revenues of a property transferred to him as security for a loan, the owner being appointed administrator of the estate until the loan is repaid.

Dowager.

The dowager is bound to maintain the leases made by her husband subject to her dower, provided there has been no fraud nor excessive anticipation. (Art. 1456 C. Code).

Leases made by her during the term of her enjoyment expire with her usufruct; nevertheless, the tenant has a right, and may be obliged, to continue in occupation

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[1] Art. 179 C. Code. *Guy v. Dagenais*, Q. R. 9 S. C. 44.

Where an action was taken by a wife on lease of property belonging to her but the lease proved to be made in the name of the husband;—*Held*, good. *Mathewson v. Fletcher*, S. C. 1882, 5 L. N. 131.

[2] *Guy v. Dagenais*, Q. R. 9 S. C. 44.

[3] *Lachance v. Lebœuf*, 16 Que. P. R. 37.

[4] Art. 457, and see *Labelle v. Villeneuve*, C. Ct. 1872, 28 L. C. J. 254.

[5] Art. 1457 C. Code.

[6] *Supra* p. 6-7; *Letang v. Donohue*, Q. R. 6 Q. B. 160, affirming C. R., which reversed S. C. 8 S. C. 496.

during the remainder of the year which had begun when the usufruct expired, subject to the payment of the rent to the owner. (See Art. 1457 C. C.)

Lease by person who is not owner.

A lease of property which does not belong to the lessor is valid, where the tenant occupies in good faith.[1] If the tenant builds upon the property, the subsequent buyer of the property cannot, without the authority of the Court, demolish the building and expose the goods stored in it to destruction.[2]

Where a person leases property of which he is not the owner and in which he has no right, but of which he has the apparent possession, to a party in good faith, the lease is valid, at least to this extent: that the landlord is bound to warrant the tenant in his possession, or in the event of his eviction by the real owner, to indemnify him for the damages thereby suffered, and so long as the tenant is in undisturbed possession, he is bound to pay the rental to the person with whom he made the lease.[3]

Such a tenant is not disturbed in his possession so as to have recourse to an action of damages under Art. 1618, C. C. by the fact that the usufruct has expired and that the proprietor has given him warning of his

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[1] *Ante* p. 3; *Baillargeon v. Robillard*, Q. R. 17 K. B. 334, 335; *Mongrain v. Canadian Carbonate Co.*, Q. R. 46, S. C. 534, (C. R. 1914).

[2] *Mongrain v. Canadian Carbonate Co., supra.*

[3] *Poitras v. Berger*, Q. B. 1879, 2 L. N. 390, 10 R. L. 214; Pothier' n. 20; *Merlin vo. Bail*, sec. 2, n. 7; Agnel, n. 47; Domat, *Louage*, sec. 1, n. 6; 1 Guillouard, pp. 63, 66; Art. 2682 C. Code Louisiana; *Hullet v. Wright*, K. B. 1817, 2 R. de L. 59.

Mr. Troplong (*Louage*, n. 98 *et seq.*) goes still further, and holds that in such case the tenant cannot be evicted by the real owner, even where the lease is for more than nine years, but the contrary has been held in our courts in *Desautels v. Parker*, S. C. 1894, Q.R. 6 S.C. 419, confirmed in Review (unanimously), 9 Feb., 1895. See under chapter VI. "Termination of the lease—Eviction of the landlord.

A person who obtains a *conditional* promise of sale followed by possession, and who has not complied with the conditions before the time fixed by the contract, ceases to have any right in the property, and is therefore unable to give a tenant any right therein as against the real owner. *Desautels v. Parker*, S. C. 1894, Q. R. 6 S. C. 419.

intention to take possession; there must be a material dispossession or at least an action by the proprietor to evict.[1]

Joint Owners.

One of the joint owners of an undivided property cannot lease it, nor even his share of it, without the consent of the other joint owners.[2] If he should lease such property, the other joint owners could demand the cancellation of the lease, but the tenant could demand damages against the joint owner who leased to him.[3]

Where, by the terms of a lease made by the joint owners of a property, the lessors are constituted joint creditors of the tenant, one of such lessors has the right to demand, in his own name, the execution of the lease.[4] One of the joint owners can demand, in his own name, the cancellation of the joint lease, where the tenant has sublet without the permission of the lessors, contrary to the terms of the lease.[5]

The creation of a trust by co-owners of property, in a power of attorney to the trustees, to receive the revenues of the property and apply them to certain uses, but without any conveyance of title or ownership, can have no effect upon a lease, made subsequently by one of such co-owners of his share of the property, or upon the relations between him and his lessee.[6]

Partners.

A member of a partnership, the term of which is about to expire, has no action to rescind a lease of the premises in which the business is carried on, made to the

[1] *Baillargeon v. Robillard*, Q. R. 17 K. B. 334.

[2] *Stearns v. Ross*, Q. B. 1885, M. L. R., 2 Q. B. 379; confirming S. C., M. L. R., 1 S. C. 448.

[3] 1 Guillouard 54; 2 Bourjon, lib. 4, tit. 4, ch. 1, sec. 3; 17 Dur. 35; 3 Duv. 87; 1 Troplong 100; 25 Laurent 44.

[4] *Bagg v. Wiseman*, Q. R. 1 S. C. 12 (1897).

[5] *Ibid.*

[6] *Nelson v. Resther*, Q. R. 16 K. B. 550.

firm, without his knowledge or authority, at the solicitation of the other partner, and for a period when the firm will have ceased to exist.[1]

President of Company—Use and Occupation of Company's Office.

The president of a company, who acts as manager of its affairs, is liable to it for the value of the use and occupation of its office, when he carries on his own business therein, distinct from that of the company.[2]

Company.

Where a company is empowered by its charter to construct, acquire, operate and dispose of cotton and woollen manufactories of every description, this empowers the company to lease all its mills to another company formed for the purpose of acquiring capital stock and a controlling influence in the cotton company and its three principal competitors.[3]

Things Sequestrated.—

Things sequestrated cannot be leased directly or indirectly to any of the parties in the contest concerning it.[4]

Husband leasing to Wife.

Although contracts between husband and wife after marriage are rarely valid,[5] yet a husband can lease property to his wife in payment of her claim upon the community property, arising out of a judicial separation of property.[6]

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[1] *Hyder v. Webster*, Q. R. 23 K. B. 1 (1913).

[2] *Miller v. The Diamond Light & Heating Co. of Canada, Ltd.*, Q. R. 22 K. B. 411 (1913).

[3] *Amyot v. Dominion Cotton Mills Co.*, Privy Council, 1912, 4 D. L. R. 306.

[4] Art. 1826 C. Code.

[5] Art. 1265 C. Code; Art. 1483 C. Code.

[6] *Deslauriers v. Bourque*, Q. B. 1870, 15 L. C. J. 72.

18. LEASE FOR UNLAWFUL OR IMMORAL PURPOSES.

Immoral Contracts.

It is the policy of our law not to uphold a contract the consideration for which is unlawful; such a contract has no effect;[1] and the consideration is unlawful when it is prohibited by law, or is contrary to good morals or public order.[2] The leasing of houses for purposes of prostitution is now made a criminal offence by Sec. 228*a* of the Criminal Code which enacts as follows:—"Any one who, as landlord, lessor, tenant, occupier, agent or otherwise, has charge or control of any premises, and knowingly permits such premises or any part thereof to be let or used for the purposes of a disorderly house shall be liable upon summary conviction to a fine of $200 and costs, or to imprisonment not exceeding two months, or to both fine and imprisonment.

2. If the landlord, lessor or agent of premises in respect of which any person has been convicted as the keeper of a common bawdy house, fails, after such conviction has been brought to his notice, to exercise any right he may have to determine the tenancy or right of occupation of the person so convicted, and subsequently any such offence is again committed on the said premises, such landlord, lessor or agent shall be deemed to be a keeper of a common bawdy house unless he proves that he has taken all reasonable steps to prevent the recurrence of the event."

Where a house is leased expressly for the purpose of prostitution, the landlord cannot recover rent therefor, or anything for use and occupation under Art. 1608 C. Code, or by way of damages;[3] nor can he exercise the remedy of *saisie-gagerie* where the tenant is about to move out, especially where the tenant is ordered

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[1] Art. 989 C. Code.

[2] Art. 990 C. Code.

[3] *Garish v. Duval*, S. C. 1854, 7 L. C. J. 127; *Harris v. Fontaine*, C. Ct. 1869, 13 L. C. J. 336. *Balthazar v. Quilliam*, Q. R. 23 K. B. 46.

to vacate the premises by the public authorities.[1] In one curious case in this Province, it was sought to impute to the landlord knowledge of the purpose for which the premises were leased, because the tenant's wife told him, at the time the lease was made, that it was necessary to have twelve bedrooms; but the Court did not consider that in itself was evidence that the house was to be used for immoral purposes.[2] It has been held by our Court of Appeal[3] that in an action by a landlord to have the lease of a house resiliated on the ground that it was used for immoral purposes, the tenant might prove that the landlord himself leased some of his rooms to prostitutes, and this being done, the action was dismissed. But, in an earlier case,[4] decided by the Court of Appeal, Duval, Chief Justice, remarked that he would hesitate before he allowed a person to plead his own infamy, for *Pothier*[5] said it was no answer to the action. And these views of the Chief Justice had been sustained in a case decided only the year before.[6] Since then, and quite recently, the Court of appeal in *Paul* v. *Cousineau*[7] held that the lease of a house for purposes of prostitution was null and void. But the purchaser of such property can institute an action to have such a lease cancelled, even when she herself keeps a house of prostitution, for if she puts the property, the possession

[1] *Lachance v. Roy*, Q. R. 29 S. C. 478 (1906).

[2] *Ritchie v. Wragg*, Q. B. 1865, 1 L. C. L. J. 59.

[3] *Menard v. Bryson*, Q. B. 1892, Q. R. 1 Q. B. 154.

[4] *Ritchie v. Wragg*, Q. B. 1865, 1 L. C. L. J. 59.

[5] Nos. 24, 25.

[6] *Guy v. Goudreault*, S. C. 1864, 14 L. C. R. 225.
The fact that the lessor's *auteur*, who was also the manager of the company appellant, was aware, during several years, that a portion of the leased premises was being used for immoral purposes, and that he acquiesced therein, does not deprive the purchaser and transferee of such premises of the right to demand the resiliation of the lease on the ground of such immoral use of premises. Such knowledge can only affect the question of costs. *Provident Trust & Investment Co., Ltd. v. Chapleau*, Q. R. 12 K. B. 451 (1903).

[7] Q. R. 24 K. B. 264 (1915).

of which she seeks to recover, to such use, she is still subject to the penal laws. Of course, neither the landlord or the purchaser of such property, with knowledge of the use to which it has been put, could recover anything by way of rental for use and occupation or by way of damages.[1] It may be said, in addition, that it is an offence under the Montreal city by-laws for a proprietor or usufructuary to knowingly lease premises for purposes of prostitution. The penalty for such offence is a fine not exceeding $200, or imprisonment not exceeding six months. (See By-law No. 55).

Public Market—License.

A building composed of a number of stalls, each of which is rented to a lessee, is not a public market. Hence, a tenant of one of such stalls cannot have his lease cancelled on the ground that he cannot carry on his business therein, without violating a municipal by-law which prohibits the sale of food in an unlicensed public market.[2]

Monopoly.

The plaintiffs leased their rope factory to the defendant for a period of twenty-one years. In answer to an action for rent due under the lease, the defendant pleaded that the lease was passed in order to create a monopoly in the cordage, rope and twine business, and, that the consideration being illegal, the lease was null. It was held that the plaintiffs, not being parties to the proposed monopoly, but being merely in the position of lessors leasing their factory in good faith, and selling the good-will of their business, their rights under the lease were not affected by the lessee's intentions.[3]

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[1] *Ibid; Balthazar v. Quilliam*, Q. R. 23 K.B. 46 (1913).
[2] *Wollenberg v. Merson*, Q. B. 21 K. B. 310 (1911).
[3] *Bannerman v. Consumers Cordage Co.*, Q. R. 14 S. C. 75.

19. THE PRICE OR RENT.

The price or rent is essential to the contract of lease and hire.[1] If premises were leased to a tenant without any stipulation as to rent, this would amount to a mere loan for use (*commodatum*).[2] But where a person holds real property by the sufferance of the owner, without lease, the law presumes a lease, and therefore requires the occupant to pay the annual value of the property.[3]

The rent usually consists of a sum of money, but it may be represented by the labor of the tenant, or other commodity.[4] For instance, where a gardener was engaged at $30 per month, with the right of occupying a tenement free from rent as long as he should continue to hold the situation, on condition that he should be subject to dismissal at a month's notice to quit, it was held by the Court that the relation of lessor and lessee existed so as to bring the parties within the scope of the Lessors' and Lessees' Act for the purposes of ejectment.[5] And again, where the owner of property permits another to occupy the premises in consideration of his guardianship, and to manage the mills thereon, and lodge the owner and his family from time to time, this is a contract which, although not strictly a lease of an immoveable, sufficiently resembles one to render applicable thereto the laws of landlord and tenant, and the tenant would be entitled to a three months' notice to quit the premises before being evicted therefrom.[6] Where a person leases to another a boiler and engine fixed to the landlord's realty, and a place to store

[1] 1 Guillouard 62; Poth. 32; 3 Duv. 93; 1 Troplong 3.

[2] And therefore governed by Art. 1763 *et seq.* C. C.

[3] Art. 1608 C. Code.

[4] *Simard v. Rousseau*, Q. R. 47 S. C. 197 (C. R. 1914).

[5] *Hart v. O'Brien*, C. R. 1866, 2 L. C. L. J. 187; Pothier n. 38; 1 Guillouard 62.

[6] *Brunet v. Berthiaume*, S. C. 1892, Q. R. 2 S. C. 416. Dismissal from service without notice does not terminate lease of house. Notice required. *Reid v. Smith*, C. R. 1872, 6 Q. L. R. 367.

wood in, this constitutes a lease of an immoveable even where the lease stipulates for one price for the use of the boiler and engine, and for the salary of the landlord's son whose services were hired by the tenant in the same contract of lease.[1]

The equivalent of the rent must be determinate. Thus where the owners of a garage allow mechanics to occupy for an indefinite time a part of the premises on consideration that they shall have a repair shop nearby, and also with the intention that the latter shall do their best to induce their own customers to patronize the garage in preference to any other, there is not between the parties a contract of lease, but a contract of gratuitous loan or an indefinite contract by which the mechanics undertake, in consideration of the occupation of the premises, to favor the garage. In such a case there would be no right to bring an action for rent, the action could only be for damages in consequence of failure to carry out the conditions of the contract.[2]

The price or rent (which must be agreed upon)[3] must also be an actual one, and not fictitious; if it were otherwise, or if it were agreed that the landlord should remit the rent, the contract would only be one of loan for use, and governed by the laws appertaining thereto.[4] But once the price is an actual one, it is of not much account that it is shown to be insignificant, viewed in its relation to the property leased. This would certainly not be ground for revocation of the lease in favor of the landlord, nor would it avail the creditors, hypothecary or otherwise, to that end. Actual fraud must be *proved* in such case, in order that the lease may be vitiated.[5]

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[1] *Lanoie v. Sylvestre*, Q. R. 24 S. C. 233 (C. R. 1903).

[2] *Simard v. Rousseau*, Q. R. 47 S. C. 197.

[3] 1 Guillouard 65.

[4] 4 Pothier 33 to 36; 1 Troplong n. 3; 3 Duvergier n. 101; 1 Guillouard 63.

[5] 1 Guillouard 64.

CHAPTER II.

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1. General Obligations of the Landlord.

The landlord is obliged by the nature of the contract:

1. To deliver to the tenant the thing leased;

2. To maintain the thing in a fit condition for the use for which it has been leased;

3. To give peaceable enjoyment of the thing during the continuance of the lease.[1]

All the above obligations can be modified by agreement.[2] Said obligations are really all contained in the obligation of the landlord to afford the tenant the enjoyment of the premises leased.[3]

2. Obligation to Deliver the Premises Leased.

Delivery.

Delivery of possession of the premises leased at the time agreed upon is of the essence of the contract of leasing, and on refusal or neglect to give possession a summary action lies to recover damages resulting from the non-performance of the terms of the lease.[4]

As to specific performance of delivery see *post* p. 50.

The landlord is obliged to deliver the property leased[5] with all the accessories naturally belonging to it; and if these are not stated in the lease, they must be determined by local usage and the nature of the property leased.[6]

The outgoing occupant of the house leased, whether the landlord himself or a tenant, has by law, jurisprudence and usage three days' grace for moving out, and the incoming tenant has not an absolute right to the

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[1] See Art. 1612 C. Code.

[2] Baudry-Lacantinerie, I. n. 270, citing Guillouard I. no. 86 and II. n. 616; Fuzier-Herman Art. 1719, n. 1.

[3] Baudry-Lacantinerie, I. n. 271. See *McKillop v. Tapley*, Q. R. 32 S. C. at p. 382; Art. 1601 C. Code.

[4] *Davignon v. Chevalier*, 8 Que. P. R. 104 (Ct. Rev.)

[5] Art. 1612 C. Code.

[6] Baudry-Lacantinerie, I. n. 286; Dalloz, 1856-2-75 and note.

property leased to him, until the expiration of that delay.[1] His right to move in on the first day of his lease is subject to the former occupant's days of grace for moving out. Consequently, where, probably as a result of misunderstanding of his rights on the part of the proprietor occupant, he refused his incoming tenant the reciprocal right to move in his effects on the first day, nor until the expiration of three days, but in effect he had moved out on the second day, leaving the keys with the incoming tenant, the latter had no grounds to take proceedings in cancellation of the lease without further putting his landlord in default, and the tenant having leased other premises, the landlord could proceed against him to recover damages for loss of rental and could attach such of his effects as could be found on the premises originally leased.[2]

Accessories.

The use of a common yard in the rear of a house must be regarded as being always available to the tenant whether by foot or by vehicle.[3] But when a vacant lot extends, without division, at the rear of two contiguous buildings, leased to two different tenants, the whole owned by the same landlord, and no part

[1] Art. 1624, sub. sec. 2 C. Code; 2 Guillouard at p. 51; *Landry v. Lafortune*, Q. R. 33 S. C. at p. 135 (C. R. 1907).

[2] *Landry v. Lafortune*, Q. R. 33 S. C. 126 (1907).
The damages against the landlord for failure to deliver possession to the tenant may be limited to the advance rent paid if the tenant for a new term is shown to have taken his lease subject to the present tenant vacating and to the new tenant arranging for possession. *Sanofosky v. Harris*, 19 D. L. R. 325.

[3] Dalloz, 1856-2-75, and note thereto.
And see *Ritchie v. Walcott*, S. C. 1889, 15 Q. L. R. at p. 166. A tenant, like the owner of enclaved property, has a right of way of ingress and egress to and from the spot leased.
An injunction does not lie to prevent the tenant from using a wagon for the conveyance of his goods and effects, where it is shown that such use is almost indispensable and does not prove injurious to the landlord or of others having a right otherwise to complain.
The case would be different should the tenant misuse or abuse the Privilege. *New Orleans City Ry. Co. v. McCloskey*, Supreme Ct. Louisiana 1883, 35 La. Ann. 786.

of it is included, or mentioned in either lease, the tenants have no right to claim any part of it, as being accessory to either building.[1] A machine shop or manufacturing establishment, if leased as such, must be delivered over with all its accessories adapted to and necessary for the carrying on of the particular enterprise for which it is leased.[2] Where a tenant leased buildings in course of construction, and on taking possession of the same also occupied and used, without objection on the part of the landlord, during nearly four years, a small shed in the rear of the leased premises, the shed though not mentioned in the lease, nor shown on the architect's plans of the buildings, was considered by the court as an accessory of the premises leased; and that the landlord, by acquiescing for so long a period in the tenant's occupation without claiming rent, had placed that construction upon the contract.[3] Where a building is leased to tenants with all its accessories and appurtenances, the roof, to which all the tenants have access, is an accessory to the building.[4]

Where a lease stipulated that the tenant should have the use of a portion of the yard in rear of the building leased, which portion should be determined by the landlord, with right to the tenant to fence the same at his option, the landlord was not entitled, after the tenant had been four years in possession, with the yard open, to erect a fence across the yard, more especially as the fence deprived the tenant of light and air.[5]

Where, in the lease of an unfinished house, it was stipulated that the tenant agreed to take the house in the condition in which he took it over on its completion, and the presence of steam pipes indicated at the

[1] *Saad v. Simard*, Q. R. 43 S. C. 499 (C. R. 1913).

[2] 1 Troplong 160; 25 Laurent 104; 4 Pothier, n. 54; 1 Guillouard 88.

[3] *Myler v. Styles*, Q. B. 1888, M. L. R., 4 Q. B. 113.

[4] See per Greenshields J. in *Cooper v. Holden Co., Ltd.*, Q. R. 48 S. C. at p. 460. (C. R. 1915) reversing S. C.

[5] *Myler v. Styles*, M. L. R. 4 Q. B. 116 (1888).

date of the lease that the house was to be heated by steam, the tenant can oblige the landlord upon taking possession, to put in radiators to connect with the steam-pipes where the connection was indicated, where the landlord refused to make such connection.[1] It was held otherwise in the case of a store under the dwelling rented by such tenant, the indications being that it was not intended that it should be heated by steam, but rather by a stove, to which system of heating it was adapted, whereas in the case of the dwelling above,owing to the great depth of the building, this would have necessitated the placing of several stoves to insure a proper distribution of heat.[2]

The tenant of apartments in a building heated by a single furnace does not acquire the right to make use of the furnace for the special purposes of his own establishment; for instance, that of drawing hot water therefrom for shower-baths. He has, therefore, in this respect, no right of action for the recovery of damages, or for a reduction of rent.[3]

As already remarked,[4] the law relating to sale is also applicable by analogy, in many cases, to lease;[5] therefore, unless the lease contains stipulations to the contrary, moveable things which a proprietor has placed on his real property for a permanency, or which he has incorporated therewith, are immoveable by their destination as long as they remain there, and go with the premises. Thus, within these restrictions, the following and other like objects are immoveable:[6]

1. Presses, boilers, stills, vats and tuns;

2. All utensils necessary for working forges, paper-mills and other manufactories.

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[1] *Bazinet v. Collerette*, Q. R. 21 S. C. 508 (S. C. 1902), confirmed in C. R. 29 April, 1902.

[2] *Ibid.*

[3] *Roumageon v. Greenberg*, Q. R. 40 S. C. 426 (C. R. 1911).

[4] *Supra* p. 8.

[5] And see Art. 1499 C. Code as to accessories.

[6] Art. 379 C. Code.

Those things are considered as being attached for a permanency which are placed by the proprietor and fastened with iron and nails, imbedded in plaster, lime or cement, or which cannot be removed without breakage, or without destroying or deteriorating that part of the property to which they are attached. Mirrors, pictures and other ornaments are considered to have been placed permanently when without them the part of the room they cover would remain incomplete or imperfect.[1]

And not only must the premises be delivered over to the tenant with all the accessories which exist at the moment of delivery, but those which are wanting and which the law requires should be extant, must be supplied. The principal obligation of the landlord consists in affording to his tenant the enjoyment of the property leased.[2] This obligation continues during the whole course of the lease.[3] He is also obliged to warrant his tenant against all defects and faults in the thing leased which prevent or diminish its use, whether known to the landlord or not.[4] He is also obliged to maintain the property leased in a fit condition for the use for which it has been leased.[5] Therefore, a dwelling-house delivered without a privy, especially where its absence would be a contravention of the city's by-laws, will be a ground for cancellation of the lease.[6] And where a landlord delivers over to his tenant a city house furnished with water-pipes, water-closets, etc.,

[1] Art. 380 C. Code.

[2] Art. 1601 C. Code.

[3] Art. 1612, par. 3.

[4] Art. 1614 C. Code states that "The lessor is obliged to warrant the lessee against all *defects* and faults in the thing leased, which *prevent* or *diminish* its use, whether known to the lessor or not." And by Art. 1612: "to maintain the thing in a fit condition for the use for which it has been leased." And see 1 Guillouard 88; Sirey 76-2-40.

[5] Art. 1612 C. Code.

[6] *Lambert v. Laframboise*, C. Ct. 1860, 11 L. C. R. 16; *Beaudry v. Lupien*, Q. B. 1881, Mont., Sept. 23. *Lemonier v. De Bellefeuille*, 5 L. N. 426.

this constitutes a representation on the part of the landlord that the house is to be furnished with a supply of water, and failure to afford his tenant the usual water supply will enable the tenant to have his lease cancelled, even where the failure to supply the water is not the fault of the landlord, but of the company supplying the locality with water; the pressure being insufficient to carry the water to the height of the house.[1]

But in regard to other accessories, the absence of which would not render the premises unfit for occupation, the continued occupation by the tenant without complaint would be equivalent to his acquiescence in the existing state of affairs.[2]

Loss of thing leased.

The contract of lease or hire of things is terminated by the loss of the thing leased.[3] The words, "the loss of the thing leased," have been held to apply not only to a material loss resulting from a total or partial destruction, but apply alike to loss of enjoyment.[4]

Tenant prevented from occupying premises—Disturbance of third person.

Although the Code declares that the landlord is not obliged to warrant the tenant against disturbance by the mere trespass of a third party,[5] this only applies during the course of the lease, and not to what occurs prior thereto; nor is there any distinction in this respect between disturbance by mere trespass and disturbance in consequence of a claim concerning the right of the property, or other right in and upon the thing leased.[6]

[1] *McKillop v. Tapley*, Q. R. 32 S. C. 380 (C. R. 1907). Arts. 1601, 1612, par 3.

[2] Cassation, Sirey, 58-1-728; 1 Guillouard 94; and see *Peatman v. Lapierre*, S. C. 1889, 18 R. L. 35; *Masson v. Masson*, S. C. 1894, Q. R. 7 S. C. 5.

[3] Art. 1659 C. Code.

[4] See *McKillop v. Tapley*, Q. R. 23 S. C. at p. 383, citing Baudry-Lacantinerie and Guillouard.

[5] Art. 1616 Civ. Code.

[6] Art. 1618, which only applies after delivery of the premises.

The landlord is obliged, says the Code,[1] to deliver to the lessee the thing leased, and where any disturbance of a third person results which prevents the tenant's occupation of the premises, the landlord will have defaulted in his obligation.[2]

Delivery in good state of repair.

The premises must be delivered in a good state of repair in all respects,[3] and, whereas, during the pendency of the lease, two kinds of repairs are distinguished by the Code,[4] this distinction does not exist at the moment of entering into possession by the tenant, for the premises, in the language of the Code, "must be delivered in a good state of repairs *in all respects*,"[5] unless the lease otherwise provides.

Defects and faults.

The landlord is also obliged to warrant the tenant against all defects and faults in the property leased, which prevent *or diminish* its use, whether known to the landlord or not.[6] A tenant is not obliged to enter into possession of premises which have just been occupied by a person suffering from a virulent infectious disease, such as typhoid fever, where the landlord refuses to have the premises properly disinfected.[7] The

[1] Art. 1612.

[2] Cassation, Sirey 37-1 970; 3 Duvergier 277; 1 Troplong 262; 4 Aubry & Rau, pp. 473-474; 25 Laurent 105; 1 Guillouard 89.

[3] Art. 1613 C. Code.

[4] *Ib.*;—and Art. 1635.

[5] 1 Guillouard 93; 3 Duvergier 278; 25 Laurent 107; 1 Troplong 164. Baudry-Lacantinerie, I, n. 272; *Desautels v. Prefontaine*, Q. R. 42 S. C. at p. 405 (S. C. 1912).

Where, upon a tenant taking possession of the premises, and especially after the landlord has made certain repairs to the house, the walls need re-papering and whitewashing, the tenant can, upon refusal of the landlord, himself have such work done and charge the cost of it to the landlord. *Fauteux v. Beauvais*, Q. R. 49 S. C. 141 (C. R. 1915).

Where a landlord undertakes to make certain repairs, without specifying any delay, but it is agreed that the tenant shall take possession on May 15th, the repairs should be completed by that date. *Royal Trust Co. v. White*, Q. R. 50 S. C. 277 (S. C. 1916).

[6] See Art. 1614 C. Code.

[7] *Laurier v. Turcotte*, C. R. 1896, Q. R. 9 S. C. 86.

tenant would be equally justified in such a course were the house to be infested with vermin to such an extent as to render the premises uninhabitable to cleanly people.[1] Where, on the day before entering the premises, the sanitary inspector had reported that they were not in good sanitary condition, it was held that the tenant was not bound to receive them under the agreement.[2] Where there is a smoking chimney, and no defective construction can be proved, the presumption is that the smoking is attributable to the tenant, and not to a defective draught.[3] Where premises are leased for a butcher's business, and there is a refrigerator as an accessory, if the refrigerator is defectively constructed, and therefore useless for the purpose for which it is required, the landlord must make good the defect, if requested by the tenant.[4]

Clause in lease putting all repairs at charge of tenant.

It is quite lawful for the parties to the lease to stipulate therein that any or all repairs which the premises might need at the date of delivery shall be made by the tenant;[5] but in case of doubt such a stipulation must be construed in favor of the tenant and against the landlord,[6] Article 1613 of the Civil Code puts at the charge of the landlord all necessary repairs, except those lesser repairs which article 1635 declares

[1] Bordeaux, 29 May, 1879, Sirey, 80-2-4. Baudry-Lacantinerie Vol. I. n. 431.

The landlord who has been duly put *en demeure* to remedy the evil, is responsible for damages suffered by the tenant in consequence of the premises leased being infested with bed bugs to such an extent as to cause grave inconvenience and to render it impossible for the tenant to carry on therein her business as a boarding house keeper. *Snodgrass v. Newman*, Q. R. 10 S. C. 433 (confirmed in Review 9 Dec., 1896).

[2] *Shuter v. Saunders*, S. C. 1883, 3 L. N. 134.

[3] *Canada Newspaper Syndicate Ltd., v. Gardner*, Q. R. 32 S. C.452.

[4] *Desautels v. Prefontaine*, Q. R. 42 S. C. 401 (S. C. 1912).

[5] *Hudon v. Plimsoll*, C. Ct. 1886, 9 L. N. 322; *Deault v. Lelour*, C. R. 1894, Q. R. 5 S. C.293; *Rivard v. Pelchat*, Q. R. 28 S. C. 8.

[6] *O'Connor v. Flint*, Q. R. 33 S. C. 491 (C. R. 1908). Reversing S. C., Martineau J. dissenting.

to be imputable to the tenant. To absolve the landlord from the duty of fulfilling his common law obligations, the clause in the lease to that effect must be very clear. Thus, where the lease provides that, in consideration of a reduction of rental, the tenant undertakes to make "all and every the repairs which may be necessary to the inside of the premises," this would not relieve the landlord of his obligation to make such repairs as are necessary to make the premises habitable. The above clause in a lease must be held to include merely such lighter repairs as re-papering, painting, repairing the bath, also the water and gas pipes, etc., and not such as are needed to remedy radical defects in the house.[1]

Habitableness of premises—Acquiescence—Acceptance—Damages.

Even where the lease stipulates that the landlord shall not be required to make any repairs—not even those which the law imposes on the landlord—this does not absolve the landlord from his obligation where the premises become totally uninhabitable owing to their *unsanitary* condition,[2] nor where it is a question of constructing a new roof rather than of repairing an old one.[3]

Unless the lease contains such a stipulation, nothing short of occupancy of the premises by the tenant, with knowledge of the defects for a certain period, without complaining, will absolve the landlord from the obligation of delivering them in a good condition *in all respects*.[4] The fact of having paid the rent will, according to circumstances, imply renunciation by the tenant of the landlord's warranty, but not necessarily so, especially, for instance, where the tenant has protested his

[1] *O'Connor v. Flint*, Q. R. 33 S. C. 491 (C. R. 1908), Reversing S. C., Martineau J. dissenting.

[2] *Bagg v. Duchesneau*, C. R. 1892, Q. R. 2 S. C. 350.

[3] *Ross v. Stearns*, S. C. 1885; M. L. R., 1 S. C. 448, confirmed in appeal, M. L. R., 2 Q. B. 379; and see *Brown v. Lighthall*, C. Ct. 1888, 15 R. L. 694; *Deault v. Ledoux*, C. R. 1894, Q. R. 5 S. C. 293.

[4] 1 Guillouard 94. Cassation, Sirey 58-1-728; *Ballantine v. Snowdon*, Q. B. Montreal, June, 1894.

landlord before paying the rent.[1] The mere entering into possession will not be construed into acquiescence, on the part of the tenant.[2] Even where the premises have been examined by the tenant before signing the lease, and accepted by him, this will not relieve the landlord of his common law liability to make the house habitable,[3] although it may affect the question of damages.[4] But where the lease declares that the tenant has visited the premises, and that he finds them in good condition, and accepts them as such, and the lease stipulates that the landlord shall not be obliged to make any repairs of any kind whatever, the tenant cannot compel him to make good certain defects which were not hidden at the time of inspection and where there has been no misrepresentation on the part of the landlord.[5] It would probably be otherwise in the case of hidden defects.[6] And if the house became unfit for the purpose for which it was leased the tenant would have a remedy by way of cancellation of the lease.[7] Where the lease expressly exempts the landlord from the obligation of making any repairs not specified therein, he is not responsible in damages for failure to make any repairs other than those mentioned in the lease.[8] If the

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[1] Baudry-Lacantinerie, n. 442.

[2] 1 Guillouard 94; Caen, 30 Aug., 1862, *Rec. de Caen*, 63, p. 58; 17 Duranton no. 61; 3 Duvergier, no. 278; Troplong, no. 164 *et seq.*

[3] *O'Connor v. Flint*, Q. R. 33 S. C. 491 (C. R. 1908), reversing; Martineau J. dissenting; *Desautels v. Prefontaine*, Q. R. 42 S. C. 401 (1912); *Lair v. Simonovitch*, Q. R. 45 S. C. p. 351 (S. C. 1914).

In *Desautels v. Prefontaine*, Q. R. 42 S. C. 401 (S. C. 1912), where premises were leased as a butcher's stall, and the tenant made the usual declaration in the lease that he accepted the premises after inspection, and the refrigerator did not work effectively owing to defective construction, it was held that the tenant had an action to compel the landlord to remedy the defect within a certain delay, and in default the tenant could have the work done at the landlord's expense.

[4] *Ibid.*

[5] *Rivard v. Pelchat*, Q. R. 28 S. C. 8 (1905).

[6] Baudry-Lacantinerie, I, no. 441.

[7] *Rivard v. Pelchat, supra.*

[8] *Maillet v. Roy*, Q. R. 12 S. C. 375 (S. C. 1897); *Deault v. Ledoux*, Q. R. 5 S. C. 293 (C. R. 1894).

defects have been known to the tenant, a very short period of occupancy will be construed into acquiescence, provided always, as stated above, that such defects do not radically affect the habitableness of the premises. [1]

Specific performance of delivery.

If the landlord refuses to deliver the premises leased by him and it is in his power to do so, he can either be compelled by the tenant to specifically perform his contract, [2] or to have the lease cancelled. [3] If specific performance is required by the tenant, and the landlord who occupies the premises himself refuses to comply, the Court will order him, within three clear days' delay, to vacate the premises, in default of which his household effects will be ejected therefrom and the plaintiff put in possession by the officers of the Court. [4]

Where premises not ready for occupation at date stipulated.

If the premises are not ready for occupation at the time stipulated, the tenant is justified in refusing to take possession, and is not liable for rent under the contract, although the house was in course of construction when the lease was made. [5] And to his principal action the tenant can join a demand of damages, or he may sue in damages only. [6]

[1] 1 Guillouard 94.

[2] Art. 1065 C. Code; 1 Guillouard 95.

[3] *Evans v. Moore*, Q. B. 1888, 16 R. L. 668; *Riopel v. St. Amour*, C. R. 1892, Q. R. 1 S. C. 238.

[4] *Morgan v. Dubois*, C. R. 1888, 32 L. C. J. 204; *Jaeger v. Sauve*, S. C. 1878, 1 L. N. 139.

[5] *Riopel v. St. Amour*, C. R. 1892, 1 Que. 238; *Evans v. Moore*, Q. B. 1888, 16 R. L. 668.

The presence of the tenant in the house leased, after the beginning of the term of the lease, as a contractor employed to do certain work on the premises, will not be considered an occupation or possession of the premises under the contract of lease. *Riopel v. St. Amour, supra.* Where a house is uninhabitable, either because the landlord has not made the necessary repairs, or because he is engaged in making them, and the tenant, who does not occupy the premises, moves his effects into the house without locking them up, he has no recourse in damages against the landlord, if such effects are lost or stolen during such period. *Fauteux v. Beauvais*, Q. R. 49 S. C. 141 (C. R. 1915).

[6] *Evans v. Moore*, Q. B. 1888, 16 R. L. 668.

Failure to deliver—Damages.

The landlord would not be held liable for failure to deliver, where such failure is caused by a fortuitous event or by irresistible force, without any fault on his part, unless he has specially obliged himself by the terms of the contract.[1] But where the landlord fails to deliver the premises through his fault, proximate or remote, he is only liable for the damages which have been foreseen or might have been at the time of making the lease.[2] And even where his refusal or inability to deliver them arises from his fraudulent act, the damages comprise only that which is an immediate and direct consequence of his inexecution.[3] For instance, a tenant cannot recover damages for the profit he might have made by leasing a theatre promised to him, to the government at an extra profit, the government buildings having been burnt down, although the refusal of the landlord was wilful and fraudulent.[4]

Even where no special damages have been proved by the tenant, and there was no malicious withholding on the part of the landlord, the Court will award nominal damages for the breach of obligation.[5]

The term "vindictive" is sometimes applied to "nominal" or presumed damages, and *vice versa*. For instance, in the case cited above,[6] *nominal* damages of $100 were allowed, although none were proved, and the judge admitted that there was no malice or fraud

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[1] Arts. 1072, 1200 C. Code.

[2] Art. 1074 C. Code.

[3] Art. 1075 C. Code; *Bell v. Court*, Q. B. 1886, M. L. R., 2 Q. B. 80; *Lee v. L'Association de la Salle de Musique*, S. C. 1855, 5 L. C. R. 134; *Evans v. Moore*, Q. B. 1888, 16 R. L. 668.

[4] *Lee v. L'Association de la Salle de Musique*, S. C. 1855, 5 L. C. R. 134.

[5] *Mulcair v. Jubinville*, C. R. 1878, 23 L. C. J. 165; *Lee v. L'Association de la Salle de Musique*, S. C. 1855, 5 L. C. R. 134; and see *Corporation du Comte d'Ottawa v. Cie. du Ch. de Fer*, Supreme Ct. 1885, 14 Can. S. C. R. 193; but see *McDougall v. McGreevy*, P. C. 1889, 12 L. N. 379.

[6] *Mulcair v. Jubinville*, C. R. 1878, 23 L. C. J. 165; and see *Swanson v. Defoy*, Q. B., 2 R. de Leg. 167.

on the part of the landlord. This sum was awarded in virtue of the discretion allowed our judges, in assessing damages. On the other hand, in an earlier case before the Code,[1] *vindictive* damages to the same amount were awarded, no actual damage being proved, on the ground that the landlord had deliberately leased and given possession of the property to another tenant on account of the better price received. It is solely within the discretion of the judge to award damages for breach of contract, even where no damage has been proved and whether the breach was wilful or not. The Supreme Court has decided that where a party has suffered wrong, and is unable to prove the damages sustained by that wrong, the Court should not dismiss his action, but give him reasonable damages.[2] And the Court in this case allowed $100. But the Privy Council, in a later case, decided that though a person *wilfully* refuse to perform his part of an obligation, yet he will not be liable in damages, where it is *clear* that the other party has not suffered any.[3]

It is no defence for a landlord to set up that he was prevented from delivering the premises owing to the refusal of his former tenant to quit; he will still be liable, provided the tenant's right of enjoyment had commenced;[4] and, it may be remarked here, that where the failure to deliver, on the part of the landlord, is caused by the forcible opposition of a third party, such act occurring before the occupancy of the tenant, the latter

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[1] *Lee v. L'Association de la Salle de Musique*, 5 L. C. R. 134 (1855).

[2] *Corporation of the County of Ottawa v. Montreal, Ottawa & Western Ry.*, Supreme Ct. 1886, 14 Can. S. C. R. 193, in appeal from Ct. of Appeal P. Q.

See *Lariviere v. Vinet*, Q. R. 25 S. C. at p. 343, "Considering that damages must be assessed in strictness, as there was no bad faith on the part of the defendants."

[3] *McDougall v. McGreevy*, P. C. 1889, 12 L. N. 379, in appeal from P. Q.

[4] *Swanson v. Defoy*, Q. B. 1847, 2 R. de L. 167.

Damages claimed by tenant in such case allowed in *Lariviere v. Vinet*, Q. R. 25 S. C. 338 (S. C. 1904).

is not bound under Art. 1616 of the Civil Code to look to the third party for redress.[1] The landlord is obliged to deliver the thing leased,[2] or pay the penalty.

Delay in delivery—Damages—Set-off—Cancellation of lease.

If the tenant is only enabled to, and does take possession of the premises considerably after the date stipulated for, in consequence of the landlord's delay in getting them ready, it has been held that he is entitled to set off the damages suffered, in consequence, from the rent due under the lease in an action therefor by the landlord.[3] But this is doubtful (see *infra*), and it has been held otherwise.[4]

If the tenant prefers to have his lease cancelled rather than wait for the premises until they are ready,— and he has his option in this respect,[5]—the damages allowed him will be those incurred preparatory to moving from his old premises, and for the deprivation of the new premises leased to him from the date they should have been delivered, to that of taking action to resiliate the lease.[6]

Retaining rent to set off defects remediable by landlord.

If the premises are delivered to the tenant in bad repair, under such circumstances as to make the remedying of the defects devolve upon the landlord, the tenant cannot retain an amount of rent proportionate to the

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[1] *Swanson v. Defoy* Q. B. 1847, 2 R. de L. 167.

[2] Art. 1612 C. Code.

[3] *Belleau v. Regina*, Q. B. 1861, 12 L. C. R. 40.

[4] See *Lariviere v. Vinet*, Q. R. 25 S. C. 338 (S. C. 1904), where the defendant in warranty had obtained judgment against the plaintiff in warranty in the Circuit Court, in an action for rent, which action was upheld despite a plea of compensation in damages pleaded by the tenant, plaintiff in warranty, owing to delay in delivery. See pp. 339, 343.

[5] *Riopel v. St. Amour*, C. R. 1892, Q. R. 1 S. C. 238; *Evans v. Moore*, Q. B. 1888, 16 R. L. 668.

[6] *Evans v. Moore*, Q. B. 1888, 16 R. L. 668.

damage suffered.[1] He must have the sanction of the Court.

3. Obligation to Maintain the Premises in a Fit Condition for the Use for which they were Leased.

Enjoyment of premises an essential of contract of lease—Special stipulations in lease as to repairs.

The lease of a house is a contract by which the landlord grants to the tenant the *enjoyment* of the premises leased during a certain time, etc.,[2] and this involves, on the part of the landlord, the maintenance of the premises in a fit condition for the use for which they have been leased.[3]

As it is of the nature of the contract of lease that the landlord shall maintain the premises in a fit condition for the use for which they have been leased, nothing short of an express clause in the contract will absolve him from that obligation.[4] And even where there is an undertaking on the part of the tenant that all repairs to the premises that may be necessary, whether "*grosses*" or "*menues*," shall be made by him, this will not absolve the landlord from his obligation to make such repairs as would amount to a reconstruction of part of the premises, such as the making of a new roof rather than the repairing of an old one;[5] or where, through some

[1] *Weippert v. Iffland*, K. B. 1820, 2 R. de L., 441; *Loranger v. Perrault*, S. C. 1854, Ramsay's Condensed Reports, p. 61. See *Mulhaupt v. Enders*, 38 La. Ann. 744 in same sense. Also Baudry-Lacantinerie, I, n. 328; Cass., Sirey, 76-1-104.

But in France a contrary doctrine sometimes prevails under the particular circumstances above stated; 1 Guillouard 101; 4 Aubry & Rau, p. 474; Cass., Sirey, 53-1-361; Cass., Sirey, 81-1-170; Douai, Sirey, 57-2-209; but see 25 Laurent 109.

[2] Art. 1601 C. Code.

[3] Art. 1612 *ib.*

[4] 1 Guillouard 103; 17 Duranton, no. 61; 3 Duvergier, no. 278; Troplong, nos. 164 *et seq; Johnson v. Brunelle*, S. C. 1886, 14 R. L. 219.

[5] *Ross v. Stearns*, S. C. 1885, M. L. R., 1 S. C. 448; confirmed in appeal M. L. R., 2 Q. B. 379; *Brown v. Lighthall*, C. Ct. 1888, 15 R. L. 694.

cause beyond the control of the tenant, the premises become so insalubrious as to be totally uninhabitable;[1] or where the premises are seriously damaged by fire;[2] but the effect of such a clause will be to disentitle the tenant to any reduction of rent, by way of damages, while repairs are being made.[3]

Renunciation by tenant of his right to have repairs made.

The express renunciation by the tenant, of his right to have such obligation performed, so far as the Court will construe it, is perfectly valid, and is not contrary to public order,[4] the obligation, though being of the *nature* of the contract, is not of its *essence*.[5]

Landlord's repairs—Tenant's repairs.

The Code expressly declares[6] that the landlord is obliged during the lease to make all necessary repairs, but, referring to a subsequent article,[7] it excepts those of a minor importance, and which, as a reference to some of the instances enumerated in that article will show, are of such a nature that they might naturally be presumed to arise through the fault of the tenant or his family, or to result from the ordinary use of the premises.[8] That this presumption is the basis of the

[1] *Bagg v. Duchesneau*, C. R. 1892, Q. R. 2 S. C. 350; but see *Deault v. Ledoux*, C. R. 1894, Q. R. 5 S. C. 293; and *Simmons v. Gravel*, C. Ct. 13 Q. L. R. 263.

Where the walls of the leased premises, in consequence of some unascertained defect of construction, are subject to sweating and dampness, the tenant is entitled to obtain the resiliation of the lease. But where the defect was unknown to the landlord and he is not by law presumed to have known it, the tenant is not entitled to claim damages suffered by reason thereof. *Maillet v. Roy*, Q. R. 12 S. C. 375 (S. C. 1897).

[2] *Samuels v. Rodier*, Q. B. 1867, 2 L. C. L. J. 272.

[3] *Rex v. Smith*, K. B. 1817, 2 Rev. de Leg. 440.

[4] See Art. 990 C. Code.

[5] *Deault v. Ledoux*, C. R. 1894, Q. R. 5 S. C. 293; *Hudon v. Plimsoll*, C. Ct. 1886, 9 L. N. 322; *Rivard v. Pelchat*, Q. R. 28 S. C. 8; *O'Connor v. Flint*, Q. R. 33 S. C. at p. 498 (C. R. 1908).

[6] 6 Art. 1613 C. Code.

[7] Art. 1635.

[8] 1 Guillouard 104. (The distinction between these two kinds of repairs, viz., landlord's repairs and tenant's repairs, will be treated of in a subsequent chapter.)

tenant's obligation to make the lesser repairs, is evident from the succeeding article of the Code,[1] which absolves the tenant from this obligation when the repairs are rendered necessary by age or by irresistible force. The burden of proving that such repairs are necessitated by those causes devolves upon the tenant.[2]

With the exception, therefore, of lesser repairs under exceptional circumstances, the making of all other kinds devolves upon the landlord, even where the tenant receives the premises in bad condition, without complaint; but in this case, the *lesser* repairs will devolve upon the tenant, from whatever cause they may arise, except that of irresistible force.[3]

Destruction of premises in whole or part only—Rights of tenant in such cases.

But Art. 1660 of the Civil Code provides that, if during the lease the premises be wholly destroyed by irresistible force, or a fortuitous event, or be taken for purposes of public utility, the lease is dissolved of course. It also provides that, if the premises be destroyed or taken in part only, the tenant may, according to circumstances, obtain a reduction of rent or the dissolution of the lease; but in either case he has no claim for damages against the landlord.[4] In the happening of the latter event, the Code makes no provision for restoring the premises, but it is the better opinion that the landlord cannot be compelled to reconstruct where there has been a partial *loss* of the premises, but that anything in the nature of *repairs* necessitated by a for-

[1] Art. 1636.

[2] 1 Guillouard 104; Art. 1627 C. Code.

[3] *Johnson v. Brunelle*, S. C. 1886, 14 R. L. 219.

[4] A tenant cannot demand resiliation of the lease where he is disturbed in his enjoyment of the premises by the legitimate acts of the Government; he can only demand a diminution of rent. *Walcot v. Ritchie*, S. C. 1889, 15 Q. L. R. 165. Nor can he demand damages from the landlord in such case (*ib*). As to damages, see *Panneton v. Fraser*, S. C. 1893, Q. R. 4 S. C. 355.

tuitous event will devolve upon him, if demanded,[1] when the lease is not cancelled, and it is merely a question of reduction of rent. See further as to this Chapter VI, "Termination of the Lease—Destruction of the Premises."

Execution of repairs by landlord—Tenant's rights.

The demolition of the side wall of a house is a sufficient ground for the resiliation of the lease.[2] So is the use by the landlord, in making repairs, of material which emits a disagreeable odor, and damages the stock of the tenant, a grocer;[3] and in such case the damages sustained can also be recovered.[4] The tenant can also recover damages against the contractor for negligently executing repairs for the landlord.[5] Where premises leased for manufacturing purposes were damaged by fire, and subsequently the tenant visited the premises daily during two or three weeks while repairs were in progress, and the repairs were fully completed about a month after the fire, and the tenant did not protest for resiliation of the lease until fourteen days after the fire; it was decided by the Court that he was not entitled to obtain the dissolution of the lease, more especially as the legal presumption stood against him that the fire was due to his fault (see Art. 1629 C. Code) or the carelessness of his watchman, who was proved to have been drunk at the time it occurred.[6] But where a barber, who combined with his business the selling of cigars, rented a shop in a hotel, with the exclusive

[1] 1 Guillouard 107; Pont in 3 Rev. Crit. (1853), p. 282; Marcadé, Art. 1722; 4 Aubry et Rau, p. 474; 25 Laurent 111; see 11 R. L. at p. 608. Troplong holds that the landlord would be bound to reconstruct the thing partially lost; see 1 *Louage* no. 220.

[2] *Jacotel v. Gault*, S. C. 1889, M. L. R., 5 S. C. 60.

[3] *Daigneau v. Levesque*, Q. B. 1886, M. L. R., 2 Q. B. 205.

[4] *Ib.*

[5] *Mignon v. Brunet*, S. C. 1895, Q. R. 8 S. C. 120.

[6] *Pinsonneault v. Hood*, S. C. 1892, Q. R. 2 S. C. 473; and see *De Sola v. Stephens*, S. C. 1884, 7 L. N. 172, 13 R. L. 472; *Hache v. McGauvreau*, 10, R. L. 194; *Gerriken v. Pinsonneault*, Q. B., June, 1875.

privilege of selling cigars therein, and the hotel was burnt and the shop damaged by water, thereby requiring three weeks for making repairs to such shop, this would not give rise to the resiliation of the lease, but the tenant could claim a remission of rental for a certain period to recoup him for damages.[1]

Repairs may be exacted from transferee of property.

Repairs may be legally exacted from the actual proprietor of a property leased by a former proprietor.[2]

Tenant's remedies for compelling execution of landlord's repairs.

The tenant has a right of action, which he can exercise either by summary proceedings or in the ordinary course of law, to *compel* the landlord to make the repairs and ameliorations stipulated in the lease, or to which he is obliged by law; or to obtain authority to make the same at the expense of the landlord; or, if the tenant so declare his option, to obtain the rescission of the lease in the event of such repairs or ameliorations not being made.[3] Where a tenant, by *mise en demeure*, has demanded the execution of repairs by the landlord, and the latter, in accordance therewith, has proceeded with the repairs, which though still unfinished at the date of the tenant's action for rescission under Article 1641 C. Code, are yet completed before the trial thereof, the Court has a discretion to refuse rescission.[4]

Putting the landlord in default.

The tenant has also an action of damages for breach of the landlord's obligation in the above respect,[5] pro-

[1] *Tardif v. Cie. de l'Hotel Balmoral*, S. C. 1890, 20 R. L. 224.
[2] *Sache v. Courville*, Q. B. 1867, 11 L. C. J. 119, 2 L. C. L. J. 251.
[3] Art. 1641 C. Code.
[4] *Consumers' Cordage Co. v. Bannerman*, 2 D. L. R. 419.
[5] Art. 1641 C. Code.

vided he first puts the latter in default by notifying him and making a demand upon him to perform the obligation;[1] which demand must be made in writing where the lease is a written one.[2] But a verbal notice from the tenant and a written one from the sanitary inspector has been held a sufficient written notice,[3] and even a commencement of proof in writing, or an admission, will avail as such.[4] Damages run only from the date the defaulting party is notified.[5] A delay of one day between the putting in default and taking the action is not sufficient.[6] Where the tenant suffers personal injuries, resulting from the giving way of a portion of the structure leased, the fault is not contractual but delictual, and the landlord is responsible therefor without having been put in default, even where the defect was not apparent.[7]

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[1] Art. 1070 C. Code; *Decary v. Lafleur*, Mag. Ct. 1890, 13 L. N. 314; *Benson v. Valliere*, S. C. 1894, Q. R. 6 S. C. 245; *Acheson v. Poet*, S. C. 1885, 29 L. C. J. 206 (repudiating *Scanlan v. Holmes*, 2 L. N. 185); *Holland v. de Gaspe*, C. R. 1891, M. L. R., 7 S. C. 440; *Johnson v. Brunelle*, S. C. 1886, 14 R. L. 219; *Marcil v. Mathieu*, S. C. 1883, 7 L. N. 55; *Charbonneau v. Duval*, C. Ct. 1885, 13 R. L. 309; *Panneton v. Fraser*, S. C. 1893, Q. R. 4 S. C. 355; *Masson v. Masson*, Q. R. 7 S. C. 5; *Pelletier v. Boyce*, Q. R. 21 S. C. 513 (S. C. 1902) and authorities there cited. See especially remarks of Dorion, C. J., in *Daigneau v. Levesque*, Q. B. 1886, M. L. R., 2 Q. B. at p. 207; Baudry-Lacantinerie, I, n. 332; Cass. Dalloz, 92-1-257. But some French authorities hold that damages can be recovered without a putting in default where the landlord especially obliges himself in the lease to do a thing. Guillouard, I. n. 108; Sirey, 65-2-199, 48-2-189; and see *Scanlan v. Holmes*, 2 L. N. 185, 9 R. L. 557.

[2] Art. 1067 C. Code; *Marcil v. Mathieu*, S. C. 1883, 7 L. N. 55; *Fitzpatrick v. Darling*, S. C. 1896, Q. R. 9 S. C. 247; *Rae v. Phelan*, Q. R. 13 S. C. 491.

A lease by tacit reconduction is not a verbal lease, therefore a verbal *mise-en-demeure* to make repairs is insufficient. *Pelletier v. Boyce*, Q. R. 21 S. C. 513 (S. C. 1902, Andrews J.)

[3] *Palmer v. Barrett*, M. L. R., 6 S. C. 446.

[4] *Decary v. Lafleur*, Mag. Ct. 1890, 13 L. N. 314.

[5] *Filibien v. Moir*, C. R. 1877.

[6] *Ib.*

[7] *Vineberg v. Foster*, Q. R. 24 S. C. 258 (S. C. 1903); *Central Ancgey v. Les Religieuses, etc.*, Q. R. 27 S. C. 281. See *post* p. 68.

How tenant should proceed where he seeks to have repairs made, or lease cancelled, or to justify abandonment of premises.

The general rule regarding the proceedings the tenant should adopt, where he seeks either to have repairs made or to have the lease cancelled, may be stated as follows, attention first being directed to the fact that the present discussion relates to the repairs, properly so called, and not to *defects and faults* (vices et defauts)[1] in the premises, which will be dealt with under a subsequent heading.[2] Where the tenant takes possession of the premises leased to him, without complaint (the lease usually containing a declaration to that effect),[3] and such repairs as the law obliges the landlord to make become necessary, the tenant must notify his landlord to that effect, and if the latter fails to attend thereto, the former must, if he wishes to have the repairs made, summon the latter before the Court, and demand that he be ordered to make them, or that he, the tenant, be allowed to make the same at the landlord's expense; or he may demand that if the landlord, after being ordered by the Court to make the repairs, fails to do so, the lease be declared cancelled.[4]

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[1] See Art. 1641 C. Code.

[2] See *infra*, p. 66.

[3] And see Art. 1633 C. Code.

[4] Art. 1641 C. Code; *Boulanger v. Doutre*, S. C. 1851, 4 L. C. R. 170; *Pagels v. Murphy*, C. R. 1886, M. L. R., 3 S. C. 50; *Simmons v. Gravel*, C. Ct. 1884, 13 Q. L. R. 263; *Spelman v. Muldoon*, S. C. 1869, 14 L. C. J. 306; *Ginchereau v. Lachance*, C. Ct. 1890, 16 Q. L. R. 117; *Marchand v. Caty*, S. C. 1879, 23 L. C. J. 259; *Desautels v. Prefontaine*, Q. R. 42, S. C. 401 (S. C. 1912); *Saint-Onge v. Gauthier*, Q. R. 27 S. C.; *Vennat v. Fischel Ship*, Q. R. 34 S. C. 529 (C. R. 1908); *Pelletier v. Boyce*, Q. R. 21 S. C. 513; Baudry-Lacantinerie, I, n. 328. But see 1 Guillouard, n. 101; 1 Troplong, n. 331; Agnel, p. 398; 4 Aubry et Rau, p. 474; Huc. X, n. 292.

If the repairs are ordered by the tenant, the contractor who made them has his recourse against the tenant, and not the landlord; and where the amount sued for is in excess of $50, evidence is not admissible to prove that the landlord had authorized the tenant to have such repairs made. *Larochelle v. Barter* C. Ct. 1891, 21 R. L. 87.

There are some exceptions to the above. For instance, where the landlord has obliged himself in the lease, or is by law bound, to put the premises in good tenantable condition, and he neglects to do so, the tenant may, after putting the landlord in default[1] (if there be time to do so), make such repairs as are *urgently* needed for the safety and health of the occupants, without having first obtained judicial authority, and may recover the cost of the same from the landlord.[2] Likewise, where the condition of the premises is such as *absolutely* to prevent the tenant's use and enjoyment, he may abandon them without incurring liability for rent from the day of his departure.[3] But in this case he should demand the resiliation of the lease.[4]

Urgent repairs—Where extending over forty days—Tenant's remedies.

The tenant is obliged, during the lease, to allow the landlord to make such repairs to the premises as are urgent and cannot be deferred, whatever may be the inconvenience caused to him,—in fact, even though he may be deprived, during their progress, of the en-

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[1] See *supra* p. 58. Some of the French authorities hold that damages can be recovered without putting the landlord in default where he specially obliges himself in the lease to do a certain thing. Sirey 65-2-199, 48-2-189; 1 Guillouard 108; and see *Scanlan v. Holmes*, 2 L. N. 185, 9 R. L. 537. But see *contra*. Baudry-Lacantinerie, I, n. 328; Cass. Dalloz. 92-1-257.

[2] *McCaw v. Barrington*, C. R. 1889, 34 L. C. J. 78; confirming S. C. 1888, M. L. R., 4 S. C. 210; *Palmer v. Barrett*, S. C. 1890, M. L. R., 6 S. C. at p. 448; *Heney v. Smith*, C. Ct. 1887, 10 L. N. 333; 1 Guillouard 108; Sirey 42-2-482; 4 Pothier 129-131; 2 Troplong 351; Marcadé, Arts. 1730, 1731; 4 Aubry et Rau, p. 475.

[3] *Wright v. Gault*, S. C. 1883, 6 L. N. 42; *Boucher v. Brault*, S. C. 1870, 15 L. C. J. 117; *Daigneault v. Levesque*, Q. B. 1886, M. L. R., 2 Q. B. 205. See *Pagels v. Murphy*, C. R. 1886, M. L. R., 3 S. C. 50; *Boulanger v. Doutre*, S. C. 1851; 4 L. C. R. at p. 173; *McCaw v. Barrington*, S. C. 1888, M. L. R., 4 S. C. at p. 210. But see *Wurtele v. Brazier*, 2 R. de L. 440, as to rent accrued during occupation; and see Art. 1660 C. Code in case of partial destruction.

[4] *Cantin v. Belleau*, Q. R. 15 S. C. 286 (C. R. 1898); 14 S. C. 287.

joyment of a part of the premises.[1] But if such repairs became necessary before the making of the lease,[2] he is entitled to a diminution of the rent according to the time and circumstances; and in any case, if more than forty days be spent in making such repairs, the rent must be diminished in proportion to time and the part of the premises leased of which he has been deprived. If the repairs be of a nature to render the premises uninhabitable for the tenant and his family, he may cause the lease to be rescinded.[3] Damage by fire so inconsiderable in extent that repairs may be made in three or four days, does not justify the tenant in abandoning the premises. His remedy is to put the landlord in default to make the necessary repairs, and then, if the repairs be not made, to ask for the cancellation of the lease.[4]

Consent of tenant to the making of repairs.

It is to be noted, however, that although the tenant is obliged to suffer certain repairs to be made, yet the

[1] Where, in a lease of a house, it is stipulated that the landlord shall provide such additional heating facilities as might be required, such an obligation on the part of the landlord involves the reciprocal obligation on the part of the tenant to allow him access to the premises leased, in order that he may be able to carry out this obligation, and if the landlord is unable to gain access to these premises which are in possession of a sub-tenant, he is not liable and cannot be called in warranty by his tenant in an action of damages taken by the sub-tenant for default in the heating apparatus. *Gordon v. Demitre*, Q. R. 46 S. C. 312 (S. C. 1913).

[2] The French version of the Code, Art. 1634, has "*avant le bail*," which is correct one. See 33 L. C. J. at p. 167.

[3] Art. 1634 C. Code. The lessor of a building rented for business offices is not liable to tenants for the stoppage of the elevator for some days, owing to its being out of order, and to provide electricity as the motive power, instead of water, provided the work was done with all possible despatch. *Cook v. Royal Ins. Co.*, S. C. 1893, Q. R. 4 S. C. 396.

A stipulation in the lease, that the tenant shall suffer such large repairs as may be deemed necessary, without demanding reduction of rent, only applies to repairs which may become necessary during the lease, and not to work necessary for the remedying of defects actually existing in the leased premises at the date of the commencement of the lease, and against which the landlord was bound to warrant the tenant. *Masson v. Masson*, S. C. 1894, Q. R. 7 S. C. 5.

[4] *Ligget v. Viau*, Q. R. 18 S. C. 201 (C. R. 1899), Q. R. 14 S. C. 396.

landlord cannot make repairs in general without the former's consent. If the repairs are urgent, and the tenant refuses to give his consent to their being made, the landlord must have recourse to the Courts and obtain an order permitting them. Otherwise the tenant may restrain him by injunction[1] before exercising his recourse for any damages that may have been incurred.[2]

Where landlord uses material for repairs which emits odor injurious to merchant's stock.

If the landlord, in making repairs, uses material which emits a strong odor, such as tarred felt for placing under the clapboarding of a wooden house, he will be liable for damages and to have the lease rescinded, if the premises repaired, being used for business purposes, and the goods stored therein being of an edible nature, become damaged.[3]

Repairs extending over and under forty days.

If the making of urgent repairs has occupied less than forty days, the tenant cannot demand any indemnity in the way of reduction of rent, except where, as in the above instance, the landlord has been exceptionally negligent or careless.[4] If the repairs occupy more than forty days, it is better the opinion that such indemnity should be based upon the whole of the period occupied in making them;[5] Art. 1634 of the Code declaring that

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[1] *Bolduc v. Prevost*, Q. B. 1886, 31 L. C. J. 68. *Haycock v. Pacaud*, Q. R. 27 S. C. 464 (S. C. 1905).

The owner of property who, while it is under lease, has considerable improvements made thereto, which disturbs his tenant's quiet enjoyment, may be compelled by interlocutory injunction to desist, *Haycock v. Pacaud*, Q. R. 27 S. C. 464, 7 Q. P. R. 249 (S. C. 1905).

[2] *Haycock v. Pacaud supra.*

[3] *Daigneau v. Levesque*, Q. B. 1886, M. L. R. 2 Q. B. 205; 30 L. C. J. 188; confirming M. L. R., 1 S. C. 414.

[4] 1 Guillouard at p. 125; see also *Morison v. Langevin*, S. C. 1870; *Dufresne v. Hubert*, S. C. 1871; *Langevin v. Senecal*, S. C. 1869; *Wiseman v. Coultry*, S. C. 1874.

[5] 1 Guillouard 112; 3 Duvergier, n. 303; Marcadé, Art. 1724, 1; 7 Colmet de Sansterre, p. 246 (2nd edit.); 25 Laurent 140.

in such case "the rent must be diminished in proportion to time."

Damages for extended repairs—How estimated.

As the debtor is liable only for the damages which have been foreseen or might have been foreseen at the time of contracting the obligation, where this breach of it is not accompanied by fraud (Art. 1074 C. Code) so where a landlord, in making repairs, has exceeded the time agreed upon in the lease, the tenant can claim only the damages arising directly out of this default and which could have been foreseen at the time of passing the lease. Consequently, where it did not appear that the premises had been leased for business purposes the landlord could not be presumed to have foreseen that he would be liable to any other damages than those arising from the lease of a dwelling house. He could not, therefore, be held liable for the damages suffered by the tenant in her business as seamstress, in consequence of the extended duration of the repairs, the residence having been rented for residential purposes only.[1]

Rescission of lease—Abandoning the premises.

The right to have the lease rescinded where the premises become uninhabitable through the making of repairs exists irrespective of their duration.[2] If the Court determines that the tenant has been deprived, not only of the whole of the premises, but even of an important part thereof, so as to essentially deprive him of their use for the purpose for which they were leased, the tenant may have the lease cancelled, even when the premises are other than dwelling houses; for instance, in the case of shops or stores.[3] Where damage by fire is so incon-

[1] *Leveille v. Pigeon*, Q. R. 26 S. C. 73.

[2] 1 Guillouard 113; 25 Laurent 142.

[3] 1 Guillouard 113, 114; 25 Laurent, n. 142; 7 Colmet de Sansterre, n. 170; 3 Duvergier, n. 300; Sirey 62-2-277; *Pinsonneault v. Hood*, S. C. 1892, Q. R. 2 S. C. 473; and see *De Sola v. Stephens*, S. C. 1884, 7 L. N. 172; *Gerriken v. Pinsonneault*, Q. B., June, 1875.

siderable that repairs may be made in three or four days, the tenant is not justified in abandoning the premises. His remedy is to put the landlord in default to make the necessary repairs, and then if the repairs be not made, to ask for the cancellation of the lease.[1] Where the damages necessitating repairs are presumably occasioned by fire started through the negligence of the tenant, the Court will construe more strictly the latter's right to have his lease cancelled, if, in making the repairs, he is obliged to leave the premises for some weeks;[2] although, if partial destruction had made the premises absolutely unfit for the uses assigned to them, the tenant would be entitled to get free of the lease, while being still liable for the loss caused by the fire.[3]

Interpretation of clause in lease putting indispensable repairs at charge of tenant.

A clause in a lease "that indispensable repairs shall be performed without reduction of rent, damages or compensation" does not apply to the reconstruction of the premises leased, when partially destroyed so as to render them unfit for the purposes of the lease and to compel the lessee to vacate them. In such a case, the latter is relieved from the obligation to pay rent during the period of reconstruction.[4]

The following clause in a lease "The lessee shall permit the lessor to make all landlord's repairs (*grosses reparations*), whenever necessary, without any reduction of rent or compensation, provided that such repairs are necessary and finished within a reasonable time," as well as Article 1634 C. Code, applies only to repairs which become necessary during the lease; and where

[1] *Ligget v. Viau*, Q. R. 18 S. C. 201 (C. R. 1899), modifying Q. R. 14 S. C. 396.

[2] *Pinsonneault v. Hood*, S. C. 1892, Q. R. 2 S. C. 473; *Gerriken v. Pinsonneault*, Q. B., June, 1875.

[3] *Ib.*, and see Art. 1660.

[4] *Central Agency Ltd. v. Les Religieuses, etc.*, Q. R. 27 S. C. 281 (C. R. 1904).

the tenant can take possession only after the works agreed upon have been effected by the landlord, the tenant need only pay rent for the time he has occupied the premises.[1]

4. Obligation to Warrant the Tenant against all Defects and Faults.

Defects and faults in premises—Tenant's recourse.

The landlord is obliged to warrant his tenant against all defects and faults in the thing leased, which prevent *or diminish* its use, whether known to the landlord or not,[2] and whether existing before or arising during the lease.[3] A violation of this obligation will give rise, either to damages alone, or to discharge from rent, or resiliation of the lease with damages.[4]

Damages where defects are unknown to landlord—Collapse of premises.

There has been much controversy upon the question as to whether the landlord can be held liable for *damages* where the defects were unknown to him, or where he was not, by reason of his profession or trade, bound to know of their existence. The earlier cases held the

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[1] *Royal Trust Co. v. White*, Q. R. 50 S. C. 277 (S. C. 1916).

[2] Art. 1614 C. Code.

[3] *Benson v. Valliere*, S. C. 1894, Q. R. 6 S. C. 245; 1 Guillouard 120; 1 Troplong, n. 199; 4 Aubry et Rau, p. 477; Masse et Verge, p. 362; Note 6.

[4] Art. 1641 C. Code. *Peatman v. Lapierre*, S. C. 1889, 18 R. L. 35; *Masson v. Masson*, S. C. 1894, Q. R. 7 S. C. 5; *Benson v. Valliere*, S. C. 1894, Q. R. 6 S. C. 245. *Stanton v. Donnelly*, Q. R. 13 S. C. 306 (S. C. 1897). Damages refused to a lithographer who was obliged to remove a lithographing machine owing to hidden defects in the supports of the flooring.

Where, in an action taken by a tenant against his landlord to recover damages for *partial* inexecution of the obligations of the lease, he has judgment for a diminution of rent for three months prior to action and for such period since as the landlord fails to conform to the obligations of the lease, this is not *res judicata* as to a new action taken by the tenant for damages arising from a *total* inexecution of the obligations of the lease, since arising. *Saumure v. Ouimet*, Q. R. 36 S. C. 121.

landlord not liable in such a case.[1] The question seems to be now settled by the Court of Appeal decision in *The St. Lawrence Realty Co., Ltd. v. The Maryland Casualty Co.*[2] In that case the tenant had suffered damages through the breaking of a sprinkler pipe caused by the subsidence of the building owing to a latent defect, viz., the decay of the support of an inside column. Damages were allowed to the tenant, notwithstanding the latter's undertaking in the lease to make all repairs *grosses* or *menues*, on the grounds of articles 1614, 1065 and 1067 C. Code and not on the ground of article 1053 C. Code relating to *quasi-delicts*. Art. 1065 C. Code says, that every obligation renders the debtor liable in damages in case of a breach of it on his part. Art. 1067 of the Civil Code says, *inter alia*, that the debtor may be put in default by the sole operation of law. And Art. 1614 obliges the landlord to warrant the tenant against all defects and faults in the thing leased, which prevent or diminish its use, whether known to the lessor or not. It was also held in *Central Agency, Ltd. v. Les Religieuses, etc.*,[3] that the landlord is liable for the damages sustained by his tenant by the collapse of the premises leased, caused by bad construction and defective materials, even though such defects were hidden and could not have been ascertained by any ordinary examination of the building. But it was held that the landlord was liable as such under article 1614 C. Code and as proprietor under Arts. 1053 and 1055 C. Code relating to responsibility. This case was followed and approved of in *Granger v. Muir*,[4] but owing to the question of prescription and for the better appreciation of damages it was thought necessary to indicate more precisely the exact

[1] *Masson v. Masson*, S. C. 1894, Q. R. 7 S. C. 5; *Benson v. Valliere*, S. C. 1894, Q. R. 6 S. C. 245; *Maillet v. Roy*, Q. R. 12 S. C. 375 (S. C. 1897).

[2] Q. R. 22, K. B. 451 (1913). It was further held in this case that the fact that the sprinkler had been sold by the tenant to his landlord did not affect the latter's responsibility.

[3] Q. R. 27 S. C. 281 (C. R. 1904).

[4] Q. R. 38 S. C. 68 (S. C. 1909).

grounds of the landlord's liability. It was held that the owner of a building is responsible to his tenant under two heads for damages suffered by the latter; 1st for inexecution of the obligation to give the tenant enjoyment of the premises under the contract of lease, and 2nd by reason of the tort or *quasi-delict* arising under Art. 1055 C. Code. The former damages being contractual, are, by Art. 1074 C. C., limited to the damages which have been foreseen or might have been foreseen at the time of contracting the obligation; the latter would be limited to those resulting immediately and directly from the collapse of the building, and would be prescribed by two years (Art. 2261 C. Code). The tenant, it was held, would have his option of either or of both of such remedies.

In an action of damages only, the landlord will not be liable, unless, occupancy having commenced, the tenant proves that he is without fault. [1]

Collapse of building or part of building.

In *Vineberg v. Foster*, [2] it was held that the fault of the landlord arising from the collapse of a gallery, resulting in injury to female plaintiff, his tenant, the collapse being caused by a hidden defect, unknown to either party, was not contractual but delictual, and the landlord would be responsible without being put in default. It was there pointed out, [3] that in a contract of lease the parties have not in view the personal injuries which may be suffered by the tenant by the falling of the building owing to a secret defect.

In *Allan v. Fortier*, [4] it was held that a tenant who is obliged by his lease to make all repairs whether "*grosses*" or "*menues*," is not responsible for an accident happening to others by a collapse of the premises occupied by him

[1] *Juteau v. Major*, S. C. 1892, Q. R. 2 S. C. 428; Art. 1627 C. Code.
[2] Q. R. 24 S. C. 258 (S. C. 1903).
[3] At p. 264.
[4] Q. R. 20 S. C. 51 (S. C. 1901).

as a tenant, where there has been no abuse of enjoyment on his part, and the accident was caused by a defect in the construction of a gallery of the building.

Article 1641 of the Civil Code relating to the recovery by the tenant of damages for violation of the obligations of the lease, or arising from the relation of lessor and lessee makes no special provision for such damages, consequently, in *Schimanski v. Higgins*,[1] the Court fell back upon the terms of Art. 1070 *et seq.* of the Code to decide the matter, and this article requires that damages are not due for inexecution of an obligation until the debtor is in default under Arts. 1067, 1068, 1069 C. Code. In this case an accident happened to a sub-tenant by reason of the collapse, through decay, of one of the stairs leading to his room. The sub-tenant had been in occupation of this room for four years. It was not proved that the principal tenant knew of the defective condition of the stairs. It was held that the principal tenant could not be held, either by law or by the terms of the lease, to be in default to make such repairs to the stairs as would have avoided the accident, and not having been put in default by the sub-tenant the latter could not recover damages.

Where damage caused by defective work of municipal corporation.

Where the defective work of a municipal corporation, affecting the drains, done before the date of a lease, has given rise to a hidden defect unknown to both parties to the lease, and the lease being in writing the tenant has only verbally protested the landlord, who failed and was unable to make the changes necessary to render the premises fit for habitation; this would afford to the tenant ground for cancellation of the lease or reduction of rent, but not for damages. Had the works of the municipality causing the damage been performed after

[1] Q. R. 13 S. C. 348 (C. R. 1898).

the date of the lease the case would have been governed by Article 1616 C. Code, and the landlord would not be obliged to warrant the tenant against disturbance by the mere trespass of a third party—the city.[1]

Defective construction — Fire — Liability of landlord to boarders.

The proprietor of a building which burns down owing to a defect in construction (*e.g.*, a single brick chimney, one side of which is placed alongside of woodwork) which by law he is bound to know, is responsible in damages to his boarders for the value of their effects destroyed as a result of such fire.[2]

An action against a landlord for damages resulting from the defective state of the premises will be dismissed on exception to the form where the declaration is vague, the facts are insufficiently stated, and it does not appear that defendant was guilty of negligence or how he was the cause of the injury suffered by the plaintiff.[3]

Acceptance of premises by tenant—Acquiescence by tenant in defects.

Secondly, the landlord is not obliged to warrant the tenant against defects which are apparent, or against those which the tenant has either tacitly or expressly acquiesced in.[4] But this will not relieve the landlord of his common law liability to make the premises habitable for the purpose for which they were leased.[5] And where defects are hidden, and the tenant accepts

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[1] *Rae v. Phelan*, Q. R. 13 S. C. 491 (C. R. 1898).

[2] *Gervais v. Costello*, 8 D. L. R. 510.

[3] *Raso v. Miller*, 8 Que. P. R. 329.

[4] *Peatman v. Lapierre*, S. C. 1889, 18 R. L. 35. *Lair v. Simonovitch*, Q. R. 45, S. C. at p. 350 (1914); *Rivard v. Pelchat*, Q. R. 28 S. C. 8 (1905); *St. Lawrence Realty Co., Ltd. v. Maryland Casualty Co.*, Q. R. 22 K. B. at p. 456 (1913). By analogy, Arts. 1522, 1523, 1524, C. Code; *Doutre v. Walsh*, Q. B. 1865, 1 L. C. L. J. 56; 1 Guillouard 122.

[5] *Lair v. Simonovitch*, Q. R. 45 S. C. pp. 350, 351 (S. C. 1914); *O'Connor v. Flint*, Q. R. 33 S. C. 491 (C. R. 1908); *Rivard v. Pelchat*, Q. R. 28 S. C. 8 (1905).

Where a tenant takes possession of the premises leased to him, in

the premises and undertakes to make all repairs, whether *grosses* or *menues*, this undertaking will not relieve the landlord of his warranty under Art. 1641.[1] But it may be remarked, that the fact that a tenant continues to dwell in a house for some time after its unsanitary condition has manifested itself, would not necessarily amount to his acquiescence therein.[2] The fact of paying rent, may, according to circumstances, but not necessarily, amount to acquiescence.[3] See further *ante* p. 48.

Even where a tenant declares to have visited the premises leased and to have accepted them in spite of their worn appearance, he is not debarred thereby from demanding necessary repairs where new defects have appeared caused by the age of the building and defects in construction, which added to the former dilapidation, render the house uninhabitable. Refusal of the landlord in such case to make the necessary repairs will entitle the tenant to cancellation of the lease and damages.[4]

Where a tenant declares in the lease that he accepts the premises in the condition in which he found them at the time, and absolves the landlord from all repairs, and the tenant sues the landlord for damages for a broken arm caused by his falling from the steps which lead to his upper flat, which steps were not provided with a railing, he cannot recover. Such a defect is an apparent one.[5]

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spite of their age and dilapidations, he has none the less the right to insist upon the necessary repairs when new dilapidations caused by the age of the house or by faults of construction render the house uninhabitable. The refusal of the landlord to repair, gives the tenant the right to take proceedings for cancellation of the lease. *Lair v. Simonovitch*, Q. R. 45 S. C. 341 (S. C. 1914), referring to *O'Connor v. Flint*, Q. R. 33 S. C. 491 (C. R. 1908). In the above case the building had been condemned by the building inspector.

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[1] *St. Lawrence Realty Co., Ltd. v. Maryland Casualty Co.*, Q. R. 22 K. B. 451 (1913).

[2] *Thibault v. Pare*, Q. B. 1893, Q. R. 3 S. C. at p. 52 per Blanchet, J.

[3] Beaudry-Lacantinerie, Louage, Vol. 1, n. 442.

[4] *Lair v. Simonovitch*, Q. R. 45 S. C. 341 (S. C. 1914).

[5] *Cartier v. Durocher*, Q. R. 22 S. C. 255 (confirmed in Review 27 Feb., 1900). See Baudry-Lacantinerie, Louage, Vol. 1, p. 232.

Where a tenant declares in the lease that he accepts the premises in the condition in which he finds them, he cannot afterwards sue his landlord for resiliation of the lease and damages on the ground that the waste pipes in the dwelling above his shop, connecting with his waste pipes, were in bad order, which caused water to overflow in his sink and flood his shop, and to overflow from the dwelling above into his shop, where he had knowledge of the defect upon entering into the lease, such defect not rendering the premises uninhabitable.[1]

Defects and faults—Instances of.

Flooding of roof.

It is not a defect in construction to protect by a cage, the opening of a drain soil pipe on the roof of a building, even when the neglect to keep it free and clear from refuse would cause the flooding of the roof. It is the duty of the tenant to attend to this clearing.[2]

Smoking chimney.

A chimney which, without the fault of the tenant, smokes in such a manner as to seriously affect the habitableness of the house is ground for resiliation.[3] But where no defect in the construction of the chimney can be proved, the presumption is that the smoking arises from the fault of the tenant, and not from a defective draught.[4]

Butcher's premises—Refrigerator defective.

Where premises adapted for the purpose are leased to a butcher, and there is the usual refrigerator as an accessory, if the refrigerator is defectively constructed

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[1] *Beauchamp v. Brewster*, Q. R. 16 S. C. 268 (S. C. 1899).

[2] *Cooper v. The Holden Co., Ltd.*, Q. R. 48 S. C. 455 (C. R. 1915) reversing 44 S. C. 525.

[3] *Lair v. Simonovitch*, Q. R. 45 S. C. at p. 348 *et seq.* and authorities there cited.

[4] *Canada Newspaper Syndicate Ltd. v. Gardner*, Q. R. 32 S. C. 452.

and therefore useless for the purpose for which it is required, the landlord must make good the defect if required by the tenant.[1]

Water supply.

Failure on the part of the landlord, to supply his tenant with the usual water supply, through no fault of his own, but owing to the fault or incapacity of the company or municipality furnishing the water supply, will entitle the tenant to demand a cancellation of the lease, or reduction of the rental,[2] but not to demand that the landlord be ordered to furnish the usual water supply, and instal closets, or that upon failure to do so he, the tenant, shall be permitted to do so at his landlord's expense, or that the lease be cancelled at the option of the tenant, and without prejudice to any damages he may suffer. The municipal by-laws in this case prohibited the installation of closets in houses until the water connection had been made.

House infested with bed bugs.

A landlord who has been duly put in default to remedy the evil, is responsible for damages suffered by the tenant in consequence of the premises leased being infested with bed bugs to such an extent as to cause grave inconvenience and to render it impossible for the tenant to carry on therein her business as a boarding house keeper.[4]

House just vacated by person suffering from virulent infectious disease.

A tenant is not obliged to enter into possession of premises which have just been occupied by a person

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[1] *Desautels v. Prefontaine*, Q. R. 42 S. C. 401 (S. C. 1912).

[2] *McKillop v. Tapley*, Q. R. 32 S. C. 380 (C. R. 1907); *Lazanis v. Grenier*, Q. R. 36 S. C. 171 at p. 178 reversing.

[3] *Lazanis v. Grenier, supra.*

[4] *Snodgrass v. Newman*, Q. R. 10 S. C. 433 (confirmed in Review 9 Dec., 1896); Bordeaux, 29 May, 1879, Sirey 80-2-4; Baudry-Lacantinerie Vol. 1. n. 431.

suffering from a virulent infectious disease, such as typhoid fever, where the landlord refuses to have the premises properly disinfected.[1]

House invaded by rats.

The landlord of a house rented as a private residence is liable for damages caused to his tenant by rats which infest the leased premises; and the tenant can have the lease cancelled if the house becomes uninhabitable in consequence of the rats, provided there is no fault on the part of the tenant, who has taken every means to destroy or drive away the vermin.[2] In this case there were stables in the immediate vicinity of the premises leased and the rats entered through holes in the walls of the foundations in the cellar, and into the house. The landlord was put in default to remedy this state of affairs but wholly ignored the protest of his tenant. The latter was granted cancellation of the lease and the proved damages.

Dampness and flooding of cellar.

Serious dampness and flooding of the cellar, seriously interfering with the habitableness of the house, will be ground for cancellation of the lease if the landlord does not remedy the defect.[3]

Localities subject to periodical inundations.

Some defects or faults are inherent in the locality in which the premises are situated. For instance, it is notorious that certain low-lying localities give rise to damp houses, and even to periodical inundations, and that in consequence the cellars are apt to be flooded. When such defects are notorious in the locality or are visible they become apparent, and not hidden, defects, and where, as is usual, the tenant declares in the lease that he has visited the premises and accepts them as

[1] *Laurier v. Turcotte*, Q. R. 9 S. C. 86 (C. R. 1896).

[2] *Bigonesse v. Bouchard*, Q. R. 48 S. C. 406. But see 1 Guillouard 122; Caen 3rd July, 1885, Recueil de Caen, 1886, p. 138.

[3] *Rae v. Phelan*, Q. R. 13 S. C. 491 (C. R. 1898).

he finds them, this releases the landlord from his warranty under Art. 1614 C. Code, although it would afford ground for the cancellation of the lease if the premises became uninhabitable.[1] But the landlord would not be released where the tenant had reason to suppose that the landlord could remedy the defect, or that the apparent defects were less serious than in reality they were; or that they have become aggravated to a degree which could not have been foreseen.[2]

Noise—Preventing communication of sound from one tenement to another.

Where tenements are constructed in the manner adopted by a large number of architects and builders, the fact that noises incidental to the occupation of a lower tenement are heard by the occupant thereof coming from the upper tenement, is not a ground for resiliating the lease, although possibly a more effectual means of preventing communication of sound from one tenement to the other might have been devised.[3] In this case the Court held that although it was proved that noises were heard in the early morning in one or two bedrooms occupied by plaintiffs, which awoke the occupants thereof about six o'clock in the morning, these noises being caused by occupants of the upper tenement moving about the kitchen of said tenement, in a perfectly ordinary and usual manner, must be considered to be inconveniences incidental to the occupation of a lower tenement.

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[1] *Molz v. Houston*, 2 Rev. de Leg. 440, K. B. 1817; *Doutre v. Walsh*, Q. B. 1865, 1 L. C. L. J. 56; *Scanlan v. Holmes*, S. C. 1881, following Sirey 49-2-77; *Peatman v. Lapierre*, S. C. 1889, 18 R. L. 35; 1 Guillouard n. 122; Baudry-Lacantinerie, Louage 1, p. 232.

Held, an overflow of the Mississippi is not such an extraordinary accident as to entitle tenants to an abatement of rent, *Jack v. Mitchie*, 33 La. Ann. 723.

[2] Baudry-Lacantinerie, Louage Vol. 1., p. 233.

[3] *Benoit v. Smith*, Q. R. 16 S. C. 591 (S. C. 1899).

Remedy of tenant in case of defects and faults—Putting landlord in default—Abandoning the premises—Resiliation of lease—Judicial sanction.

The remedy of the tenant, in the event of the premises leased by him becoming uninhabitable or diminished in their use, owing to defects or faults therein, has presented some difficulty, and a corresponding uncertainty in our jurisprudence. Undoubtedly, the general principle is that the landlord must be put in default, in the manner already explained,[1] before damages can be recovered or the lease cancelled.[2] But in extreme cases, and where the house is uninhabitable, a tenant is justified in leaving the premises without putting the landlord in default.[3] As to putting in default where damages are sought, and the hidden defect is discovered only when the damage has occurred, this question has been dealt with, *supra* p. 66. The next question is, whether, after such default, the tenant can obtain a resiliation of the lease without due legal process or an order from the Court. If the question is simply one of repairs, according to the usual interpretation of that word, then undoubtedly the procedure to be adopted is that previously laid down.[4] But we are now treating of hidden defects or faults in the premises leased. Again, undoubtedly, the proper course, where it is available, is to have the landlord

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[1] *Supra* p. 58.

[2] *Palmer v. Barrette*, S. C. 1890, M. L. R., 6 S. C. 446; *Benson v. Valliere*, S. C. 1894, Q. R. 6 S. C. 245; *Thibault v. Pare*, Q. B. 1893, Q. R. 3 Q. B. 48; *Fyfe v. Lavalliere*, Mag. Ct. 1889, 12 L. N. 147; *Acheson v. Poet*, S. C. 1885, 29 L. C. J. 206; *Rae v. Phelan*, Q. R. 13 S. C. 491; *Beauchamp v. Brewster*, Q. R., 16 S. C. 268 (S. C. 1899); *Landry v. Lafortune*, Q. R. 33 S. C. 126.

In *Daigneau v. Levesque*, M. L. R. 2 Q. B. p. 205, Dorion C. J. said: "As to the cancellation of the lease, I do not think there is any difficulty, but I would not have this case taken as a precedent for holding that the *mise en demeure* is not required before bringing an action for the recovery of damages. If the appellant had pleaded, as he should have done, offering to remove the tarred felt, I for my part would not have been disposed to grant any damages."

[3] *Rae v. Phelan*, Q. R. 13 S. C. 491 at pp. 500, 501 (C. R. 1898).

[4] *Supra*, p. 60.

condemned by the Court to have the repairs or alterations made necessary to put the house in a proper condition.[1] But it is clear that there must be cases where the condition of the premises will justify their sudden and immediate abandonment, with resiliation of the lease. The chief difficulty lies in determining what is or what is not a sufficient ground for adopting such a course. The better opinion is to the effect that, where a house becomes uninhabitable, according to medical and sanitary authorities, owing to its *defective construction*—where, for instance, there is no connection between the sink and the drains in the street—and the landlord, being formally protested, refuses or neglects to remedy the defect, the tenant can abandon the premises, even within six days after the protest, and sue for a resiliation of the lease.[2] And it may be safely stated that, in any case, where the premises have become, without the fault of the tenant, not only insalubrious, but where there is immediate and extreme danger to health in their further occupation, and the landlord, upon being requested, has either refused or failed to remedy the defect, the tenant can immediately abandon the premises and have the lease cancelled.[3]

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[1] *Belanger v. De Montigny*, C. R. 1894, Q. R. 6 S. C. 523; *Seymour v. Smith*, C. R. 1889, 33 L. C. J. 165; and see *Boulanger v. Doutre*, S. C. 1851, 1 L. C. R. 393, 4 L. C. R. 170; *Boucher v. Brault*, C. R. 1871, 15 L. C. J. 274; *Rae v. Phelan*, Q. R. 13 S. C. 491 (C. R. 1898).

[2] *Thibault v. Parc*, Q. B. 1893, Q. R. 3 S. C. 48. In that case, the Court remarked, it is paragraph 2 of Art. 1641 that becomes applicable, viz.:—The tenant has an action "to rescind the lease for failure on the part of the lessor to perform *any other* of the obligations arising from the lease or devolving upon him by law," rather than paragraph 1 of said article; *Benson v. Valliere*, S. C. 1894, Q. R. 6 S. C. 245; and see *Tylee v. Donegani*, C. R. 1871, 3 R. L. 441; *Fyfe v. Lavallee*, Mag. Ct. 1889, 12 L. N. 147. *Rae v. Phelan*, Q. R. 13 S. C. 491 (C. R. 1898).

[3] *Palmer v. Barrette*, S. C. 1890, M. L. R., 6 S. C. 446; *Benson v. Valliere*, S. C. 1894, Q. R. 6 S. C. 245; *Tylee v. Donegani*, C. R. 1871, 3 R. L. 441; *Fyfe v. Lavallee*, Mag. Ct. 1889, 12 L. N. 147; *Rae v. Phelan*, Q. R. 13 S. C. 491, see p. 501 (C. R. 1898).; and see *Doutre v. Boulanger*, 4 L. C. R. 170. Remarks of Day J. Otherwise, if the landlord has not been put in default. *Seymour v. Smith*, C. R. 1889, 33 L. C. J. 165.

It is only in extreme cases that a tenant is justified in abandoning the leased premises without formally (*i.e.* in writing) putting the landlord in default and obtaining the sanction of the Court.[1]

But where such an extreme cause for abandoning the premises does not exist; where, for instance, they are merely insalubrious without being immediately and urgently dangerous, it is clear that the safest course for the tenant to adopt would be to sue the landlord to have the defect remedied, with a demand that upon his default or failure to do so, he, the tenant may have the lease cancelled.[2] The reason is this: The landlord is obliged to warrant his tenant against all defects or faults in the premises leased, and, as already stated,[3] whether the defect existed before or occurred after the lease; but where a hidden defect becomes noticeable to the tenant some time after occupation, it may turn out upon investigation that such defect arose more through wear and tear of the premises than through any radical defect in their construction. In that case the question resolves itself into one of repairs, and it would not be sufficient merely to put the landlord in default by protest in order to secure the right to have the lease cancelled upon his refusal to make such repairs, for the case would be governed by paragraph 1 of Art. 1641 C. Code, which requires a previous order of the Court to effect that purpose,[4] always excepting cases of extreme urgency. It is only where the defect is purely one of construction, or, more properly, an

[1] *Rae v. Phelan*, Q. R. 13 S. C. 491, 500-501 (C. R. 1898).
In this case the tenant was granted resiliation of the lease because the premises were unsanitary, although not uninhabitable, and the landlord, although he had not been put in default by a written protest, as required by Art. 1067 C. Code, had been verbally notified a long time previously as to the condition of the premises, and had not remedied them. Had he promptly remedied the defects, the Court would not have granted resiliation. No damages were allowed.

[2] *Belanger v. DeMontigny*, C. R. 1894, Q. R. 6 S. C. 523; *Rae v. Phelan, supra.*

[3] *Supra*, p. 66.

[4] See *supra*, p. 60.

original hidden defect, as for example the premises having become unsanitary, the landlord has, after request made to him, refused to remedy such defect, that the tenant is entitled to abandon the premises and to demand a cancellation of the lease without a previous order from the Court, such a case being governed by paragraph 2 of Art. 1641 C. Code.[1] The necessity of appealing to the Courts in all but the most urgent and extreme cases is apparent, for nothing short of the appointment of experts[2] to examine the premises and an adjudication upon the respective rights of the parties will suffice to determine: 1st, whether the defect complained of is one which the tenant has impliedly or expressly acquiesced in; 2nd, whether the defect is purely an original one or arises wholly or partly from age; 3rd, whether the tenant is at fault, such as carelessness in allowing a drain to choke up by letting things pass through which it was not intended to receive,[3] or whether the unsanitary condition of the premises is due to his uncleanliness, or carelessness in ventilating them; 4th, whether the defect is sufficient to give rise to a cancellation of the lease or merely a reduction of rent.

5. OBLIGATION TO WARRANT THE TENANT AGAINST DISTURBANCE.

Disturbance by the Landlord Himself.

The landlord is obliged to give peaceable enjoyment of the premises during the continuance of the lease,[4] which means that he must not only warrant his tenant against disturbance by third parties, as expressly stated in Arts. 1616-1618 C. Code, but against disturbance by himself whether of a legal or material character.[5]

[1] See *supra*, p. 66; *Rae v. Phelan*, Q. R. 13 S. C. 491 (C. R. 1898).

[2] *Simon v. Larue*, Prev. de Que. 1737, Perrault p. 30.

[3] See Art. 1627 C. Code, which presumes fault on the part of the tenant during his enjoyment in case of *injuries* or *loss* to the premises.

[4] Art. 1612 C. Code.

[5] See 1 Guillouard 127.

A lease made by the Government is governed by the same rules of common law as in the case of an individual. [1]

The quality or extent of disturbance that gives a tenant the right to rescission of the lease is a matter left to the discretion of the Court. [2]

Where a vacant lot extends, without division, at the rear of two contiguous buildings leased to two different tenants, the whole owned by the same landlord, and no part of it is included, nor mentioned, in either lease, the tenants have no right to claim any part of it, as being accessory to either building; consequently, if one of the tenants erects a wall on the part of the vacant lot behind his building, without encroaching on the remainder, the other tenant has no action against him for damages, on the ground of interference with his enjoyment, nor an injunction to remove the wall.

And if the tenant so sued sets up the defence of leave granted by the landlord, the plaintiff has no action in warranty against the latter. [3]

Where premises are leased to a photographer for the purpose of carrying on his business therein, and the landlord afterwards constructs a wall on the adjoining property, of such a height and in such a position as to deprive the photographer of part of the light necessary to the carrying on of his business, the tenant will be entitled to have his lease cancelled and to the full amount of damage sustained. [4]

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[1] *Bonnehomme v. Montreal Water & Power Co.*, Q. R. 48 S. C. 486 (C. R. 1915).

One who leases from the Crown, the property being already leased and occupied by another person, and who does work upon it, is liable for the damages caused to the first tenant. A clause in the first lease that the tenant abandons all recourse for damages against the Crown of any nature whatsoever, does not apply to the act of the Crown itself, which is bound to provide peaceable enjoyment for its tenant, and the second tenant could have no greater right than his landlord had. *Bonnehomme v. Montreal Water & Power Co., supra.*

[2] *Taylor v. Frigon*, Q. R. 44 S. C. 108 (C. R. 1913).

[3] *Saad v. Simard*, Q. R. 43 S. C. 499 (C. R. 1913).

[4] *Remillard v. Cowan*, S. C., 6 Q. L. R. 305.

The erection by the landlord of out-buildings in the rear of premises leased as a dwelling, so as to obscure the light and to obstruct a pleasant view or prospect from the windows, is a "change in the form of the thing leased" within the meaning of Art. 1615 C. Code, that gives the tenant a right to rescind the lease.[1]

Parol evidence is inadmissible to prove the consent of the tenant to the erection of such out-buildings.[2]

Where a landlord allows one of his tenants to change the destination of the premises leased to him, and to carry on therein a manufacturing business, which has the effect of rendering the premises of the adjoining tenants under the same landlord uninhabitable, the landlord will be held to have sanctioned such use of the premises, and his responsibility towards his other tenants will be the same as if express permission for such use had been given by him in the lease.[3]

Where two tenants occupy different flats of the same building, under leases from the owner, the disturbance caused to the one, by the use of machinery by the other, with the consent of the owner, is not a mere trespass of a third party (Art. 1616 C. Code), but amounts to failure by the landlord to give peaceable enjoyment of the premises leased. The tenant has in consequence, a right of action against him to rescind the lease.[4] An action to have a nuisance suppressed will lie against the landlord after written notice to him. Held thus, where the contiguous premises are leased by him for immoral or dangerous purposes.[5] Where the premises

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[1] *Vidal v. Cauchon*, Q. R. 41 S. C. 1 (S. C. 1910).

[2] *Ibid.*

[3] *Procureur General v. Cote*, S. C. 1887, 3 Q. L. R. 235.

[4] *Taylor v. Frigon*, Q. R. 44 S. C. 108 (C. R. 1913).

[5] *Fitzpatrick v. Darling*, S. C. 1896, Q. R. 9 S. C. 247; 1 Guillouard 135, and authorities there cited; see also *Crathern v. Soeurs de St. Joseph de l'Hotel Dieu*, 12 L. C. R. 497.

The tenant of a room can be evicted if the neighbors complain of noise made by him in the course of pursuing his trade (making shoes with wooden soles), *Leger v. Maufils*, Prevosté de Quebec, Perrault's Conseil Superieur, p. 10.

rented were formerly leased by the landlord for immoral purposes and he failed to disclose this fact to the incoming tenant, an action will lie by the latter to have his lease rescinded.[1]

The Landlord cannot, during the lease, change the form of the thing leased—Application of this principle.

Art. 1615 of the Civil Code provides that "The lessor cannot, during the lease, change the form of the thing leased." This applies to *indirect* changes as well as to changes directly made,[2] and therefore applies to cases of disturbance which are attributable, either directly or indirectly to the landlord himself. The foregoing cases are instances. It also extends to accessories of the leased premises.[3]

Accessories—Change by Landlord—Tenant's right of access to premises—Right of passage over or through adjoining premises belonging to landlord.

A nice question presented itself in *Roumageon v. Chene*[4] as to change in an accessory. A professor of gymnastics had rented by authentic lease, for five years, an out-building in the rear of 348 St. Denis Street, Montreal, for the purpose of carrying on a school of gymnastics, the lease including the use by the tenant and his pupils of a yard in common with the landlord; the yard to be used by the professor for giving instructions in gymnastics to his pupils, instead of in the out-building

[1] An action by a tenant will lie to rescind the lease of a dwelling previously occupied as a brothel and in close proximity to two other houses, the property of the landlord, actually leased and occupied for similar purposes, in consequence of which the tenant and his family are molested, insulted and troubled by frequenters of such resorts, in their enjoyment of the premises leased. *Levin v. Lalonde*, Q. R. 30 S. C. 481 (S. C. 1906); *Lorio v. Morgan*, Q. R. 46 S. C. 379 (S. C. 1914).

[2] I Guillouard, n. 132.

[3] Baudry-Lacantinerie I., n. 458, 507; Guillouard I., n. 132; Troplong I., n. 243; Massé & Vergé IV., p. 363; Laurent XXV., n. 146; Huc X., n. 297; Fuzier-Herman, Art. 1719, n. 68.

[4] Q. R. 41 S. C. 178 (C. R. 1911), Bruneau J., dissenting.

rented for the purpose. The yard gave access to the highway by a lane. The lease also obliged the landlord to furnish the tenant with a room at the above premises, no. 348, for four months,—a room which he was then occupying under a former landlord. At the date of this authentic lease, the professor was occupying, under a former lease, the same room at no. 348, and the same yard and out-building. The room he used as an office, and his pupils were in the habit of using the front door of no. 348 to pass to and from their lessons in the rear premises. This usage continued for a while under the new lease with the new landlord, but, upon dissentions arising, the landlord forbade the use of the passage through the house for the pupils, hence an action of damages by the tenant of the out-building. In the Court of first instance, Fortin J. decided in favor of the landlord; and his judgment was confirmed in Review (Guerin and Martineau JJ.), Bruneau J. dissenting. The dissenting judge gave a very elaborate dissenting judgment, reviewing many authorities. The majority of the Court of Review held that the lease did not include the right of the pupils to pass through the house at no. 348 and that parol evidence to establish the right was not admissible. Bruneau J., dissenting, held that, the lease being silent on this point, the tenant had a right to use the premises occupied by him according to their former destination, the necessities of his profession, known to the new landlord, and according to the manner the premises occupied by the tenant were enjoyed by him at the date of the lease, and parol evidence of such use was admissible. In this connection *Baudry-Lacantinerie*, in his work on the contract of lease,[1] says, in effect, that it sometimes happens that it is the intention of the parties to the lease that the tenant shall have a right of passage over or through the adjoining premises belonging to the landlord; this intention

[1] Vol. 1. at no. 288.

can be manifested by the former state of the premises.[1] At no. 515 the same author says, in effect, that the tenant obviously cannot require that a passage be left to him through the adjoining premises of his landlord. But the contrary can result from the intention of the parties, especially in the case of rural leases. This intention can be manifested by the previous state of the premises; it is a question of the interpretation to be given to the lease.

Landlord allowing rival business to be set up in adjoining premises owned by him—Change of destination by tenant.

On the same principle, it has been held that the landlord also owes it to his tenant not to set up a business similar to the latter's in the same block owned by him, nor to allow another of his tenants to do likewise.[2] It is usual for leases between a landlord on the one side, and a tenant, who is a trader or manufacturer, on the other side, to contain a clause to the above effect; but in view of the uncertainty that surrounds this question, particular care should be taken by the tenant to have such a clause inserted in the lease. And even with or without such a clause, the tenant has no ground of complaint if an industry similar to his already existed on the premises.[3] Whatever may be the argument where a

[1] Citing Rennes, 23 April, 1896, *Rec. Angers* 96, 308.

[2] *Styles v. Myler*, S. C. 1886, 14 R. L. 517; I Guillouard 139; Cass. Dalloz 50-1-307; Dalloz 57-2-125; Agnel 203; 4 Massé & Vergé, section 704, note 8, p. 363; Fuzier-Herman, Art. 1719, n. 89 et 94 s. But the French authors are very much divided upon this point, likewise the jurisprudence. Baudry-Lacantinerie at n. 484 ranges himself on the side of the preponderating French jurisprudence, which holds that the landlord owes no warranty to his tenant against such competition. Likewise Laurent XXV, n. 132 s; Huc X,, n. 299; Colmet de Santerre VII,, n. 169 *bis* II. *Contra* Agnel, n. 203; Guillouard I., n. 138 and 139; Fuzier-Herman, Art. 1719, n. 87 and 94 s.

[3] I Guillouard 141; Agnel 205; and see *Styles v. Myler*, S. C. 1886, 14 R. L. 516; where it was apparent by the structure of the other buildings, which were under the same roof, that they were intended for similar purposes, such as hotels or boarding-houses; and see *Crathern v. Les Soeurs de St. Joseph de l'Hotel Dieu*, S. C. 1862, 12 L. C. R. 497, Baudry-Lacantinerie I., n. 487; Cass. Sirey, 64-1-25.

new block of stores is at once offered for rental—and we think even in that case the landlord should be held liable in damages towards an injured tenant, where he leases two stores in that block to two separate parties carrying on the same business—[1] yet, where the stores in a block have already been rented for stated purposes, it may be said with some force that the landlord owes it to those tenants not to bring therein rival establishments, and for this reason. On the one hand, the Code contains provisions that a tenant may use the premises leased by him only for the evident purpose for which they are rented,[2] or for which they are designed, or according to the terms and intention of the lease.[3] For instance, premises leased for the express purposes of concerts, lectures, fairs, bazaars, clubs, societies, public exhibitions and meetings, could not be used for the holding of religious meetings of the Salvation Army.[4] Nor can a bakery be sub-let to a Chinaman for a laundry;[5] nor can a store rented to a dealer in fancy goods be sub-let to a warehouseman;[6] nor can the tenant of premises leased as a hotel, cease to carry on the business of hotelkeeper therein and carry on a similar business in another building at a distance of two hundred feet.[7]

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[1] See I Guillouard 138.

[2] Art. 1624 C. Code.

[3] Art. 1626 C. Code.

[4] *Pignolet v. Brosseau*, Q. B. 1891, M. L. R., 7 Q. B. 77, 21 R. L. 1.

A retail store leased to a wine merchant could not be sublet by the latter to a locksmith. (Paris, 25 March, 1817; Dalloz vo. *Louage* no. 272).

A shop rented and always used as a grocery store, could not be used by the tenant as a baker's shop (Bourges, 4 March, 1842; Dalloz *loc cit.*)

Where a shop has a good-will attaching to the premises, derived from but apart from that of its late occupants, a tenant thereof cannot close it for a considerable period. Such closing would be ground for cancellation of the lease. (Dalloz, Rep. vo. *Louage*, no. 278; and *Latreille v. Charpentier*, C. Ct. 1885, 29 L. C. J. 233.)

[5] *Pearson v. Polvin*, Q. R. 25 S. C. 54 (S. C. 1904).

[6] *Prevost v. Holland*, Q. R. 15 S. C. 298 (C. R. 1898).

[7] *Caron v. Lamarche*, Q. R. 17 K. B. 495 (1908).

To offset such provisions in favor of the landlord we have others in favor of the tenant, viz.:—he is entitled to a *peaceable* enjoyment of the premises during the lease,[1] and the landlord cannot, while it lasts, change the form of the premises.[2] This has been interpreted unanimously by the commentators, as implying that the landlord cannot disturb his tenant by permitting on the contiguous premises owned by him immoral, dangerous or disagreeable industries.[3] Why, then, should a landlord be allowed with impunity to change the destination of premises contiguous to those of his tenant with the result of seriously embarrassing the latter's business by competition, where the tenant is expressly prohibited by law from adapting himself to the changed circumstances by engaging in a new business in the same premises? It is the policy of the law, especially in this country, to discourage any contractual obligations which restrict the freedom of trade; but it is well recognized that where the restriction is a purely local one, and confined to the immediate vicinity of the business which it is desired to protect, covenants relating thereto will be strictly upheld. At any rate, Art. 1624, section 1, is in itself an exception to this policy, and should, we think, be met by a like exception in favor of the tenant. The consequence to the landlord, of allowing such unfair competition against his tenant, should be either cancellation of the lease or diminution of rent, with damages in both cases.[4]

Landlord visiting the Premises leased—Putting up "To Let" Sign.

The landlord is entitled to visit the premises leased by him in order to ascertain what repairs may be needed, or he may order workmen to make such investigation.

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[1] Art. 1612 C. Code.
[2] Art. 1615 C. Code.
[3] *Supra*, p. 82; *Fitzpatrick v. Darling*, S. C. 1896, Q. R. 9 S. C. 247.
[4] I Guillouard 142.

He may also allow persons to inspect the premises with a view to becoming tenants, at such period before the expiration of the current lease as is allowed by local usage.[1] The landlord may also, during the period required for re-letting, put up a "to let" sign on the leased premises.[2]

Disturbance by the Government, whether Municipal or Parliamentary.

As stated before,[3] if, during the lease, the premises be taken for purposes of public utility, the lease is dissolved of course; but if they be taken in part only, the tenant may, according to circumstances, obtain a reduction of rent or the dissolution of the lease; but in either case, he has no claim for damages against the landlord.[4] The tenant cannot exercise his choice between the two alternatives in the case of a partial taking; this is a matter for the appreciation of the Court.[5] All of the foregoing which relates to a partial taking, is applicable to the case of disturbance on the part of the authorities acting lawfully and in the regular course of their duties.[6] If, however, the authorities act illegally or abusively, then they are in the position of trespassers, and for the disturbance of the tenant traceable thereto

[1] I Guillouard, 143; Pothier 203; Agnel 420; and see Art. 1024 C. Code. Three months before expiration of lease, and during reasonable hours in the case of dwelling houses, is the usage in our cities, but the matter being one of some uncertainty, leases should always contain a stipulation to that effect.

[2] Baudry-Lacantinerie I., p. 282; Huc. X., n. 301; *Contra*, Guillouard I, n. 143. The French jurisprudence is conflicting on this point.

[3] *Supra*, p. 56.

[4] Art. 1660 C. Code; see *infra*, Chap. vi., "Termination of the lease,—Expropriation."

[5] 25 Laurent, n. 402; *Ritchie v. Walcott*, S. C. 1889, 15 Q. L. R. at p. 170, and authorities there cited; and see Art. 1618 C. Code.

[6] *Ritchie v. Walcott*, S. C. 1889, 15 Q. L. R. 165; 1 Guillouard, n. 149, and cases there cited, and 154.

the landlord will not be held liable in warranty;[1] the tenant's recourse will be either against the government by petition of right, or by action of damages against the municipality.

The word "disturbance" must be held to include an act of the government or municipality ordered in the interest of the public health, safety, or welfare,[2] but the landlord's liability in warranty will cease when such an act has arisen through the abuse of the tenant;[3] neither will he be liable where the modification of the premises is of such a nature as to be included in those risks incidental to commercial undertakings, such as where theatres are obliged by municipal by-law to adopt proper measures of safety for the exit of their audiences.[4]

Disturbance by Third Parties.—Trespass.

The landlord is not obliged to warrant the tenant against disturbance by the mere trespass of a third party not pretending to have any right upon the thing leased; saving to the tenant his right of damages against the trespasser.[5] And if the tenant's right of action against

[1] Art. 1616 C. Code; I Guillouard 147; 25 Laurent 148; 4 Aubry et Rau, p. 479.

Works performed by the municipality and without negligence, but interfering with the tenant's drains, and rendering his house uninhabitable, would give the tenant ground for rescission of the lease or reduction of rent according to the extent of the disturbance, but not for damages against the landlord—the trouble arising from a fortuitous event. But if such works were negligently or wrongly performed by the municipality, this would constitute disturbance by a third party, and the tenant's recourse for damages would be against the municipality. *Rae v. Phelan*, Q. R. 13 S. C. 491 at p. 498 (C. R. 1898).

[2] 1 Guillouard 150 *et seq.*; 4 Aubry et Rau, pp. 478-479; 25 Laurent 152.

[3] *Ib.*: Should a tenant sustain damage in consequence of a constitutional police legislation, adopted subsequent to his contract of lease, such as the "*Sunday law*," which forbids the use of the property rented, to a particular use, to which the lessee applies it, in a special way and on a special day, such damage is *injuria sine damno*, which is not compensable. *Abadie v. Berges*, Supreme Ct. Louisiana, 41 La Ann. 281.

[4] Dalloz, 84-2-63; 1 Guillouard 150. (1).

[5] Art. 1616 C. Code.

the latter be ineffectual by reason of his insolvency, or of his being unknown, such tenant will be entitled to indemnity from the landlord by way of reduction of rent.[1] If the trespass of a third party result in material injury to the leased premises, it would appear that where the tenant fails to act against the trespasser, the landlord may take action against him in his own name; saving the trespasser's right to call in the tenant so as to protect himself against a second action by the latter.[2]

The cutting of hay, and hunting, upon leased property, by a third party not pretending to have any right upon the property leased, but merely asserting that the land on which he cut hay and hunted was not part of the property leased, is not a *trouble de droit*, but a mere trespass against which, in the terms of Art. 1616 C. Code, the landlord is not obliged to warrant the tenant.[3]

Where a landlord leases a house which has, with his consent, been occupied as a house of prostitution, and an honest tenant takes possession without knowledge of such fact, the insults and importunities to which the members of his family are subjected are not the acts of third parties under Art. 1616 C. Code which release the landlord from his warranty to the tenant against disturbance. The reticence of the landlord in concealing from his new tenant the former immoral destination of the premises constitutes a fraud on such tenant, who can demand the cancellation of the lease.[4]

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[1] Arts. 1617 and 1660 C. Code, and see *Panneton v. Fraser*, S. C. 1893, Q. R. 4 S. C. at p. 358. If repairs become necessary in consequence of a trespass, the tenant is bound to put the landlord in default to make said repairs, before he can claim damages from the landlord for delay in making the same. *Ib.* at p. 356. See also as to construction of Art. 1660 in case of trespass, *infra* p. 92.

[2] 1 Guillouard 164; Sirey 70-2-247.

[3] *Fitzpatrick v. Lavallee*, Q. R. 25 S. C. 298 (C. R. 1903).

[4] *Lorio v. Morgan*, Q. R. 46 S. C. 379 (S. C. 1914); *Levin v. Lalande*, Q. R. 30 S. C. 481 (S. C. 1906). In this latter case the landlord had also leased two other houses for the same purpose, in close proximity to the one occupied by plaintiff.

Sometimes the trespass of a third party is accompanied by an assertion of right made by him at the time of the commission of the act. In this case the disturbance should be treated as a mere trespass, and the tenant should bring suit against the trespasser for the recovery of the damages which he has suffered by reason of such trespass, and to prohibit the trespasser from further disturbing him in his enjoyment. And if the trespasser by his plea raises a claim of right, the tenant should notify his landlord of the disturbance, and can then bring an action in warranty against the latter for the purpose of obtaining a reduction of rent and damages.[1]

Disturbance caused by one tenant to another—Liability of landlord for acts of tenant.

Where a tenant causes a disturbance to another tenant of the same landlord, and under the same roof, it is often a much controverted question whether the recourse of the tenant receiving the disturbance is against the landlord or against the tenant causing the disturbance.[2] In the first place, Article 1054 of the Civil Code says that a person is responsible for the damage caused by the fault of persons under his control and by things which he has under his care. It

[1] *Great North-Western Telegraph Co. v. The Montreal Telegraph Co.*, Supreme Ct. 1891, 20 Can. S. C. R. 170; confirming M. L. R., 6 Q. B. 257; 34 L. C. J. 35, 20 R. L. 412, S. C., M. L. R., 6 S. C. 74. See this case noted in *Fitzpatrick (Hon. C.) v. Lavallee*, Q. R. 25 S. C. at p. 306 (C. R. 1903).

Where a tenant occupies a lot in good faith, under a lease legally given or not, and builds upon it, the subsequent buyer of the property cannot, without the authority of the Court, demolish this building and expose the goods stored in it to destruction. An action of damages will lie against the defendant in such case. The defendant had called in his auteurs in warranty, alleging that an agreement in writing had been passed between them by which his vendor undertook to remove the shed and hold the defendant harmless against any claim of the occupant. It was *held* that the defendant in warranty could not assume that anything of an illegal nature would be done, and that the damages which the plaintiff suffered were damages in consequence of the illegal act of the defendant, which the defendant in warranty was not obliged to warrant him against. *Mongrain v. Canadian Carbonate Co.*, Q. R. 46 S. C. 534 (C. R. 1914).

[2] See *Beaulieu v. Beaudry*, Q. R. 16 S. C. at p. 477, showing the conflict of opinions of authors and jurisprudence.

was held by the Court of Appeal in *Dufour v. Roy*[1] that a tenant is not under the control of his landlord, within the meaning of Article 1054 C. Code, so as to make the landlord responsible for the negligence of the tenant in the use of the premises leased. In 1902 in the case of *Kieffer v. Ecclesiastiques, etc.*,[2] this view was sustained by the Privy Council holding that the owner of land is not responsible for damages suffered by the owner of contiguous lands by flooding caused by works of the former's tenant executed for his own purposes, and not as agent of the landlord. But there are circumstances under which a landlord will be held responsible for negligence of the tenant.[3] Thus, where the proprietor of premises lets them for a purpose which is likely to cause a nuisance of a particular character, and such nuisance results, the proprietor will be liable,[4] even though the lease stipulate that the tenant shall assume all responsibility for damages.[5] Again, if the landlord of an apartment house leases apartments to persons notoriously unfit to be trusted with the care of the same, *e.g.*, because of drunken habits, the landlord may be held liable for damage caused the other tenants thereby, *e.g.*, where the drunken tenant allows the water to overflow so that the rooms below are flooded.[6]

In disturbances between tenants of a common landlord, if the author of the disturbance claims that he has acted in accordance with his rights, the recourse of the

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[1] 11 Q. L. R. 192 (1885).

[2] Privy Council, reported Q. R. 13 K. B. 89; and see dictum of Taschereau C. J. in *Thurston v. Dawson*, Q. R. 17 K. B. at p. 152, citing Demolombe Vol. 31, n. 626, extending the principle between tenant and sub-tenant. But see per Bosse J. *Ibid* at p. 150.

[3] See per Taschereau C. J. in *Thurston v. Dawson*, Q. R. 17 K. B. at p. 152.

[4] *Lachance v. Cauchon*, Q. R. 24 K. B. 421 (1915). Appealed to Supreme Court.

[5] *Lesage v. Saint-Clair*, Dalloz 1873-2-201 (Cour d'appel de Paris).

[6] *Yonge v. Vineberg*, Q. R. 45 S. C. 318 (C. R. 1914).

disturbed tenant is against the landlord in warranty.[1] Thus, where two tenants of the same landlord were, by virtue of their leases, making common use of an adjoining yard, which neither of them had a right to obstruct, and one of the tenants sues the other for obstructing the yard by the piling up of piano cases, if the defendant sets up a defense denying the plaintiff's right to use the yard under his lease, and that he (the defendant) alone had that right, the plaintiff tenant can call in his landlord in warranty to defend him against the pretentions of the tenant defendant.[2] Art. 1616 says the landlord is not obliged to warrant the tenant against disturbance by mere trespass of a third party *not pretending to have any right upon the thing leased.* In the above case there was such a pretention of right upon the property leased; hence, that Article did not apply.

Where two tenants occupy different flats of the same building, under leases from the owner, the disturbance caused to the one, by the use of machinery by the other, with the consent of the owner, is not a mere trespass of a third party under Art. 1616 C. Code, if a trespass at all, but amounts to a failure by the landlord to give peaceable enjoyment of the premises leased. The tenant has, in consequence, a right of action against him to rescind the lease.[3]

As already stated,[4] a conflicting jurisprudence has arisen respecting the recourse of the complaining tenant when the disturbance of another tenant of the same landlord under the same roof has arisen without any claim of right and without any fault on the part of the

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[1] Baudry-Lacantinerie, *Louage*, Vol. I., n. 576; 1 Guillouard no. 165; *Hamilton v. Royal Land Co.*, Q. R. 24 S. C. 411 (C. R. 1903); *Saad v. Simard*, Q. R. 43 S. C. at p. 507 (C. R. 1913).

[2] *Hamilton v. Royal Land Co.*, Q. R. 24 S. C. 411 (C. R. 1903); and see *Saad v. Simard, supra.*

[3] *Taylor v. Frigon*, Q. R. 44 S. C. 108 (C. R. 1913); *Procureur General v. Cote*, S. C. 1887, 3 Q. L. R. 35. See *ante* p. 81.

[4] *Supra* p. 90.

landlord. The difficulty seems to centre in the question whether a co-tenant causing a disturbance is a third party under Art. 1616 C. Code.[1] The French authors and jurisprudence are so conflicting on this point as to furnish but little definite assistance.[2] It has sometimes been held that the recourse of the injured tenant in such a case is by direct action against the tenant causing the trouble.[3] On the other hand, it has been held by weightier authority that the co-tenant causing the injury is not a third party within the meaning of Art. 1616; hence the recourse of the injured tenant should be against the landlord.[4] In effect, Art. 1616 seems not to be adapted to the case of many of the disturbances caused by co-tenants of the same building. In using the words "mere trespass" in Art. 1616 of the C. Code, it would seem that it was merely intended to qualify the kind of trespass that was contemplated by that Article. The Article was adapted from *Pothier*,[5] who instanced as examples of such trespass: where neighbours pasture their herds on the estate leased without claiming any right therein; where thieves at night time rob the tenant's grape vines; or where evil disposed persons throw poison in the pond with the view to poisoning the fish therein. These instances show what *Pothier* meant by *voies de faits*. The cases of disturbances caused to tenants by their co-tenants, especially under

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[1] See text of article in appendix.

[2] See Baudry-Lacantinerie, *Louage*, Vol. I., n. 580, and cases cited in note.

[3] *Boily v. Vezina*, C. Ct. 1864, 14 L. C. R. 325; *Pigeon v. Roussin*, C. Ct. 1881, 4 L. N. 326; *Beaulieu v. Beaudry*, Q. R. 16 S. C. 475 (S. C. 1899). And see per Pagnuelo J. in *Beaudoin v. Dominion Clothing Co.*, Q. R. 34 S. C. at p. 161 (C. R. 1908).

[4] *Bernard v. Cote*, Q. R. 2 S. C. 83. Freezing of the water pipes in the storey above, and consequent flooding of plaintiff's premises (C. R. 1892); *Mann v. Neild*, Q. B. Montreal Sept. 1875 (*Ramsay's Digest*); *Beardmore v. The Bellevue Land Co.*, Q. R. 15 K. B. 43 disapproving of *Beaulieu v. Beaudry, supra*. And see *Brisker v. Larue*, Q. R. 23 S. C. 447 (S. C. 1903).

[5] Vol. 4, n. 81.

the same roof, usually arise by reason of the negligence of the co-tenant, and not by "mere trespass." And as a consequence of the co-tenant's negligent action other consequences arise; it may be a case of damages suffered to the property of the injured tenant; or the consequences may go to impair or destroy the tenant's use of the premises. In the latter case, it is of no avail for the landlord to say that he is not responsible for the acts of co-tenants in the building,[1] for the fundamental obligation of the landlord is to give peaceable enjoyment of the thing during the continuance of the lease (Art. 1612 par 3. Civ. Code).

The matter is sometimes provided for in the lease of apartments in apartment houses by a clause stipulating that the tenant shall use the leased premises so as not to cause disturbance to the other tenants. Co-tenants must settle among themselves all disputes arising from their common or separate use of certain parts of the building—without any recourse against the landlord.

The landlord should be put in default before suit is brought against him, where it is possible to do so.[2]

Judicial disturbance—Disturbance in consequence of a claim in or upon the property.

If the disturbance be in consequence of a claim concerning the right of property, or other right in and upon the premises leased, the landlord is obliged to suffer a

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[1] *Beardmore v. Bellevue Land Co.*, Q. R. 15 K. B. 43. Held, in this case, that the tenant has an action to rescind the lease of a flat which is uninhabitable by reason of smoke and noxious odours. Evidence of the existence of smoke and obnoxious odours in it, during a stated period, is not sufficiently rebutted by proof that it was free from both, immediately before and after the period in question, and that the building of which it forms part was well constructed with all modern improvements. Nor is it an answer to the action to say that the smoke and bad odours complained of came from neighbouring chimneys, while windows were opened, or from two flats underneath, and that the landlord is not responsible for the acts of neighbours or of co-tenants in the building.

[2] *Marcil v. Mathieu*, S. C. 1883, 7 L. N. 55. *Ante* pp. 58, 76.

reduction in the rent, proportionally to the diminution in the enjoyment of the thing, and to pay damages according to circumstances, *provided the landlord be duly notified of the disturbance by the tenant.*[1] Upon any action brought by the claimant, the tenant is entitled to be dismissed from the cause simply upon declaring to the claimant by dilatory plea the name of his landlord.[2]

The tenant cannot himself ask for the dismissal of a petitory action brought against him; he may simply ask to be dismissed from the cause when the landlord indicated by him shall have been brought in. If the landlord designated by the tenant denies that he is the landlord, the tenant, on notice of such defence, will be obliged to prove the truth of his declaration.[3]

A judicial disturbance may arise, either by an action of a third person setting up a claim of right to the detriment of the tenant, or by an exception setting up a claim of right in answer to an action of damages brought by the tenant against a trespasser.[4] The procedure to be adopted in the latter instance has been explained in a former section.[5] Until a judicial disturbance has arisen, and a partial eviction has been the consequence thereof, no claim by a tenant for reduction of rent or for damages can be maintained.[6]

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[1] Art. 1618 C. Code.

[2] *Ib.*; *Demers v. Samson*, 8 Q. L. R. 345; *Dupuis v. Bouvier*, 27 L. C. J. 339; *Lawlor v. Cauchon*, 6 Q. L. R. 13.

[3] *Dupuis v. Bouvier*, C. R. 1883, 27 L. C. J. 339; *Baillargeon v. Robillard*, Q. R. 17 K. B. 334 (1907).

[4] *Great North-Western Telegraph Co. v. The Montreal Telegraph Co.*, Supreme Ct. 1891, 20 Can. S. C. R. 170, confirming M. L. R., 6 Q. B. 257; 34 L. C. J. 35, 20 R. L. 412, and M. L. R., 6 S. C. 74.

The latter instance arose in *Hamilton v. Royal Land Co.*, Q. R. 24 S. C. 411 (C. R. 1903). Plaintiff sued defendant, a co-tenant, for obstruction of a common yard. Defendant denied plaintiff's right to the yard. *Held*, the plaintiff could call in his landlord in warranty to defend him against the pretentions of defendant.

[5] *Supra*, p. 90.

[6] *Gt. N. W. Tel. Co. v. Mont. Telegraph Co., supra.*

The extinction of a right of usufruct of an immoveable leased to a tenant, and notice by the reversioner that he intends to occupy the

The necessity for giving notice of the disturbance must be emphasized, for not only will the tenant's failure to do so deprive him of all recourse against his landlord if the latter is prejudiced thereby, but it might compromise the landlord's rights, in which case the tenant will be held liable to him to the extent of his loss.[1]

If the tenant is evicted of such a portion of the premises, that without it he would not have leased them, he will be entitled to cancellation of the lease, as in the case of a total eviction.[2] And, however small the portion of which he is deprived, the tenant will be entitled to a proportional reduction of rent.[3]

The damages in case of eviction will, as the Code declares,[4] be due by the landlord according to circumstances; which will require that if the landlord had previous knowledge of the cause of the disturbance, or likewise the tenant, this must be taken into account in estimating the measure of damages, or as a ground for refusing them; or that, if the disturbance arose through a cause beyond the control of the landlord, such as a fortuitous event or an act in the nature thereof, or where the tenant has accepted the premises with all risks attaching thereto, no damages will be due by the landlord.[5] In other respects the indemnity will be regulated by the articles of the Code relating to damages resulting from the inexecution of obligations in general, which would include the loss that the tenant has sustained

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premises, do not afford grounds to the tenant to take an action of damages under article 1618 C. Code against his landlord. The disturbance under that article must be a material one, or at least an action in eviction must have been instituted to give rise to such an action. And see *Charpentier v. Quebec Bank*, Q. R. 21 S. C. 296 (S. C. 1901) to same effect (action for resiliation of lease and damages).

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[1] 1 Guillouard 167; 25 Laurent 165; 4 Aubry et Rau, p. 480; 3 Duvergier 323.

[2] 1 Guillouard 168; 3 Duvergier 321.

[3] *Ib.*

[4] Art. 1618, C. Code.

[5] See 1 Guillouard 169 to 171, and Art. 1660 C. Code.

and the profit of which he has been deprived,[1] provided that the loss or profit is such as might have been foreseen at the date of passing the lease, and the landlord has not acted fraudulently.[2]

The acceptance of the premises by the tenant, with all risks attached thereto, will only dispense the landlord from the payment of *damages* in the event of the tenant's eviction partial or total; it will not entitle the landlord to demand the full rent. Nothing short of an express clause in the lease, whereby the tenant undertakes to pay the rent in the event of his eviction, will entitle the landlord to demand it upon the occurrence of that event.[3]

The pretention of a third party that he had acquired a right by prescription to cut hay on the leased property, which pretention was never brought to the Crown, landlord, by a legal proceeding or otherwise, and which was manifestly untenable as regards property of the Crown, would not constitute a *trouble de droit* under Art. 1616 C. Code.[4]

A landlord is liable in damages to his tenant where thieves, having broken into the adjoining house belonging to the landlord, have destroyed a cistern and water pipes having connection with the tenant's premises, thereby flooding them. Such an occurence is not a mere trespass under Art. 1616 C. Code, but is an act directly affecting the substance of the property leased and diminishing its enjoyment.[5]

Damages caused by neighbouring proprietor.

The landlord is obliged to warrant his tenant against disturbance in consequence, not only of a claim con-

[1] Art. 1073 C. Code; and see Pothier, *Louage*, 92; Marcadé, Art. 1725 *et seq.*; 1 Troplong 277.

[2] Art. 1074 C. Code.

[3] 1 Guillouard 169-170.

[4] *Fitzpatrick (Hon. C.) v. Lavallee*, Q. R. 25 S. C. 298 (C. R. 1903).

[5] *Brisker v. Larue*, Q. R. 23 S.C. 447 (S. C. 1903).

cerning the right of property in the premises leased, but also concerning any *other right in and upon the thing leased*.[1] This provision of the law clearly includes the exercise by a neighbour of his right of *mitoyennete* or right of ownership in the party wall and of other servitudes. Therefore, where a party wall has been demolished by a neighbour in the exercise of his right of *mitoyennete*, the tenant has recourse against the landlord by way of reduction of rent or cancellation of the lease, according to the extent of the disturbance.[2] It has been held that this is the limit of the tenant's recourse, and that he cannot claim damages, the disturbance being in the nature of a fortuitous event so far as the landlord is concerned.[3] But the question is a controverted one in France,[4] and in the case of *Gauthier v. St. Onge*[5] our Court of Appeal decided that where the owner of property contiguous to the leased property builds a mitoyen wall, and in doing so cuts off means of access to them, shuts off light openings, and by sinking foundations puts a strain on the frame-work of the building, opening cracks and fissures therein through which rain gets in, the landlord, who made no effort to protect his tenant (although duly protested by the latter), becomes liable to a reduction of rental proportionate to the loss of enjoyment of the tenant, and further to pay damages for deterioration of his goods. This was not laid down as a general rule to apply to all cases, but the proprietor, landlord, was held liable under the circumstances disclosed in the case. This case was

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[1] Art. 1618 C. Code.

[2] *Russell v. Clay* (C. R. 1894), Q. R. 6 S. C. 62; *Lanctot v. Boeck* Q. R. 38 S. C. at p. 232; *Peck v. Harris*, Q. B. 1862, 12 L. C. R. 355 6 L. C. J. 206; *Lyman v. Peck*, Q. B. 1862, 12 L. C. R. 355 and 368; 6 L. C. J. 214; overruling *Delvecchio v. Joseph*, S. C. 1859, 3 L. C. J. 226; and see Art. 1660 C. Code; 1 Guillouard 183; *Panneton v. Fraser*, Q. R. 4 S. C. 355.

[3] *Russell v. Clay, supra*; *Lanctot v. Boeck*, Q. R., 38 S. C. 228 (C. R. 1910).

[4] See *Lanctot v. Boeck*, Q. R. 38 S. C. at p. 232 (C. R. 1910).

[5] Q. R. 15 K. B. 264 (1906).

not cited in the subsequent case of *Lanctot* v. *Boeck*.[1] The facts were exceptional in the case of *Gauthier v. St. Onge* (*supra*).

In this case the Court said "the neighbouring proprietor, who owned the property alongside of the property in question in this lease, began the construction of a three story store, and in order to erect that store, it was necessary for him in the first place to take away a stairway that ran to the second storey of the leased property, outside of the building, from the street. The result of that was, that the independant access to the second storey of the property leased was taken away. Not only did he do that, but he took a strip of the land which had been leased in the lease to the respondent, and he also took part of the shed, which had been leased to the respondent, and he blocked up one of the windows that gave light to the second storey of the leased shop. He did all this with the concurrence of the landlord, the appellant in this case. These were admitted to be not *troubles de fait* but *troubles de droit*, because it is admitted that the neighbour had a right to do all these acts, and make these changes, and take the shed and this strip of land, and remove the staircase, and obstruct the light from this window. As these were all leased by the respondent in this case, there was undoubtedly *trouble de droit* in depriving the lessee of these important rights, but that was not all; the neighbour proceeded to build a stronger *mur mitoyen* between his building and the new property, and he made a deep excavation and made it of unusual width. He went fifteen inches on to the leased property, and put in an unusually wide wall. He went fifteen inches with his wall, and the landlord—the appellant in this case—stood by and allowed that to go on. The result was that the foundation sank, and in sinking, it deranged all the framework of the house, and it caused cracks in the roof, and allowed the rain to come in, and during

[1] *Supra*.

all this time, the appellant in this case, the proprietor stood by and did nothing to effectually protect his tenant against these damages and this injury to the enjoyment of his property. He was protested twice but took no effectual steps. What we do say is this; without laying down any general rule to apply in all cases, we say that these damages that were caused by the removal of the stairway, the blocking of the light, by raising a high wall, which went further to darken the leased premises, by building a foundation which, *even through negligence*,[1] caused a sinking of the foundation, and the derangement of the framework of the building, and cracks in the roof which resulted in the rain coming in on the lessee's goods—we say that these are damages for which the proprietor is responsible under the circumstances disclosed in this case." Dealing with the question where the disturbance is caused by the neighbour's business *Baudry-Lacantinerie* says,[2] in effect, "that it has often been decided that the tenant cannot demand damages[3] for the landlord is not in fault, the disturbance being in the nature of a fortuitous event. This solution appears to us to be correct, but only where the landlord has done everything in his power to put an end to the disturbance.[4] The solution is correct in any event if the landlord's warranty arises in consequence of an act which the neighbour had a right to perform.[5]

It has been held that if the neighbouring proprietor abuses his rights in demolishing the party wall, the tenant can recover damages from him by direct action, such

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[1] The italics are ours.

[2] N. 600 (*Louage* Vol. I.)

[3] Citing Trib. Civ. seine 25 Juil. 1892, *Droit* 11 Nov., 1892; Trib. Civ. Lyon, 28 Juin 1895; Guillouard I., n. 176. But see Lyon 27 Nov., 1896.

[4] Citing Wahl, *note*, Sirey, 95-4-17.

[5] Citing Trib. Civ. Lyon 27 Juin, 1895, Gaz. Pal. 95-2-386; Trib. Civ. Lyon, 28 Juin, 1895.

abuse constituting a disturbance by trespass.[1] If the tenant sues the landlord, the latter has a recourse against the neighbouring proprietor, if the latter is in fault.[2] If, however, the proprietor performs his work with reasonable care, skill and speed, he will not be liable in damages either to the landlord or the tenant, for he is acting in the use of a right which the law has conferred upon him.[3]

It has been held that the demolition of a side wall of a house by a neighbour exercising his right of *mitoyennete* renders it uninhabitable, so that the lease will be cancelled in consequence thereof, even where there was an express stipulation therein, to the effect that the tenant obliges himself to permit all necessary repairs.[4] If, however, the house has not become uninhabitable, the tenant will be entitled to a diminution of rent provided he be deprived of a definite proportion of the premises during any time.[5] If repairs become necessary to the leased premises in consequence of the acts of the adjoining proprietor in demolishing and rebuilding the mitoyen wall, the landlord is bound to make such repairs within a resaonable time, but he will not be liable in damages for delay in making the same unless he has been put in default to do so.[6]

Where the demolition and reconstruction of a party wall is necessitated by its age and consequent deterioration, the case must be regulated by Art. 1634 Civil

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[1] *Russell v. Clay* (C. R. 1894), Q. R. 6 S. C. 62; *Moynaugh v. Angus*, Q. R., S. C., see Abbott's Ry. Law, p. 184; Art. 1616 C. Code; 1 Guillouard 181; Baudry-Lacantinerie 1., p. 257.

[2] Baudry-Lacantinerie 1., no. 610.

[3] *Lyman v. Peck*, Q. B. 1862, 6 L. C. J. 214; 12 L. C. R. 368; 1 Guillouard 181; *Chausse v. Larcau*, C. R. 1881, 4 L. N. 351; Baudry-Lacantinerie 1., no. 476.

[4] *Jacotel v. Gault*, S. C. 1889, M. L. R. 5 S. C. 60; *Coleman v. Haight*, Supreme Ct. Louisiana, 14 La. Ann. 564.

[5] *Panneton v. Fraser* (S. C. 1893), Q. R. 4 S. C. 358; 1 Guillouard 182.

[6] *Panneton v. Fraser* (S. C. 1893), Q. R. 4 S. C. 356.

Code, for the question is resolved into one of necessary repairs, which it is the duty of the tenant to submit to, under certain restrictions as to his rights.[1]

A proprietor can also cause a disturbance to his neighbour by acts other than those done by virtue of his right of *mitoyennete*, and a distinction should be made between acts of trespass properly so called and those which are performed in pursuance of a legal right. For it is to be noted that the landlord's exemption from warranty under Art. 1616 Civil Code, in the event of mere trespass by a third party, is subsidiary to his principal obligation under Art. 1612 Civil Code to give peaceable enjoyment of the premises during the lease.[2] For instance, where a proprietor, or his representative, piles rubbish against a party wall for a long period, thereby causing it to fall over on to his neighbour's premises, and greatly disturbing such neighbour's tenant then occupying the premises, the latter has a direct action against the neighbouring proprietor, the damage being caused solely through the negligence and positive fault of a third party known to the plaintiff, and independently of any right of *mitoyennete* in the wall.[3] Another kind of disturbance is where an adjoining proprietor causes a nuisance to his neighbour's tenant while exercising a legal right; such as the demolition of his house and the erection of a new one, which invariably causes considerable damage and annoyance by dust, etc., if the adjoining tenant be a storekeeper. The damage to the adjoining tenant in a like case, if moderate, arises from a cause which everyone must take into account when leasing a house in a town, and so long as the work is done in accordance with the conditions laid down by the local by-laws, according to local usage, and within a reasonable time, the tenant can receive no indemnity either from his

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[1] See *supra*, p. 61; 1 Guillouard 180.

[2] 1 Guillouard, p. 182.

[3] *Gallagher v. Allsopp*, Q. B. 1858, 8 L. C. R. 156, 6 R. J. R. Q. 183.

landlord or the adjoining proprietor.[1] But if the damage, although temporary, be of a serious and abusive nature, the tenant can look to his landlord to have the cause abated and for a reduction of rent, and to the third party for damages; provided he takes action at such time as to allow of the nuisance being abated before serious damage is committed.[2]

If the disturbance of the tenant, by the act of an adjoining proprietor, be of a continuing or permanent nature, and where it surpasses the usual inconveniences which neighbours must expect from each other, the tenant has an action against the latter to recover damages to the extent of his loss; he has also, independently of the action against the adjoining proprietor, an action against his landlord in reduction of rent or cancellation of the lease, according to circumstances, but not in damages.[3] Art. 1616 Civil Code, which exempts the landlord from his usual obligation towards his tenant in the event of a mere trespass or *voies de faits* by third parties, was adopted from *Pothier*,[4] who instances as examples of such trespass: where neighbors pasture their herds on the estate leased without claiming any right therein; where thieves at night time rob grape vines thereon; or when evil disposed persons throw poison in the pond with the view to piosoning the fish therein. These instances show what *Pothier* intended by *voies de faits*.

[1] Baudry-Lacantinerie, *Louage*, Vol. 1. no. 606; 1 Guillouard 177; and see Art. 406 C. Code.

A proprietor cannot demand the demolition of stables on an adjoining lot, especially where his house has been built subsequently to the existence of the stables, provided they be kept in a proper manner, and that the inconveniences arising therefrom do not exceed the ordinary bounds of toleration imposed upon neighbouring proprietors. *Forget v. Lavergure* (S. C. 1896), Q. R. 9 S. C. 98.

[2] 1 Guillouard 177, 178, 179; Caen, 25th Feb., 1885. *Rec. de Caen*, 85, p. 119; see *Russell v. Clay* (C. R. 1894), Q. R. 6 S. C. 62.

[3] 1 Guillouard 174 and 176; but see Baudry-Lacantinerie 1. no. 604; and see Pothier 81; and Art. 1660 C. Code. Considerable allowance must be made for local by-laws and usages which permit certain nuisances that would otherwise be unlawful, and for many other circumstances, all relating to the law of nuisance which cannot be treated of at length in this work.

[4] Vol. 4, no. 81.

CHAPTER III.

PRIVILEGE OF THE LANDLORD

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1. IN GENERAL.

The landlord has, for the payment of his rent and *other obligations of the lease,*[1] a privileged right upon the moveable effects which are *found upon the property leased.*[2] This privilege cannot be exercised by the landlord himself

[1] *Langlois v. Rocque*, C. Ct. 1882, 5 L. N. 156. Damages for not delivering over premises at expiration of lease.

It would seem that where a room in a factory has been leased, including power and light, the privilege of the landlord does not exist for the price of furnishing such power and light. *Thurston v. Hughes*, Q. R. 16 S. C. 473.

Lease of premises for manufacturing brick, with right of tenant to use the clay thereon for that purpose. *Held*, this was not a sale of the clay, and the landlord's privilege could not be limited to the value of the mere use and occupation of the premises, but extended to the whole price of the lease which included the tenant's right to take out the clay necessary for his business. *Cantin v. Morel*, S. C. 1885, 11 Q. L. R. 210.

[2] Art. 1619 Civil Code.

without the process of the Court,[1] unless there is a stipulation in the lease allowing the landlord to seize the effects furnishing the premises, without judicial proceedings; and even this agreement would only affect the immediate parties thereto, and not a third party to whom the effects had been transferred in good faith.[2] Nevertheless, it is a greater privilege than that accorded to the ordinary privileged creditor, for the landlord may seize before judgment the moveable effects subject to his privilege, without alleging any special cause,[3] and if the effects have been removed from the premises without the landlord's consent, express or implied, he may follow them up and seize them within eight days after their removal. If the things consist of merchandise, they can be seized only while they continue to be the property of the tenant.[4] However short may be the duration of a lease—for instance where a theatre is leased for two performances, the property of the tenant brought into the premises for the purpose of his lease, will be subject to the landlord's privilege.[5]

The giving of an I.O.U. by a tenant to his landlord for balance of rent, does not change the nature of the

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[1] *Gagnon v. Hayes*, C. Ct. 1864, 15 L. C. R. 170; *Leblanc v. White*, Mag. Ct. 1889, 13 L. N. 69; *Forrestiers Catholiques v. St. Martin*, Q. R., 15 S. C. 30 (S. C. 1898); see *Williams Mnf. Co. v. Willock*, 13 L. N. 145.

[2] *Fauteux v. Watters*, Mag. Ct. 1889, 12 L. N. 275.

[3] Art. 1623 Civil Code, Art. 952 C. P.

Held, in *Lachance v. Roy*, Q. R. 29 S. C. 478 (S. C. 1906) that the fact that the tenant is about to vacate the leased premises, taking with him the effects furnishing the premises leased, does not justify the landlord in having recourse to a *saisie-gagerie*, espécially where the tenant is leaving the premises by order of the authorities for keeping a house of prostitution.

But *Held*, that the landlord has a right to make a conservatory seizure of the moveables of his tenant who has publicly announced their sale, even though no rent be due at the time. *Carroll v. Elliott*, 11 Que. P. R. 217. See further as to this, *post* pp. 107-108.

[4] Art. 1623 C. Code; Art. 953 C. P.; 4 Pothier, 265; 1 Pont *Priv.* 131.

[5] *Allard v. Charlebois*, Q. R. 15 S. C. 517 (C. R. 1898).

debt, and does not release the tenant's effects on the premises from the landlord's lien.[1]

Where a person has had his effects seized, he cannot as a means of avoiding the seizure, sell the seized goods with the house in which they are situated, and have the purchaser of the house lease it to him together with the seized goods. This would not confer upon the landlord a lien upon the seized goods superior to that of the creditor seizing.[2]

Nor can a landlord, acting in collusion with his tenant, by fraudulently and irregularly obtaining a judgment for rent due, succeed in ousting the rights of a creditor of the tenant who had previously seized the tenant's effects.[3]

The landlord's lien or privilege, it is to be noted, is a privilege created by law, and cannot be made a matter of contract.[4]

Articles 1619-1623 C. Code deal with the landlord's privileged rights; Articles 1994, and 2005 also deal with the landlord's privilege. The former privilege is of the nature of a lien or right of pledge in the thing, and even of a right of retention, whereas the latter confers a right of preference over other creditors respecting the thing. The former is a *jus in re*, the latter a *jus ad rem*. The mere fact that effects are taken into the leased premises, whether the lease be authentic, or by private writing, verbal or implied, subjects them to the landlord's lien or privileged right, with certain exceptions to be noted hereafter, for the payment of his rent and other obligations of the lease.[5] For instance, where a six-year lease for a stated price stipulates that upon insolvency

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[1] *Ibid.*

[2] *Dagenais v. Honan*, Q. R. 17 S. C. 478. (S. C. 1900).

[3] *Lapointe v. The Original Salvador Co., Ltd.* Q. R. 49 S. C. 243 (C. R. 1915).

[4] *Payette v. Payette*, Q. R. 44 S. C. at pp. 540, 541 (C. R. 1913). Art. 1983 C. C.

[5] See *Pare v. Warwick Pants Co.*, Q. R. 47 S. C. 60 (S. C. 1914).

of the tenant the whole of the balance of the price of the lease shall become due and exigible,[1] the landlord may, although no rent be owing at the time, take a *saisie-gagerie* attaching all the tenant's moveable effects on the premises leased, on the ground of the tenant's insolvency, and demanding the balance of the price of the lease. And if, some days after, and while the effects seized are in the hands of a judicial guardian, a winding-up order is made against the tenant, a joint stock company, the liquidator in contesting the *saisie-gagerie* cannot oppose Art. 2005 of the Civil Code to the landlord's claim, in limitation thereof. This article has no application as between the landlord and his tenant; but only applies in the event of competition with creditors of the tenant.[2]

Art. 952 of the Code of Procedure deals with attachment for rent. It mentions only rent "due" in virtue of the lease as being the object of the seizure, and not rent to become due. But the foundation of the privilege is to be found in the Civil Code, Arts. 1619-1623 which give the landlord a privileged right for the payment of *his rent*, and not in Art. 952 of the Code of Procedure which merely prescribes certain rules for putting th s privileged right into effect.[3] Where the tenant's effects have been removed without the landlord's consent, Article 953 C. P. allows of their attachment in recaption for amounts not yet due. But where a landlord's *gage* or privileged right is threatened—where, for instance, the effects subject to the privilege are about to be removed from the leased premises—the landlord can seize them by *saisie-gagerie conservatoire* to preserve his *gage* even

[1] This is also the effect of Art. 1092 C. Code. *Plante v. Robitaille*, S. C. 1878, 4 Q. L. R. 225; *Hamilton v. Valade*, 7 L. N. 15; *Pare v. Warwick Pants Co.*, Q. R. 47 S. C. 60 (S. C. 1914). But see per Doherty J. diss. in *MacPherson v. Symonds*, Q. R. 29 S. C. at p. 121. See further *post* Ch. vi., Termination of the Lease—Effect of insolvency of tenant.

[2] *Pare v. Warwick Pants Co.*, *supra*.

[3] *Ibid.* at p. 65. See further as to this Ch. vii., Actions between Landlord and Tenant.

where no rent is due at the time.[1] If his security is not threatened he could seize the effects only for rent due.[2] In any event judgments for future rent will be declared *tenante* only, so that the effects seized can be sold only in the measure that future payments are unpaid at maturity.[3]

Art. 646 of the Code of Procedure, dealing with oppositions to the seizure of moveable property, after stating that the execution may be also opposed by any party who has a right of ownership or of pledge in the property seized, goes on to state that the landlord cannot, however, oppose the seizure and sale of the moveable property subject to his privilege; he can only exercise such privilege upon the proceeds of the sale. This Article is a direct recognition of the landlord's lien on the effects furnishing the leased premises, but by exception allows the effects to be sold, subject to the landlord being collocated by privilege for his special lien; upon the product of the sale.[4]

It is submitted that Art. 1994, clause 8, of the Civil Code, is drawn up so as to be capable of misinterpretation, for at first sight it would appear that the landlord is not accorded any rank for his privilege in respect to claims arising from obligations of the lease other than the payment of rent. Art. 1994 provides that the landlord shall rank eighth for his claim in accordance with Art. 2005. But Art. 2005 deals only with *rent* due

[1] *Dufaux v. Morris*, Q. R. 2 S. C. 500; *Mathieu v. Clifford*, Q. R. 19 S. C. 410 (C. R. 1901). *Carroll v. Elliott*, 11 Que. P. R. 217. But see *Lachance v. Roy*, *ante* p. 105, note 3. See further *post* p. 133, note 1.

[2] *Gadbois v. McPherson*, 1 Rev. de Jur. 536. *Vinette v. Panneton*, M. L. R. 5 S. C. 318.

[3] *Simmons v. Gravel*, 13 Q. L. R. 263; *Sansfacon v. Boucher*, 6 Q. L. R. 384; *Joseph v. Smith*, S. C. 1880, 3 L. N. 115; *Catudal v. Cool*, S. C. 1891, 21 R. L. 494; *Williamson v. Depatie* Q. R. 4 Q. B. 202.

[4] *Ibid* p. 66.

The court has no power to summarily dismiss, on motion, an opposition for payment in which the insolvency of the debtor is alleged and an order is prayed for to call in the creditors, on the ground that the monies levied are insufficient to cover the plaintiff's privileged claims or rent and costs of suit. *Hull v. McFadden*, Q. R. 37 S. C. 430 C. R. 1909).

or to become due, and makes no mention of other obligations of the lease. This anomaly would appear to have arisen through a loose redaction of the statute 49-50 Vic., ch. 12. Originally Art. 1994, clause 8, read thus in regard to the landlord's privilege: "The claim of the lessor," which would clearly include a claim for liquidated damages as well as for rent. At that date Art. 2005 contained no provision for the case of insolvency, and upon the repeal of the Insolvent Acts that article allowed the landlord an advantage over other creditors quite out of proportion to the necessities of the case. To alter this condition of affairs the statute 49-50 Vic., ch. 12 (1886) was passed, amending Art. 2005, and providing that, in the case of the insolvency of the tenant, the landlord's privilege was to be reduced to much more reasonable proportions. And Art. 1994, clause 8, was made to accord with Art. 2005 by adding the words "in accordance with the provisions of Art. 2005 C. Code. Article 2005 was still further amended by 61 Vic., c. 46 (1898).

Seeing that there is no special legislation depriving a landlord of his privileged right under Art. 1619 C. Code for the payment of "other obligations of the lease," it is reasonable to conclude that he still ranks by privilege the same as formerly; and that Art. 1994, clause 8, includes all that it did formerly, viz., the claim of the lessor, with the addition that, in respect to rent, reference must be made to Art. 2005 as amended. No doubt the use of the word "extends" in the first line of Art. 2005 indicates that the article merely relates to an *extension* of the privilege to rent to become due.

The landlord's privilege, or right to rank on the proceeds of sale of the tenant's effects in competition with other creditors,[1] is very extensive if the lease be a notarial one; in that case it extends to all rent that is due or to become due, with this proviso: that if the tenant, being a trader, becomes insolvent, and makes an aban-

[1] See *supra* p. 106

donment in favor of his creditors, the landlord's privilege is restricted to twelve months rent due and the rent to become due during the current year if there remain more than four months to complete the year; if there remain less than four months to complete the year, to the twelve months rent due, and to the rent of the current year and the whole of the following year. If the lease be not in authentic form, the privilege can only be claimed for three overdue instalments and for the remainder of the current year.

The question of insolvency of the tenant and its effect will be dealt with in the Chapter on "Termination of the Lease."—sub-title "Effect of Insolvency of Tenant."

2. WHAT EFFECTS ARE SUBJECT TO THE PRIVILEGE.

In general—Commercial paper—Liquor license.

In general the landlord has a privileged right upon the *moveable effects* which are found upon the property leased.[1]

In the lease of *houses* the privileged right includes the furniture and moveable effects of the tenant,[2] and if the lease be of a store, shop or manufactory, the merchandise contained in it.[3] But the merchandise can be seized only while it continues to be the property of the tenant.[4] This latter provision is not restricted to daily sales of merchandise in detail. It applies to

[1] Art. 1619 C. Code.

[2] As to what furniture the tenant is bound to keep on the premises, and what he may remove. See *post*, Chapter IV, "Obligations of the Tenant."

See article 396 C. Code defining furniture, and article 397 defining the expressions "moveable property," and "moveable things," the latter referring back to articles 383 *et seq.*

A court, not incorporated, of the Catholic Order of Foresters, a body incorporated under the laws of Illinois, is not owner of the moveables furnishing the hall where it holds its meetings; such moveables belong to the order itself. *Forrestiers Catholiques v. St. Martin*, Q. R. 15 S. C. 30 (S. C. 1898).

[3] Art. 1620 C. Code.

[4] Art. 1623 C. Code.

any sale which a merchant may make in the ordinary course of business; and the sale *en bloc* of a stock which has been damaged by a fire on the premises, is an ordinary and usual transaction.[1]

In regard to the question whether promissory notes, and the like, are subject to the landlord's privilege, it is to be noted that by Art. 1620 C. Code, the landlord's privilege extends to the furniture and *moveable effects* of the tenant. This is more extensive than the corresponding Art. of the Code Napoleon (2102) which limits the privilege to goods which "furnish" the premises. The Louisiana Code (Art. 2705) is similar to ours but omits the word "furniture," and it has been there held that the landlord's privilege extends to promissory notes that are the property of the tenant, and found on the leased premises.[2] It has also been there held that there was no good reason why the assets of a banker, so far as they are susceptible of being pledged, should not be subjected to the same privilege as merchandise in a store.[3] But we do not think our Courts would go so far as this, for *Pothier* says that such paper only represents the credit of which it is the evidence; the credit itself is an incorporeal thing which cannot be said to be on the premises.[4] And the same might be said of insurance policies. But jewelry and the like would be subject to the privilege.[5] As to books of account, etc., see *post* p. 128.

It has been held by the Court of Appeal in this Prov-

[1] *Liggett v. Viau*, Q. R. 18 S. C. 201 (C. R. 1899), Q. R. 14 S. C. 396.

[2] *Succession of Stone v. Creditors*, Supreme Ct. Louisiana, 31 La. Ann. 311. In *Mathews v. Creditors*, 10 Louisiana Annual Reports, 718, it was held that the clause which confers the privilege is absolute and unambiguous, and the words "moveable effects" were too comprehensive to admit of doubt or discussion with reference to their application, and that the concluding clause of the article appears rather illustrative than restrictive in its character.

[3] *Mathews v. Creditors*, 10 L. Ann. 718; see also *Bazin v. Segura*, 5 La. Ann. 718, as to difference between French Code and Louisiana Code, and favoring a wider interpretation than the former.

[4] 4 *Louage*, 251; and see Art. 398 C. Code.

[5] *Ib.* 248.

ince in *Poulin v. St. Germain*,[1] that the proceeds of the sale of a tenant's liquor license is not a moveable effect subject to the landlord's privilege.

No matter how short the term of a lease may be—for instance, the lease of a theatre for two nights—the landlord's privileged right or lien obtains over the moveable effects of the tenant brought on to the premises so leased. The exception of Art. 1622 as to goods transiently or accidentally on the premises applies only to effects belonging to third persons.[2]

Moveable Effects of Third Persons.

The landlord's privileged right includes also moveable effects belonging to third persons, and being on the premises by their consent, expressed or implied, for sums which have become due by the tenant prior to the notification given to the landlord of the property rights of third persons or before the knowledge acquired by the landlord of such rights of third persons, but not if such effects be only transiently on the premises, as the baggage of a traveller in an inn, or articles sent to a workman to be repaired or to an auctioneer to be sold. The notification in due time to the landlord shall avail against a subsequent acquirer of the leased premises.[3]

This article assumed its present form by virtue of 61 Vict., c. 45 (15 Jan., 1898). The original article read as follows:—"It includes also moveable effects belonging to third persons, and being on the premises by their consent, express or implied, but not if such moveable

[1] Q. R. 11, K. B. 353 (1900); *Paul v. Mondon*, 13 Que. P. R. 185 (S. C. 1912).

[2] *Allard v. Charlebois*, Q. R. 15 S. C. 517 (C. R. 1898).

[3] Art. 1622 C. Code.

When the landlord has taken a *saisie-gagerie* against his tenant for rent, and subsequently a third party, owner of the effects seized, causes them to be revindicated and a new guardian appointed, the landlord himself, and not only the first guardian, has a right to intervene in this latter cause and demand that the moveables seized be returned to him to satisfy his privileged claim. *Sonenblum v. Insenga*, Q. R. 47 S.C. 111 (S.C. 1914).

effects be only transiently or accidently on the premises, as the baggage of a traveller in an inn, or articles sent to a workman to be repaired, or to an auctioneer to be sold.''

The amendment of 1898 to Art. 1622 was brought about by the conflicting jurisprudence decided thereunder before it was amended. Before the Code the law in the Province upon this question was that the landlord's privilege was based upon the *presumption* that the moveable effects found upon the leased premises are the property of the tenant, but that this privilege did not extend to those effects which the landlord knew not to belong to the tenant.[1] Since the Code came into force, and before this Article was amended, the same principle was upheld in *Sheridan v. Trahan.*[2] and *Beaudry v. Lafleur,*[3] but in *Vallieres v. Carrier,*[4] *Claxton v. Glover,*[5] *Leveille v. Labelle,*[6] *Willis v. Navert,*[7] and *Shaw v. Messier,*[8] it was held to the contrary, that the landlord's lien was not affected by the fact that he had been notified, or that he knew that the effects did not belong to his tenant.[9] Art. 1622 as amended definitely deprives the landlord of his lien or privileged right upon effects in the house, shop or manufactory[10] where he knows that they do not belong to his tenant. But for sums which have become due[11] by the tenant prior to notification to or knowledge

[1] *Easty v. La Fabrique de Montreal,* 17 L. C. R. 418 (Q. B. 1867) cited in *Cie. Pontbriand (Ltee.) v. Feeny,* Q. R. 36 S. C. at p. 28 (S. C. Bruneau J. 1909).

[2] 5 L. N. 298 (S. C. 1882).

[3] 24 L. C. J. 150 (C. R. 1880).

[4] Q. R. 6 S. C. 1 (S. C. 1894), confirmed in Review 30 June, 1894.

[5] Q. R. 6 S. C. 227 (C. R. 1894).

[6] 16 L. C. J. 54 (S. C. 1871).

[7] Q. R. 12 S. C. 80.

[8] Q. R. 5 S. C. 468 (S. C. 1894).

[9] *Cie. Pontbriand v. Feeny,* Q. R. 36 S. C. at p. 28-29 (S. C. 1909).

[10] Art. 1620 C. Code.

[11] See *Ouimet v. The Heirs Green,* Q. R. 37 S. C. at pp. 140-141 C. R. 1909).

of the landlord the latter still preserves his privilege on the moveable effects of third persons, with the exceptions stated in that Article.

Article 1622 C. Code is thus brought into conformity with Article 2102 Code Napoleon. Some difficulty must arise in construing the expression "or before the knowledge acquired by the lessor of such rights of third persons." It must depend upon the facts of each case whether the landlord has acquired such knowledge.[1] *Troplong* says:[2] The moveables which *notoriously* do not belong to the tenant or of which the ownership by a third party has been notified to the landlord, are not subject to the landlord's privilege". (See further *infra* Proof of Notification). Where a landlord seizes and sells, in satisfaction of his privileged right, the effects of his tenant, and having bought them in at the judicial sale, re-sells them to a third party who leaves them on the leased premises in the well-grounded expectation that he can re-sell them to the landlord, the latter loses his privilege on the effects so sold for the rent which has become due since the sale. He could not, therefore, seize them in an action against his tenant, and the purchaser of the effects could intervene to contest the seizure and have it annulled.[3]

Ibid—Subsequent acquirer of leased premises—Art. 1622 C. Code.—Notification.

The last paragraph of Article 1622 C. Code which provides that "The notification in due time to the lessor shall avail against a subsequent acquirer of the leased premises" does not apply to the case where the landlord has mere knowledge that certain effects on the premises of his tenant belong to a third party.[4]

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[1] See Pont Vol. 10 Art. 2102 no. 122 (*Privileges et Hypotheques*) *Hyatt v. Herlihy*, Q. R. 50 S. C. 163 (C. R. 1916).

[2] *Louage*, 530.

[3] *Cie. Pontbriand v. Feeny*, Q. R. 36 S. C. 25 (S. C. 1909).

[4] *Bolduc In re*, Q. R. 19 S. C. 524 (S. C. 1901).

Where a property changes hands, and the lease in force at the time when notice was given by a third party has expired, and a new proprietor leases the property, and the same tenant remains in possession, the new proprietor, being wholly ignorant of the existence of any such notice, the privilege of the new proprietor is not affected, and a new notice must be given.[1]

Ibid—What constitutes sufficient notification—Specifying what effects belong to third person.

In order to benefit by the provisions of Art. 1622 C. Code a third person, owner of goods found on the leased premises, must, in notifying the landlord, specify what is his property; it is not sufficient that he inform the landlord that the greater part of the effects on the leased premises belong to him.[2] But where the landlord in such a case issues a conservatory attachment for rent against the effects on the leased premises (no rent being then due) by reason that the third person has commenced to remove indiscriminately all the effects furnishing the leased premises, an intervention by such third person demanding the annulment of the seizure, and enumerating those effects which belong to him, constitutes a sufficient notification to the landlord. But in such a case the intervenant is liable for the costs incurred by the landlord in making his seizure, and if such costs are not tendered with his intervention he will be condemned to costs of the contestation of his intervention.[3]

Who are third parties—Notice by married woman.

A wife separated as to property is a third party

[1] *Harbour Commissioners of Montreal v. Mathurin*, Q. R. 49 S. C. 272.

[2] *Mathieu v. Clifford*, Q. R. 19 S. C. 410 (C. R. 1901); *Gosselin v. Morin*, Q. R. 38 S. C. 385 (C. R. 1910). And see *Royal Trust Co. v. Keating*, Q. R. 48 S. C. 516 (S. C. 1915).

[3] *Mathieu v. Clifford, supra;* and see *Gosselin v. Morin*, Q. R. 38 S. C. 385 (C. R. 1910).

toward her husband. She can properly give to a landlord the notice mentioned in Art. 1622 C. Code, where she is the owner of the effects which garnish a house rented by her husband and occupied by both. But the following notice given by the husband, without it being established that the writing was to the knowledge of the wife, or at her request, or under her directions was held insufficient:—"According to our conversation this morning, I thought I would give you in writing the reasons why I wish the lease of No. 85 ——— ——— changed to Mrs. K.'s name. By marriage contract Mrs. K. owns everything in the house amounting to between four and five thousand dollars worth of property and pictures, and therefore is more responsible than I am."[1] Where the wife is not a party to the lease she is not bound by any of the terms or conditions thereof, consequently, where in the lease by the husband he declares that he is the sole and absolute owner and proprietor of all goods and effects garnishing the leased premises, and that the same are subject to the privilege of the landlord, this would not interfere with the effectiveness of her notification to the landlord that she was the proprietor of all the effects furnishing the house rented by her husband.[2]

Proof of Notification to Landlord and of Knowledge Acquired by Landlord.

The Courts are at variance regarding the manner in which the notification to the landlord by the third person, owner of the effects on the leased premises, should be made under Art. 1622 C. Code. In *Ouimet v. The Heirs Greene & Willis intervenant,*[3] decided by the Court of Review in 1909, Willis the intervenant claimed that he sent one of his employees to verbally notify the

[1] *Royal Trust Co. v. Keating,* Q. R. 48 S. C. 516 (S. C. 1915).

[2] *Ibid,* p. 517.

[3] Q. R. 37 S. C. 136 (C. R. 1909).

landlord that the piano in question upon the leased premises belonged to him and not the tenant. He also claimed to have sent a bailiff to serve a notice to the same effect upon the landlord, the bailiff duly making his return. Both of these facts were denied by the landlord, and the question arose whether proof of them could be made. In the bailiff's return it appeared that the notice had been served, not at No. 1219 St. Denis street, the domicile of the landlord, but at No. 1229, and that subsequently by means of an alteration the number 1219 had been substituted and put in place of No. 1229. The trial judge held that the notification spoken of in the article is simply a fact, proof of which could be made by any evidence, not only by obtaining a written acknowledgment, signed by the landlord, but by testimonial proof and even by presumption and held that the intervenants had proved the allegations of their intervention, and dismissed the objections to the proof made by the landlord plaintiff. This judgment was confirmed by the Court of Review.[1] Pagnuelo J. dissented, and held that as Article 1622 C. Code did not specify the nature of notice to be given, the rules of the common law should govern, and that there was not commencement of proof in writing in this case sufficient to let in testimonial proof. The dissenting judge also held that the third person giving the notification should make proof of his title, but admitted that the jurisprudence in France upon this question was divided.[2] In 1913 it was decided in *Archambault v. Gerard*[3] that service of a written notice informing a landlord that the piano in the tenant's premises is the property of a third person and is not subject to his privilege as landlord, may be proved by parol

[1] Dunlop and Demers J.J.

[2] Q. R. 37 S. C. at p. 137, citing Laurent, XXIX. no. 420.

[3] Q. R. 46 S. C. 346 (S. C. 1913); and see *Montpetit v. Bellemare*, 10 Que. P. R. 340. *Held* notice by registered letter sufficient. The post office books are official and form a commencement of proof by writing which enables the sender of a registered letter to prove its contents by parol evidence.

evidence. But in *Duperrault Pauze*[1] the Superior Court, Robidoux J, decided that a bailiff has not quality to serve a landlord with the notice given by a third person under Art. 1622 C. Code, hence no proof of service was made, and so held by Pagnuelo J. dissenting in the *Ouimet Case*. In 1910 the Court of Review would appear to have decided in *Gosselin v. Morin*,[2] affirming the judgment of the Superior Court, (Tellier J. dissenting), contrary to the *Ouimet Case* (*supra*), that the notification must be in writing, but agreeing that the "knowledge acquired" by the landlord could be proved by parol evidence. In any event, both notification and "knowledge acquired", it was held, must be based upon effects which are determinate.[3] The judgment in the *Gosselin Case* was based upon the opinions of DeLorimier and Charbonneau JJ, Charbonneau J., while agreeing generally with the formal judgment rendered by the Court, (not set out in the report) stated, at p. 386, that "without examining the thorny question as to whether notification of a title or right or knowledge of the same could be proved by parol testimony, I base my opinion upon the insufficiency of the notice, even supposing the notice was legally proved."[4] It is submitted that the judgment in the *Ouimet Case* is more in conformity with the spirit of Article 1622 as defined, *supra* at p. 113.

Effects transiently or accidentally on the premises—Goods on the premises by the consent of a third person expressed or implied.

"Effects" which are "only transiently or accidentally on the premises, as the baggage of a traveller in an inn, or articles sent to a workman to be repaired or to an auctioneer to be sold", are not subject to the landlord's

[1] Q. R. 25, S. C. 401 (S. C. 1904).
[2] Q. R. 38 S. C. 385 (C. R. 1910).
[3] *Ibid*, and *Mathieu v. Clifford*, Q. R. 19 S. C. 410 (C. R. 1901).
[4] *Ibid*. p. 386.

privilege under Art. 1622 C. Code. This enumeration of effects not subject to seizure by the landlord is only illustrative and not limitative.[1] Further, in order that the landlord's privileged right shall take effect upon the goods of third persons, such goods must be on the leased premises by their consent expressed or implied.

C. purchased an agricultural implement from G., a dealer in such things, with the understanding that it should be removed without delay. Shortly after the sale, C. went for it, but in consequence of snow having fallen and ice formed about the instrument, it was feared it might be injured by cutting it out, and it was allowed to remain until spring,—some months—when it was seized for rent due by G. The Court held that, under the circumstances, it was transiently and accidently on the premises, and not subject to the landlord's privilege.[2]

The landlord's privilege does not extend to a piano stored with the tenant, a piano dealer, by a third party.[3] Nor does the privilege extend to a piano temporarily placed in a concert room for an evening concert;[4] nor goods temporarily deposited in that part of a store leased as a bonded warehouse,[5] or goods temporarily stored in an ordinary warehouse;[6] nor deals manufactured for saw-logs and sent to a mill to be sawn;[7] nor to horses stabled at an hotel by a horse dealer;[8] nor the effects of boarders boarding with the tenant, provided, at the

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[1] *Ireland v. Henry*, Q. B. 1876, 20 L. C. J. 327.

[2] *McGreevy v. Gingras*, S. C. 1877, 3 Q. L. R. 196. Reversed in Review on points of procedure, 4 Q. L. R. 203.

[3] *Ireland v. Henry*, Q. R. 1876, 20 L. C. J. 327.

[4] *Pearce v. Mayor of Montreal*, 1859, 3 L. C. J. 122; *Brown v. Hogan*, S. C. 1854, 4 L. C. R. 414.

[5] *Eastty v. Fabrique of Montreal*, Q. B. 1867, 17 L. C. R. 418, 12 L. C. J. 11.

[6] *Renaud v. Hood*, Q. B. 1868, 12 L. C. J. 197.

[7] *Price v. Hall*, Q. B. 1876, 2 Q. L. R. 88, 10 R. L. 120.

[8] *Delvecchio v. Lesage*, S. C. 1879, 2 L. N. 251.

moment of moving in, they notified the landlord that the effects belonged to them and not the tenant,[1] and provided also that they do not furnish their own apartments, for in that case they would be considered as sub-tenants, and subject to the law applicable to them.[2]

But horses and vehicles on the premises leased, which were continuously in the possession of the husband of the tenant, though they were used by him in travelling most of the time, are subject to the privilege;[3] also a cart voluntarily left in the possession of a tenant by a third party during several months, provided that the landlord had no knowledge that the tenant was not the proprietor of the cart;[4] also effects loaned to a tenant for several months in the expectation that he would buy them;[5] or left with him on promise of sale, or sale with suspensive condition, the proposed vendor retaining the property in the goods;[6] also goods stored for deposit and sale on a wharf;[7] also moveables seized and sold by authority of justice at the instance of the landlord, and left by the purchaser in the house where they are so seized and sold.[8] It is otherwise where the privilege sought to be exercised over said goods relates to rent

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[1] *Bruneau v. Berthiaume*, Mag. Ct. 1890, 13 L. N. 322; *Clarke v. State*, S. C. 1892, Q. R. 2 S. C. 433; *Foisy v. Houghton*, Q. R. 12 S. C. 521 (S. C. 1897).

[2] *Aimong v. Cassidy*, S. C. 1888, 16 R. L. at p. 459. See *infra* pp. 211-212 as to subletting part of the premises and keeping boarders.

[3] *Thomas v. Coombe*, C. R. 1883, 7 L. N. 77.

[4] *Beaudry v. Lafleur*, C. R. 1880, 24 L. C. J. 150.

[5] *McKercher v. Gervais*, Q. R. 12 S. C. 336 (S. C. 1897).

[6] *Hyatt v. Herlihy*, Q. R. 50 S. C. 163 (C. R. 1916). A person who leaves with a tenant objects on trial, or with promise of sale, with suspensive condition, reserving his right of property in such object, is not a vendor who can exercise an action in resolution or in revendication under Arts. 1543, 1998 C. C. (*Ibid.*)

[7] *Jones v. Anderson*, Q. B. 1852, 2 L. C. R. 154; *Jones v. Lemesurier*, Q. B. 1840, 2 R. de L. 317. Goods of a third person in a leased store consigned to be sold at a fixed price are liable for rent. (*Goodrich v. Bodley*, 35 Louisiana Annual 525).

[8] *Leveille v. Labelle*, S. C. 1871, 16 L. C. J. 54. Moveables seized and sold by authority of justice, and left in the house where they are so seized and sold, will, nevertheless, remain liable for the rent due to the landlord of the house. *Leveille v. Labelle*, S. C. 1871, 16 L. C. J. 54.

which became due before the judicial sale.[1] The landlord's privilege for rent due before the date of the sale is converted into a privilege upon the proceeds of the goods sold, and they could not be sold twice for the same debt.[2]

If the landlord expressly renounces his right to seize the property of a third party on the premises leased by him, this renunciation is for the protection of the third party, and could not be made use of by the tenant for his advantage.[3]

Landlord's Privilege upon Effects of under-tenant.

The landlord's lien or privileged right includes also the effects of the under-tenant, but only in so far as he is indebted to the principal tenant,[4] which means that the under-tenant's effects are liable to the landlord's privilege for the amount due and to become due for the whole term of the undertenant's lease, less what he may already have paid thereon.[5] But as long as the lease is maintained and the landlord's security is not threatened, he can seize the under-tenant's effects only for the rent past due by him and not for rent to become due.[6] Where by the lease the principal tenant is forbidden to sublet, an under-tenant is toward the proprietor in the position of a third person whose effects have been deposited on the property leased with his consent, and consequently his effects will be liable for the whole rent of the original

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[1] *Vineberg v. Barton*, S. C. 1895, Q. R. 7 S. C. 448.

[2] *Ibid.*

[3] *Corse v. Hudson*, C. R. 1880, 3 L. N. 78; 2 L. N. 260.

[4] Art. 1621, 1639 C. Code.

[5] *Vinette v. Panneton*, C. R. 1889, M. L. R., 5 S. C. 318, 324. Art. 162 Custom of Paris says: "S'il y a des sous-locatifs, peuvent être pris leurs biens pour le dit loyer et charges du bail; et néanmoins leur seront rendus en payant le loyer pour leur *occupation*."

[6] *Vinette v. Panneton, supra*; *Sanarens v. True*, 22 Louisiana Annual 182; Art. 1639 C. C.

The French version of Art. 1639 reads:—"Le sous-locataire n'est tenu envers le locateur principal que jusqu'a concurrence du prix de la sous-location dont il peut etre débiteur au moment de la saisie," etc.

tenant and for other obligations of the lease;[1] excepting those goods which, by the Code of Procedure, Arts. 598, 599, are made exempt from seizure.[2] The same rule applies where the tenant is allowed to sublet, but sublets to a person for purposes of prostitution. In such a case the sub-tenant is in the position of a mere third person whose effects are on the leased premises with his consent, and his effects will be liable to the landlord's lien for the rent and damages for inexecution of the obligations of the principal tenant.[3]

If the landlord has the lease of the principal tenant cancelled, because the latter has sublet without his consent and against the prohibition in the lease, the landlord can still retain and exercise his privilege upon the effects of the under-tenant, the principal tenant having left the premises with his effects, and can have the attachment declared good (*tenante*) for rent to become due until the expiration of the period of the lease.[4] But if the landlord, in such case, should choose not to exercise his right to have the lease cancelled, he would not have the right to sue out an attachment for rent not due, where sufficient effects belonging to the principal

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[1] *Arnoldi v. Grimard*, C. Ct. 1874, 5 R. L. 748; *Smith v. Leclaire*, S. C. 1879; *Sœurs de la Charité, etc., v. Yuile*, Q. B. 1875, 20 L. C. J. 329; *Lampson v. Nesbitt*, C. Ct. 1863, 13 L. C. R. 365; *Boyer v. McIver*, S. C. 1877, 21 L. C. J. 160. Confirmed in Review, 22 L. C. J. 104; *contra Barry v. Bowker*, S. C. 1889, 14 R. L. 289; but for rent to become due the attachment will be declared "tenante" only. *Catudal v. Cool*, S. C. 1891, 21 R. L. 494.

The goods of a third person contained in the leased house by his consent, under an agreement with the lessee, that no rent or other consideration was to be paid for the occupancy, are not the goods of an "under-tenant" and are affected by the landlord's privilege (University Publishing Co. *v.* Piffet, 34 Louisiana Annual 602); but it was held by Pothier that where such persons occupy a definite portion of the house free of rent, the furniture, etc., will be held liable for the principal tenant's rent in proportion to the part of the house occupied by them (4 Pothier 236).

[2] See *infra*, p. 123

[3] *Montmarquette v. Berman*, Q. R. 29 S. C. 193.

[4] *Catudal v. Cool*, S. C. 1891, 21 R. L. 494.

tenant and under-tenant are left on the premises to guarantee the rent.[1]

The sub-tenant cannot set up payments made in advance to the principal tenant, unless made by virtue of a stipulation in the lease, or in accordance with the usage of the place.[2]

It would appear that Arts. 1621, 1639 Civil Code, which limit the liability of the under-tenant's effects for the landlord's privilege to the amount in which he is indebted to the principal tenant, are not applicable to the case where the principal tenant wholly assigns his lease to a sub-tenant for a less rent than he himself agreed to pay. In this case the sub-tenant's effects would be liable for the whole of the rent due and to become due equally as if he were the principal tenant.[3]

But where, with the consent of the landlord, a new tenant is substituted for his former tenant, and the new tenant, with the knowledge and acquiescence of the landlord purchases the effects of the former tenant which furnish the leased premises, the landlord, after eight days from the taking possession by the new tenant, loses his privilege on such effects for arrears of rent due by the former tenant, even though such effects have never been displaced, for the new tenant is in the position of a third person in good faith.[4]

Exemptions from seizure.

Certain effects of householders are rendered absolutely exempt from seizure whether for the claim of the land-

[1] *Vinette v. Panneton*, S. C. 1889, M. L. R., 5 S. C. 318.
The goods of a sub-lessee, on the leased premises, are only liable to seizure for rent past due. *Sanarens v. True*, 22 La. Ann. 182, C. Code Louisiana, Art. 2676.

[2] Art. 1639 C. Code; *Wilson v. Pariseau*, S. C. 1856, 6 L. C. R. 196.

[3] *Wilson v. Pariseau*, S. C. 1856, 6 L. C. R. 196; *Lampson v. Nesbitt*, C. Ct. 1863, 13 L. C. R. 365. Both decided under Art. 162 Custom of Paris. See Ferriere, Coutume de Paris, vol. 2, p. 1063, no. 16.

[4] *Banque du Peuple v. Marquis*, Q. R. 12 S. C. 378.

lord[1] or for any other claims, privileged or otherwise,[2] with the exception hereafter stated.

By article 598 of the Code of Procedure the debtor may select and withdraw from seizure:

1. The bed, bedding and bedsteads in use by him and his family.
2. The ordinary and necessary wearing apparel of himself and his family.
3. Two stoves and their pipes, one pair of andirons, one pot hook and its accessories, one pair of tongs and one shovel.
4. All the cooking utensils, knives, forks, spoons and crockery in use by the family, two tables, two cupboards or dressers, one lamp, one mirror, one washing stand with its toilet accessories, two trunks or valises, the carpets or matting covering the floors, one clock, one sofa, twelve chairs, *provided that the value of such effects does not exceed the sum of fifty dollars.*
5. All spinning wheels and weaving looms intended for domestic use, one axe, one saw, one gun, six traps, such fishing nets, lines and seines as are in common use, one tub, one washing machine, one wringer, one sewing machine, two pails, three flat irons, one blacking brush, one scrubbing brush, one broom.
6. Fifty volumes of books and all drawings and paintings executed by the debtor or the members of his family for their use.
7. Fuel and food sufficient for the debtor and his family for three months.
8. One span of plough horses or a yoke of oxen, one horse, one summer vehicle and one winter vehicle, and the harness used by a carter or driver for earning his livelihood; one cow, two pigs, four sheep, the wool from such sheep, the cloth manufactured from such wool, and the hay and other fodder in-

[1] *Michon v. Venne*, C. R. 1886, M. L. R. 2 S. C. 367.
[2] Arts. 598, 599, C. P.

tended for feeding the said animals; and moreover, the following agricultural tools and implements: one plough, one harrow, one working sleigh, one tumbril, one haycart with its wheels, and all harness necessary and intended for farming purposes.

9. Books relating to the profession, art or trade of the debtor, to the value of two hundred dollars;
10. Tools and implements or other chattels ordinarily used in his profession, art or trade to the value of two hundred dollars.[1]
11. Bees to the extent of fifteen hives.
12. The things mentioned in Articles 1743 to 1748 of the Revised Statutes and their amendments.

Nevertheless, the things and effects mentioned in paragraphs 4, 5, 6, 7, 8, 9 and 10 are not exempt from seizure and sale when the suit is to recover the price of their purchase, or when they have been given in pawn.[2]

The law requires that the debtor must make his choice at the time of seizure, of those effects enumerated above (as, for instance, tools of trade up to the value of $200) for which he claims exemption up to the stated limit.[3] But the bailiff must also offer to the person whose effects are seized his choice in this respect.[4]

The following moveable effects are exempt from seizure.[5]

2. Family portraits.
3. Objects given or bequeathed upon the condition of their being exempt from seizure.
5. All vessels, boats, and other fishing craft, tackle, nets, seines, lines or other fishing apparatus, and provisions belonging to any fisherman, and

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[1] A pastry oven is an implement of a confectioner's trade, and therefore exempt from seizure. *Roy v. Lefebvre*, S. C. 1894, Q. R. 6 S. C. 485. A "Goodyear" machine valued under $200, used by the tenant of a room for earning his living is exempt under this paragraph. *Thurston v. Hughes*, Q. R. 16 S. C. 472.

[2] Art. 598 C. P.

[3] *Ross v. Lemieux*, S. C. 1886, M. L. R., 2 S. C. 272.

[4] *Lanthier v. Thouin*, C. Ct. 1892, Q. R. 2 S. C. 157.

[5] Art. 599 C. P.

necessary for his subsistence and that of his family or for his fishing operations, such effects, however, may be seized and sold for their purchase price, but not between the first day of May and the first day of November.

There is a condition under which the tenant may lose his right to avail himself of the exemption from seizure provided for under Articles 598 and 599 paragraph 2. For instance, under Article 1089 C. P. relating to certain proceedings between landlord and tenant, it is provided that:—

"Whenever any rent is due by a lessee and is not paid when due the proprietor or lessor may notify the lessee in writing, to quit the premises leased within a delay which shall not be less than three clear days; and if he quits within the said delay the rent due is remitted him.

"If the lessee refuses or neglects to comply with the said notice within the specified delay, the lessor may, by suit before a competent court, have all the moveables, garnishing the leased premises, and which have not been removed within the specified delay attached, and have them sold in the ordinary manner, without the said lessee having any right to avail himself of the exemption from seizure provided for under Articles 598 and 599, paragraph 2."

"The lessor need not avail himself of the benefit of this Article, and in that case he retains all his rights and recourse as though this Article did not exist."

The question has arisen as to whether the right to select and withdraw from seizure the effects detailed in Art. 598 C. P. can be exercised by others than the debtor. That Article says:—"The debtor may select and withdraw from seizure." It has been held by Davidson J. in *Hamilton v. Dwyer*,[1] that the effects of a person who was occupying the premises virtually as an under-tenant,

[1] Q. R. 16 S. C. 469 (1899), citing *Belanger v. Roy* ,S. C. 1879, 2 L. N. 378.

but who, in view of a prohibition to sublet, and the fact that the landlord did not know of his occupancy, was merely a third party, could not select and withdraw from the seizure of his effects by the landlord those effects which can be selected and withdrawn by a debtor whose goods are seized, and which, up to the value of $200, are used by him in earning his livelihood. And it was so held in *Bartel v. Desroches.*[1] But in *Battison v. Potvin,*[2] Rochon J held that the landlord's privilege does not extend to effects exempt from seizure found on the leased premises and which belong to a third party; that the law does not distinguish between the persons who can demand the withdrawal from seizure of effects which are declared exempt, and the owner can demand their withdrawal, instead of the tenant. But this was a different case to the foregoing, for the opposant was the tenant's creditor for the goods under seizure, and in demanding that the effects which he had sold to the tenant, up to the value of $200, be withdrawn from seizure, as being used by the tenant in earning his livelihood, he was merely exercising the right of his creditor under Art. 1031 C. Code.

Under the former Code of Procedure, the position was somewhat different, for Art. 873 of that Code relating to attachment for rent, as amended by Art. 5973 R. S. Q., enacted that:—"the moveables and effects mentioned in Article 556 must be substracted from the sale." This provision was omitted in the corresponding Articles of the present Code of Procedure (952-955). Under the former Code of Procedure as thus amended, it was held that the privilege granted by Art. 873 of substracting from sale the effects mentioned in Art. 556, could be exercised by a third person who is the owner of any effects on the leased premises, which, had they belonged to the tenant could have been withdrawn by him.[3]

[1] Q. R. 4 S. C. 60 (S. C. 1893).

[2] Q. R. 27 S. C. 165 (1905).

[3] *Herron v. Brunette,* S. C. 1894, Q. R. 6 S. C. 318; *Brophy v. Fitch* Q. R. 7 S. C. 173 (C. R. 1895).

Unless the judgment debtor consents, the sale of the effects seized must not proceed beyond the amount necessary to pay the debt in principal, interest and costs; to this end the judgment debtor has a right to determine the order in which the effects are to be put up for sale.[1] It is doubtful whether a third party can exercise this right.[2]

As to the renunciation by the tenant of the exemptions declared in his favor the decisions are conflicting,[3] but the better opinion seems to be that such a renunciation would be immoral and against public order, and therefore void, only where it relates to those articles of which, from motives of humanity, it would be conscienceless to deprive the debtor; such as bedding, ordinary wearing apparel, and food for the family.[4] The renunciation by the tenant will be maintained where it is a question of a lease of an office, and the effects seized are the relatively luxurious furnishings of an office.[5] But it is to be noted that even Article 1089 C. P. deprives the tenant of the right to avail himself of the exemptions from seizure provided by Arts. 598 and 599 paragraph 2 where rent is overdue and the landlord, availing himself of the short delay for expulsion and compensating advantage to the tenant provided by Art. 1089 C. P., the tenant refuses or neglects to comply with the landlord's notice to vacate within the specified delay.

Books of account, titles of debt, and other papers in the possession of the debtor, saving the exceptions mentioned in Article 641, are exempt from seizure.[6] The exceptions mentioned in Art. 641 C. P., are debentures, promissory notes, whether negotiable or not, shares in

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[1] Art. 664 C. P.

[2] *Malette v. Patenaude*, S. C. 1895, 2 Rev. de Jur. 1 affirmative; *contra Langhoff v. Boyer*, Q. R. 9 S. C. 216 (S. C. 1895).

[3] *Brodeur v. Rogers*, C. Ct. 1885, 30 L. C. J. 2; *Robitaille v. Bolduc*, C. Ct. 1878, 4 Q. L. R. 179.

[4] *New York Life Ins. Co. v. Garceau*, Q. R. 16 S. C. 247 (S. C. 1899).

[5] *New York Life Ins. Co. v. Garceau, supra.*

[6] Art. 599 (12) C. P.

corporations and other instruments, payable to order or to bearer, bank-notes included. These may be seized like all other moveable effects belonging to the debtor.[1]

3. REMOVAL OF EFFECTS FROM THE LEASED PREMISES; RIGHT OF LANDLORD TO FOLLOW THEM. (*Saisie Gagerie par droit de suite*).

The landlord may follow and seize in reception, even for amounts not yet due, the moveable effects which were in the house or premises leased (except merchandise when sold),[2] when they have been removed without his consent; but he must do so within *eight days* after their removal. The attachment in reception must be served upon the new landlord, who must also be summoned to show cause against its execution.[3]

In regard to rent to become due, the landlord, unless he demand the resiliation of the lease, or unless the tenant loses the benefit of the term by reason of his insolvency or the conditions of the lease,[4] cannot realize a money payment in advance by having the goods seized in reception sold at bailiff's sale; the court will pronounce judgment condemning the defendant to pay without delay the rent due, and that to become due must be paid at the proper periods; and the attachment in reception will be declared *tenante* until the judgment is declared entirely satisfied.[5]

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[1] Art. 641 C. P.

[2] Article 1623 C. Code is not restricted to daily sales of merchandise in detail, but includes the sale *en bloc* of goods which have been damaged by fire. *Liggett v. Viau*, Q. R. 18 S. C. 201.

[3] Art. 953 C. P.; Art. 1623 C. Code.

[4] See *Pare v. Warwick Pants Co.*, Q. R. 47 S. C. 60.

[5] *Simmons v. Gravel*, C. Ct. (Que.), 13 Q. L. R. 263; *Sansfacon v. Boucher*, C. Ct. 1886, 6 Q. L. R. 384; *Joseph v. Smith*, S. C. 1880, 3 L. N. 115; *Catudal v. Cool*, S. C. 1891, 21 R. L. 494.

The lessor of premises leased for a special business, who brings suit with attachment in reception for rent due and to rescind the lease, has a further right to recover by the same action the damages arising from the likelihood of the premises remaining unoccupied for a length of time, *Darwent v. Montbriant*, Q. R. 31 S. C. 54 (S. C. 1907). See further Ch. vi., *post*.

It has been held that the landlord's right to follow by *saisie-gagerie par droit de suite* the effects which have been removed from his leased premises is absolutely extinguished after the expiration of the eighth day from their removal, even if they have been fraudulently given in pledge to a third party by the tenant, and even as against the tenant.[1]

But in a comparatively recent case[2] the Court of Review held that the words occurring in Article 1623 Civil Code "within eight days after they are taken away" must not be construed too strictly, and held that where effects furnishing the leased premises have been secretly and fraudulently removed by a third party, the delay for seizing such effects by attachment in recaption runs only from the date the landlord is informed of their removal. But when he is informed of their removal he must, to retain his privilege, seize in recaption the effects so removed within eight days; after that delay he will have lost his privilege and will be without recourse in damages against the third party guilty of the wrongful removal, for the loss of his privilege would arise from his own negligence and not from the fault of the third party. But upon an inscription in law, in the same case, the same Court, differently constituted, held that a third party who secretly and fraudulently in collusion with the tenant removes all the latter's stock in trade, which were subject to the landlord's privilege, is liable for damages thereby caused to the landlord for loss of rent.[3] The judgment of the Court of Review in Q. R. 39 S. C. 218, was based upon the landlord's demand as set out in his declaration, viz., a claim of

[1] *Cuddy v. Kamm*, S. C. 1895, Q. R. 9 S. C. 32; *Williams Mfg. Co. v. Willock*, C. Ct. 1880, 13 L. N. 145; *Leveillee v. Couillard*, C. Ct. 1886, 14 R. L. 653; *Emmans v. Savage*, Q. R. 24 S. C. 104 (S. C. 1903); *Contra, Thouin v. Rosaire*, 7 L. N. 287.

[2] *Lallemand v. Larue*, Q. R. 39 S. C. 218 (C. R. 1910), reversing Guerin J., and citing French authorities, notably Guillouard (*Priv. et Hyp.* No. 352) to the same effect, and the Court of Cassation 1895-1-88.

[3] *Lallemand v. Larue*, Q. R. 35 S. C. 432 (C. R. 1908).

damages against the third party fraudulently removing the effects. The Court did not have to consider what would have been the result if the landlord had not been adjudged guilty of negligence, and a third party had fraudulently deprived him of all means of exercising his lien. If the landlord in this case had established that the goods surreptitiously removed were not at the date of taking action in the possession of defendant, and that he could not have usefully exercised his recourse by *saisie-gagerie*, the result might have been otherwise.

And it was held in an earlier case,[1] that the fraudulent removal of goods which are subject to the landlord's privilege, does not deprive the latter of his recourse by way of attachment in reaption, saving the rights acquired by a new landlord or a third party where the seizure is taken out more than eight days after the removal of the goods. And held that the party fraudulently removing effects from the leased premises cannot effectively set up that the eight days having expired the landlord has lost his recourse by *saisie-gagerie*.

The delay of eight days for making an attachment in reaption may be regarded as a short prescription.[2] And prescription does not run where there is an impossibility of acting.[3] Thus where there is an attachment in reaption taken out the last day of the delay allowed by law, and the plaintiff could only execute it the following day, because the defendant refused to open his door, the new landlord cannot take advantage of the expiration of the delay to have the attachment quashed.[4]

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[1] *Hart v. Lachapelle*, Q. R. 12 S. C. 428, 1897.
The tenant, his surety, or any person who fraudulently removes to another place the effects which are subject to the landlord's privilege, cannot take advantage of the fact that the delay of Article 1623 for following in reaption has expired, the new landlord alone can do this. *Brunet v. Raynault*, Q. R. 49 S. C. 228 (S. C. 1915).

[2] See *Renaud v. Aumais*, Q. R. 49 S. C. 40 (S. C. 1915); *Lallemand v. Larue*, Q. R. 39 S. C. at p. 224.

[3] *Renaud v. Aumais, supra*; *Lallemand v. Larue, supra*; Art. 2232 C. C.

[4] *Renaud v. Aumais, supra.*

Article 1623 C. Code states that "In the exercise of the privileged right, the lessor may seize the things which are subject to it upon the premises, or within eight days *after they have been taken away*," *etc.* The words italicized do not mean only a physical removal and displacement, but also include a constructive change of possession, as may result from a sale. Hence, in the case of a lease that expires on the 30th of April, if the goods subject to the landlord's privilege are sold, on or before that day, his right to seize them, under the above article, is lost on the 9th May, although they are still on the leased premises.[1]

The recourse of seizing in recaption is available only where the effects *have been* removed, and not where the tenant is immediately about to make such removal.[2] As to *saisie-gagerie conservatoire* see *ante* p. 107.

Where moveables attached by *saisie-gagerie* in an action for rent by the landlord are removed into premises belonging to a third party, a second action will not lie to bring such party into the suit and to preserve the privilege of the landlord against him; such a proceeding is useless for such purposes; and if brought will be dismissed as such, for the result of Articles 1623 C. Code and 953 C. P. is, that the removed effects having been seized before they left the seized premises, and being then under the charge of the guardian, the proprietor of the premises to which they were removed could acquire no privilege upon them, which could rank before the plaintiff's. The effect of the first seizure could not in any way be destroyed or impaired by the removal of the effects which were in custody of the Court.[3]

[1] *Holstein v. Knopf*, Q. R. 44 S. C. 49 (C. R. 1913). In *Emmans v. Savage*, *supra*, it was held that the landlord's privilege ceases where he has not seized the effects which furnished the leased premises within eight days after their removal, even where the tenant who is not the owner of the effects removed, pledged them to the landlord, and the real owner could revendicate them.

[2] *Chasse v. Desmarteau*, Q. R. 14 S. C. 65 (S. C. 1898).

[3] *Simard v. Champagne*, Q. R. 30 S. C. 505 (C. R. 1906); *Gagnon v. McLeish*, K. B. 1811, 2 R. de L. 440; *Chausse v. Christin* Q. R., 3. S. C. 40. But see *Johnson v. Bonner*, Q. B. 1857, 1 L. C. J. 116; 7 L. C. R. 80 reversing 6 L. C. R. 42.

Where the recourse by attachment in recaption becomes ineffective, it has been held that the landlord may resort to other more effectual remedies permissible under the Code of Procedure.[1] Thus where the tenant transfers his stock in trade, while notoriously insolvent, to one of his creditors, who is aware of his insolvency, the landlord may, within eight days, attach by garnishment the stock transferred to the creditor. The sale being declared null and void, the garnishee was ordered to restore them or pay the value thereof to the landlord.[2] It will be otherwise if the charge of fraud is not proved, and in such a case the attachment by garnishment will not serve as a substitute for the attachment in recaption.[3] Where a tenant has removed his effects at night time and refuses to divulge their present location or to pay the landlord's claim, the remedy of *capias* is open to the landlord.[4] Or, having discovered where the goods have been removed to, he can, in addition to the *capias*, take an attachment by garnishment in the hands of the party having possession of the goods.[5] Where a third party takes away effects garnishing leased premises, and refuses

[1] *Bastien v. Richardson*, Q. R. 35 S. C. at p. 483 (C. R. 1908). *Hyatt v. Herlihy*, Q. R. 50 S. C. at p. 170 (C. R. 1916). See *Auld v. Laurent*, Q. B. 1864, 8 L. C. J. 146, reversing C. Ct. 7 L. C. J. 49, Chief Justice Lafontaine was in favor of the judgment in appeal, but died before the judgment was delivered (8 L. C. J. at p. 152).

In *Hyatt v. Herlihy*, Q. R. 50 S. C. at p. 170 (C. R. 1916) the Court said:—"La procédure suivie en cette cause n'est pas très usuelle. On a joint une saisie-arrêt avant jugement a la saisie-gagerie ordinaire, et on a donné un affidavit en conséquence. Les mis en cause (Henry Morgan & Co.) sont appelés à déclarer quels meubles ayant garni les lieux loués, ils ont en leur possession. Il n'y a point incompatibilité entre la saisie-gagerie et la saisie-arrêt avant jugement. C'est une procédure conservatoire; on aurait du se servir des termes de saisie-conservatoire, et non pas de saisie-arrêt avant jugement (Art. 955, paragraph 3). On fait mettre sous la main de la justice un bien-meuble sur lequel on a des droits privilégiés, pour assurer l'exercise de ces droits." See further as to *saisie-gagerie conservatoire, ante* p. 107.

[2] *Lyman v. McDiarmid*, S. C. 1883, 6 L. N. 162.

[3] *Bastien v. Richardson*, Q. R. 35 S. C. 481 (C. R. 1908).

[4] *Mitcheson v. Burnett*, S. C. 1892, Q. R. 2 S. C. 260; *St. Michel v. Vidler*, S. C. 1885, M. L. R. 1 S. C. 163; *Cowans v. Briere*, C. R. 1889, 33 L. C. J. 103.

[5] *St. Michel v. Vidler, supra.*

to indicate these effects to the bailiff who is equipped with a writ of attachment in recaption, thus rendering impossible their effective seizure, it was held that the landlord could issue a writ of attachment by garnishment against such third party, as the best remedy available for preserving his privilege on the effects and having them brought under the hands of the law and sold accordingly.[1]

Where a tenant has removed his effects from the premises leased, on account of their becoming uninhabitable by fire, an attachment before judgment in the hands of the auctioneer, to whom the effects have been taken to be sold on account of damage thereto by the fire, will not lie.[2]

The mere fact that a tenant is indebted to his landlord for rent will not prevent him from selling the effects in the premises to a third party. Such sale is, however, subject to the landlord's right of recaption within eight days, and in order to vitiate the sale the right must not only be exercised to the extent of seizing the removed effects, but it must be prosecuted to judgment.[3] See *supra* p. 132, where the effects sold are left on the premises.

The landlord's privilege subsists on effects which the landlord, with the consent of the outgoing tenant, takes into his own possession as security for the amount due for rent.[4] But if, instead of keeping the effects in his own possession, they are deposited in the hands of a third party, with the written understanding that the landlord shall be allowed to exercise his privilege thereon after the expiration of eight days, this agreement will not hold as against an intervening party owner of the

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[1] *McDonald v. Meloche*, Q. R. 11 S. C. 318 (S. C. 1896).

[2] *Perrault v. Tite*, C. R. 1896, Q. R. 9 S. C. 260.

[3] *Archibald v. Shaw*, C. Ct. 1869, 14 L. C. J. 277; confirmed in Review 28th June, 1870.

[4] *Williams Manufacturing Co. v. Willock*, C. Ct. 1890, 13 L. N. 145. See also *Emmans v. Savage*, Q. R. 24 S. C. 104 (S. C. 1903).

effects when they are seized after the expiration of eight days.[1]

4. RANKING OF THE LANDLORD'S PRIVILEGE.

The landlord cannot oppose the seizure and sale of the moveable property subject to his privileged claim or lien; he can only exercise such privilege upon the proceeds of the sale.[2] Four days after the sale the bailiff pays the moneys realized, after deducting the duties thereon and taxed costs, to the seizing creditor, if no opposition for payment has been received; otherwise he must return them into court, to be adjudged to such persons as are thereto entitled.[3] Within six days after the sale, the bailiff must return the writ with all his proceedings thereunder into the office of the Court.[4] When the moneys levied have been returned into Court, the seizing creditor has a right to be paid in preference to all other chirographic creditors, saving the right of a prior seizing party for his costs, the case of insolvency of the debtor, and of the case of privileged claims.[5]

"The claims which carry a privilege upon moveable property are the following, and when several of them come together they take precedence in the following order, and according to the rules hereinafter declared, unless some special law derogates therefrom."[6]

The following privileges are superior to that of the landlord:—

1. Law costs and all expenses incurred in the interest of the mass of the creditors.[7] But only such costs as

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[1] *Hearn v. Vezina*, C. Ct. 1880, 6 Q. L. R. 93.

[2] Art. 646 C. P. See *Pare v. Warwick Pants Co.*, Q. R. 47 S. C. at p. 66.

[3] Art. 670 C. P.

[4] Art. 671 C. P.

[5] Art. 672 C. P.

[6] Art. 1994 C. Code.

[7] Art. 1994 C. Code.

"Law costs are all those incurred for the seizure and sale of the moveable property and those of judicial proceedings for enabling the

are incurred in the Court of first instance.[1] When the suit has been against a firm, the plaintiff's privilege for costs has priority even as regards the personal effects of the individual members of the firm, over the lien of the landlord for rent of premises leased to such members.[2] The above law costs and expenses do not include the curator's costs, where the abandonment is made after the landlord's attachment,[3] or where, being made before the attachment the curator had not then taken possession; the landlord's privilege is superior to such costs,[4] but otherwise as to costs of sale of the effects which

creditors generally to obtain payment of their claims." Art. 1995 C. Code.

The only law costs having priority over a *special* privilege are those incurred in the interest of such privileged creditor and for the preservation and realization of his *gage*. See *Anderson v. Hood* reported in Appendix, Part II.

"The expenses incurred in the interest of the mass of the creditors, include such as have served for the preservation of their common pledge" Art. 1996 C. Code. See *Lester v. Turcotte* Q. R. 43 S. C. 385 (C. R. 1913) holding that where the owner of horses seized and placed under judicial control has been appointed voluntary guardian and afterwards assigns his property for benefit of creditors, the trader who sells him fodder in the interval between the seizure and the assignment cannot claim that such sale was made in the common interest of the creditors and had served to preserve their common security, in order to claim the privilege provided by Art. 1994 C. Code, especially if he was not aware of the seizure and gave credit to the owner as such and not as guardian.

The following order is observed as regards the collocation of judicial costs:

1. Costs of seizure and sale;
2. The duty payable upon moneys levied and paid into Court;
3. The fees of the officer receiving moneys levied or paid in;
4. The fees upon the report of distribution;
5. The fees of the advocate prosecuting the distribution;
6. Costs, subsequent to judgment, incurred in order to effect the seizure and sale, and according to the priority of date, or of privilege when there are several seizing creditors; the costs of a prior seizing party have a preference over those of a subsequent one; nevertheless, if two or more units of execution issue upon judgments rendered on the same day against the same debtor, the costs thereon are paid concurrently;
7. Costs of seals or of inventories, when ordered by the Court;
8. Costs of suit of the seizing creditor; Art. 676 C. P.

[1] *Beaudry v. Dunlop & Lyman*, Q. B. 1887, M. L. R., 3 Q. B. 278.
[2] *Ib.*
[3] *De Bellefeuille v. Desmarteau*, Q. B. 1887, M. L. R., 3 Q. B. 303, 31 L. C. J. 301, 15 R. L. 544.
[4] *McWilliam v. Osler*, S. C. 1892, Q. R. 2 S. C. 126.

are subject to his privilege, costs of inventory thereof, and distribution of proceeds of sale thereof.[1]

This is a special privilege only.

2. Tithes.[2] (These only affect farm leases.)

3. The claims of the vendor.[3] But they only take precedence of the landlord's claim where the goods are sold for cash, and then only within eight days after the sale, or, in case of insolvency, thirty days.[4] This is a special privilege only.

4. The claims of creditors who have a right of pledge or of retention,[5] provided their right is still subsisting, or could have been claimed at the time of the seizure if the thing has been sold.[6] This is a special privilege only.

5. Funeral expenses,[7] which include only what is suitable to the station and means of the deceased, including the mourning of the widow.[8] This privilege extends to all the moveable property of the debtor.

6. The expenses of the last illness,[9] which include the charges of the physicians, apothecaries and nurses during the illness of which the debtor died. In cases of chronic disease the privilege avails only for the expenses during the last six months before the decease.[10] This privilege extends to all the moveable property of the debtor.

[1] *Poulin v. St. Germain*, Q. R. 11 K. B. 353 (1900).
See *Anderson v. Hood* reported in the Appendix, Part II.

[2] Arts. 1994, 1997 C. Code.

[3] Arts. 1994-2000 C. Code.

[4] Arts. 1998 as amended to date, 1999, 2000 C. Code. The lessor's privilege upon moveables garnishing the leased premises is superior to that of the unpaid vendor of such moveables. So the latter, who is also lessor, cannot apply to the payment of his unpaid claim the proceeds of sale of such moveables garnishing leased premises, to the detriment of a third party whose effects are also upon the premises leased, and would, in case of non-payment of the rent, become liable therefor. *Valliere v. Carrier*, S. C. 1894, Q. R. 6 S. C. 1, confirmed in Review 30th June, 1894. See *Pare v. Warwick Pants Co.*, Q. R. 47 S. C. at p. 65.

[5] Art. 1994 C. Code.
[6] Art. 2001 C. Code.
[7] Art. 1994 C. Code.
[8] Art. 2002 C. Code.
[9] Art. 1994 C. Code.
[10] Art. 2003 C. Code.

7. Municipal taxes.[1] This privilege extends to all the moveable property of the debtor. The privileges of the Crown are defined by special statutes.[2]

But where goods are confiscated for contravention of the revenue laws, or for crime, the landlord still retains his privilege for rent thereon.[3]

8. Eighth in rank comes the claim of the landlord in accordance with Article 2005 C. Code. This has been explained *ante* pp. 106, 108. This privilege of the landlord's is a special one and extends only to those effects of his tenant over which he has retained his privileged right or lien, as before explained. The privileges specified under the numbers 5, 6, 7, 9 and 10 of Article 1994 C. C. extend to all the moveable property of the debtor.

8a. The owner of a thing who has lent, leased or pledged it, and who has not prevented its sale, has a right to be paid the proceeds of its sale, after the claims of law costs and expenses incurred in the interest of the mass of the creditors, as explained in Articles 1995, 1996 C. C., and the claims of the landlord have been collocated.[4] The same rule applies to the owner of a thing which has been stolen, who would not have lost his right to revendicate it, had it not been judicially sold.[5]

The owner of property seized under writ of *saisie-gagerie* and subsequently sold with other property assigned by the curator of defendant's estate, has a right to claim the price by privilege if the other property has produced an amount sufficient to pay the landlord seizing in full. And it matters not that in his claim filed he did not invoke such privilege nor produce evidence to establish his rights. He is still in a position to contest the collocation.[6]

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[1] Arts. 1994, 2004 C. Code.

[2] Art. 2006a C. Code.

[3] *Rasconi v. Poupart*, S. C. 1892, Q. R. 1 S. C. 307; *Dumphy v. Kehoe*, S. C. 1891, 21 R. L. 119. See now Art. 1033 Criminal Code.

[4] Art. 2005a.

[5] *Ibid.*

[6] *Lester v. Turcotte*, Q. R. 43 S. C. 385 (C. R. 1913).

9. Domestic servants and hired persons are next entitled to be collocated by preference upon all the moveable property of the debtor for whatever wages may be due to them, for a period not exceeding one year previous to the time of the seizure or of the death. Clerks, commercial travellers, apprentices and journeymen are entitled to the same preference, but only upon the merchandise and effects contained in the store, shop or workshop, in which their services were required (for a period of arrears not exceeding three months). Employees of railway companies, engaged in manual labour, have also the same privilege upon all the moveable property of the company, for arrears not exceeding three months. Those who have supplied provisions have likewise a privilege, concurrently with domestic servants and hired persons, for the supplies furnished during the last twelve months.[1]

10. The claims of the Crown against persons accountable for its moneys.[2] This privilege extends to all the moveable property of the debtor.

In addition to the foregoing, the Code provides that mutual fire insurance companies have a privilege upon the moveable property of the insured for the payment of assessments which may be imposed on the deposit notes of the members, which privilege takes rank immediately after municipal taxes and rates and remains in force for the same time.[3] See also Arts. 1994a and 1994c.

For any balance remaining due to the landlord after privileged claims have been satisfied he ranks as an ordinary or chirographic creditor.

5. EXTINCTION OF THE PRIVILEGE.

The interpretation put upon the extension of the landlord's privileged claim to eight days after the effects

[1] Arts. 1994, 2006 C. Code.
[2] Art. 1994 (10).
[3] Art. 1994b C. Code.

furnishing the leased premises have been "taken away" has already been dealt with.[1]

Express renunciation of the privilege by the landlord will also extinguish it, but only for the period of the lease; it will revive upon continuation.[2] The privilege ceases where the effects subject to it are destroyed by fire; consequently it will not extend to the insurance on such effects.[3] A landlord who sells the leased premises thereby loses his privilege on the moveables therein for rent due at the time of the sale.[4] Also where, having seized and sold effects of his tenant, and having bought them in at the judicial sale, the landlord sells them to a third party who leaves them on the premises in the expectation of reselling them to the landlord, he loses his privilege upon such effects for rent due since the sale.[5]

The landlord's privilege for rent to become due may be lost where he allows his tenant, a trader, to form a partnership, and transfer his effects to the partnership which carries on the business in the leased premises, and the partnership notifies the landlord under article 1622 C. C. of its ownership.[6]

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[1] *Supra* pp. 130 *et seq.*

[2] *Shaw v. Messier*, S. C. 1894, Q. R. 5 S. C. 468.

[3] *Wood v. Lamoureux*, S. C. 1885, 15 R. L. 313; *Voscelles v. Laurier*, S. C. 1895, Q. R. 8 S. C. 404; *Vaughan v. Pelletier*, Q. R. 15 S. C. 123 (S. C. 1898).

[4] *Lamb v. Wittingham*, Q. R. 37 S. C. 267 (S. C. 1909).

[5] *Cie. Pontbriand v. Feeny*, Q. R. 36 S. C. 25 (S. C. 1909).

Where, with the consent of the landlord, a new tenant is substituted for the former one, and the new tenant, with the knowledge and acquiescence of the landlord, purchases the effects of the former tenant which were on the leased premises, the landlord, after the expiration of eight days from the time the new tenant took possession, loses all privilege upon such effects for arrears of rent due by the former tenant, although the effects were never displaced; the new tenant in such a case is a third party in good faith. *Banque du Peuple v. Marquis*, Q. R. 12 S. C. 378 (S. C. 1897).

[6] *Payette v. Payette*, Q. R. 44 S. C. 537 (C. R. 1913), comfirming 46 S. C. 488.

CHAPTER IV.

OBLIGATIONS OF THE TENANT.

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1. To Furnish the Premises Leased.

The landlord has a right to have the lease rescinded when the tenant fails to furnish the premises leased, if a house, with sufficient furniture or moveable effects, unless other security be given.[1] It has been a question of some little difficulty to determine what is "sufficient furniture," etc., under the circumstances.

In the first place, it is certain that the tenant is not bound to retain more furniture than is sufficient to cover the amount of his liability for rent under the lease; any surplus he can remove or dispose of.[2] An attachment in recaption to seize the goods removed, within eight days of their removal, where, upon a proper valuation (see *infra*) there remain sufficient effects to secure the landlord, and the tenant notified the landlord of his intention to remove the effects, will be at the cost of the landlord seizing.[3] Local usage, where any exists, should govern the nature and quantity of effects that must be brought into the premises as security for the rent;[4] also the profession of the tenant and the use for which the premises are intended.[5] For instance, if a hall is rented for a public meeting, the lessee would not have to instal any more furniture than that usually required for such a purpose, unless the lease otherwise expressly stipulated.[6] Generally speaking, a manufacturer will be required to furnish only such moveables as are necessary for conducting his business.[7] The

[1] Art. 1624 C. Code, paragraph 1.

[2] *Black v. Edwards*, C. R. 1885, 29 L. C. J. 246; *Donohue v. De la Bigne*, C. Ct. 1896, 2 Rev. de Jurisprudence 132; *Vinette v. Panneton*, M. L. R., 5 S. C. at p. 322; and see *Zeigler v. McMahon*, 1 Rev. de Leg. 95; Pothier, 268; 1 Guillouard 465; 25 Laurent 425; 4 Duvergier, n. 17 and 18; *Foisy v. Houghton*, Q. R. 12, S. C. 521 (1897).

[3] *Rousseau v. Archibald*, Q. R. 12 K. B. 14, 22, 23.

[4] Pothier 318; 2 Guillouard 461.

[5] 1 Guillouard n. 461; Baudry-Lacantinerie, *Louage*, Vol. I. n. 700; 6 Boileux, p. 105; *Lynch v. Reeves*, M. L. R., 5 S. C. 23, 15 R. L. 148.

[6] Guillouard I. no. 461; Baudry-Lacantinerie, *Louage*, Vol. I, n. 700.

[7] *Ibid.*

question of "other security" mentioned in Article 1624 C. Code does not arise where the premises are appropriately furnished or equipped for the purposes for which they are rented. [1]

The tenant has the right to replace his effects by others. [2]

Also, where the tenant sublets to an under-tenant without violating the conditions of the lease, he can remove his effects from the leased premises, and have them replaced by the effects of the under-tenant, provided, at least, that the replacing be done quickly, [3] and that the lease does not stipulate to the contrary.

The tenant who is a trader can also freely sell his merchantable stock-in-trade, provided he adequately replenishes the stock so sold, [4] but he cannot displace his material if the effects remaining are insufficient to secure the rental. [5]

In the absence of a local usage and of other particular circumstances, the better opinion is that the landlord can only require that the premises be furnished with sufficient moveables to guarantee one year's rent and costs of seizure and sale, whether the lease be for one year or more. [6] And if the lease be for a year, and part of the

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[1] Baudry-Lacantinerie Vol. I. n. 700.

[2] Baudry-Lacantinerie, Vol. I., n. 709; Dalloz 87-2-52; Huc. X., n. 348, 21 March, 1902.

[3] Baudry-Lacantinerie Vol. I., n. 709; citing cases and Laurent XXV., n. 426; Huc. X., n. 349.

[4] Baudry-Lacantinerie Vol. I., n. 709; citing cases and Baudry-Lacantinerie et de Loynes, *Priv. et Hyp.* I., n. 365.

[5] Baudry-Lacantinerie, Vol. I., n. 709; Trib. Civ. Lyon, 18 Jan. 1893.

[6] 2 Guillouard 462; 4 Duvergier 16; Merlin Rep. vo. *Bail*, section vii., n. 3; *Desloriers v. Lambert*, C. Ct. 1875, 1 Q. L. R. 365; *Longpre v. Cardinal*, S. C. 1886, M. L. R., 5 S. C. 28, confirmed in Review 31st Jan., 1887; *Donohue v. de la Bigne*, C. Ct. 1896, 2 Rev. de Jurisprudence 132; and see *Lynch v. Reeves*, C. R. 1886, M. L. R., 5 S. C. 23, 15 R. L. 148; *Gareau v. Pacquet*, C. Ct. 1870, 14 L. C. J. 267.

"While courts will deal sternly with removals of furniture which once become liable for the rent, they deal in a broader spirit with questions as to the sufficiency of the tenant's effects to secure his lease. Security for the full term of the contract is not required. The lessor

rent has been paid, the furniture on the premises need only suffice to cover the rent due for the balance of the year. [1]

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is expected to see to it that his rent is paid from term to term, according to the stipulations of the deed of lease. The requirements of the law are satisfied if there be enough on the premises to secure rent due, and the current term. In the present case plaintiff has not been able to show that defendant had not enough on the premises to secure the $18 due on the 1st October, and a like sum to become due for that current month." Per Davidson J. in *Foisy v. Houghton*, Q. R. 12 S. C. at p. 523 (1897), citing *Lynch v. Reeves*, M. L. R., 5 S. C. 23. In the Foisy case the landlord alleged that the premises were not sufficiently garnished to secure the rent, and that there had been a wrongful removal of the piano which formed part of his security. The piano was seized in recaption.

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[1] *Desloriers v. Lambert*, C. Ct. 1875, 1 Q. L. R. 365; *Longpre v. Cardinal*, S. C. 1886, M. L. R., 5 S. C. 28; confirmed in Review, 31st Jan., 1887.

In this case the tenant, described as an electrician, leased premises at $55 per month, payable monthly. He undertook in the lease to furnish the leased premises with "a sufficient quantity of household furniture or goods to secure the payment of one year's rent." He paid the rent and complied with all the conditions of the lease for over two years, to the satisfaction of the landlord, who had in the meantime acquired the property from the original landlord. In March, 1901, he wrote to his landlord that he proposed to remove to larger premises, but that he should continue to keep the leased store until the termination of the lease for a fruit and cigar business, with sufficient stock and furniture to cover the rental as agreed. The landlord replied in writing that he would not permit him to remove his electrical stock from the premises, which had been rented to him for the purposes of an electrical business, and that if he undertook to remove his effects, he would seize them for rent due and to become due under the lease. In the latter part of May, the tenant, having secured other premises, removed to them the greater part of the electrical supplies which he had in stock in the store leased from the landlord, who promptly on May 30th took an action of attachment in recaption for $600 for a year's rental, for which amount he asked for judgment. The defendant pleaded that no justification existed for the seizure, as he was not in arrears for his rent and had property upon the leased premises exceeding in value the year's rental. He paid the instalment of rent due on June 1st, which the landlord accepted. He also tendered the subsequent instalments as they fell due, but as the landlord declined to accept them, they were deposited in court in connection with this action. The issue between the parties was held to be narrowed to the question of fact as to the value of the property left upon the leased premises. It was held that, as the property left on the leased premises, valued in accordance with their ordinary merchantable value, and not in accordance with what they might bring at forced sale, exceeded the yearly rental for which the tenant contracted to provide security, inclusive even of the probable cost of an action to enforce the provisions of said lease, the seizure should be quashed and annulled with costs in favour of tenant. *Rousseau v. Archibald*, Q. R. 12 K. B. 14 (1902).

Leases not infrequently contain the following clause: "It is especially and distinctly understood and agreed between the parties that the furniture, goods, chattels and effects of every kind and description belonging to the tenant shall be security for the payment of the rent for the entire term, and shall not be removed from the said leased premises until the rent for the whole term be paid, even if not due, any law, usage, or custom to the contrary notwithstanding, for without this condition the present lease would not have been made; nothing herein contained to be deemed or construed as comminatory or evasive, but of rigor." Under such a clause the tenant cannot remove a part of his moveables from the leased premises, even where apparently sufficient remain to guarantee the rent for the remainder of the term.[1]

A tenant of a shop who forms a partnership with other parties, the partnership becoming owner of the goods and moveables on the premises, violates the legal obligation to furnish to secure the rent, and the landlord has in consequence an action to rescind the lease.[2] Such a firm would be in the position of a third person towards the landlord, and being a third person, and owner of the goods, it would be competent for it to give a notice to the landlord, as provided by Art. 1622 C. Code, of such ownership, and upon such notice being given the landlord's privilege would cease to attach for all rent to become due subsequent to such notice.[3]

In valuing the effects furnishing the premises, for the above purpose, those which are by law exempt from seizure[4] should not be included, nor those which undoubtedly belong to a third party, whether by reason

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[1] *Vanier v. Boncenfant*, Q. R. 48 S. C. 363 (C. R. 1915).

[2] *Payette v. Payette*, Q. R. 44 S. C. 537 (C. R. 1913), confirming Lane J., Q. R. 46 S. C. 488.

[3] *Ibid*, Q. R. 44 S. C. at p. 540.

[4] *Ante* p. 123.

that the landlord has been notified to that effect by their owner, or that it is a matter of public knowledge.[1] Where by the terms of the lease, the tenant undertakes to furnish the leased premises with "a sufficient quantity of household furniture or goods to secure the payment of one year's rent," the effects upon the leased premises should be valued in accordance with their ordinary merchantable value, and not in accordance with what they might bring at forced sale.[2]

If the house leased be a furnished one, the landlord should stipulate in the lease for some security or payment of rent in advance, for in the absence of such stipulation he cannot fall back on Art. 1624 C. Code.[3]

The consequence to the tenant of not adequately furnishing the leased premises, or not giving adequate other security, or having adequately furnished the premises, removing the effects therefrom, is that the landlord may demand cancellation of the lease.[4] He may also merely seize in recaption the goods which have been removed in violation of the law or of the lease; and this even for amounts not yet due.[5] But this does not have the effect of rendering exigible the rent of the leased premises not yet due under the lease.[6] It would be otherwise where the lease specially stipulates that the balance of rent for the whole period of the lease shall become due and exigible where the tenant becomes

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[1] 1 Guillouard 463; but see *supra*, p. 112, as to landlord's privilege on goods of third parties on the premises with their consent express or implied.

[2] *Rousseau v. Archibald*, Q. R. 12 K. B. 15, reversing the judgment of Doherty J., which maintained the attachment in recaption of the effects removed.

[3] 1 Guillouard 464. Baudry-Lacantinerie, I., n. 698.

[4] Art. 1624 C. Code.

[5] Art. 953 C. P. And see *ante* p. 129.

[6] See per Doherty J. in *Rousseau v. Archibald*, Q. R. 12 K. B., at p. 16, reversed in appeal on the question of estimating the value of the goods left on the premises. And see *ante* p. 129.

insolvent or fails to furnish the premises sufficiently to secure the rent.[1] The landlord cannot obtain an order of the court compelling the tenant to specifically perform his obligation to furnish the premises.[2] Our courts will not order specific performance where, as in such a case, the performance of the obligation depends upon the personal act of the debtor, the selection of furniture being a matter requiring individual judgment. See *ante* p. 9.

2. OBLIGATION OF THE TENANT TO USE THE THING LEASED AS A PRUDENT ADMINISTRATOR, ETC.

Prudent administrator—Unlawful disturbance by tenant.

One of the principal obligations of the tenant is to use the premises as a prudent administrator, for the purposes only for which they are designed, and according to the terms and intention of the lease.[3] The obligation to use the premises as a prudent administrator means, in one sense, that the tenant must bring the same amount of care to their use and *preservation* that a prudent person would if the property were his own;[4] and in another sense, that he must not cause any unlawful disturbance to other tenants, if any, on the premises.[5] In the case of unlawful disturbance by a tenant, the landlord's responsibility therefor will only arise where

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[1] *Pare v. Warwick Pants Co.*, Q. R. 47 S. C. 60 (S. C. 1914). See further as to insolvency of tenant Ch. vi. *post*.

[2] Baudry-Lacantinerie I. n. 710; Trib. Civ. Lille, 31 Jan. 1898.

[3] Art. 1626 (1) C. Code.

[4] See Pothier n. 190; Guillouard I. n. 189.

[5] 1 Guillouard 191; Bordeaux, 25th Aug. 1836; Dalloz Rep. vo. Louage, n. 286. Where one of several tenants painted the entire front of the leased building a conspicuous red color, and the defendant, who leased the upper flats, and to whom this color was offensive, covered over the red with a neutral tint,—*Held*, that the landlord had no ground of rescission against the latter on account of the change. *Deguire v. Marchand*, C. R. 1878, 1 L. N. 326.

the injured party is a co-tenant,[1] and not merely a neighbour,[2] unless such disturbance were authorized by the lease.[3]

Liability of Landlord for Acts of Tenant.

It has already been pointed out[4] that the tenant is not the agent of his landlord, consequently the latter is not liable for the delicts or torts of the tenant committed in the exploitation of the leased property.[5] It is likewise where the tenant causes damage to a neighbour by his method of exploiting the leased premises, unless the landlord has authorized or could have foreseen the damages caused by such method of exploitation.[6]

It is otherwise where the damage caused by a tenant in the exploitation of the leased premises is authorized or could easily have been foreseen by the landlord; he is then a consenting party.[7] Thus, where the owner of an ice-house leases it to a tenant, and the melting of the ice during the summer, owing to insufficient drainage of the ice-house, causes water to flow on to the land of a neighbour, thereby causing him substantial damage, the owner of the ice-house will be held liable for such damages.[8] Likewise, the owner of a quarry leased to a person for the purpose of quarrying thereon, for damages caused to neighbours as a result of a careless

[1] See *supra*, p. 90; 1 Guillouard 192; and see *Attorney Gen. v. Cote*, 3 Q. L. R. 235.

[2] *Dufour v. Roy*, Q. B. 1885, 11 Q. L. R. 192, 8 L. N. 75, 14 R. L. 511; 1 Guillouard 192.

[3] 1 Guillouard 193; Sirey 72-1-403.

[4] *Supra* p. 90 *et seq.*

[5] *Kieffer v. Les Ecclesiastiques, etc.*, Privy Council, 1902, Q. R. 13 K. B. 89; affirming on this point Q. R., 11 K. B. 173; Baudry-Lacantinerie I. n. 1041; Guillouard I., n. 287; Sourdat *Respons.* II., n. 895; Fuzier-Herman Art. 1384, n. 147, *et seq.*, and Art. 1728, n. 22; Demlombe XXXI., n. 626; Laurent XX., n. 612 and 623. *Thurston v. Dawson*, Q. R. 17 K. B. at p. 152.

[6] Baudry-Lacantinerie, I. n. 1041; Cass S. 98-1-265; D. 98-1-175; *Lachance v. Cauchon*, Q. R. 24 K. B. 421.

[7] Baudry-Lacantinerie, n. 1041; *Thurston v. Dawson*, Q. R. 17 K. B. at p. 152 (K. B. 1907).

[8] *Marcotte v. Henault*, Q. R. 13 S. C. 453 (S. C. 1898).

method of blasting the rock,[1] even where the lease purports to absolve the landlord from all responsibility in the matter.[2]

Injunction to restrain.

It has been held that an action by a landlord for an injunction restraining a tenant from using the land leased in a manner contrary to the lease, may be maintained as an independent action, without the addition of a prayer for the cancellation of the lease.[3] An injunction will lie against the owner of a quarry, leased to a person for quarrying therefrom, to restrain him from having the quarry operated in a dangerous manner.[4]

Obligation not to abandon the leased premises.

Where the tenant vacated the premises during the term of the lease, and informed the landlord of the fact, but added that precautions had been taken by him to have the water turned off and the gas meter removed, and the landlord, relying on this notice, did not take any steps to protect the premises, and great damage occurred from frozen water-pipes, the tenant, having misled the landlord, was held liable for such damages.[5]

The tenant is obliged to occupy the premises leased by him, either personally or by his representatives,—that is to say, they must be kept open, ventilated, heated and guarded.[6] Breach of this and the foregoing obligations will be a ground for resiliation of the lease, even where the tenant tenders the rent.[7] Where a house is rented as a summer cottage, which is neces-

[1] *Lachance v. Cauchon*, Q. R. 24 K. B. 426 (1915) (appealed to Supreme Ct.); *Lesage v. St. Clair*, D. 1873-2-201.

[2] *Ibid.*

[3] *Audet v. Jolicoeur*, Q. R. 22 K. B. 36 (1912); 5 D. L. R. 68.

[4] *Lachance v. Cauchon, supra.*

[5] *Burland v. Munyon's Homeopathic Home Remedy Co.*, Q. R. 14 S. C. 411 (S. C. 1898).

[6] *Vincent v. Samson*, Mag. Court 1894, 13 L. N. 339; Dalloz, 55-2-3; 1 Guillouard 194.

[7] *Vincent v. Samson, supra;* Art. 1624 C. Code, paragraph 1.

sarily meant for summer occupation, the tenant's obligation will be fulfilled if he occupies it for the summer only. He will, therefore, *prima facie*, not be liab'e for objects leased with the cottage and stolen therefrom out of season.[1] If the premises be devoted to purposes of commerce, the tenant may even be obliged to *exercise* therein the particular commerce for which they were leased, for if they were closed up, their value might be decreased by the loss of the good-will which had formerly attached to them in a particular capacity; provided always that such good-will had so attached.[2]

Use of business premises.

If the premises are, to the knowledge of the tenant, old and in bad condition at the moment of his acceptance of them, he has only himself to blame if, by putting in machinery which they are unfitted to support, they get into such a condition that he is no longer able to carry on his industry therein.[3] But the landlord cannot demand the resiliation of the lease if the tenant use the premises, without negligence, for the purpose for which they were leased, although the landlord may be much annoyed and damaged thereby; for instance, where there arises from the storage of goods in a warehouse the odor which such articles usually produce.[4] But where a store is leased for the purpose of carrying on therein a fancy dry-goods business, and the tenant sublets it to a person for the purpose of a warehouse, and

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[1] Baudry-Lacantinerie, p. 428; Trib. Civ. Seine, 9 Juin 1891, *Gaz. Trib.* 8 Sept. 1891; Guillouard II. n. 271; Amiens 8 Juil. 1890.

[2] *Latreille v. Charpentier*, C. Ct. 1885, 29 L. C. J. 233; 1 Guillouard 194; see *infra*, p. 153.

The obligation of the tenant to use the premises for the purpose for which they are leased, is violated where he rents a house for a hotel and dwelling, and subsequently abandons them to keep a hotel on a property owned by him some two hundred feet away. In such a case the landlord can demand resiliation of the lease and damages. *Caron v. Lamarche*, Q. R. 17 K. B. 495 (1908).

[3] *Mireau v. Allan*, S. C. 1894, Q.R. 5 S.C. 433.

[4] *Joseph v. Kinghan*, Q. B., Ram. Dig. 610; 17 Duranton 99 note; 3 Duvergier 400.

serious damage is caused to the building by the weight of the goods stored there, the landlord can have the lease cancelled and the tenant condemned to pay the damages suffered.[1]

Tenant using the premises leased for illegal purposes, or contrary to the evident intent for which they are leased.

The landlord has a right of action, in the ordinary course of law, or by summary proceeding as prescribed in the Code of Procedure, to rescind the lease when the tenant uses the leased premises for illegal purposes, or contrary to the evident intent for which they are leased.[2]

The destination of the premises is usually expressly stated in the lease; but in the absence of direct or indirect mention therein of such use, the question will be largely controlled by the nature of their former destination.[3]

Where land is leased for a purpose which is not stated in the lease, but which on the admission of the tenant was understood between the parties to the lease to serve for piling some lumber on, and constructing "a little camp," the tenant cannot erect a saw-mill thereon, for the destination of the thing leased is agreed upon, and there is an implied prohibition against using it for any other purpose.[4]

Once premises, although formerly used for a private residence, have by usage become commercial premises, a change from one kind of commerce to another, both being equally legitimate and respectable, is not a change of destination contemplated by law. Consideration must also be given to the locality in which the premises are

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[1] *Prevost v. Holland*, Q. R. 15, S. C. (C. R. 1898).

[2] Art. 1624 C. Code.

[3] *3* Duvergier 396; 1 Guillouard 196.

[4] *Audet v. Jolicoeur*, Q. R. 22 K. B. 35 (1912); 5 D. L. R. 68.

situated, and the purposes for which they had been used, with the knowledge and consent of the parties.[1]

The conversion of the leased premises to an illegal and immoral use is a sufficient ground for the resiliation of the lease; for instance, where premises are converted into a *cafe chantant*, which is frequented by immoral persons—*cafes chantants* being prohibited by the city by-laws in force during the said lease;[2] or where the tenant proves to be a kept mistress (without the previous knowledge of the landlord), although she represented herself in the lease to be a dressmaker.[3] An under-tenant who rents a house from the principal tenant for purposes of prostitution will be held liable to the proprietor for resulting damages.[4]

The fact that the landlord's vendor, who was also manager of the company appellant, was aware during several years that a portion of the leased premises was being used for immoral purposes, and that he acquiesced therein, does not deprive the purchaser and transferee of such premises of the right to demand the resiliation

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[1] See per Greenshields J. in *Latreille v. Beaumier*, Q. R. 44 S. C. at p. 479 (C. R. 1913).

Held, in this case, that the sub-lease by a tenant of premises occupied for a number of years as a furrier's shop and residence, to a sub-tenant, as a restaurant with rooms to let, does not amount to using them for a purpose contrary to the evident intent for which they were leased (art. 1624 C. C., paragraph 1). Hence, it affords no ground for an action by the owner to rescind the lease.

In construing a lease, in which the landlord and tenant are both described as manufacturers of tobacco, and the premises as "a four-storey building, etc., *now occupied by the landlord as a factory*," it is fair to infer that the premises were leased to be used as a tobacco factory. Therefore, a clause in the lease that "the tenant shall pay all extra premiums of insurance of the premises, exacted in consequence of the business or work he carries on therein." does not make him liable for the difference between warehouse and factory rates of insurance. *Fortier v. Youngheart*, Q. R. 28 S. C. 118 (C. R. 1904).

[2] *Joseph v. St. Germain*, S. C. 1894, Q. R. 5 S. C. 61.

[3] *Beaudry v. Champagne*, C. Ct. 1868, 12 L. C. J. 288; *Life Association of Scotland v. Downie*, C. Ct. 1880, 4 L. N. 47; and see 1 Guillouard 197.

[4] *Montmarquette v. Berman*, Q. R., 29 S. C. 193 (S. C. 1906).

of the lease on the ground of such immoral use of the premises. Such knowledge can only affect the question of costs.[1]

It has been held in this province that where a tenant leases premises for his own occupancy, and who uses one part as a store and the other part for a private residence, he is not considered as having changed the destination of the premises in subletting the part occupied by him as a residence to a club formed of young people who assemble at evenings to discuss, smoke and amuse themselves.[2] This case must be regarded as applicable only to the particular circumstances therein brought forward, for it was not proved that the club in question made any noise or other kind of disturbance, and that, at any rate, it was situated over premises occupied as shops. Generally speaking, the above conversion of the destination of premises would be regarded as giving rise to cancellation of the lease.[3] It has been held that premises leased for "purposes of concerts, lectures, fairs, bazaars, clubs, societies, public exhibitions and meetings in accordance with law" could not be used for the purpose of holding religious meetings of the Salvation Army, an organization which is obnoxious to a large portion of the inhabitants of the locality; and the building having been injured in consequence, such a use entitled the landlord to obtain rescission of the lease.[4] A shed belonging to a dwelling-house may be used for the purpose of stabling a horse therein.[5]

Where the tenant commits waste upon the premises leased, the landlord may demand the rescission of the lease.[6] The question of the tenant making alterations

[1] *Provident Trust & Investment Co. v. Chapleau*, Q. R. 12 K. B. 451 (1903).

[2] *Black v. Dorval*, Q. B. 1885, 29 L. C. J. 326.

[3] Aix, 31st Jan., 1833, Sirey, 33-2-485; Troplong 305; Marcadé, n. 1; 4 Aubry et Rau, p. 481; Agnel n. 303; 25 Laurent 259.

[4] *Pignolet v. Brosseau*, M. L. R., 7 Q. B. 77, 21 R. L. 1.

[5] *Methot v. Jacques*, Mag. Ct. 1884, 7 L. N. 384.

[6] Art. 1624 C. C., paragraph 1.

or improvements affecting the form of the leased premises is dealt with in Chapter V.: "Rights of the Tenant."

Remedy in above instances.

The consequence of using the premises for illegal purposes, or contrary to the evident intent for which they are leased, or of committing waste, is that the landlord can demand, summarily if he wishes, the rescission of the lease.[1] In other respects his recourse is by action for damages.[2]

An action by a landlord, for an injunction to restrain a tenant from using the land leased in a manner contrary to the lease, may be maintained as an independent action, without demanding the cancellation of the lease.[3]

Where a tenant uses the premises contrary to the evident intent for which they were leased, the landlord, in an action against such tenant for breach of his obligation, need not prove that he has suffered any prejudice. His right of action arises from the breach of the obligation alone.[4] But it has been held that damages cannot be recovered during the lease for material injury to the premises by the tenant,[5] excepting where such injury is of an irreparable nature, or likely to become so; for instance, the demolition of a wall, or the cutting down of a tree,[6] or allowing an undue quantity of snow to accumulate on the roof.[7]

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[1] Art. 1624, paragraph 1, C. Code.

[2] Art. 1624, paragraph 3, C. Code.

[3] *Audet v. Jolicoeur*, Q. R. 22 K. B. 36 (1912).

[4] *Ibid.*

[5] Sirey, 9-1-387; Dalloz, 58-2-86; 1 Guillouard 203; and see 1 Troplong 346; 3 Duvergier 448; *Payne v. James & Trager*, Supreme Ct. Louisiana, 1890, 42 La Ann, 230.

Damages for deterioration to the leased property can be claimed only on expiration of lease where the tenant has not then put the property in proper condition. *Amiot v. Bonin*, Q. R. 23 S. C. 42, at p. 44.

[6] 1 Guillouard 205; 25 Laurent 266; Sirey 60-1 66; Dalloz Rep. vo. *Louage*, n. 279.

[7] *Hudson v. Russell*, 18 R. L. 134; *Pare v. Coghlin*, 20 R. L. 207; *Hudson v. Baynes*, 32 L. C. J. 120.

3. OBLIGATION OF THE TENANT TO MAKE CERTAIN LESSER REPAIRS.

The tenant is obliged to make certain lesser repairs which become necessary in the house, or its dependencies, during his occupancy.[1] These repairs, if not specified in the lease, are regulated by the usage of the place.[2] He is only obliged to do this by virtue of the fact or presumption that the repairs have become necessary through the use of the premises by him or those under his control,[3] including his sub-tenants. The tenant can clear himself of such presumption by proving that the repairs are rendered necessary by age or by irresistible force.[4] Such repairs are at the charge of the landlord, for his principal obligation is to maintain the thing leased in a fit condition for the use for which it has been leased.[5] By "age" is meant the deterioration which results from the ordinary use of the premises, and which cannot be traced to any carelessness on the part of the tenant, however slight.[6] By "irresistible force" is meant those accidental causes, such as where hail breaks the window panes, or a storm destroys the window frames, or where a flood washes away the cement from the underpinning of a house.[7] But the term "irresistible force" must also be construed as including hidden defects in the construction of the premises or in the material used therein.[8]

Prima facie, the landlord is obliged, during the lease, to make all necessary repairs, except those which the

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[1] Art. 1635 C. Code.

[2] Art. 1635 C. Code.

[3] Arts. 1627, 1628 C. Code; Baudry-Lacantinerie I., n. 798; Pothier n. 107.

[4] Arts. 1627, 1636 C. Code; Baudry-Lacantinerie I., n. 798.

[5] Arts. 1612, 1636 C. Code.

[6] 2 Guillouard 468; Caen, 8th Aug., 1873, *Rec. de Caen*, 74, p. 33; Sirey 73-2-256.

[7] 2 Guillouard 468, and see Art. 1635.

[8] 2 Guillouard 468; Dalloz Rep. vo. *Louage*, n. 620.

tenant is bound to make as hereinafter set out.[1] As to landlord's repairs see *ante* p. 55.

It has already been stated[2] that stipulations in the lease, charging the tenant with the making of all repairs of whatever nature and from whatever cause arising, are perfectly valid, but will not usually be held to include repairs which amount to a reconstruction and which arise from a hidden defect. In the case of doubt, such stipulations must, apart from local usage, be interpreted in favor of the tenant and against the landlord.[3]

Article 1635 Civil Code enumerates some of the repairs which are at the charge of the tenant, but states in effect that these examples are merely enunciative, and that all others must, if not specified in the lease, be regulated by the usage of the place.[4]

The first enumerated in the above article as tenants' repairs are those "to hearths, chimney-backs, chimney casings and grates." Cracks occurring in the chimney-piece or the mantel-piece may result from the heat in the fire-place or from a blow; in each of these cases the repair is at the charge of the tenant. But if the latter can prove that the crack occurred owing to an original defect in the marble or other material, then the repair will be at the charge of the landlord; this results from the application of principles already laid down.[5] Thus, repairs to a furnace, such as substituting a new section for one that is cracked and leaks from long usage, are not tenant's repairs, and the cost must be borne by the landlord, where the lease stipulates that he shall make the landlord's repairs (*grosses reparations*).[6] The sweeping of the chimney is at the charge of the

[1] Art. 1613 C. Code.

[2] *Supra*, pp. 47, 55.

[3] Art. 1019 C. Code; Baudry-Lacantinerie I., n. 801, 804; Cass. civ. 16 Nov., 1898, D. 99-1-117.

[4] Baudry-Lacantinerie I., 806; Guillouard II., n. 470. Art 1754 C. Nap.

[5] *Supra*, and see 2 Guillouard 471, commenting on Goupy.

[6] *Fortier v. Youngheart*, Q. R. 28 S. C. 118 (C. R. 1904).

tenant.[1] By-law of the City of Montreal No. 542, sec. 1, repealing sec. 114 of by-law 260, puts the cleaning at the charge of the occupant, except where the house is heated by the proprietor. There is a penalty for refusing or obstructing. Sweeps are not bound to remove soot or other rubbish resulting from sweeping—these must be removed by occupant as soon as sweeping is completed. At least two days' notice in writing is to be given to occupant of building.[2]

The second enumeration in Article 1635 of repairs at the charge of the tenant is "plastering of interior walls and ceilings." This presumption is also subject to rebuttal by proof that the plaster has fallen by age, irresistible force, or defective material.[3]

Thirdly, the tenant has also to repair floors, when partially broken, but not when in a state of decay.[4] It would appear that the word "floors" relates to floors of a room, and not of a shed or out-house, or paved yard, which are supposed to be constructed of sufficient strength to bear unusual weight and rough usage.[5]

The fourth enumeration of the tenant's repairs is "window glass, unless it is broken by hail or other inevitable accident, for which the tenant cannot be holden."[6] But unless the tenant protects his windows during a storm by closing the shutters, if any, he will have to repair the damage done to the glass even by hail.[7]

Fifthly, and lastly, the Code charges the tenant with repairs "to doors, windows, shutters, blinds, partitions,

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[1] 2 Guillouard 471; Sirey 1904-2-85; Huc X. n. 350; *contra* D. 95-3-49; 96-3-76.

[2] Fees, for each flue in a house shall be paid for each storey 5 cents; special call to sweep chimney, 50 cents.

[3] See *supra*.

[4] Art. 1635 C. Code.

[5] 2 Guillouard 473 on Goupy; Pothier no. 220, *Merlin verbo Bail*, section 8, 4°; Desgodets, Art. 171, p. 10; 2 Troplong 556-559.

[6] Art. 1635 C. Code.

[7] 2 Troplong 560.

hinges, locks, hasps, and other fastenings."[1] The presumption is that all these were in good condition when the tenant accepted the premises without formal complaint, and that they have since become unfit or broken through his fault.[2]

Other repairs, which the best authorities regard as being at the charge of the tenant, are as follows:—To the wooden canopy over doors and the wainscoting, likewise mirrors; to balconies, window and other bars, trellis-work whether of wire or wood[3] replacing wall-paper destroyed by the tenant;[4] whitewashing the ceilings.[5] It is generally agreed in France that the gutter and the pipes which carry the water from the roof are not reparable by the tenant,[6] but we think this rule must be considerably modified in its application to this country.

So far as it is a question of the choking up of the gutter or pipe, it is usual in this country to insert in the lease a clause charging the tenant with the duty of keeping the gutter free from obstructions, the rain pipe being protected with a grating. It is not certain that the landlord is obliged to furnish such a grating;[7] but if he is, and fail to do so, and the pipe becoming choked up, the water overflows, causing damage to the tenant, the former will be liable for the damage only when he has been put in default to put in a grating.[8] It has recently been held by two judges against two that it is not a defect in construction to protect, by a cage, the opening of a drain soil-pipe on the roof of a building occupied by several tenants, even when the neglect to keep it clear from refuse would cause the flooding of the roof.

[1] Art. 1635 C. Code.
[2] Pothier, n. 220.
[3] Guillouard 476, 477.
[4] D. 53-2-111; P. 53-2-393.
[5] Palais 53-2-393; D. 53-2-111.
[6] 2 Guillouard 477; Baudry-Lacantinerie I., p. 465, note 4.
[7] See *Holland v. de Gaspe*, C. R. 1891, M. L. R., 7 S. C. 440.
[8] *Ibid.*

It is the duty of the tenant to attend to this clearing.[1] But apart from any special clause in the lease, it is clear, that if a roof gutter becomes injured or broken in this country, there is a strong presumption that it has been brought about either by allowing too much snow and ice to accumulate on the roof, or through the negligent chopping of the roof cleaners, and we think its repair should be at the charge of the tenant.

In a climate such as ours, the landlord is obliged to place the water-pipes in such a position, and in such a manner, that they may be fit for their purpose in all seasons. If the lower part of the building through which the pipes pass becomes vacant, the landlord must heat it sufficiently in winter to keep the occupant of the upper portion supplied with water. At all events, the landlord is responsible for the freezing of the water pipes outside of the tenant's immediate premises.[2] If the pipes burst within the premises, the landlord will be liable for damage if the bursting were caused by their bad and insufficient condition.[3] But, doubtless, if they burst within the tenant's premises in winter time, the presumption will be that it arose through the tenant's

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[1] *Cooper v. The Holden Co. Ltd.*, Q. R. 48 S. C. 455 (C. R. 1915), Mercier, J. dissenting, and agreeing with Archibald J., in Court below, reversed in Review.

The trial judge found that with regard to the condition of the cage for the protection of the opening of the soil-pipe in question, it was a *vice de construction*, and that the landlord, defendant, was obliged to be aware thereof without notice, and to retain the same in good condition: That even if the tenant, whose premises abutted the opening of the soil-pipe in question, was obliged to take care thereof, as such soil-pipe was essential to the service of all the tenants in the premises, the tenant who had special charge thereof would be the agent of the defendant landlord for the purpose of keeping the same in good order, and would not be a third person for whom the defendant was not responsible.

[2] *Bernard v. Cote*, C. R. 1892, Q. R. 2 S. C. pp. 84-85; but see *Juteau v. Magor*, S. C. 1892, Q. R. 2 S. C. 428.

[3] *Mann v. Munro*, Q. B. Montreal, September, 1875.

The tenant of a house is not responsible for the damages caused by the bursting of the hot water pipes on account of the frost, when it is caused by the defects in the heating apparatus and in the construction of the house. *Davidson v. King*, Q. R. 48, S. C. 392 (S. C. 1915).

defective heating of the premises, and unless this presumption is rebutted, he alone will be liable.[1]

The tenant will have to repair injuries to mangers and stalls in the stables caused by the kicking or biting of the horses.[2]

The cleansing of wells and of the vaults of privies is at the charge of the landlord, if there be no stipulation to the contrary.[3]

In the absence of an agreement to the contrary, the tenant is obliged to remove the snow from the roof of the leased premises;[4] and where he neglects to do so, the landlord can recover from him the cost of having it done, or damages arising through the neglect.[5] But roofs in this country should be sufficiently strong to support a certain quantity of snow, for landlords cannot expect tenants to have their roofs at all times absolutely free therefrom during a heavy storm.[6]

The duty of removing snow from the roof devolves upon the person *occupying* or having *charge* of any house,[7] or part of any house, storehouse or part of any storehouse, building or part of any building in the city, under by-law No. 47 of the City of Montreal.

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[1] See *Juteau v. Magor*, S. C. 1892, Q. R. 2 S. C. 428.

[2] 2 Guillouard 479.

[3] Art. 1644 C. Code.

[4] *Hudson v. Baynes*, C. Ct. 1888, 32 L. C. J. 120, 18 R. L. 81; *Hudson v. Russell*, C. Ct. 1888, 18 R. L. 134; *Parc v. Coghlan*, C. R. 1890, 20 R. L. 207.

The landlord, defendant, in removing snow from the roof of a building, broke in the roof of a shed leased to the plaintiff, and his goods therein were damaged. The plaintiff was also lessee from defendant of a store in the lower part of the building from which the snow was cleared. In an action by the tenant for damages to goods in the shed, it was held that:—A printed clause in plaintiff's lease, binding him to remove snow and ice from the roof of the leased premises, could not be interpreted as requiring him to remove snow from the roof of the building of which he occupied only the lower storey, and defendant had so construed the lease by undertaking the removal of the snow from the roof of said building. *Gagne v. Vallee*, Q. R. 13 S. C. 112 (S. C. 1898).

[5] *Ibid.*

[6] *Evans v. Straubenzie*, C. R. 1889, 18 R. L. 216.

[7] See further on this subject *infra*, Ch. V. section 1. And see Scotch case, *Reid v. Baird*, 4 Rettie 232.

4. OBLIGATION OF THE TENANT TO PAY THE RENT AND CERTAIN OTHER CHARGES.

One of the tenant's principal obligations is to pay the rent of the premises leased.[1] The nature of rent; of what it may consist, and its relation to the contract of lease, are matters which have already been dealt with.[2]

Time of payment—Obligation with a term.

The period at which the rent is to be paid is invariably stated in the lease, but sometimes in a verbal lease, although the annual rental be agreed upon, no stipulation is made as to the terms of payment, or the proof may be insufficient or inadmissible to establish what was intended in that respect. In such case the periods of payment must be governed by local usage.[3] It is a matter of common knowledge that the rent of small houses in our cities is invariably payable monthly; but as the houses increase in size and rental, the tendency is towards a quarterly payment of the rent, the latter being clearly the limit, for where a person occupies a house by the mere sufferance of the owner, he can be ejected for non-payment of rent only where such non-payment has exceeded a period of three months.[4]

The tenant has the whole day on which the rent becomes due wherein to pay it; an action taken on that day by the landlord to recover the rent is premature.[5] And the intention of the tenant to remove his effects does not cause him to lose the benefit of the term.[6]

[1] Art. 1626 C. Code.

[2] *Ante* p. 36.

[3] 4 Pothier 135; 1 Guillouard 215, and see Art. 1642 C. Code.

[4] Art. 1608 C. Code.

[5] *Donaldson v. Charles*, Q. B. 1880, 27 L. C. J. 87; *Robert v. Gagnon*, Q. R., 10 K. B. 237 (1900).

[6] *Decary v. Poulie*, 12 Que. P. R. 211 (C.R. 1911).

Where a lease stipulates that the rent shall be payable by monthly instalments, the first of which shall become due on the first day of June, this gives the tenant the whole of the first day of each month, until midnight, to pay the rent for the preceding month, *Tourneur v. O'Sullivan*, Q. R. 50 S. C. 274 (S. C. 1916).

The question has arisen whether the rent, which is to become due at stated terms, constitutes an obligation with a term, or whether it is conditional debt. We have decisions taking either view. For instance, it has been held by Doherty J.,[1] that the obligation to pay the rent is not a pure and simple obligation with a term, but is an obligation correlative to that of the landlord to procure the enjoyment of the leased premises, and could thus only become due upon and proportionately to his fulfilment of the obligation. On the other hand, it is generally held here, even apart from the terms of a lease which specially provides for the case, that in the event of the insolvency of the tenant, the whole of the remaining rent becomes due by virtue of Art. 1092, for the tenant thereby loses the benefit of the term.[2] The general opinion in France is that rent to become due is a debt with a term and not a conditional debt.[3]

Hence it is subject to Art. 1092 of the Civil Code, which states that:—"The debtor cannot claim the benefit of the term when he has become a bankrupt or insolvent, or has by his own act diminished the security given to his creditor by the contract.[4] In view of the doubt surrounding this question, leases now frequently incorporate the substance of this article, so that it becomes a matter of special agreement between the parties.[5]

Where rent paid in advance.

It may be agreed that the rent shall be payable in

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[1] *McPherson v. Symonds*, Q. R. 29, S. C. 121, 122; *Rousseau v. Archibald*, Q. R., 12 K. B. at p. 16, reversed in appeal on another point.

[2] See *post* Chapter VI "Termination of the Lease"—Effect of Insolvency of Tenant, p. 236.

[3] Cass. 28 Mars 1865, Dalloz, 65-1-201; Cass. 16 Feb. 1870, Dalloz, 70-1-261; Cass. *req.* 11 Avril, 1892, Dalloz, 92-1-345; Baudry-Lacan, tinerie I., n. 859; Guillouard I., n. 358; Colmet de Santerre IX., n. 28 *bis* XXI; Pont. *Priv. et. Hyp.*, I., n. 126 *bis*; Labbe, note, Sirey-92-1-434; *Contra* Mourlon, Rev. Prat. XXIII, 1867, p. 385, Laurent XXIX, n. 393. See *post*, p. 236.

[4] Baudry-Lacantinerie I., n. 860, 1268.

[5] As in *Pare v. Warwick Pants Co.*, Q. R., 47 S. C. 60 (S. C. 1914).

one amount, or it may be paid in advance.[1] Where a tenant pays one year's rental in advance to his landlord, such a payment is valid as against the latter's vendee, or even his creditors, hypothecary or otherwise, in the event of his insolvency in the course of the year.[2] That is to say, he will not be bound to pay the rent a second time, for instance to a hypothecary creditor whose claim is not satisfied by the sale of the immoveable leased.[3] If a like payment were made for the purpose of defrauding the landlord's creditors, to the knowledge of the tenant, it would not be valid, but the burden of proving the fraud would be upon the creditors.[4] If, however, the tenant paid more than one year's rental in advance, it would be valid against a subsequent purchaser only where the discharge for the payment had been registered, together with a description of the immoveable.[5] And in any event, where the tenant pays rent in advance, whether his lease be registered or not, he will always be liable to be ejected by the purchaser, where the property is sold at judicial sale at the instance of hypothecary or other creditors.[6]

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[1] In a lease with promise of sale, providing that, on default of payment of any of the notes given as consideration of the contract, the landlord could take possession of the property, and that the tenant would lose all that he had paid to the landlord, the clause which stipulated that the landlord "should return the then unmatured notes at the time of their maturity; that is to say, that the landlord would only be obliged to retire them and return them to the tenant at the time of their maturity," gives to the landlord a right of action against the tenant to recover the amount of the notes due at such time, the amount of which would represent the value of the enjoyment of possession of the property during the running of the lease; and in such case the landlord need only deliver up the notes not yet due at the time of his taking possession. *Richards v. Octeau*, Q. R., 47 S. C. 259, (C. R. 1915).

[2] *Dupuy v. McClanaghan*, C. R. 1880, 27 L. C. J. 61; reversing S. C., 24 L. C. J. 243; see remarks of Dorion, C. J., in *Baylis v. Stanton*, Q. B. 1882, 27 L. C. J. a p. 210; and Arts. 1663, 2128, 2129 C. Code.

[3] *Dupuy v. McClanaghan, supra.*

[4] Arts. 1032, 1038, 1203 C. Code; 1 Guillouard 216.

[5] Art. 2129 C. Code.

[6] *Desjardins v. Gravel*, S. C. 1880, 25 L. C. J. 105; *Societe de Construction Metropolitaine v. Commissaires d'Ecoles, etc.*, Q. B. 1879, 24 L. C. J. 25; *Harte v. Bourgette*, K. B. 1846, 2 R. de L. 33;

Where a tenant abandons the leased premises, with the consent of the landlord, before expiry of the lease, and at the same time pays the rent to become due for the balance of the lease, if the landlord re-lets the premises for the same price during the currency of the former lease to another tenant, this has the effect of resiliating the former lease, and the landlord must reimburse the former tenant for the rent he has paid in advance, according to the period when the new lease begins to run.[1]

Proof of rent to be paid—Authentic lease.

Where a tenant, during nearly three years, paid rent at the rate of $29 a month, and accepted receipts for the money paid as said rental, it was held that such receipts, as well as the admissions of defendant, tenant, constituted a commencement of proof in writing to contradict the terms of the authentic lease by which the rent was declared to be $15 per month, and the evidence of the landlord was sufficient to complete the proof.[2]

Bonus paid by tenant for improvements—Subsequent Resiliation of the lease.

Where a sum is paid by a tenant to his landlord by way of bonus for improvements the latter has made to the premises, this is equivalent to a rent paid in advance, and if the lease is subsequently resiliated at the suit of the tenant for failure on the part of the landlord to make repairs which were chargeable to him, he will be obliged to refund such bonus, as in the case of rent paid in advance.[3]

Bogle v. Chinic, Pyke's Rep., p. 20; *Dupuy v. McClanaghan*, C. R. 1880, 27 L. C. J. 72; reversing S. C., 24 L. C. J. 243; *Mowry vs. Bowen*, C. R. 1884, M. L. R., 3 S. C. 417, following *McLaren v. Kirkwood*, 25 L. C. J. 107.

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[1] *Vallerand v. Lachance*, Q. R. 43, S. C. 526 (S. C. 1913).

[2] *Beauchamp v. Beauchamp*, Q. R. 14 S. C. 427 (S. C. 1898), confirmed in Review 31 Oct. 1898.

[3] *Cote v. Cantin*, Q. R., 21 S. C. 432 (S. C. 1901), confirmed in Review 28 Feb. 1902.

Apportionment of rent.

Where two properties are leased for a single rent, the tenant has an action against the purchaser of one of the properties, who is at the charge of assuming existing leases, to have it declared what proportion of rent he owes the purchaser.[1]

Demand of payment of rental.—Where rent payable.

The rent is payable at the domicile of the tenant, in the absence of any other place agreed upon in the lease,[2] which means that before the tenant can be considered as having defaulted in the payment of his rent, so that an action will lie by the landlord to recover it, the latter must first demand it from him at his domicile.[3] The consequence to the landlord of taking an action for the rent, without first demanding it, would be that if the tenant brings the money into court with him, the landlord would have to pay the costs of the action.[4] No action of damages would lie against the landlord in such case, on the ground of vexatious proceedings, even where the proceedings are commenced by process of attachment.[5]

Leaving a letter, without asking or waiting for a reply, is not a sufficient demand of rent.[6] Where a tenant has his domicile elsewhere than at the leased premises when the rent becomes due, our courts have held that the landlord is not obliged to notify him elsewhere than at those premises; and if they are altogether closed, he

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[1] *Bronner v. Lapointe*, Q. R. 38 S. C. 309 (C. R. 1910).

[2] Pothier, 136; Baudry-Lacantinerie L., n. 861; 1 Guillouard 218; and see Art. 1152 C. Code.

[3] *Hubert v. Dorion*, C. Ct., 16 L. C. J. 53; *Martineau v. Breault*, 1889, 12 L. N. 204; *Thymeus v. Beautrong*, S. C. 1879, 9 R. L. 540; *Hearn v. McGoldrick*, C. Ct. 1876, 3 Q. L. R. 368; *White v. Norman*, *ib.*; *Donohue v. De la Bigne*, C. Ct. 1896, 2 Rev. de Jur. 132; *Robert v. Gagnon*, Q. R. 10 K. B. 237, pp. 241, 242.

[4] *Ibid.*

[5] *David v. Thomas*, Q. B. 1857, 1 L. C. J. 69; and see remarks of Lacoste, C. J., in *Scott v. McCaffrey*, Q. B. 1892, Q. R. 1 Q. B. at pp. 125, 126.

[6] *Hearn v. McGoldrick*, C. Ct. Que. 1876, 3 Q. L. R. 368.

is exempted from that obligation.[1] The contrary view is held in France.[2]

To whom rent to be paid—Purchaser of premises.

If rent be paid by the tenant to the wrong party, he cannot be turned out of the premises without an opportunity of paying to the right person.[3]

Where a landlord has, subsequently to the lease, sold the property leased, to the knowledge of the tenant, and where, moreover, a third party, whom the tenant constituted an administrator of his business affairs, especially in connection with the execution of the said lease, has paid instalments of rent to the purchaser of the property, the tenant cannot set up in defence to an action by the purchaser to have the lease resiliated for default in payment of the rent, that he was not served with a copy of the deed of sale, or that there was no acceptance by him of the transfer of his indebtedness for rent; especially where the tenant has alleged that the plaintiff granted him delay for payment of rent, said agreement being denied by plaintiff and not proved. Such an allegation constitutes an admission that plaintiff is the creditor of the rent due under said lease.[4]

The sale of an immoveable property under lease, with a transfer to the purchaser of all rentals due and to become due, "thereby subrogating him in all the rights of the seller," is creative of a privity of contract between the purchaser and the tenant that gives the former the right to bring suit against the latter, not only to recover rent, but for cancellation of the lease for any of the causes for which the seller could have done so.[5]

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[1] *Vincent v. Samson*, C. Ct. 1890, 13 L. N. 339; *Donahue v. De la Bigne*, C. Ct. 1896, 2 Rev. de Jur. 132; and see *Tasse v. Savard*, Mag. Ct. 1889, 13 L. N. 266.

[2] Baudry-Lacantinerie I., n. 861; 1 Guillouard 219; 27 Demolombe 270.

[3] *Baylis v. Stanton*. Remarks of Ramsay, J., 27 L. C. J. at p. 210.

[4] *Fortin v. Voisard*, Q. R. 13 S. C. 257 (S. C. 1898).

[5] *Ettenberg v. Aronson*, Q. R. 45 S. C. 87 (C. R. 1913).

Interest.

Interest will begin to run on overdue rent from the date of judicial demand of payment.[1]

Sale of contents of building to tenant—Reduction of rent.

Where a building, and the machinery therein, were rented to a tenant, upon the purchase of the machinery by the tenant, he is entitled to a reduction of rent proportionable to the value of the machinery purchased, from the date of the purchase.[2]

Grounds of refusal of tenant to pay rent.

Where the landlord, after being notified, fails in his obligation to keep the premises in proper repair, the authorities are much divided as to whether the tenant is justified in refusing to perform his obligation to pay rent. It has been held under our law that where the landlord has delivered the premises, and the tenant accepts and occupies them, the latter's obligation to pay rent becomes absolute. If he considers that he has a grievance against his landlord, he has a recourse by action at law either to have the lease cancelled, with damages, or a reduction of rent. On the one hand, the tenant's obligation to pay rent is a liquidated debt proportioned to the duration of his occupation, but on the other hand, the landlord's liability for breach of his obligations is an unliquidated debt which can, in the case of dispute, be liquidated only by a judgment of the Court. Therefore, a tenant must, if he has a grievance, and having previously put his landlord in default, either sue his landlord for a cancellation of the lease, or reduction of rent, with damages or for damages alone, or, if sued by the landlord for arrears of rent, he can set up an incidental cross demand

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[1] Art. 1077 C. Code; *O'Halloran v. Kennedy*, C. R. 1874, 18 L. C. J. 284; Pothier 138.

[2] *Sun Life Assurance Co. v. Pauze*, Q. R. 17 K. B. 1 (1907).

for damages; he cannot plead compensation,[1] unless the claim is a liquidated one.[2] But there are weighty authorities who take a contrary view.[3] But if the tenant is sued in cancellation of the lease for non payment of rent, he can oppose to the landlord's demand that the landlord has not fulfilled his obligations, such as not giving complete enjoyment of the premises, or not making necessary repairs or repairs agreed upon.[4]

Reduction of rent where urgent repairs have to be made.

If during the lease the premises be in urgent want of repairs, which cannot be deferred, the tenant is obliged to suffer them to be made, whatever inconvenience they may cause him, and although he may be deprived, during the making of them, of the enjoyment of a part of the thing.[5] But, if such repairs became necessary before the passing of the lease the tenant is entitled to a diminution of the rent according to the time and circumstances; and in any case, if more than forty days be spent in making such repairs, the rent must be diminished in proportion to the time and the part

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[1] *Lockie v. Mullins*, S. C. 1886, M. L. R., 2 S. C. 262; *Chaperon v. Boucher*, C. Ct. 1885, 11 Q. L. R. 367; *Morin v. Hardy*, S. C. 1889, 17 R. L. 657; *Weippert v. Ifland*, K. B. 1829, 2 R. de L. 441; *Loranger v. Perrault*, S. C. 1854, Ramsay's Condensed Reports p. 61; *Mulhaupt v. Enders*, Supreme Ct. Louisiana, 38 Louisiana Annual, 744; Baudry-Lacantinerie I., nos. 328-332; Cass. 5 Jan., 1876, S. 76-1-104; Cass. Civ. 11 Jan. 1892, S. 92-1-117, D. 92-1-257; 25 Laurent 109; *Wurtele v. Brazier*, Q. B. 1818, 2 R. de L. 440; *Fyfe v. Lavallee*, 12 L. N. 147.

Held, that a tenant sued for rent may plead as a defence that he has not had quiet enjoyment of the leased premises, or that he has only had a partial enjoyment thereof. *Synod of the Diocese of Montreal v. Kelly*, Q. R., 20 S. C. 19 (S. C. 1901).

[2] Baudry-Lacantinerie I., n. 329.

[3] See *Lemoine v. DeBeliefeuille*, S. C. 1882, 5 L. N. 426; *Shuter v. Saunders*, 3 L. N. 134; *Penny v. Montreal Herald Printing Co.*, 27 L. C. J. 83, 4 Aubry et Rau, p. 474; Sirey 48-2-190; Sirey 65-2-199; Cassation, 15th Dec., 1880; Sirey 81-1-170; 1 Guillouard 101 and 222; *Boucher v. Brault*, 15 L. C. J. 117. Guillouard I., n. 146, maintains that it is not a question of compensation but merely of reduction of rental.

[4] Baudry-Lacantinerie I., n. 880, 1378; Cass. Dalloz 83-1-415.

[5] See Art. 1634 C. Code.

of the thing leased of which he has been deprived.[1] If the repairs be of a nature to render the premises uninhabitable for the tenant and his family, he may cause the lease to be rescinded.[2] This subject has also been dealt with in a previous part of this work.[3] Article 1634 C. C. is a recognition of the principle that the tenant is not bound to fulfil his obligations, where the landlord fails in his obligation to give the tenant enjoyment of the premises leased to him. But, obviously, in the case of dispute, the process of the Court must be invoked before the tenant can set off in reduction of his rent the amount which he claims to be entitled to in virtue of repairs made under this article.

Where property leased is destroyed.

Where the property leased is destroyed, the tenant is immediately discharged from his obligation to pay rent;[4] even where the property is destroyed by the fault of the tenant. In the latter case the tenant would be liable in damages to the landlord, but the obligation to pay rent always ceases with the destruction of the property leased.[5]

Remission of rent under Art 1089 Code of Procedure.

That provision of the Code of Procedure has already been set out,[6] which provides that, in the case where the landlord chooses to avail himself of the provision, the tenant obtains a remission of the rent due if he quits the premises within the delay notified to him by the landlord. The delay must not be less then three clear days. If a tenant on being served with the following notice from his landlord:—"The house having been rented from the 1st July next, we take the liberty of notifying

[1] *Ibid.*

[2] *Ibid.*

[3] *Ante* p. 62.

[4] Arts. 1659, 1660 C. Code.

[5] See *infra*, Ch. VI "Termination of the lease, section 8. Destruction of the premises"; Dalloz 68-1-471.

[6] *Ante* p. 126.

you that we wish you to quit the premises at that date," quits the leased premises within three days, he is released from liability to pay rent then due, such notice meeting all the requirements of Art. 1089 C. P.[1]

Compensation.

Rent can be compensated like all other debts.[2] Where a tenant is compelled to leave the premises on account of their becoming uninhabitable, and is also allowed damages, he can compensate such damages against rent due by him at the time of his departure.[3] Defendant was creditor of a portion of the rental which plaintiff his creditor, attached by garnishment. The defendant had agreed with the garnishee, his creditor, that he would take out his portion of the rental by boarding with him, and that this arrangement should last as long as the defendant should board with the garnishee. It was held, in the absence of proof that such an agreement had been collusively made to deprive the defendant's creditors of their recourse, the garnishee could set off against the plaintiff's demand the conventional compensation resulting from the above agreement, as long as the defendant boarded with him. But the duration of such an agreement being uncertain, the Court declared the seizure *tenante* for the case where the said agreement might terminate before the expiration of the lease.[4]

Remedies of landlord for non-payment of rent by tenant.

One of the consequences to the tenant of the non-payment of his rent, according to the stipulations of the lease, whether verbal or otherwise, is that the landlord can institute an action against him, either in the ordinary course of law or by summary proceedings, according

[1] *Pontbriand Co. v. Chateauvert*, 11 Que. P. R. 242.

[2] *Thymeus v. Beaudrong*, S. C. 1879, 9 R. L. 540.

[3] *Fyfe v. Lavallee*, Mag. Ct. 1889, 12 L. N. 147. See *supra* pp. 167-168.

[4] *Manufacturers' Life Insurance Co. v. De Bellefeuille*, Q. R. 15 S. C. 431 (S. C. 1899).

to Art. 1150 *et seq.* C. P., to recover possession of the premises leased.[1] This is the case even where there is only one instalment of rent due.[2] If there be no lease, either written or verbal, so that the tenant is occupying by the mere tolerance of the proprietor, he can be ejected only where he has not paid rent for a period exceeding three months.[3]

But Article 1089 of the Code of Procedure provides for summary expulsion of a tenant for non-payment of rent where the landlord finds it desirable to adopt the proceedings therein set out. For instance, this Article declares that "Whenever any rent is due by a lessee and is not paid when due, the proprietor or lessor may notify the lessee in writing, to quit the premises leased within a delay which shall not be less than three clear days; and if he quits within the said delay the rent due is remitted him."

"If the lessee refuses or neglects to comply with the said notice within the specified delay, the lessor may, by suit before a competent court, have all the moveables garnishing the leased premises, and which have not been removed within the specified delay, attached, and have them sold in the ordinary manner, without the lessee having any right to avail himself of the exemption from seizure provided for under Articles 598 and 599, paragraph 2."

[1] Art. 1624, paragraph 2 C. Code; *Guardian Insurance Co. v. Humphrey*, Q. R. 33 S. C. 393 (C. R. 1908), citing *Quintal v. Noiron*, 5 L. C. J. 28; *McDonnell v. Collins*, 3 L. C. J. 41; *Carry v. Johnston*, 15 L. C. R. 260; *Lusignan v. Rielle*, 16 R. L. 694, and disapproving *Joseph v. Penfold*, Q. R., 10 S. C. 152.; *Robert v. Chateauvert*, S. C. 1887, M. L. R., 3 S. C. 214, overruling *Pelletier v. Lapierre*, C. Ct. 1875, 7 R. L. 241.

[2] *Guardian Insurance Co. v. Humphrey* (C. R. 1908), Q. R. 33 S. C. 393.

There is not litispendence where a landlord, having seized his tenant's effects for rent, and the seizure is opposed on the ground of their being unseizable, the landlord makes a second seizure of the same effects for rent due since the first seizure in case the effects may be declared seizable in the first action; *Montreal Street Railway Co. v. Gauthier*, Q. R., 14 S. C. 147 (S. C. 1898).

[3] Arts. 1624 paragraph 2 and 1608 C. Code.

As to the recourse of the landlord under Art. 1608 C. Code, see *ante* p. 6.

"The lessor need not avail himself of the benefit of this Article, and in that case he retains all his rights and recourse as though this Article did not exist."

The judgment rescinding the lease by reason of the non-payment of the rent is pronounced at once without any delay being granted by it for the payment; nevertheless, the tenant may pay the rent with interest and costs of suit and thereby avoid the rescission at any time before the rendering of the judgment.[1] The delay between service of judgment and ejectment, however, is within the discretion of the Court,[2] but is usually three days.

For non-payment of rent, the landlord can also join to the action in expulsion a demand for rent with or without an attachment for rent, an attachment in recaption, if necessary, or an attachment before judgment in the hands of the tenant or of garnishees.[3]

Damages for loss of rental.

Where the landlord demands rescission of the lease for non-payment of rent, the tenant is obliged to pay the rent up to the time of vacating the premises and also damages, as well for loss of rent afterwards, during the time necessary for re-letting, as for any other loss resulting from the wrongful act of the tenant.[4] For the method of reckoning the indemnity due the landlord, where the lease is resiliated for the fault of the tenant, see *post* Chapter VI, "Termination of the Lease."

Surety for payment of rent.

Where a third party has become surety for a tenant's

[1] Art. 1625 C. Code.

[2] Art. 1160 C. P.

[3] Art. 1624 C. Code; Art. 1152 C. P.
The liquidators appointed under Art. 1896a of the Civil Code, to wind up a dissolved partnership, can sue a debtor of the partnership for rent and damages, with a conclusion for resiliation of the lease, without first obtaining an order of the Court or of a judge or the authorization of the members of the partnership. *Robert v. Gagnon*, Q. R. 10 K. B. 237 (1900).

[4] Art. 1637 C. C., *Guardian Assurance Co. v. Humphrey*, Q. R. 33 S. C. 394 (C. R. 1908), affirming S. C. See Article 1065 C. Code.

rent, he is released where the lease has been resiliated at the landlord's demand, for a cause other than the non-payment of rent, and the landlord cannot claim from the surety for periods of rental due since the date of instituting his action, even where such rental is included in the damages to which the tenant has been condemned by reason of the resiliation.[1] Where a sum is deposited with the landlord as a guarantee for the prompt payment of the rent as it becomes due and to serve as liquidated damages in case of delay to pay, the acceptance by the landlord, without reserve, of overdue rent, constitutes an implied renunciation by him of damages, and the tenant may recover the sum so deposited upon resiliation of the lease.[2]

Receipts for rent paid.

The tenant must be careful to obtain receipts for rent paid and to preserve them during the whole course of the lease, and even thereafter, for he may need them for the purpose of showing them to future prospective landlords. For this reason a tenant has a right to demand a receipt, for each payment of rent, from his landlord or some person duly authorized by him.[3] A receipt given by the landlord's attorney in an attachment for rent is not sufficient, and upon refusal of the landlord to give a receipt under his own hand, the tenant can sue to compel him to give it, or in default that the judgment ordering him to do so shall stand in lieu thereof.[4]

Where the tenant is sued for rent, if he cannot produce a receipt he will be allowed to bring witnesses to prove the payment only where the amount involved is fifty dollars or under, or, if over that amount, where there is

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[1] *Burland v. Valiquette*, Q. R. 24 S. C. 94 (S. C. 1903); *Casey v. Janvier*, Q. R., 16 S. C. 43 (S. C. 1899).

Where the landlord goes security for his tenant's gas bill, he can sue his tenant for this bill only where he is sued by the creditor. *Beaudry v. Boucherie*, C. R. 1883, 30 L. C. J. 329.

[2] *Wallace v. Honan*, Q. R. 32 S. C. 236 (C. R. 1907).

[3] *Plamondon v. Mathieu*, Q. R. 16 S. C. 32.

[4] *Ibid.*

some writing or admission which will serve as a basis for the admission of testimony, unless the landlord can be got to admit the payment upon the oath being put to him.[1] If receipts can be produced for the rent of several consecutive years, the better opinion, we think, is that such receipts can serve as a commencement of proof in writing to support the inevitable presumption that the rent was paid for the period anterior to such receipts, and to allow the admission of testimony to that effect.[2]

Prescription of action for rent.

House rent is prescribed by five years;[3] but if during that period the tenant makes some acknowledgment of the debt without paying it, this will interrupt the prescription, which will commence to run anew from the date of such acknowledgment.[4]

Cost of lease and registration.

The cost of the lease and its registration is at the charge of the tenant.[5]

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[1] Art. 1233 C. Code; Private receipts for rent or otherwise make *prima facie* evidence of their contents, and the burden of proof is upon the opposite party to disprove them. *Baylis v. Stanton*, Q. B. 1882, 27 L. C. J. 203.

Held, in France, that an admission by the tenant of the existence of the lease, but claiming to have paid his rent, is indivisible, Trib. paix. Bazas, 27 Dec. 1890. Rec. de Bordeaux, 91, 3, 62; Baudry-Lacantinerie I., n. 868.

Acceptance of a cheque bearing the words "in full for rent to first of August" does not necessarily imply acquiescence on the part of the person receiving it. The circumstance of each case must determine such a question, *Royal Trust Co. v. White*, Q. R. 50 S. C. 277 (S. C. 1916).

[2] 1 Guillouard 226; Baudry-Lacantinerie I. n. 868; Colmar, Sirey 4-2-119; Cassation, Sirey 37-1 914; Bordeaux, Sirey 40-2-222; Cassation, Sirey 56-1-421; Cassation, *France Judiciaire*, 81-82, p. 527.

[3] Art. 2250 C. Code.

This applies also to lease by sufferance under Art. 1608 C. C., *Breakey v. Carter*, Supreme Court, Cassel's Digest, 2nd Edit. 463.

Effect will be given to the prescription even though not pleaded and only set up for the first time in appeal. (*Ibid.*)

[4] Art. 2227 C. Code.

[5] See Art. 1479 C. Code; 1 Guillouard 229.

Taxes.

The landlord always retains the *property* in the premises leased, and he has even the enjoyment of it in the form of rental;[1] it is said to be only just, therefore, that he should support all the real estate taxes thereon, whether ordinary or extraordinary, unless the lease stipulates to the contrary.[2] In the event of such a stipulation in regard to those taxes which it would otherwise be incumbent on the landlord to pay, such taxes assume, so far as the tenant is concerned, the same character as, and go to make up, the rent which the landlord is to get from his tenant for the enjoyment of the thing leased;[3] they are therefore prescribed by five years,[4] and they can be sued for by the landlord, if in arrears. The landlord, or the purchaser of the leased premises, can also sue in resiliation of the lease on the ground of non-payment of the taxes which the tenant has expressly or by implication in the lease agreed to pay.[5] The tenant cannot refuse to pay the taxes to the landlord because the latter has not paid them to the city or municipality.[6] If the stipulation in the lease, charging the tenant with payment of taxes, is of a wide nature, mentioning specially "all taxes and assessments," this will include special assess-

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[1] Pothier 211.

[2] Pothier 211; 1 Guillouard 231.

Baudry-Lacantinerie I., n. 885, does not agree with this reasoning, and thinks that it cannot be laid down as a general principle that the landlord should support all taxes, in the absence of a contrary stipulation.

[3] *Ettenberg v. Aronson*, Q. R. 45 S. C. at p. 93 (C. R. 1913).

[4] *Ouimet v. Robillard*, S. C. 1881, 5 L. N. 8, 27 L. C. J. 227; *Guy v. Normandeau*, 21 L. C. J. 300, is not to the contrary as the record shows that it was not as tenant, but as co-proprietor, *i. e.*, as *grevé de substitution*, that the party was there held liable, the prescription being held as that of 30 years.

[5] *Ettenberg v. Aronson*, Q. R. 45 S. C. at p. 93 (C. R. 1913), citing *Thivierge v. Laurencelle*, *infra*; *Ecclesiastiques du Seminaire de St. Sulpice de Montreal v. City of Montreal*, 16 S. C. R. 399.

[6] *Thivierge v. Laurenceville*, C. Ct. 1889, 18 R. L. 403; *Ouimet v. Robillard*, *supra*; Contra, *Maille v. Richer*, S. C. 1879, 2 L. N. 414.

ments, *e.g.*, such as are imposed for local improvements.[1] But a tenant would not in that case be held liable to pay a special assessment for the widening of a road for which the proprietor had received compensation.[2]

The water tax is not a tax affecting realty, but is a personal tax, and by By-law No. 432, sec. 7, of the City of Montreal, such tax is made payable by the tenant, occupant or proprietor occupying a house or part of a house. The water tax is payable by the tenant to the City *only* and not to the landlord.[3]

Insurance charges.

Leases of manufacturing premises not infrequently contain clauses containing covenants relating to insurance of the premises. A covenant in a lease that the tenant will insure the premises and transfer the policies to the landlord, and, in default of doing so, the landlord will have the right to insure them himself and recover the premiums from the tenant, is binding, notwithstanding difficulties in the way of obtaining insurance from regular underwriters, particularly when such difficulties arise from the circumstance that the tenant does not occupy the premises. In such a case the landlord has the right to insure as best he can and to recover the premiums, even if somewhat in excess of ordinary rates.[4]

A covenant in a lease that the tenant shall pay, in addition to rental, any "extra premiums of insurance of the premises exacted in consequence of the business or work he carries on therein," does not impose on the landlord the obligation to notify the tenant when such extra premiums are exacted, even though the premises

[1] *Les Ecclesiastiques de St. Sulpice de Montreal v. City of Montreal*, Supreme Ct. 1889, 16 Can. S. C. R. 399; *Pinsonnault v. Ramsay*, 5 L. C. J. 227; *Pinsonnault v. Henderson*, 5 L. C. J. 338; *Berthelet v. Muir*, 5 L. C. J. 339; *Dumas v. Viau*, 5 L. C. J. 339; *Ettenberg v. Aronson*, Q. R. 45 S. C. at p. 93 (C. R. 1913).

[2] *Shaw v. Laframboise*, Q. B. 1871, 3 R. L. 451.

[3] *Donaldson v. Charles*, Q. B. 1880, 27 L. C. J. 87.

[4] *Bannerman v. Consumers Cordage Co.*, Q. R. 34 S. C. 441; affirmed in appeal Q. R., 18 K. B. 305 (1908).

were occupied for a number of years by the same tenant, carrying on the same business, under a lease containing the same clause, during which no extra premiums had been paid.[1] Dilatoriness on the part of the landlord, and his not making the demand for such extra premiums for several years, cannot be construed as a waiver of his right to recover them.[2]

In construing a lease, in which the landlord and tenant are both described as manufacturers of tobacco, and the premises as a "four storey building, etc., now occupied by the lessor as a factory," it is fair to infer that the premises were leased to be used as a tobacco factory. Therefore, a clause in the lease that "the lessee shall pay all extra premiums of insurance of the premises, exacted in consequence of the work or business" does not make him liable for the difference between warehouse and factory rates of insurance.[3]

5. OBLIGATION OF THE TENANT TO PRESERVE THE PREMISES AND RESTORE THEM IN THE CONDITION IN WHICH HE RECEIVED THEM.

General Obligations.

Where a statement has been made between the landlord and the tenant, of the condition of the premises, the latter is obliged to restore them in the condition in which the statement shows them to have been, with the exception of the changes caused by age or irresistible force.[4] If no such statement has been made, the tenant is presumed to have received the premises in apparent good condition, and is obliged to restore them in the same condition, saving his right to prove the contrary.[5]

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[1] *McMillan v. Wing Sang Kee*, Q. R. 29 S. C. 440 (C. R. 1906).
[2] *Ibid.*
[3] *Fortier v. Younghart*, Q. R., 28 S. C. 118 (S. C. 1904).
[4] Art. 1632 C. Code.
[5] Art. 1633 *ib.*; 1 Guillouard 246.
This presumption can be invoked not only by the landlord, but by third parties. *Paquet. v. Nor. Mount Royal Realty Co.*, Q. R. 49 S. C. 302.

And, further, the tenant is liable for injuries and loss which happen to the premises during his enjoyment of them, unless he proves that he is without fault;[1] he is responsible even where the injuries and losses happen from the acts of persons of his family or of his sub-tenants.[2]

No doubt, if premises are left in a very untidy or filthy condition, an action of damages would lie to recover damages for the trouble and expense the landlord would be put to in having the premises tidied up or cleaned. But the Courts would seem not to favor such an action unless the damage is considerable.[3]

If, upon expiry of the lease, the landlord claims that the premises are not delivered up in as good condition as they were received by the tenant, or are delivered in part only, making allowance for ordinary wear and tear,[4] it must first be ascertained whether the deterioration existed at the time the premises were taken over by the tenant, or occurred during his occupation. If a statement of the premises were drawn up at the time of making the lease, this will easily be ascertained; if no such statement exist, and if the deterioration be an apparent one, the burden of proving that the premises were delivered with the deterioration existing at the date of the lease is upon the tenant; if the deterioration be a hidden one, such as the existence of bed-bugs in the house, the burden of proving that it arose through the fault of the tenant is upon the landlord.[5] If it be established that the deterioration or loss occurred during the occupancy of the tenant, it must next be ascertained whether it occurred by virtue of the age of the premises, by the fault of the tenant, or from causes beyond his control. The first of these can be determined by an expert examination of

[1] Art. 1627 *ib.*

[2] Art. 1628 *ib.*

[3] See *Stevenson v. McPhail*, Q. R., 17 K. B. at pp. 126, 130, reversing Dunlop J. (see latter at p. 120).

[4] 25 Laurent 270; 1 Guillouard 242.

[5] Arts. 1632, 1633 C. Code; Caen, 25th Feb., 1871; Dalloz 72-2-150; 1 Guillouard 246; Baudry-Lacantinerie I., n. 918, 925.

the premises, and in order to escape from the presumption of fault against him declared by Art. 1627 C. Code, the tenant must prove that the condition of the premises has arisen through causes beyond his control.[1]

The tenant, it has been said, is responsible for injuries, etc., caused by the persons of his family or of his subtenants;[2] this liability must be interpreted as extending to all persons in the house who are under the control of the tenant, such as his wife, children, servants, workmen engaged by him to work about the premises, boarders and guests.[3]

Remedy of landlord where tenant refuses to give up the premises leased when lease expired.

The landlord has a right of action in the ordinary course of law, or by summary proceeding, to recover possession of the premises leased in all cases where there is a cause for rescission, and where the tenant continues in possession, against the will of the landlord, *more than three days* after expiration of the lease.[4] The landlord cannot recover possession by his personally taking forcible possession of the leased premises, at the moment occupied by the tenant.[5] If the tenant claims the right to remain on after expiration of the lease in a quality other than that of tenant, the landlord could exercise his recourse against him by possessory action,[6] otherwise the action must be a personal one.[7]

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[1] Arts. 1627, 1200 C. Code; 25 Laurent 274; 7 Colmet de Santerre, p. 257; 1 Guillouard 237.

[2] Art. 1628 C. Code.

[3] Pothier 193; Domat, liv. 1, tit. 4, Sect. 2, No. 5; 1 Guillouard 247; Baudry-Lacantinerie I. n. 932. And see French version of Art. 1628 C. Code, which uses the expression "personnes de sa maison."

[4] See Art. 1624 C. Code.

[5] Baudry-Lacantinerie I., n. 967.
Brien v. Lacombe, Montreal, Novb. 1916.

[6] Baudry-Lacantinerie I., n. 967; Cass. *req.* 6 *frim*, An. XIV. S. Chr.; Aubry et Rau II. p. 224 et 225, section 187, note 8.

[7] Baudry-Lacantinerie, *loc. cit.*

Special Obligation in the Case of Destruction by Fire.

Where loss by fire occurs in the premises leased, there is a legal presumption in favor of the landlord, that it was caused by the fault of the tenant or of the persons for whom he is responsible; and unless he proves the contrary he is answerable to the landlord for such loss.[1]

Rebuttal of presumption by tenant.

It seems now to be settled under our law that, in order to rebut the presumption created by article 1629 C. Code, it is not necessary to prove the exact or possible origin of the fire, or that it was due to unavoidable accident or irresistible force. It is sufficient for the tenant to prove that he has used the premises leased as a prudent administrator (*en bon pere de famille*), and that the fire occurred without any fault that could be attributed to him or to persons for whose acts he should be held responsible; he need not show how the fire originated.[2]

As indicated below, the jurisprudence and authors in France are much divided on this question, but the ques-

[1] Art. 1629 C. Code.

[2] *Evans v. Skelton*, 16 S. C. R. 637; *Murphy v. Labbe* (1896), 27 S. C. R. 126; Q. R. 5 Q. B. 88; *Lindsay v. Klock* (1898), 28 S. C. R. 453; Q. R. 7 Q. B. 9; see *Ford v. Phillips*, Q. R. 21 S. C. at p. 20, Q. R., 22 S. C. 296 (C. R. 1902), reversed in appeal 23 June 1903; *Parent v. Potvin*, S. C. 1895, 1 Rev. de Jur. 387. In this sense also Guillouard, I., n. 269; Planiol II., n. 1718; Colmet de Santerre VII., n. 179 *bis*; Duvergier I., n. 435; Boileux VI., p. 76; Laurent XXV., n. 2798; Prudhom, *Usufruit* IV., n. 1552; Larombiere, *Obligations*, Art. 1148, n. 14; Taulier VI., p. 244, and the generality of the courts in France.

Contra, *Evans v. Skelton*, per Taschereau J., 16 S. C. R. at p. 656; *Seminary of Quebec v. Poitras*, S. C. 1870, 1 Q. L. R. 185; *Belanger v. McCarthy*, C. R. 1875, 19 L. C. J. 181; and see Baudry-Lacantinerie I., n. 978; Cass. 16 Aout 1882, Dalloz 83-1-213; Touillier XI., n. 161; Marcadé, Art. 1733 n. 1; Masse et Verge IV., section 702, note 19; Aubry et Rau IV., p. 485, section 367, notes 20, 21 and 22; Huc. X., n. 3158.

In *Jamieson v. Steele*, Supreme Court, 1878, Cassel's Digest, 2nd Edit. p. 466, affirming Q. B. 1876, Ramsay's Digest p. 217, it was held that appellant, having failed to establish that the fire occurred without any fault of his or of his men, he should be condemned to pay the damages caused to the premises leased by him; and moreover, that respondent having proved that it was through the negligence of appellant's men that the fire occurred, he was also liable under Art. 1630 C. C. for the damages to the adjoining premises.

tion there is on a different footing to that which obtains in this province. Article 1733 of the Code Napoleon declares that the tenant is responsible for loss by fire on the premises leased unless he proves that the fire arose through a fortuitous event or by defective construction —or that the fire was started in an adjoining building. This is very much more specific than our Article 1629 C. Code, *q.v. supra*, p. 180. Therefore, when *Baudry-Lacantinerie*[1] says that the language of Article 1733 Code Napoleon is itself conclusive that the tenant must show how the fire originated, and that it originated without his fault, this reasoning is clearly not applicable to our corresponding Article, and lends additional weight to the view above expressed, as adopted in this Province of late years, and sustained by the Supreme Court of Canada. Whatever weight a contrary doctrine may have had before the advent of electricity as a means of lighting the interior of buildings, to now hold the tenant to a stricter responsibility under Article 1629 C. Code than that adopted by the Supreme Court, would be to convert that Article into a very unreasonable and oppressive rule of law. It is well known that a great many fires are now attributable to defective wiring, for which the tenant is not responsible.

A more difficult question arises where the lease contains a stipulation that the premises shall be delivered over to the landlord at the expiration of the lease in as good order, etc., "*accidents by fire excepted.*" It has been held in that case, and more particularly where the tenant undertakes to pay all extra premiums of insurance, which might be charged to the landlord consequent on the nature of the business carried on in the premises by the tenant, that the presumption of fault established by Art. 1629 C. Code against the tenant cannot be invoked by the landlord; on the contrary, the burden of proof is upon him to establish fault on the part of

[1] I. p. 564.

the tenant.[1] In the case, of *Ford v. Phillips*,[2] Davidson J., in the Superior Court,[3] after reviewing the authorities, stated that while it was difficult to ignore the opinions just cited, he could not refrain from asserting that if his judgment had to rest solely upon them, he would need to seriously consider if they represented a settled and final interpretation of the law, and that it was not improbable he would have come to the opinion expressed by Mathieu J. in *De Sola v. Stephens*,[4] where it was held that a like lease exception as to fire was not a waiver by the landlord of Art. 1629 C. Code, and that the tenant had still to prove absence of fault. But the learned Judge went on to state that he had no need to pursue the subject to a conclusion, for he considered that the evidence adduced by the defendant fully sufficed to exonerate him from all responsibility in regard to the destruction of the building. In Review, it was held, affirming the *dispositif* of the judgment of the Superior Court, that a fire in the leased premises, the cause of which is unknown, or not legally proved, is an accident within the meaning of the above-mentioned clause in the lease excepting accidents by fire."

In such a case, it was said, there is no presumption of fault against the tenant, where a fire occurs the origin of which is unknown, but rather a presumption of absence of fault, and the burden of proving fault is on the landlord. Two of the judges in Review held that, even assuming that the burden of proving absence of fault was on the tenant, he had succeeded in doing so in the

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[1] *Evans v. Skelton*, Supreme Ct. 1889, 16 S. C. R. 637; confirming Q. B. 1887, M. L. R. 3 Q. B. 325, 31 L. C. J. 307 (overruling *De Sola v. Stephens*, S. C. 1884, 7 L. N. 172, 13 R. L. 472); *Liggett v. Viau*, Q. R. 18 S. C. 201, affirming, Q. R. 14 S. C. 396, but increasing the damages; *Ford v. Phillips*, Q. R. 21 S. C. 1, confirmed in Review, Q. R. 22 S. C. 296 (1902), but reversed in appeal 23 June 1903 (unreported.

[2] *Supra.*

[3] Q. R. 21 S. C. at p. 23.

[4] *Supra.*

present case. The author is informed that this judgment was reversed in appeal 23 June, 1903 (unreported).

At the moment of going to press, the case of *Seminary of St. Sulpice vs. Frothingham & Workman*, reported in the Montreal Gazette of October 30, 1916, has decided, where the above clause was present in the lease, that thawing out the water-pipes by an employee using a gasoline lamp, which lamp exploded, thus causing the fire, constituted negligence on the part of defendants; the fire was therefore not caused by an accident, and the clause in question did not exempt them from liability. Appeal dismissed.

A fire is in itself not necessarily either a fortuitous event or the result of fault;[1] it is a simple fact. With such a clause in the lease, it might reasonably be contended that, as the tenant pleads such a contractual exception to a general rule of the law, it is upon him to prove the exception. Such proof would have to establish that the premises had been destroyed by fire, and that it was an accident.

In any event the tenant is required to use the leased premises as a prudent administrator,[2] and is liable for injuries and loss which happen to such premises during his enjoyment of it, unless he proves that he is without fault,[3] and his responsibility extends, as regards injuries, to the acts of persons of his family or of his sub-tenants.[4]

The presumption against the tenant, in respect of fire on his premises, exists in favor of the landlord only, and not in favor of the proprietor of a neighbouring property who suffers loss by fire, which has originated in the premises occupied by such tenant.[5] But if, in an action against his tenant for damage by fire, the landlord proves affirmatively that the fire arose through the

[1] Baudry-Lacantinerie I., n. 972; Guillouard I., n. 249.
[2] Art. 1626 C. C.
[3] Art. 1627 C. C.
[4] Art. 1628 C. C.
[5] Art. 1630 C. Code.

gross negligence of such tenant in the use of dangerous materials, and the neglect of the most simple precautions to guard against the accident, he can recover for damage thereby done to an adjoining property owned by him, as also could a neighbouring proprietor if he could make the same proof.[1] The presumption established by Arts. 1629, 1630 C. Code does not arise in favor of the landlord, where the fire arises in other premises leased by his tenant and communicating with those belonging to such landlord.[2]

If there be two or more tenants of separate parts of the same property, each is answerable for loss by fire according to the proportion of his rent to the rent of the whole property, unless it is proved that the fire began in the habitation of one of them, in which case he alone is answerable for it, or some of them prove that the fire could not have begun with them, in which case they are not answerable.[3]

Where the proprietor also inhabits a part of the house leased by him, the presumption against the tenant is somewhat modified. According to French authorities, the landlord must prove that the fire did not originate in his part of the premises, in order to get the benefit of the presumption established by Art. 1629 Civil Code in his favor, and then the presumption only exists for the part actually occupied by the tenant, not for the whole house. To render the tenant liable for damage to the rest of the premises, the burden of proving his negligence would be upon the landlord.[4] The same rule is applicable to an

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[1] *Jamieson v. Steele*, Supreme Ct. 1878, Cassel's Dig., 2nd edit., p. 466. See *supra* p. 180, note

[2] *Pinsonneault v. Gerriken*, Q. B. Montreal, June, 1875.

[3] Art. 1631 C. Code.

[4] Sirey 9-2-314; Sirey 44-2-175; Sirey 56-1-103; Dalloz 55-1-457; Sirey 73-2-69; Dalloz 74-5-318; 1 Troplong 380; 3 Duvergier 425; Marcadé, Art. 1733; 4 Aubry et Rau, section 367; 1 Guillouard 272. Since 1883 the French law on this point has been modified by statute. The rule only exists where the relation is one of landlord and tenant and not that of joint occupants. *Foster v. Allis*, Q. B. 1871, 16 L. C. J. 113.

action by a tenant for the same cause, against his sub-tenants in the same building.[1]

The damages to which a landlord is entitled should cover all losses directly traceable to the fire,[2] such as a sufficient sum to reconstruct the premises, on the basis of the value of the property at the date of the fire, and loss of rent. But if the tenant should rebuild at his own expense, allowance must be made for the increased value, if any, of the new building over the old.[3] Where the landlord is insured, the amount due by the insurance company is limited to the actual loss sustained to the *premises* insured, and does not include loss of rental during the period required to rebuild or repair.[4] The latter is purely a matter between the landlord and the tenant. The insurance company may be subrogated in all the rights of the landlord as regards the actual insurance money paid by them, provided that *at the same time the payment is made*, they are *expressly* subrogated in his rights against the tenant in regard to that sum.[5] If the company should fail to be so subrogated, their recourse against the tenant for damages would exist merely by virtue of Art. 1053 C. Code after having paid the insurance to the insured.[6] The advantage of subrogation in this case is that the insurers succeed to the special presumption of fault on the part of the tenant provided by Art. 1629 in favor of the landlord, whereas by Art. 1053 the burden of proving fault is upon the insurers.[7]

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[1] 1 Guillouard 272.

[2] Art. 1073 C. Code.

[3] Guillouard 279, 280; Sirey 51-2-129; Sirey 51-2-132; Sirey 70-1-60; Dalloz 74-5-319; 4 Aubry et Rau, section 367; Marcadé, Arts. 1733-1734; Cassation J. P. 1840-2-729.

[4] 1 Guillouard 279; Vallet, *Obligations du Locataire d'Immeubles en cas d'Incendie*, p. 122.

[5] *Cedar Shingle Co. v. La Cie. d'Assur. de Rimouski*, Q. B. 1893, Q. R. 2 Q. B. 379; Arts. 1155-2584 C. Code.

[6] *Ibid.*

[7] *Ibid.*

Insurable Interest of Tenant.

A person who has a limited interest may insure nevertheless, on the total value of the subject matter of the insurance, and he may recover the whole value, subject to these two provisions: first of all, the form of his policy must be such as to enable him to recover the total value, because the assured may so limit himself by the way in which he insures as not really to insure the whole value of the subject matter, and secondly, he must intend to insure the whole value at the time. If he has intended to cover other persons besides himself, he can hold the surplus for those whom he had intended to cover.[1] Thus, when additions to leased premises are built by the tenant, under agreement with the landlord, that, as a consideration therefor, he shall have certain rights as to the enjoyment of the whole, as to recoupment of his outlay and the option to purchase at the highest price that may be offered, the tenant acquires an insurable interest in the premises and additions that gives him the right to insure them as a whole against loss by fire.[2] Such an interest is sufficiently described in a policy, by the words "the interest of —as co-proprietor in a building, etc.," particularly when the lease and other documents concerning it were handed to the insurance broker or agent who procured the insurance, and who, under the Act 8 Ed. VII, c. 69, s. 203, is deemed the agent of the insurer.[3] The tenant so insured has a right to recover the whole amount of the insurance, subject to his liability to account to the landlord for the surplus over his own interest.[4]

[1] See *Castellain v. Preston*, 11 Q. B. D. 380.

[2] *Mutual Fire Ins. Co. of Canada v. La Cie. C. A. Paquet Ltee.*, Q. R. 21 K. B. 419 (1912).

[3] *Ibid.*

[4] *Ibid.*

CHAPTER V.

Rights of the Tenant.

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1. Right to Enjoy the Thing Leased.

Enjoyment of premises leased as affecting the tenant and third parties.

The tenant has a right to the peaceable enjoyment of

the premises leased during the continuance of the lease.[1] But the exercise of this right is subject to the restrictions imposed upon the enjoyment of immoveable property by virtue of the corresponding right of neighbours to the undisturbed enjoyment of their properties. It has already been pointed out[2] that the landlord cannot be held liable for the damages resulting from the acts of his tenant by virtue of the principle of law that every person is responsible for the damage caused by the fault of those who are under his control, for *prima facie*, the tenant is not considered as being under the control of his landlord; neither is he his agent. But it was also pointed out that if the landlord has authorized the tenant in his wrongful use of the property, his liability then arises. If he orders the tenant to make a wrongful use of the property leased, the tenant would be his agent, and the landlord would be liable as principal. The tenant is liable at common law to third parties for damage caused to them by his fault,[3] or the fault of persons under his control and by things he has under his care.[4]

Thus, where the landlord and tenant were sued jointly by the proprietor of a barn, which was burnt by sparks from a steam engine in a tanning factory leased to the tenant, it was proved that there was no defect in the construction of the furnace and the smoke-stack. The Court held the tenant liable, and dismissed the action so far as it related to the landlord.[5] But if the tenant uses the premises for the purpose for which they were

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[1] Art. 1612 C. C.

Where a person rents a brewery with which a machine has been incorporated so as to become immoveable by destination, he can, during the lease, oppose the revendication of such machine by the unpaid vendor. But the revendication can be maintained so as to take effect after the lease. *Bishop, Babcock, Becker Co. v. The Independent Brewery Co.*, Q. R. 49 S. C. 499 (S. C. 1916.)

[2] *Supra*, p. 148.

[3] Art. 1053 C. C.

[4] Art. 1054 C. C.

[5] *Dufour v. Roy*, Q. B. 1885, 11 Q. L. R. 192; 8 L. N. 75; 14 R. L. 511.

leased, and in a normal manner, he will not ultimately be held liable to third parties for any damage which they may suffer in consequence of his use of the premises. The landlord, in effect, is obliged to give his tenant a peaceable enjoyment of the premises during the continuance of the lease, which would be evaded were the tenant to be plied with actions at law in consequence of his use thereof.[1] This would constitute a *trouble de droit* or judicial disturbance, against which the landlord is obliged to warrant his tenant.[2] For instance, where a neighbour sues the tenant by reason of the noise made on the leased premises, if the noise is authorized by the landlord, or is incident to the business therein normally and legally carried on, and permitted by the lease, such action is, towards the tenant, a judicial disturbance against which his landlord is obliged to warrant his tenant.[3] And it was so decided in the case of premises rented as a glue factory, which was normally operated, but which allowed maloderous liquids to escape on to adjoining lands.[4] But where a property is leased for the exploitation of an industry which may easily become a source of annoyance or danger to neighbours, the landlord's direct responsibility to such neighbours may arise.[5]

The landlord could not, however, be held in warranty where the tenant operates his business in an abnormal manner, and is sued by a neighbour in consequence;[6]

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[1] Art. 1612 C. Code; 1 Guillouard 287; 25 Laurent 174; Cassation, Dalloz 76-1-263. See *Muller v. Stone*, Supreme Court of Louisiana, 27 La. Ann. 125.

[2] Art. 1616 C. Code; Baudry-Lacantinerie I., n. 596; Guillouard I., n. 193 and 287; Huc. X., n. 310; Cass. 3 Dec. 1872, Dalloz, 73-1-294; 25 Laurent 174.

[3] Baudry-Lacantinerie, I., n. 596, citing Cass. 3 Dec. 1872, Dalloz 73-1-274; Guillouard I., n. 193 et 287; Huc. X., n. 310.

[4] Baudry-Lacantinerie I., n. 596, citing 3 Dec. 1872 *supra*; Guillouard I., n. 287.

[5] *Lachance v. Cauchon*, Q. R. 24 K. B. 421 (1915). Appeal to Supreme Ct. quashed.

[6] Baudry-Lacantinerie I., n. 596, citing Cass. 27 Mars 1876, Dalloz 76-1-263; Guillouard I. n. 277; Fugier-Herman, Art. 1719 n. 32.

his liability may, however, arise through a statutory provision.

The tenant who neglects to make the repairs known as tenant's repairs, is liable to a co-tenant for damages arising from his negligence.[1]

Where the tenant of a shop erects an awning, which, being blown down by a storm, seriously injures a passer-by, the latter's recourse is against the tenant only.[2] Thus, also, where a flower-pot falls from a window-sill of the premises occupied by the tenant, causing injury to a passer-by;[3] also where the tenant makes an excessive and unreasonable noise;[4] or by the particular mode of conducting his business injures the business of his neighbours.[5]

The landlord's direct liability will occur where injury to third persons arises from a defective construction of the premises or want of repairs, whether the injury occurs to passers-by or to guests of the tenant, or to others rightly on the premises.[6] Landlords are obliged to inspect their own property from time to time, to ascertain if *grosses reparations* are required, and are not exempt from liability for accidents to tenants for want of notification on the part of tenants that such repairs have become necessary.[7] The landlord of an office building is

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[1] *Paquet v. Nor-Mount Realty Co.*, Q. R. 49 S. C. 302 (C. R. 1916).

[2] *Brisson v. Renaud*, S. C. 1888, M. L. R., 4 S. C. 88.

[3] Baudry-Lacantinerie I., n. 1042, citing Paris, 30 Avril 1896, *Gaz. Pal.* 96-2-546.

[4] Baudry-Lacantinerie I., n. 1038, citing Trib. Civ. Seine, 25 Feb. 1902. *Droit*, 20 Juin 1902.

[5] Baudry-Lacantinerie I., n. 1038, citing Trib. Com. Marseille, 29 Nov. 1900, *Rec. Marseille*, 1901, 1, 64.

[6] Art. 1055 C. C., *Elliott v. Simmons*, Q. B. 1890; M. L. R., 6 Q. B. 368, confirming S. C., M. L. R., 5 S. C. 182. Tait J., in the Superior Court, stated that he did not think the term "ruin," used in Art. 1055 C. Code, was to be restricted to the absolute ruin of a building (p. 185); and see as to this, *Rancour v. Hunt*, Q. R., 1 S.C., at p. 81; Andrews J. (C. R. 1892); *Ferrier v. Trepanier*, 24 S. C. R. 91; *Jackson v. Vanier*, Q. R. 18 S. C. 244 (C. R. 1900); *Troude v. Meldrum*, Q. R. 21 S. C. 75 (S. C. 1902); Baudry-Lacantinerie I., n. 1042.

[7] *Troude v. Meldrum*, Q. R. 21 S. C. 75. (Tenant's wife severely injured by leaning against railing on gallery, which railing gave way, precipitating her to the ground below). *Tremblay v. Gratton*, Q. R.

liable to a tenant who is injured by falling into the elevator well through the carelessness of an employee of the landlord, who left the elevator open while at lunch.[1] As regards third parties, the owner of a building, abutting on a highway, is under a positive duty to keep it from being a cause of danger to the public by reason of any defect, either in structure, repair or use and management, which reasonable care can guard against.[2] Thus, where a double window, in an office occupied by a tenant, falls to the ground, on account of the hinges or fastenings giving way, owing either to the bad repair of the hinges or fastenings, or because they were not strong enough, the proprietor of the building will be held responsible.[3] The tenant would also be directly responsible, under Art. 1054 C. Code, if the accident occurred through his fault.[4] But the fact that the tenant is responsible does not, it is said, relieve the proprietor from responsibility where it rests upon such an authoritative provision of law as Art. 1055 C. C.[5]

Care of sidewalk in winter.

Where the administration of the sidewalks belongs to the city, town, or village, and if any accident occurs thereon by reason of their slipperiness or an undue accumulation of snow, in winter time, it is proper to sue the municipal corporation as being primarily responsible.[6] And where there is a by-law which renders it incumbent

8 S. C. 22 (C. R. 1895), (damages to a member of the tenant's family by a defect in a staircase constructed by a previous tenant).

[1] *Stephens v. Chausse*, Supreme Ct. 1888, 15 S. C. R. 379.

[2] See *Ferrier v. Trepanier*, 24 S. C. R. pp. 91 and 92.

[3] *Ibid.*

[4] See per White J., rendering the judgment of the Court of Review in *Jackson v. Vanier*, Q. R. 18 S. C. at p. 269; Baudry-Lacantinerie I., n. 1042, citing Trib. Civ. Chartres, 19 Juin 1901; *Gaz. Trib.* 31 Juil. 1901.

[5] Baudry-Lacantinerie I., n. 1042. Per White J,. in *Jackson v. Vanier*, Q. R. 18 S. C. at p. 269 (C. R. 1900); *contra*, Trib. Civ. Chartres, 19 Juin 1901, *Gaz. Trib.*, 31 Juillet, 1901.

[6] *Grenier v. City of Montreal*, Q. B. 1876, 21 L. C. J. 296.

upon the person *owning, occupying* or *having charge* of the house, to clear the snow from the sidewalk,[1] the municipal corporation can sue in warranty either one of the above-mentioned parties if he be at fault.[2]

Calling in tortfeasor in warranty.

The law has always been that one remedy open to a municipality condemned in damages was that it could, after paying the damages, sue the person ultimately liable therefor, when grounds existed for so doing. But it is now held that the party sued as primarily responsible for a *quasi*-delict can, before condemnation, call in the tortfeasor and have him condemned by one and the same judgment. Whether the calling in of the tortfeasor be called an action of warranty or not, it is simply the joinder of two actions *en responsabilite*.[3]

Responsibility for removal of snow and ice from roof, and accidents arising from neglect.

In regard to snow or ice, which may fall off a roof and injure a passer-by, the city of Montreal having no right of control over the roof, but simply (as provided by by-law No. 47 City of Montreal) the right to punish the occupant or person having charge who neglects to remove the ice and snow therefrom, is not liable for accidents arising from that cause.[4]

It is a matter of some difficutly to determine who is liable in a like case. But the holding in the well-

[1] In Montreal the sidewalks are now cleared of snow by the City.

[2] *City of Montreal v. Larose*, S. C. 1880, 3 L. N. 406.

[3] *Montreal Gas Co. v. St. Laurent*, Supreme Court 1896, 26 Can. S. C. R. 176; *Archibald v. Delisle*, Supreme Court 1895, 25 Can. S. C. R. at p. 17; Sourdat *Respons.* no. 805. "Il n'est pas necessaire, pour cela, que l'auteur du dommage figure dans la cause, sauf a la personne civilement responsable a l'y appeler pour le faire condamner par le meme jugement a la garantie, s'il y a lieu." (*Ib.*) *Guillaume v. City of Montreal* and *City of Montreal v. Larose*, 3 L. N. 406; *Royal Electric Light Co. v. Wand*, S. C. 1894, Q. R. 5 S. C. 383. But see *Corp. de St. Jean v. The Atlantic & N. W. Ry.*, Q. B. 1894, Q. R. 4 Q. B. 66; *Central Vermont v. Cie d'Assurance*, Q. B., 1893, Q.R. 2 Q. B. 450.

[4] *Thibault v. City of Montreal*, S. C. 1894, Q. R. 5 S. C. 45.

considered case of *Jackson* v. *Vanier*[1] seems accurately to sum up the law on the question thus:—"The proprietor of a building is responsible for injuries caused by snow or ice falling from the roof thereof, where the fall of the snow or ice results from a want of proper care in keeping the premises in a safe condition; and the proprietor is not relieved from this responsibility towards the public by the fact that the building is wholly occupied by tenants, or by the fact that the municipal by-laws impose upon tenants the obligation of keeping the roof free from snow." It should be added that most of the tenants of the building in the above case had, by their leases, undertaken to keep the roof free from ice and snow. This clause is usual in most leases.[2] The tenant, however, immediately over the shop, in front of which the accident took place from the falling of ice from the roof above, had no written lease, and had not assumed any obligation as to the care of the roof beyond that imposed by law. But it has been held that, in the absence of a stipulation in the lease, the duty of clearing the roof from snow devolves upon the tenant and not upon the landlord,[3] for the tenant must enjoy the property as a prudent administrator.[4] But it has also been doubted whether this duty devolves upon the tenant in the absence of proof of any usage to that effect.[5] However this may be, it is not a question

[1] Q. R. 18 S. C. 244 (Q. R. 1900).

[2] A printed clause in a lease, binding the tenant to remove snow and ice from the roof of the leased premises, could not be interpreted as requiring him to remove snow from the roof of the building of which he occupied only the lower storey, especially where the landlord had so construed the lease by undertaking the removal of the snow from the roof of said building. Consequently, where the landlord, in thus removing the snow from the roof of his building, broke in the roof of the shed leased to the tenant, and the latter's goods therein were damaged, he had an action of damages against the landlord. *Gagne v. Vallee*, Q. R. 13 S. C. 112.

[3] *Hudson v. Russell*, C. Ct. 1888, 18 R. L. 134.

[4] Art. 1626 C. Code.

[5] See per Andrews J., in *Rancour v. Hunt*, C. R. 1892, Q. R. 1 S. C. at p. 81.

which affects the proprietor's liability towards the public, for, even if the tenant is responsible, this would not necessarily free the proprietor from his responsibility under Art. 1055 C. Code.[1]

The case of *Rancour* v. *Hunt*[2] was also a well-considered case in Review, and was approved of in *Jackson* v. *Vanier*,[3] and in the Supreme Court.[4] In the *Rancour Case*, a by-law of the City of Quebec rendered it incumbent on the *owner*, occupant or tenant, or other person having the charge, care or administration of a house, etc., to remove the snow and ice from the roof. The building from the roof of which the snow fell, injuring a passer-by, was occupied by several tenants of the proprietor and also by the proprietor himself. It was held, in this case, that the proprietor of a house fronting on a public street is responsible for accidents to the public, caused by snow and ice falling from the roof, whether the house be tenanted or not, and the injury caused by such a snowfall, being in the nature of a *quasi-delit*, one co-proprietor may be sued alone for the damage, he having the right to call in his co-proprietor if so disposed.

Before considering the principles which we conceive should govern such a case, it should be mentioned that in both the *Rancour Case*[5] and the *Jackson Case*[6] the roofs were mansard roofs. Now, article 539 of the Civil Code provides that :—"Roofs must be constructed in such a manner that the rain and snow from off them may fall upon the land of the proprietor, without his having a right to make it fall upon the land of his neighbour." Commenting on this article in the *Rancour Case*, Andrews J. said:—"Nor do I consider this strange, considering the

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[1] Baudry-Lacantinerie I., n. 1042. Per White J., in *Jackson v. Vanier*, Q. R. 18 S. C. at p. 269 and 271 (C. R. 1900).

[2] Q. R. 1 S. C. 74 (C. R. 1892).

[3] *Supra*.

[4] *Ferrier v. Trepanier*, 24 S. C. R. 91.

[5] *Rancour v. Hunt*, C. R. 1892, Q. R. 1 S. C. 74.

[6] *Jackson v. Vanier*, C. R. 1900, Q. R. 18 S. C. 244.

different climatic conditions here and in France. The streets are the property of the public. It is of infinitely greater importance that they be safe from murderous avalanches of ice, such as have, within the last three or four years, destroyed three lives in this city....than that a piece of private ground should have more or less water on it. It has been suggested in the Montreal press that no house should be suffered to be so built as to cause these dangers. If we tolerate such houses, the least we can hold their owners to is constant vigilance to minimize the evil." In the Montreal case of *Jackson v. Vanier*, White J., rendering the judgment of the Court of Review.[1] said:—"On referring to the by-laws of the city respecting the erection of buildings, we find that, under the by-law No. 107, the construction of buildings with mansard roofs is permitted, as well as also are flat roofs; but paragraph 4 of section 37, while permitting these roofs, positively enacts that "the roof of every building to be erected on, or in close proximity to the line of any street or highway in the said city, shall be so made and constructed as to prevent the snow and ice that may accumulate thereon from falling into such street or highway. It is quite clear from the evidence in this case that the roof of the defendant's building was not so constructed. It is quite clear also that the snow and ice did fall from the roof of his building upon the sidewalk, inasmuch as it is in close proximity to the street, if not built up to the very line of the street, and the plaintiff's injury resulted directly from that cause. His building, therefore, being in contravention of the by-law, is as to that provision a '*vice de construction*' (see Art. 1055 C. Code); and it certainly was not provided with the gutters and spouts required by sec. 39 of the same by-law. We, therefore, hold the proprietor responsible.." Also in respect of city by-laws—in the *Rancour Case* the City of Quebec by-law rendered it incumbent on the

[1] Q. R., 18 S. C. at p. 271.

owner, occupant or tenant or other person having the charge, care or administration of a house, etc., to remove the snow and ice from the roof. In the *Jackson v. Vanier* case the Montreal by-law applicable to the case made the duty of removing ice and snow from the roof devolve upon the person "occupying or having under his charge any house, part of a house," etc. White J. rendering the judgment of the Court of Review in the latter case,[1] after holding the proprietor responsible, said, "and in coming to this conclusion we think it incumbent to say that we have not lost sight of the fact that the by-law of the city, No. 47, concerning sidewalks (secs. 20 and 21) seems to impose upon the occupants of any building or part of any building, the duty of removing the snow and ice from roofs. These provisions may make occupants jointly and severally responsible with a proprietor, who is in contravention of the by-law regulating the mode of construction of buildings, but they would not relieve him from his responsibility; or they might give a proprietor a right in warranty against the occupants having charge of his building, but these are questions which we are not called upon to decide in the present case."[2]

It seems to the author that the gist of this question is to be found in the remarks of Andrews J. in *Rancour v. Hunt*[3] where he pointed out that it is true the landlord

[1] Q. R., 18 S. C. at p. 271.

[2] Commenting on Article 1386 Code Napoleon, which corresponds to our Article 1055 C. Code, Baudry-Lacantinerie says, in effect (I. n. 1042) that the responsibility for the collapse of a building is attributable mainly to the proprietor (citing Trib. Civ. Chartres, 19 Juin, 1901, *Gaz. Trib.* 31 Juillet, 1901). This Article, being absolute, the landlord is responsible even where the collapse is owing to the fault of the tenant (*contra* Trib. Civ. Chartres *supra*), saving the landlord's recourse against the latter. But in such case, the tenant being in fault, he is equally responsible directly to third parties injured. (Citing Trib. Civ. Seine; 25 Fev., 1902, *Droit* 20 Juin, 1902.

See Cassation, *Ministere Public v. Farriere*, J. P., 1834-35, p. 157. This case was based upon a by-law enacting that "The *owner* or *tenant* is obliged daily to sweep the sidewalk fronting his premises, etc." The Court held that this obligation was one appertaining to the property itself, and therefore rested ultimately upon the landlord.

[3] C. R. 1892, Q. R. 1 S. C. 74.

is not responsible for the tenant's faults of commission, *e. g.*, if the tenant had thrown something from the window of the house; but the question here is "can the landlord get rid of responsibility for the non-performance of a duty originally incumbent on himself by saying he has transferred that duty to another, who has also failed to perform it, etc." The foregoing can be aptly illustrated by referring to two later cases of importance. Thus in *Kieffer v. Les Ecclesiastiques du Seminaire*, etc.,[1] the Privy Council held that where the tenant of lands, by reason of his building operations thereon, causes water to overflow on to the lands of a neighbouring proprietor, to the latter's damage, the tenant's landlord is not responsible, and the injured proprietor cannot even demand that the tenant's landlord take proceedings to demolish the works causing the nuisance; he can only demand that he be authorized to demolish the works himself and at his own expense, saving his recourse by way of action of damages against the tenant. The tenant in this case was not under the control of or in any sense the agent of the landlord in carrying out the works causing the injury. In such a case also, Article 1055 C. Code has no application.[2] On the other hand, the recent case of *Lachance v. Cauchon*[3] illustrates clearly that the ownership of property entails certain responsibilities, of which the proprietor cannot divest himself by stipulating in the lease that the tenant shall be responsible for all damages arising from the exploitation of the premises leased. For instance, where property is leased for the exploitation of an industry which may easily become a source of danger or a nuisance to adjoining proprietors, the landlord is bound to impose conditions in the lease of a nature to avoid the danger or the nuisance; and is further bound to see that these conditions are carried out. Thus, where a quarry owner

[1] Privy Council 1902. Reported Q. R. 13 K. B. 89.

[2] Q. R. 13 K. B. at p. 96.

[3] Q. R. 24 K. B. 421 (1915). Appeal to Supreme Court quashed.

leases a quarry to another; said quarry then being worked in a manner dangerous to neighbours, an injunction will lie at the instance of a neighbour against the proprietor as well as the lessee, enjoining him from having the quarry worked in a manner injurious to said neighbour, although the lease stipulates that the lessee shall be liable for all damages incurred by the working of the quarry. Applying the reasoning of this case to the case of fall of snow from the proprietor's roof on to the public highway, it would appear to be clear that where a proprietor violates the provision of the common law as laid down by Art. 539 C. Code, that roofs must be constructed in such a manner, that the rain and snow off them may fall upon the land of the proprietor without his having a right to make it fall on the land of his neighbour, the proprietor cannot saddle his responsibility to third persons, for the dangerous construction of the roof, upon his tenant, so far at least as accidents to persons on the highway are concerned. It appears not to have been decided yet what the proprietor's responsibility would be where the premises are rented, and icicles are allowed to form on the eave of a roof which is not negligently constructed in any respect and which conforms in every respect to the requirements of local by-laws. Much would depend upon the terms of the by-law, which might expressly put the duty of removing icicles upon the owner, as well as the occupant or tenant. But it is to be noted that the principle of our Article 1055 C. Code is apparently susceptible of a much wider interpretation than would appear on its face. Thus in France, under the corresponding Article of the Code Napoleon (Art. 1386), French jurisprudence and doctrine concur in extending it by analogy to the case of a fall of a tree upon an estate through age, even where the trunk shewed no apparent weakness.[1] Art. 1055 C. C. is not enacted for the pur-

[1] Paris, 20 Aug. 1877, Sirey, 78-2-48; Larombiere, Art. 1386, n. 10; 8 Demolombe *Contrats*, 664; Racamier *Respons.* p. 177; Sourdat *Respons.* Vol. II., n. 1458.

pose of limiting cases of responsibility, but only to provide expressly for instances of special importance.[1] The general principles of responsibility are laid down in Arts. 1053, 1054 C. Code, and would apply to a proprietor in other cases than those specified in Art. 1055 C. Code.

Alterations and improvements by tenant.

The tenant must be very guarded in making alterations or improvements to the premises leased by him, where he has not previously obtained the consent of his landlord. The tenant, it is true, must be allowed the peaceable *enjoyment*[2] of the premises, but, on the other hand, the landlord can require him to enjoy them as a prudent administrator, and for the purposes for which they were designed. The matter of making alterations and so-called improvements is often a question of taste, and what the tenant considers an improvement might be highly objectionable to the landlord. The tenant, in effect, is under an obligation not to change the form of the property leased without the landlord's consent.[3] It seems to be disputed whether, in case of breach of this obligation by the tenant, the landlord can take immediate proceedings against the tenant or whether he must wait until the end of the lease.[4] It is otherwise where the alterations cause changes of an irreparable nature.[5] In any event, Art. 1624 C. Code provides for rescission of the lease when the tenant uses the premises in a manner contrary to the evident intent for which they were leased. The subject of the use of the premises by the tenant

[1] Larombiere Vol. 5, cited by White J. in *Jackson v. Vanier*, Q. R 18 S. C. at p. 268.

[2] Arts. 1601, 1612 C. Code.

[3] Baudry-Lacantinerie I., n. 756; Guillouard I., n. 288; Huc. X., n. 307.

[4] Baudry-Lacantinerie I., at n. 736 maintains that the landlord's recourse arises immediately on breach of the obligation. But see Guillouard I., at n. 288, 205, and see *ante* p. 154 as to landlord recovering damages for material injury to the premises during the lease.

[5] *Ibid.*

contrary to their destination has already been dealt with.[1]

The painting of the outside of the house by the tenant a conspicuous red is a good example of what the landlord might validly complain of.[2]

Where premises are not supplied at the time of the lease with gas fixtures or gas pipes of any description, or electric installation, or telephone installation, the better opinion is that the tenant may have them put in at his own expense, in localities where gas or electricity or telephone service are supplied, even where the landlord objects on account of the disturbance to the property caused by placing the pipes, etc.[3] For the same reason, where premises are leased for manufacturing purposes, and the lease is silent as to the motor power to be employed, the tenant can install any power in general use necessary for the industry for the carrying on of which the premises were leased, and for the reception of which they might reasonably be expected to be adapted.[4] It is otherwise where the lease stipulates that the tenant shall make no alterations or demolitions of the premises leased without the express and written consent of the landlord. Such a clause in the lease is violated by the tenant, who is described therein as carrying on a wholesale grocery business, installing, after some years' occupation, an improved coffee roasting machine, gas being used to heat the coffee instead of coal, and operated by an electric motor of about two horse-power, which machine caused considerable vibration; by making a hole of about twenty-four inches in diameter in the roof, to allow of the passage of an exhaust pipe of about eighteen inches, such opening having

[1] *Ante* p. 151.

[2] Arguing from *Deguire v. Marchand*, C. R., 1878 1 L. N., 326

[3] Sirey 63-2-32; Dalloz 62-2-208; 25 Laurent 255; Agnel 330 and note; I Guillouard 290, 293; Baudry-Lacantinerie L., n. 741, 720.

[4] *Mireau v. Allan*, S. C. 1894, Q. R. 5 S. C. 433; 25 Laurent 254; Sirey 67-2-289; Dalloz 66-2-227; 1 Guillouard, p. 321; see *Audet v. Jolicoeur*, Q. R. 22 K. B. at p. 39.

the effect of raising the temperature in winter between the double roof, and thus causing icicles to form on the outside roof; the whole causing an increase in the insurance risk; and even though the lease obliged the tenant to pay any increase of insurance which the insurance companies might exact by reason of the business carried on. The increased risk of fire alone would suffice for the landlord to demand cancellation of the lease.[1]

It is admitted that a tenant can make changes of a minor nature which do not alter the general appearance of the leased premises, and which can easily be effaced at the termination of the lease,[2] unless the lease expressly prohibits them. Thus, where the lease contains a clause that the tenant shall make no alterations without the written consent of the landlord, the placing by the tenant, without such written consent, of a partition across the hall of the rented building, so as to be readily removable without injury, has been held to be a violation of that clause;[3] whereas, in the absence of such a stipulation, the placing of such a partition would be lawful.[4] But it has been held, where there was a similar prohibition in the lease to make improvements or alterations without the consent of the landlord, such a clause was not violated by tearing down and altering partitions where the lease contemplated a new destination for the premises. For instance, where the premises were at the date of the lease partitioned off to form offices, and the lease contemplated the use of the premises for a cloak and mantle manufacturing

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[1] *Valois v. Marceau*, Q. R. 17 K. B. 31 (1907), (Lavergne J. diss.), reversing C. R. and restoring S. C. (Curran, J.), Arts. 1624, 1626 C. Code.

[2] Baudry-Lacantinerie I., n. 738; Guillouard I., n. 289; Huc. X., n. 307; Duvergier I., n. 398; Aubry *r.* Rau IV., p. 471, section 365; Laurent XXV., n. 175.

See per Pagnuelo J., Q. R. 17 K. B. at p. 33.

[3] *Kuneman v. Boisse*, 19 Louisiana Annual 26. But see Baudry-Lacantinerie, *contra* I., p. 420, as to such a clause.

[4] *Kuneman v. Boisse*, 19 La. Ann. 26; Baudry-Lacantinerie I. n. 739; Guillouard I., n. 289; Huc. X., n. 307.

company.[1] The lease in this case also provided that the tenant should pay for the restoration from alterations made by him. But the removal of the partitions was not an alteration of that kind; it was an alteration made so as to let the lease take effect; in other words, an alteration made in execution of the landlord's obligation to have the premises in condition fit for the purposes for which they were leased.[2]. The action was one of damages, taken by the landlord, for damages and deteriorations to the building. His action, for the above reasons, was disallowed.

Putting nails in the walls is permissible, unless prohibited by the lease.[3]

The property cannot be disfigured by boarding up windows, etc.,[4] but the windows can be protected by iron bars as security against burglars, etc.[5] The tenant cannot make substantial openings or holes in the permanent walls.[6]

It has recently been held that, as a general rule, a tenant has a right to put up the signs required for his business, on the premises rented by him. He can also allow advertising signs on the walls of the house and its dependencies, and the profit will accrue to him; always having regard to the nature of the premises. But this right is limited to temporary signs and does not include permanent ones. This would constitute a change of the premises. The tenant must also have regard for the bill-posting rights of his landlord in which he has acquiesced.[7]. Where

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[1] *Stevenson v. McPhail*, Q. R. 17 K. B. 119 (1907), reversing S. C., Dunlop J.

[2] *Ibid*, per Cross J., at p. 132.

[3] Baudry-Lacantinerie I,. n. 739.

[4] *Pignolet v. Brosseau*, Q. B. 1891, M. L. 7 Q. B. 77. See also Laurent XXV., n. 175; Guillouard I., n. 289.

[5] Baudry-Lacantinerie I., n. 739; Trib. Civ. St. Etienne, 30 Nov. 1903; *Droit*, 13 Dec. 1903.

[6] Baudry-Lacantinerie I., n. 737 ; Guillouard n. 289 ; see *Valois v. Marceau*, Q. R. 17 K. B. at p. 33. But see *Stevenson v. McPhail*, Q. R. 17 K. B. at pp. 130, 126, 132.

[7] *Asch Ltd. v. Haney*, Q. R. 49 S. C. 131 (S. C. 1915).

the tenant has transferred his bill-posting rights under the above circumstances he cannot restrain by injunction, nor obtain damages against, the transferee of a similar right to post bills from the landlord, where the transferee is about to exercise his right.[1]

Reimbursement for improvements, etc.

The tenant cannot claim from his landlord reimbursement of his outlay for improvements made without the authorization of the latter and without his agreement to pay therefor. The tenant's only right in regard to such improvements is to remove them, where they are by law susceptible of removal.[2] But where immediate alterations to the machinery on, and leased with, the premises are required to be made by the municipal authorities, the tenant can make them, and recover therefor from the landlord without previous notice to him.[3]

Removal of improvements and additions.

The tenant has a right to remove before the expiration of the lease, not only as against the landlord, but as against the purchaser, the improvements and additions which he has made to the premises, provided he leaves them in the state in which he has received them; nevertheless, if the improvements or additions be incorporated with the premises with nails, lime or cement, the land-

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[1] *Asch Ltd. v. Haney*, Q. R. 49 S. C. 131 (S. C. 1915).

[2] *O'Hagan v. St. Pierre*, C. Ct. 1887, 16 R. L. 39.
A person who supplies material to a tenant who is making an addition to the house rented by him, cannot recover from the owner of the building for the value thereof. *Delisle v. Marier*, Q. R. 23 S. C. 521 (1903).
On a claim for repairs done by the tenant at the request of the landlord, and board of men, exceeding $50, the request cannot be proved by parol evidence. *Caron v. Gaudet*, 6 Que. P. R. 23 (Doherty J.)

[3] *Heney v. Smith*, C. Ct. 1887, 10 L. N. 333.

lord may retain them on paying the value.[1] Under these conditions a tenant may remove gas and water pipes where he fitted them in,[2] likewise double windows, or mirrors hooked to the wall of a shop to display goods, or an awning over a shop, even where the lease contains a clause that all improvements and additions made during the lease shall become the property of the landlord.[3] But the weight of authority is in favor of the view that the tenant cannot remove modifications to the premises which can be of no profitable use to him-

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[1] Art. 1640 C. Code; *Freres des Ecoles Chretiennes v. Hough*, C. R. 1893, Q. R. 3 S. C. 471.

A landlord agreed in writing with his tenant as follows:—"I shall give L. C. a seven year lease if he makes the extension now going on my property, Lagauchetiere Street, City, to my entire satisfaction and approval." The same day the tenant signed the following writing:—"Any construction or repairs made by me in this house, No. 574 Lagauchetiere, shall be the property of the proprietor without claiming any indemnity from the said proprietor." The lease was continued from year to year by tacit renewal. The landlord sold the leased property with the extension, the deed of sale reciting that the extension had been erected by the then tenant. The purchaser refused to carry out the terms for a seven-year lease, and the tenant was obliged to leave prematurely. In an action for damages by the tenant against his former landlord, it was held that the agreement between them created reciprocal rights and obligations, the one being the consideration for the other. Consequently, where the landlord claimed that the tenant had not built the extension to his satisfaction, and that he, the landlord, was not therefore bound to extend the lease as agreed, it was held he could not, while refusing to continue the lease, at the same time retain such extension to the premises without indemnifying the tenant. The agreement, not having been carried out by either party, their positions were governed by the common law (Art. 1640 C. Code), which permits the landlord to retain improvements of such a nature only where he pays their value. The landlord was ordered to pay the cost of the improvements, with interest, and a certain sum for the increased rental the tenant was obliged to pay elsewhere. *Lee Chu v. Deslauriers*, Q. R. 30 S. C. 494 (C. R. 1906), confirming S. C.

In the above case parol evidence was held inadmissible to prove that the said extension had been built to the satisfaction of the landlord, the value thereof being over $50. (*Ibid*).

[2] *Atkinson v. Noad*, S. C. 1863, 14 L. C. R. 159.

[3] *Plamondon v. Lefebvre*, C. Ct. 1877, 3 Q. L. R. 288; *Parent v. Gauthier*, C. R. 1891, 17 Q. L. R. 60; *Vinet v. Corbeil*, C. Ct. 1887, 15 R. L. 298; Baudry-Lacantinerie I., n. 746; Trib. Civ. Lyon, 11 Juin 1892; Guillouard I., n. 296; Sirey 75-2-265.

self.[1] For instance he cannot remove paintings on the walls, or paper which he had put on, and restore the walls to their former condition.[2] But this doctrine is combatted by *Baudry-Lacantinerie*[3] and others.[4]

As stated above, the right of the tenant to remove, before the expiration of his lease, the improvements and additions which he has made to the premises, can be exercised not only against his landlord, but even against a third party who has purchased the premises. And it has been held that the right of the tenant to remove a building erected by him, before the expiration of the lease, as against a purchaser of the property, need not be registered, such a right being a purely personal one;[5] and if the purchaser wishes to retain such structure *after the expiration* of the lease, he can only do so by paying the value thereof.[6]

A stipulation in the lease that the tenant shall, at the expiration thereof, have the right to remove a structure added by him to the leased premises, has the effect of mobilizing the structure, and where the property is sold under a judgment of licitation, such an addition would not *prima facie* pass with the sale, where the sale relates

[1] Guillouard I., n. 296; Troplong I., n. 355; Demolombe IX., n. 693; Sirey, 75-2-265; Bordeaux 17 Feb. 1903; Trib. Civ. Lyon 11 Juin, 1892; Lepage II., p. 88.

[2] Guillouard I., n. 296; Sirey, *supra*.

[3] I. p. 424-425.

[4] Duvergier I., n. 461; Laurent XXV., no. 185.

[5] *Les Freres, etc., v. Hough*, C. R. 1893, Q. R. 3 S. C. 471; *Duchesneau v. Bleau*, C. R. 1891, 17 Q. L. R. 349; *Rouillard v. Duval*, C. R., 30th May, 1885, noted at length, 17 Q. L. R. at p. 351; *Sangster v. Hood*, Q. B. 1889, 18 R. L. 40; *Miller v. Michaud*, Louisiana Supreme Ct. 1845, 11 Robinson 225. This question is very much disputed in France (see I Guillouard 294 *et seq.*), the doctrine, however, being in favor of the above view.

[6] *Les Freres, etc., v. Hough*, C. R. 1883, Q. R. 3 S. C. 471; and see *Sangster v. Hood*, Q. B. 1889, 18 R. L. 40.

Where a tenant occupies a lot in good faith, under a lease legally given or not, and builds upon it, the subsequent buyer of the property cannot, without the authority of the Court, demolish this building and expose the goods stored in it to destruction. *Mongrain v. Canadian Carbonate Co.*, Q. R. 46 S. C. 534 (C. R. 1914), confirming S. C.

to immoveables only. But if the tenant fails to protect his rights at such sale by an opposition to withdraw or otherwise, he is entitled to recover only what would be the value of the structure after severance and removal, and not its full value.[1]

2. Sub-Lease or Assignment of Lease.

"The lessee has a right to sublet or to assign his lease, unless there is a stipulation to the contrary."[2]

What constitutes subletting—"Undertenant."

To sublet means to lease property, in whole or in part, to another, which one holds oneself as tenant.[3] The person to whom the sub-lease is made is called the undertenant in the Code (Art. 1639); the person who makes the sub-lease we shall call the principal tenant, the original landlord being called the principal landlord. There are thus two leases superimposed. The principal tenant is engaged in two leases; as tenant in the first place, and secondly as lessor or landlord himself.

What constitutes an assignment of the lease.

An assignment of the lease is where a person transfers to another, by way of assignment, his rights accruing to him as lessee or tenant under a contract of lease. In effect the tenant assigns, by way of transfer or sale, his right of enjoyment of the leased premises.[4]

[1] *Gaudet v. Marsan*, Q. R. 36 S. C. 538 (C. R. 1909), Loranger J. *dissentiente*, and agreeing with judgment of S. C., which allowed the full value of the structure. Judgment of S. C., modified.

[2] Art. 1638 C. Code. If there be such a stipulation, it applies to leases by tacit renewal. *Vincite v. Panneton*, M. L. R., 5 S. C. at p. 324.

See *Sharpe v. Cuthbert*, M. L. R. 1 Q. B. 479. 8 L. N. 396 (1885) as to sub-lease of motor power.

[3] Baudry-Lacantinerie I., n. 1052; citing Brodeau *Cout. de Paris*, Art. 161, n. 16, and Art. 162, n. 2 and 3; Ferriere, *Corps et Compilations sur la Coutume de Paris* II., Art. 162; Bourjon. *Dr. Comm. de la France* II., liv. IV., sect. 5 et 6.

[4] Baudry-Lacantinerie I., n. 1052; Guillouard I., n. 311; Huc. X., n. 281.

Although there is much controversy in France under a similar provision of law, as to the sense in which the word "assign" (*ceder*) is used, it is generally interpreted in our jurisprudence as signifying a lease by the principal tenant to another party, of the *whole* of the premises leased by the former, rather than a *part*, and not a sale of his interest in the lease.[1] And this is the interpretation put upon the word "ceder" by *Planiol*.[2] But this opinion is combatted by *Baudry-Lacantinerie*,[3] and our Courts sometimes take the view that an assignee of a lease is not a sub-tenant.[4] The distinction is important, as, in the case of a sale of his lease to another party, the vendor would lose all control over his vendee, and yet still remain liable as formerly to his landlord; whereas, in regarding the assignment as a sub-lease of the whole of the premises rather than a part, the principal tenant can exercise over his sub-tenant all the rights which exist by law between landlord and tenant.[5] The latter view is so much more favorable to, and clearly in the interest of, the principal tenant, that the French writers generally interpret a deed by a tenant which expressly "assigns" (*ceder*) his lease, as being intended

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[1] In *Hough v. Cowan*, Q. B. 1892, Q. R. 2 Q. B. at p. 2, Blanchet J., delivering judgment, says: "Dion cède ses meubles et son bail à Déchêne; Déchêne transporte le tout a Franceœur & Cie."; and at p. 4: "Ross savait en effet que Franceœur & Cie. étaient *sous-locataires* de Dion;" and see elsewhere in same report. And see *Duncan Co. v. Bridge*, Q. R. 14 K. B. 133 (1905). Our article of the Code is even more favorable to the above interpretation than the corresponding Article of the Code Napoleon, on account of the omission of the words "*et meme de*" before "*ceder*." See 25 Laurent 187 *et seq.*; Pothier 280; Domat, Lois Civiles, liv. 1, tit. 4, sect. 1, paragraph 9; Merlin vo. *Sous Location;* Rolland de Villargues vo. *Transport de Bail*.

[2] N. 280 s.

[3] I., n. 1052 pp. 617, 618.

Art. 1717 of the Code Napoleon, which corresponds with our Art. 1638 C. Code, has the words "*et meme*" (and even) before the words "to assign the lease."

[4] *Smith v. Rosenberg*, Q. R. 41 S. C. 165 at p. 168 (C. R. 1911). See *David v. Richter*, 12 R. L. 98, noted in *Brown v. Orkin*, Q. R. 35 S. C. 142.

[5] 1 Guillouard 334; Baudry-Lacantinerie I., n. 1053. See *infra* p. 216.

to create a sub-lease with the assignee,[1] in the absence of any contrary intention to be gathered from the terms of the lease.[2]

Prohibition to sublet.

If there be a stipulation that the tenant shall not sublet or assign his lease, it may apply to the whole or a part only of the premises, and in either case it is to be strictly observed.[3] It is usual for leases in this Province to contain a clause stipulating that the tenant "will not be allowed to transfer his interest in the said lease, or sublet, without the consent in writing of the lessor." It is necessary that the prohibition should expressly extend to a transfer or assignment of the tenants' interest in the lease, as well as subletting, if it is so intended, otherwise the prohibition may be limited to subletting and not be extended to the case of an assignment of the lease.[4] The later and better forms of lease contain the word "express" before the word "consent" in the above clause.[5]

The power to sublet, with the written consent or approval of the landlord, differs from the clause positively prohibiting subletting or transferring. The latter clause must be strictly construed, whereas the former is a matter for the Courts to determine, whether under the circumstances there has been consent.[6]

Implied consent of landlord notwithstanding the prohibition.

This was considered necessary, because our Courts have frequently held that the consent of the landlord

[1] Baudry-Lacantinerie I., p. 617; 1 Guillouard 319; 25 Laurent n. 187 *et seq.*; Rolland de Villargues vo. *Transport de Bail;* Merlin vo. *Sous-Location;* Pothier 280; Domat, *loc cit.*

[2] Baudry-Lacantinerie I. p. 617, 618; Guillouard I., n. 319; *contra* Laurent XXV., n. 187.

[3] Art. 1638 C. Code.

[4] See *David v. Richter*, 12 R. L. 98, noted in *Brown v. Orkin*, Q. R 35 S. C. 142.

[5] Marchand *Formulaire*, p. 167.

[6] *Larocque v. Freeman's Ltd.*, Q. R. 50 S. C. 231 (1916)

may be implied, viz:—where he has acquiesced in the occupation of the premises by the sub-tenant for a long period, or has received the rent directly from him.[1] It has been held that such consent is not implied where the landlord has received rent directly from the sub-tenant, but has given the receipt therefor to the principal tenant.[2] But even the insertion of the word "express" before "consent in writing" will not always protect the landlord from the imputation of having acquiesced in the sub-lease, for where the landlord receives rent directly from the sub-tenant, and gives him a written receipt therefor, it has been held that such receipt will be regarded as equivalent to an "express consent in writing" to the sub-lease.[3] Where there is a clause prohibiting subletting without the express written consent of the landlord, the latter will be held to have

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[1] *Bissonnet v. Guerin*, C. Ct. 1884, 7 L. N. 368; *Cordner v. Mitchell*, Q. B. 1865, 9 L. C. J. 319; 1 L. C. L. J. 28; *Owler v. Moreau*, Q. B. 1886, 2 L. C. L. J. 84. *Larocque v. Freeman's, Ltd.*, Q. R. 50 S. C. 231; *Learmonth v. Goodman*, Q. R. 49 S. C. 12 (S. C. 1915).

The following acts of the landlord or his agent imply consent equal to a written consent to sublet—notwithstanding the clause in the lease prohibiting subletting without the written consent of the landlord:—The passing of a deed of sub-lease and its ratification by the principal landlord's notary, who was also the landlord's agent: The recognizing of the sub-tenant as such by the principal landlord. The sending of notice by the landlord to the undertenant demanding his removal on account of demolition of the premises. A claim by the principal landlord of improvements and additions made by the undertenant. *Larocque v. Freeman's Ltd.*, Q. R. 50 S. C. 231 (1916).

Parol evidence is admissible to prove the verbal consent of the landlord to a transfer of the lease notwithstanding the clause in the lease prohibiting assignment of the lease or subletting without the consent in writing of the landlord. *Prevost v. Holland*, Q. R. 15 S. C. 298 (C. R. 1898) confirming S. C. and following *Cordner v. Mitchell*, *supra*).

But *held* that the indorsement by the landlord of a cheque for rent given by the sub-tenant and immediate cancellation of the indorsement on the advice of his lawyer would not constitute a sufficient commencement of proof in writing to let in parol evidence of the landlord's consent to sublet and his acceptance of the sub-tenant. *Brown v. Orkin*, Q. R. 35 S. C. 132 (S. C. Champagne J. 1908); *Jilbert v. Bowen*, Q. R. 36 S. C. 309(C. R. 1909).

[2] *Vaillancourt v. St. Denis*, Q. R. 34 S. C. 25 (S. C. 1908).

[3] *Joseph v. St. Germain*, S. C. 1894, Q. R. 5 S. C. 61; *Prefontaine v. Fortin*, C. R. 1893, Q. R. 3 S. C. 518; and see *Hough v. Cowan*, Q. B. 1892, remarks of Blanchet J. delivering judgment, Q. R. 2 Q. B. at p. 4.

acquiesced in the assignment of the lease where he transferred his liquor licence to the tenant, and the latter assigned his lease and the licence to another party, but the landlord opposed the transfer thereof until he should be assured of the payment of the price still due to him thereon, and accepted the sum from the sub-tenant.[1] Held, thus also, where the landlord receives the extra premium of insurance for the subletting to a tavern keeper.[2]

Even where the lease requires the "express" consent in writing of the landlord before the tenant can sublet or assign his lease, where there is a sufficient commencement of proof in writing to let in parol evidence, such evidence is admissible to prove verbal consent of the landlord to the subletting or assignment of the lease.[3] The admission by the former landlord of his verbal consent to the subletting and the implied approval of the sub-lease by the purchaser of the property by reason of his allowing the sub-tenant to remain in undisturbed possession of the leased premises for several months, are sufficient evidence of permission to sublet to justify the tenant notwithstanding said clause in the lease.[4]

In order to be effective against implied consent, the clause in the lease prohibiting subletting must be absolute and formal. The moment there is a condition attached to such a clause, this lets in the possibility of proving implied consent.[5] Where there has been an assignment of the lease or a subletting of the whole of the premises, and the principal tenant, having vacated the premises, and the undertenant having taken possession; if the latter is allowed by the landlord, proprietor

[1] *Demers v. Levesque*, Q. R. 46 S. C. 158 (S. C. 1914).

[2] *Theberge v. Hunt*, 11 L. C. R. 179, C. Ct. 1861.

[3] *Jilbert v. Bowen*, Q. R. 36 S. C. 309 (C. R. 1909), confirming S. C. and citing *Cordner v. Mitchell, supra; Garceau v. Cinq Mars*, 3 L. N. 355; *Prevost v. Holland*, Q. R. 15 S. C. 298; *Persillier v. Moretti*, 14 L. C. R. 29; *Brunet v. Goldwater*, 14 R. L. N. S. 123.

[4] *Jilbert v. Bowen, supra.*

[5] *Ibid* at p. 314.

of the premises, to remain in undisturbed possession for a considerable time, the position of the undertenant, although not governed by Article 1608 C. C., may be likened to that of a tenant by sufferance recognized by that Article, in which case the law implies a lease.[1]

Where a lease for a year permits subletting, and the tenant, in consequence, sublets a part of his leased premises, if the property is thereafter sold by the proprietor, and the purchaser makes a new lease with the same tenant, with a clause prohibiting subletting, the purchaser cannot demand resiliation of the lease for violation of the clause prohibiting subletting, on the ground that the undertenant remains on under the former lease, where the yearly period has not expired. The undertenant in such a case is protected by Article 1663 C. Code.[2]

Subletting part of premises—Prohibition to sublet.

Where the prohibition is simply to sublet or assign the lease, this is not always regarded as prohibiting the subletting of part of the premises, where the principal tenant still continues to occupy the other part; provided, of course, that the sub-tenant does not change the destination of the part taken by him.[3] But this question depends largely upon the probable intention of the parties.[4] For instance, where the tenant is, at the moment of passing the lease, to the knowledge of the landlord, keeping a boarding-house in the very premises for which the lease is being passed, and the tenant states

[1] *Jilbert v. Bowen*, Q. R. 36 S. C. at p. 313.

[2] *Venner v. Thienel*, Q. R. 37 S. C. 80 (C. R. 1909), reversing 36 S. C. 223.

[3] *Dorion v. Baltzley*, C. R. 1869, 14 L. C. J. 305; *Collerette v. Bassinet*, Q. R. 24 S. C. 372 (S. C. 1903); and see remarks of Badgley J. in *Ouler v. Moreau*, 2 L. C. L. J. at p. 85 to same effect; *Persillier v. Moretti*, S. C. 1857, 14 L. C. R. 29. But in France the prohibition is said to include the renting of furnished rooms and the keeping of boarders. Baudry-Lacantinerie I,, n. 1085, 1086, 1091; Guillouard, I, n. 328, 323. See *ante* p. 120, 121 and *post* p. 251.

[4] 1 Guillouard 323; 23 Laurent 217, 221, 222; 3 Duverger 374 and 378; Sirey 6-2-450. Baudry-Lacantinerie, I n. 1091.

his intention of so continuing to use the premises, a prohibition to such tenant to sublet will not prevent the latter from continuing to rent rooms to lodgers.[1]

Renting furnished rooms to lodgers—Prohibition to sublet.

Where the lease contains a prohibition to sublet in whole or in part, the prohibition is said not to be violated by a tenant who lets furnished rooms to lodgers, the tenant retaining the entire care and control of such rooms, and the lodgers not even being in possession of keys thereto.[2] If a proprietor does not wish to have his house used in such a manner, he must specially stipulate to that effect.[3] But it is generally held otherwise in France,[4] and the matter is largely one depending upon the circumstances of each case.

Grounds for landlord's refusal to grant permission to sublet.

The right to sublet premises, whether wholly or in part, in the face of a stipulation in the lease to the contrary, depends much upon the circumstances. In spite of such a stipulation there is always the possibility that others than the original tenant may exclusively occupy the premises, and be substituted in all such tenant's rights and obligations towards the landlord,—where, for instance, the tenant dies,[5] or he becomes insolvent under an Insolvent Act enacting that the unexpired portion of a lease may be sold by the assignee,[6] no such clause in the lease can prevent the premises from passing into the hands of others who may be very objectionable to the landlord.[7] It is true that prohibitions to sublet

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[1] *Aimong v. Cassidy*, S. C. 1888, 16 R. L. 453.

[2] *Collerette v. Bassinet*, Q. R. 24 S. C. 372 (S. C. 1903).

[3] *Ibid.*

[4] Baudry-Lacantinerie, I, n. 1086, 1091; Guillouard, I, n. 328, 323.

[5] Death does not dissolve a lease (Art. 1661 C. Code).

[6] *Wright v. Beaudry*, S. C. 1872, 2 R. C. 482; 1 Guillouard 329; 25 Laurent 225; 4 Aubry et Rau, p. 492.

[7] *Ibid.*

must be construed strictly,[1] but it has been held that where the prohibition is of a negative kind, viz., where the tenant is permitted to sublet subject to the consent of the landlord, the latter cannot withhold his approval, where the person proposed to be substituted is proved to be as acceptable as the original tenant, and the landlord can give no valid grounds for his objection.[2] A positive prohibition to sublet without the landlord's consent must be strictly observed.[3] Thus, where a lease stipulates that in the event that the tenant shall sell or cede his business, he can do so only with the consent of the landlord, this has been held to be a positive prohibition to let without the consent of the landlord,

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[1] Art. 1638 C. Code; *Ettenberg v. Aronsam*, Q. R. 45 S. C. at p. 95 (C. R. 1913); *Vaillancourt v. St. Denis*, Q. R. 34 S. C. 25 (S. C. 1908).

[2] *Charbonneau v. Houle*, C. R. 1892, Q. R. 1 S. C. 41; *David v. Richter*, S. C. 1882, 12 R. L. 98, 27 L. C. J. 313; Sirey 47-2-447; Dalloz 47-2-174; Sirey 64-2-285.

In *Charbonneau v. Houle*, *supra*, there was the following provision in substance, that, in case of incapacity of the tenant to occupy, he could sublet to a person to be approved by the landlord; and it was held that the landlord would be obliged to approve a suitable person and could not by a merely unreasonable refusal deprive the tenant of the advantage of the clause.

Where the landlord reserves in the lease a discretional power as to the acceptance of an undertenant, in the case of a sub-lease by the tenant, his refusal to accept the sub-lease for a laundry establishment, for the reason that different inconveniences may arise from such an establishment, is not an abuse of such discretional power. *Mayer v. David*, 18 Rev. de Jur. 6.

And see *Larocque v. Freeman's Ltd.*, Q. R. 50 S. C. 231 (1916).

In *Bacon v. Canadian Pacific Ry. Co.* (S. C. 1886), M. L. R. 2 S. C. 277; 9 L. N. 359, the defendants had leased certain land, with stipulation that it should be sublet only to persons approved of by them; no liquor was to be sold thereon, and defendants should have right of entry, at any time, and right of ejectment of any tenant who did not conform to the terms of the lease. *Held*, that the defendants were justified in causing the demolition of buildings existing on such land, the buildings in question being used for the sale of spirituous liquors, contrary to law, and for purposes of prostitution, and the defendants never having authorized the construction thereof by the plaintiff, whose occupancy, moreover, was not proved.

[3] *Mackenzie v. Bernard*, S. C. 1887, 10 L. N. 113; *Brown v. Orkin*, Q. R. 35 S. C. 132 (S. C. 1908); 4 Aubry et Rau, p. 491; Sirey 50-2-46; Dalloz 82-2-24.

and the landlord, in such event happening, can withhold his consent without giving any reasons therefore.[1]

Effect of subletting, contrary to the terms of the lease.

The mere fact of subletting, contrary to the terms of the lease, does not *ipso facto* cancel the lease; it can only be voided upon action taken by the landlord.[2] Neither is it always a ground for rescission of the lease. For instance, where the sub-lease has terminated before the institution of the action in rescission, and the landlord has not been injured thereby;[3] and sometimes the Court, instead of cancelling the lease, will allow the tenant a certain delay to put matters in the same position in which they were before the sub-lease.[4] And in a case where the Court will not allow the landlord to withhold his consent to a sub-lease, a tenant who sublets without previously obtaining such consent may, in an action for rescission of the lease by the landlord, ask his consent before judgment upon paying costs.[5] The landlord can provide against all such contingencies by stipulating in the lease that it shall become absolutely void upon the subletting of the premises.[6]

Impleading the undertenant.

A person to whom leased premises have been sublet, contrary to the stipulations of the original lease, may be impleaded without adopting the usual forms of pro-

[1] *Rosconi v. Peladeau*, Q. R. 48 S. C. 356 (C. R. 1915), confirming S. C., Demers J. dissenting; *Brown v. Orkin, supra.*

[2] Per Blanchet J. in *Hough v. Cowan*, Q. B. 1892, Q. R. 2 Q. B. at p. 3; *Brunet v. Goldwater*, Q. R. 33 S. C. 240 (S. C. 1908); as to action for cancellation in such case taken by a joint owner, see *Bagg v. Wiseman* Q. R. 12 S. C. 12.

[3] *Gareau v. Cinq-Mars*, S. C. 1880, 3 L. N. 355; *Brunet v. Goldwater, supra.*

[4] *Vallee v. Kennedy*, S. C. 1871, 3 R. L. 450.
The landlord cannot demand resiliation of the lease, eviction of the undertenant and damages, without putting the principal tenant in default to so proceed against the undertenant. *Larocque v. Freeman's Ltd.*, Q. R. 50 S. C. 231.

[5] *Charbonneau v. Houle*, C. R. 1892, Q. R. 1 S. C. 41.

[6] *Brunet v. Goldwater*, Q R. 33 S. C. at p. 242 (S. C. 1908); 1 Guillouard 332; 25 Laurent 230; 4 Aubry et Rau p. 492.

cedure.[1] And see further as to direct action by the landlord, *infra* pp. 223-224.

Novation.

Where there is a prohibition to sublet without the consent of the landlord, and such consent has been obtained, this does not discharge the original tenant from his obligations under the lease.[2] There is no novation in the like case, unless it is *evident* that the landlord intends to discharge the principal tenant from his obligations.[3]

Subletting where partnership involved in the prohibition.

A partnership in Quebec law is a distinct legal entity apart from the persons composing it.[4] So where the lease of a shop contains a prohibition to sublet the premises, this covenant is violated by the tenant forming a partnership consisting of himself and members of his family, under the name of "—— brothers", and using the leased premises for the partnership business.[5] Where there is such a prohibition, the consent of the landlord to a sub-lease to a company about to be formed cannot be set up as a consent to a sub-lease to a partnership of which the principal tenant is the manager.[6] Where a lease to a partnership contains a clause against subletting without the consent of the landlord, it is not a ground for cancellation of the lease where the partnership, being dissolved, one of the members thereof continues in occupation of the leased premises.[7] The partnership in such case, being extinct, there was no

[1] *Rheaume v. Panneton*, Q. B. 1879, 9 R. L. 594.

[2] *Joseph v. St. Germain*, S. C. 1894, Q. R. 5 S. C. 61.

[3] Art. 1173, C. Code; *Credit Foncier Franco Canadien v. Young*, S. C. 1883, 9 Q. L. R. 317.

[4] Davidson & Henderson Canadian Law of Partnership p. 19; *Cite de Montreal v. Gagnon* (C. R. 1904) Q. R. 25 S. C. 178.

[5] *Payette v. Payette*, Q. R. 44 S. C. 536 (C. R. 1913), confirming Lane J., Q. R. 46 S. C. 488 (1913); *Ettenberg v. Aronson*, Q. R. 45 S. C. 87 at p. 95.

[6] *Ettenberg v. Aronson, supra.*

[7] *Carter v. Urquhart*, Q. R. 15 K. B. 509.

tenant to make a sublease, and there was consequently no violation of the prohibition; although one of the members of the dissolved firm had transferred all his interest in the firm to the said occupant, his former co-partner. [1]

Damages for violation of prohibition to sublet.

Where a tenant violates the condition of the lease prohibiting subletting, he is liable for the damages suffered by the landlord in consequence. [2] Thus, where the tenant sublets to a Chinese laundry without such consent, he will be obliged to pay the landlord for loss of rental suffered by an adjoining tenant of the landlord having his lease cancelled in consequence, the legal costs incurred in consequence of such tenant's action, and his expenses of moving, also costs of disinfecting the premises occupied as a Chinese laundry. [3]

Sub-lease as affecting relations of principal tenant and undertenant.

In dealing with this relationship, a sub-lease must be distinguished from an assignment of the lease. [4] We are dealing now with the case of subletting.

The effect of a valid sub-lease is to establish a new lease between the principal tenant and the undertenant, and the parties thereto will be subject to *all* the rights and obligations relating to the law of landlord and tenant. [5]

Although the undertenant is bound by the conditions of the original lease, he is not concerned with it, save in so far as the proprietor is entitled to see that its terms are respected. [6] The rent should be paid to the princi-

[1] *Ibid.*
[2] *Mayer v. David*, Q. R. 47 S. C. 516 (C. R. 1915), reversing S. C.
[3] *Ibid.*
[4] See *Smith v. Rosenberg*, Q. R. 41 S. C. 165 (C. R. 1911) and *ante* p.
[5] 1 Guillouard 334; 25 Laurent 198. *Larocque v. Freeman's Ltd.*, Q. R. 50 S. C. 231.
[6] Baudry-Lacantinerie I., n. 1121; Guillouard I., n. 334, 316; Huc. *Tr. de la cession des creances*, n. 211; Aubry et Rau IV., p. 493; Laurent XXV., n. 194; Cass. Sirey, 70-1-283.

pal tenant, the undertenant's landlord,[1] who will have a privilege for the same.[2] The undertenant is required to make tenant's repairs,[3] and use the premises for the purposes for which they are destined.[4] The undertenant cannot set up, against his landlord, any authorization of the principal landlord to the contrary.[5] It is said that the principal landlord cannot enjoin the undertenant from paying his rent to the principal tenant, his landlord;[6] he can only seize it to the extent provided by the Civil Code Art. 1639, where his claim against the principal tenant is unsatisfied.[7]

The principal tenant is bound towards his undertenant for all those warranties[8] which the law imposes on a landlord, against defects and faults in the property leased,[9] and against disturbances involving a claim or right of property upon or concerning the property;[10] for instance where the principal landlord has obliged the undertenant to fulfil an obligation of the original lease, which his sub-lease did not oblige him to do.[11] If the undertenant sues his landlord (the principal tenant) for a matter which is at the charge or warranty of the original landlord, the principal tenant so sued can call in the original landlord in warranty.[12]

[1] Baudry-Lacantinerie, *loc. cit.*; Guillouard I., n. 334; Laurent XXV., n. 194.

[2] Baudry-Lacantinerie I., n. 1121, 1127. See *ante* p. 121 as to landlord's previlege for rent.

[3] Baudry-Lacantinerie I., n. 1121; Duvergier I., n. 386; Laurent XXV., n. 149 s; Guillouard I., n. 334.

[4] *Ibid.*

[5] Baudry-Lacantinerie I., n. 1121; Trib. Civ. Seine, 16 Mai 1900.

[6] Baudry-Lacantinerie I., n. 1121, but see Trib. paix, Marseille, Dalloz, 1905-5-16.

[7] Baudry-Lacantinerie *loc. cit.*

[8] As to such warranties see *ante* p. 79 *et seq.*

[9] Art. 1614 C. C.

[10] Arts. 1616, 1617 C. Code.

[11] Baudry-Lacantinerie I., n. 1122; Guillouard I., n. 316.

[12] Where a tenant is sued by his sub-tenant for damages suffered by reason of the premises leased not being wind and water-tight, an action in warranty lies against the lessor by the tenant, although the lease between them contains a clause that the tenant shall not sublet without the consent of the lessor, and the tenant, notwithstanding, sublets without such consent, but

A tenant, who sublets premises in breach of a covenant with the owner not to do so without his consent, is liable for the damages sustained by the undertenant, who is expelled at the suit of the owner.[1]

Where the lease by the principal tenant to the undertenant stipulates that the latter assumes all the obligations of the original lease, and discharges the principal tenant, this does not render the undertenant liable for the acts of the principal tenant; it only relates to the liability that may arise through the acts of the undertenant involving the principal tenant in litigation with the principal landlord.[2]

Where the undertenant has been obliged to vacate the leased premises owing to their becoming uninhabit-

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afterwards the lessor receives from him the extra premium of insurance caused by such subletting, the sub-tenant being a tavern keeper. *Theberge v. Hunt*, C. Ct. 1861, 11 L. C. R. 179. And see *Gordon v. Demitre*, Q. R. 46 S. C. 312 (S. C. 1913) where landlord held not liable in warranty because sub-tenant would not allow him access to premises to rectify defect in heating apparatus.

The principal tenant of a theatre made an agreement with a tenant, giving him the exclusive privilege for three years of selling refreshments, etc., in the theatre for a fixed period, and a certain space for exhibiting his goods. The agreement stipulated that in case of sale, lease or transfer of the said theatre, his rights and privileges would be protected. The theatre was subsequently leased by the principal tenant to undertenants who undertook to respect all the obligations entered into by the former. The tenant holding the above exclusive privilege was ejected by the manager of the new tenants of the theatre and denied the right to exercise his privilege therein. The said tenant instituted an action against the first undertenant for damages, and re-instatement, and it was held that there was a *lien de droit* (privity of contract) established between the parties sufficient to give him a direct action against the said first undertenant, and that whatever rights he had against the latest tenant, there had been no novation of the said *lien de droit* to the detriment of his action against the first undertenant. *Authier v. Driscoll*, Q. R. 42 S. C. 52 (C. R. 1912), reversing S. C.

"Where the principal tenant is sued by his undertenant in cancellation of lease, on the ground that the premises have become uninhabitable through fire, and the principal landlord is obliged to repair and reconstruct the premises, the principal tenant has the right to call the principal landlord in warranty. *Imperial Button Works v. Montreal Watch Case Co.*, 7 Que. P. R. 217.

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[1] *Hanleyson v. Dozois*, Q. R. 28 S. C. 400 (S. C. 1905).

[2] *Stevenson v. MacPhail*, Q. R. 17 K. B. 119 (1907), reversing S. C.; Baudry-Lacantinerie I., n. 1125; Paris 25 Juin 1896, *Loi* 2 Nov. 1896.

able by the works incident to the demolition and reconstruction of a party-wall (*mur mitoyen*), and the principal tenant sues the proprietor in warranty as for a judicial disturbance or *trouble de droit*, the Court will grant him resiliation of the lease or reduction of rent, but not damages. In such a case the diminution of rent will be based upon the price of the original lease (which included several properties) as diminished by the proportional value of the property sublet, estimated as at the date of the original lease—and not by the price of the sub-lease.[1]

The principal tenant is obliged, *prima facie*, to deliver the premises sublet by him in a good state of repair.[2]

The acts of co-tenants of the principal tenant involve him with his undertenant only in the case where the acts of any third parties would do so: he is not in any judicial relationship with his co-tenants.[3] On the other hand, he is responsible for the acts of his undertenants towards each other as the principal landlord would be to his tenant for disturbance by a co-tenant.[4]

The principal tenant has a landlord's privilege for the rent of his sub-lease.[5] He also has an action to rescind the sub-lease, but only for conditions determined by the common law or the sub-lease, and not for conditions determined by the original lease[6]. For instance, if the latter stipulates that the lease shall become void *ipso facto* upon default to pay the rent, this will not give the principal tenant ground to claim rescission of the sub-lease *ipso facto* upon the undertenant defaulting in his

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[1] *Lanctot v. Boeck*, Q. R. 38 S. C. 228 (C. R. 1910), reversing S. C., Hutchison J., dissenting.

[2] Baudry-Lacantinerie I., n. 1127; Aubry et Rau IV., p. 493; Laurent XXV., n. 136; Guillouard I., n. 334 et 315.

[3] Baudry-Lacantinerie I., n. 1123.

[4] Baudry-Lacantinerie I., n. 1124. As to the landlord's warranty to his tenant for disturbance by a co-tenant, see *ante* p. 90

[5] Baudry-Lacantinerie I., n. 1127; Aubry et Rau IV., p. 493; Laurent XXV., n. 135; Guillouard I., n. 314, 334.

[6] Baudry-Lacantinerie I., n. 1127.

rent.[1]. The tenant who has sublet or transferred his lease, and who sues his undertenant, cannot demand that the latter pay him the rent due, where he himself is in arrears for rent with the principal landlord. He can only conclude that the undertenant be ordered to pay the rent to the principal landlord, and show receipt therefor, or in default to pay him a corresponding indemnity.[2]

The presumption created by Art. 1629 Civil Code in favor of the landlord when loss by fire occurs in the premises leased, is also available by the principal tenant in the case of a sub-lease by him.[3] But probably the undertenant's responsibility does not arise until the principal tenant is sued by the principal landlord.[4]

Sub-lease and assignment of lease as affecting relations of principal landlord and the principal tenant.

Subletting or assignment of the lease by the principal tenant does not discharge him from his obligations under the original lease,[5] even where the landlord has expressly consented to the sublease.[6] Thus, the landlord can still collect the rent from the principal tenant,[7] and need not previously sue the undertenant or the transferee.[8] For violation of the terms of the lease or of the rights of tenants by the undertenant or transferee of the lease, the principal landlord can sue the principal tenant either in damages or in resiliation of the lease,

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[1] Baudry-Lacantinerie I., n. 1127; Dalloz 89-2-233.

[2] *Lapointe v. The Original Salvador Co., Ltd.*, Q. R. 49 S. C. 243 (C. R. 1915).

[3] Baudry-Lacantinerie I., n. 1129; Cass. Dalloz, 96-1-331; Laurent XXV., n. 203; Larombiere, Art. 1148, n. 12.

[4] Baudry-Lacantinerie *loc cit.*

[5] Baudry-Lacantinerie I., n. 1131; citing numerous cases and authors.

[6] *Ibid*, citing Trib. paix, Béziers, 2 Juin 1904. *Joseph* v. *St. Germain*, Q. R. 5 S. C. 61 (S. C. 1894)

[7] *Ibid*, citing Trib. paix Tours, 8 Mars 1901; Trib. paix Beziers, 2 Juin 1904; Guillouard I., n. 335; Planiol II., n. 1753.

[8] *Ibid.*

as the case may provide.[1] Resiliation of the principal lease entails resiliation of the sub-lease.[2]

Where loss occurs by fire, arising in the premises of an undertenant, the principal landlord has the same rights as if the principal tenant himself occupied the said premises.[3] The same applies in the case of the burnt premises being occupied by a transferee of the lease.[4] Thus, the principal tenant cannot release himself from responsibility by shewing that the fire could not have started in that part of the property which he himself occupies.[5] Nor will he be released where he proves that the fire was caused by the fault of his undertenant, for he is responsible for the latter's fault.[6] It is likewise where there has been a transfer of the lease, instead of subletting.[7]

Where there is a subletting and not a sale of the lease, the principal tenant preserves all his rights against his landlord in the terms of the original lease. Thus, he can oblige him to make repairs,[8] and to warrant him against eviction or judicial disturbance.[9] As the principal tenant is held to all the obligations of a landlord toward his undertenant, it is only equitable that he should have a similar claim against his own landlord.[10]

Where the lease has been sold, as distinguished from a subletting, the principal tenant, having sold his rights, it is said that he necessarily loses them, and no longer

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[1] *Ibid.*

[2] *Larocque v. Freeman's Ltd.*, Q. R. 50 S. C. 231 (1916); *Duncan Co. v. Bridge*, Q. R. 14 K. B. 133. 1 Guillouard 345; Cass. Sirey, 73-1-454; Agnel 826.

[3] Baudry-Lacantinerie I., n. 1132, citing jurisprudence and Huc. X., n. 284; Planiol II., n. 1753.

[4] *Ibid.*

[5] *Ibid.*

[6] Baudry-Lacantinerie I., p. 652, citing Dalloz, 88-2-295; Agen, 3 Aout 1892.

[7] *Ibid.*

[8] *Ibid*; Guillouard I., n. 335.

[9] *Ibid.*

[10] *Ibid.*

has an action against his landlord.[1] It is disputed, however, whether he loses the right to compel his landlord to make repairs.[2]

The principal landlord can renounce all his rights against the principal tenant and proceed by direct action against the undertenant, or the transferee as the case may be, for such direct action lies, it has been shown, in both cases.[3]

Sub-lease as affecting relations of principal landlord and the undertenant.

The principal tenant cannot confer upon an undertenant or purchaser of the lease greater rights than he possesses by virtue of the principal lease.[4] For instance, he cannot grant to his undertenant rights respecting the removal of additions to the property, greater than those possessed by himself.[5] The undertenant is absolutely bound by the conditions of the principal lease.[6]

The principal landlord can require that the stipulations of the original lease shall be observed by the undertenant; for instance, he can require him to use the property according to its destination.[7] Also, where the original lease stipulates that it shall become void *ipso facto* for

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[1] *Ibid.*, Laurent XXV., n. 208.

[2] Baudry-Lacantinerie I., n. 1136; Laurent XXV., n. 208 negative; Guillouard I., n. 335 affirmative.

[3] Baudry-Lacantinerie I., n. 1136; Cass. 28 Aout, Sirey 33-1-802; Cass., Sirey 35-1-198; Cass. Sirey 72-1-331; Dalloz 88-2-59; Guillouard I., n. 336, and see *infra* pp. 223-224 as to direct action in case of subletting and p. 228 in case of sale of lease.

[4] Baudry-Lacantinerie I., n. 1138; *Duncan Co. v. Bridge*, Q. R. 14 K. B. at p. 137 (1905).

[5] *Duncan Co. v. Bridge*, Q. R. 14 K. B. at p. 138; Baudry-Lacantinerie I., n. 1138, citing Nancy, 2 Mars 1889, Sirey, 90-2-127.

[6] The voluntary cancellation by the parties, for inability of the tenant to pay the rent, of a lease with stipulation that failure to pay rent should dissolve it, extinguishes a sub-lease of part of the premises, notwithstanding the fulfilment of his obligations by the sub-tenant. And an action will be against the latter, in favor of the principal landlord, to recover possession of the part sub-leased. *Duncan Co. v. Bridge*, Q. R. 14 K. B. 133.

[7] Baudry-Lacantinerie I., n. 1142; Guillouard I., n. 321.

default to pay the rent as agreed, the principal landlord can evict the undertenant, where default has been made. [1]

Resiliation of the principal lease entails resiliation of the sub-lease. [2]

An obligation undertaken by the principal tenant to make repairs for his undertenant does not release the principal landlord from liability for hidden defects in the leased premises, even towards the undertenant occupying the leased premises, and even where the principal tenant declared that he knew the premises and that he was satisfied with them. [3]

It is generally held that a sub-lease does not give the sub-tenant a direct action against the principal landlord, but he has an indirect action, exercising the rights of his landlord, the principal tenant. [4] But in the case of the landlord's torts, as distinguished from his contractual obligations, it is admitted that the undertenant has a direct action by virtue of Article 1053 *et seq.* Civil Code. [5]

It is admitted that the principal landlord has an indirect action against the undertenant to enforce the obligations of the original lease, for the landlord is a creditor of the principal tenant and can exercise rights of action which the latter would have against the undertenant. [6]

The leading jurisprudence in France is entirely in favor of the view that the principal landlord has also

[1] Baudry-Lacantinerie I., n. 1142; Dalloz, 89-2-223.

[2] *Larocque v. Freeman's Ltd.*, Q. R. 50 S. C. 231 (1916); 1 Guillouard 345; Cass. Sirey, 73-1-454; Agnel. 826; *Duncan Co. v. Bridge*, Q. R. 14 K. B. 133.

[3] *Larocque v. Freeman's Ltd.*, *supra*.

[4] Baudry-Lacantinerie I., n. 1143; Cass. Dalloz 83-1-305; Laurent XXV., n. 211; Huc X., n. 209; Art. 1031 C. C., *Contra* Guillouard I., n. 335, who claims the undertenant has a direct action against the principal landlord.

[5] Baudry-Lacantinerie I., n. 1143; Trib. Civ. Lyon, 31 Mars 1896. (Damages caused by chimney sweeping ordered by principal landlord.)

[6] Art. 1031 C. Code; Baudry-Lacantinerie I., n. 1144.

a direct action against the undertenant for the fulfilment of the obligations of the original lease, and those arising from the relation of landlord and tenant, and the preponderance of doctrine is also in favor of the same view.[1]

The chief objection to this right of direct action by the principal landlord lies in the provision of law that contracts have effect only between the contracting parties, and hence cannot affect third parties, and the principal landlord not being represented in the new contract, there is no privity between him and the undertenant.[2] But this argument overlooks the fact that the undertenant, in the case we are dealing with, is in lawful occupation of the premises, and almost invariably with the consent of the landlord. The position of the undertenant may therefore be assimilated to that of a tenant by sufferance under Art. 1608 Civil Code,[3] under which Article the relation of landlord and tenant is presumed to arise. The law[4] and the jurisprudence[5] freely recognize tacit leases, and it is surely not too much to presume, in the case of a sub-lease, that there exists between the principal landlord and the undertenant such *lien de droit*, or privity of contract, as to enable the former to proceed against the latter by direct action, having regard to the limitation of the landlord's privilege under Article 1621 Civil Code, and the limitation of the amount due for rent by Article 1639 Civil Code. In *Duncan* v.

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[1] Cass. Dalloz, 53-1-124; Cass. Dalloz, 73-1-412; Cass. Sirey 81-1-77; Cass. Dalloz, 83-1-305; Cass. Dalloz, 92-1-509; see *Smith v. Rosenberg*, Q. R. 41 S. C. 165; Troplong I., n. 128; Duvergier I., n. 539; Marcadé, Art. 1717, n. 1; Aubry et Rau IV., p. 494; Massé et Vergé IV., p. 374, note 20; Demolombe XXV., n. 148; Guillouard I., n. 329; Agnel, n. 350; Garsonnet, p. 526, sec. 312; Thiry IV., n. 57. *Contra* Baudry-Lacantinerie I., n. 1145; Laurent, XXV., n. 2008.; Huc X., n. 283, 321, 349; Planiol II., n. 1754; Labbé, Rev. Crit. V. 1876, p. 571s and 666s.

[2] Art. 1023 C. Code; Baudry-Lacantinerie I., p. 662.

[3] See *Jilbert v. Bowen*, Q. R. 36 S. C. at p. 313.

[4] Arts. 1608, 1609 C. Code.

[5] *Hodgson v. Evans*, Q. R. 1880, 3 L. N. 300.

Bridge,[1] the Court of Appeal allowed an action by the principal landlord against the undertenant, to recover possession of the premises, on the ground that the principal tenant had failed to pay his rent.

Where the undertenant is guilty of a *quasi*-delict—where, for instance, without the consent of the principal landlord, he keeps a house of prostitution—it has been held here that he will be liable directly to the principal landlord for damages resulting therefrom—such as loss of rental.[2]

By Article 1621 the principal landlord's privileged right for the payment of his rent and other obligations of the lease, includes also the effects of the undertenant, in so far as he is indebted to the principal tenant. By Article 1639 the undertenant is held towards the principal landlord for the amount only of the rent which he may owe at the time of seizure;[3] he cannot set up payments made in advance. Payments made by the undertenant, either in virtue of a stipulation in the lease, or in accordance with the usage of the place, are not deemed to be made in advance. Article 1639 extends only to the question of personal liability of the undertenant, and does not prevent the principal landlord from suing the undertenant for possession of the property where the principal tenant has failed to pay his rent.[4]

Where there is prohibition to sublet, and the principal landlord has not consented, or where the undertenant occupies the premises in virtue of an unlawful and void contract between himself and the principal tenant, and detrimental to the principal landlord, the undertenant occupying the leased premises is placed towards the principal landlord in the position of a mere third party whose moveable effects are on the premises by their consent, as provided by Article 1622, and such effects

[1] Q. R. 14 K. B. 133 (1905).

[2] *Montmarquette v. Berman*, Q. R. 29 S. C. 193 (S. C. 1906).

[3] See *ante* p. 121 as to landlord's privilege.

[4] *Duncan Co. v. Bridge*, Q. R. 14 K. B. 133 (1905).

become liable to seizure by the principal landlord for rent and damages due by reason of violation of the obligations of the principal lease.[1] Also, where an undertenant occupies the leased premises notwithstanding a prohibition in the lease to sublet, and without the consent or knowledge of the principal landlord, he loses the benefit of Article 1639 Civil Code (*supra*), and his effects on the premises will be liable for all rent due by the principal tenant.[2]

It has been held, however,[3] that where premises have been sublet in part, contrary to the terms of the lease, and the landlord sells the property during the course of the sub-lease, the undertenant, under an annual lease, could not be expelled before the expiration of the year by the purchaser who was aware of the sub-lease, unless the purchaser had been specially empowered to do so by his deed of acquisition. But this seems contrary to the holding of the Court of Appeal in *Duncan Co. v. Bridge*.[4] But if there were no prohibition to sublet in the original lease for a year, then a purchaser of the property must respect the sub-lease, and if he makes a new lease with the former principal tenant, with prohibition to sublet, he cannot demand resiliation of the lease on the ground of the subletting prior to his purchase.[5]

It has been held that where a building has been partly destroyed by fire, but an undertenant under an authentic lease wishes to retain his portion of the premises, the principal tenant having agreed with the landlord that

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[1] *Montmarquette v. Berman*, Q. R. 29 S. C. 193 (S. C. 1906); *Archibald v. Archambault*, Q. R. 13 S. C. 342 (S. C. 1898).

[2] *Hamilton v. Dwyer*, Q. R. 16 S. C. 469 (S. C. 1899).

[3] Per Blanchet J. in *Hough v. Cowan*, Q. B. 1892, Q. R. 2 Q. B. at p. 4; *Owler v. Moreau*, Q. B. 1866, 2 L. C. L. J. 84; *contra Esciot v. Lavigne*, C. R. 1871, 16 L. C. J. 98, and see *Duncan Co. v. Bridge*, Q. R. 14 K. B. 133 at p. 136.

[4] *Supra* and *ante* p. 222.

[5] *Venner v. Thienal*, Q. R. 37 S. C. 80 (C. R. 1909), reversing Q. R. 36 S. C. 223.

the lease shall be cancelled,[1] cannot evict the undertenant who has not failed in his obligations;[2] the undertenant can be evicted in such a case only upon action by the landlord to have the whole lease cancelled, for the reason that it would be unprofitable and ruinous to him to have to maintain the sub-lease in view of the extensive destruction of the main premises, which will require to be rebuilt.[3]

Where the sub-tenant is evicted on account of breach of obligation on the part of the principal tenant, he cannot claim indemnity from the principal landlord.[4] But if the sub-tenant's eviction is sought at the instance of the landlord, on the ground that the premises being partly destroyed by fire it is necessary that the whole shall be rebuilt, the sub-tenant whose premises are not seriously injured, and who wishes to remain, can claim damages for his enforced removal.[5]

It has been held that the right to select and withdraw from seizure the effects detailed in Art. 598 Code of Procedure is established in favor of, and can be invoked only by, the debtor, and that an undertenant is not entitled to claim such exemption.[6]

Effect of assignment of lease.

If the lease is validly transferred from the principal tenant to a third party, so as to be construed as effecting a sale and not a sub-lease, then the third party stands toward the landlord in all respects in the place of his vendor, and toward his vendor he is governed by the law of sale and not of lease and hire; he can enforce all his vendor's rights, and is subject to all his obligations

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[1] Art. 1660 C. Code.

[2] *Compagnie d'Imprimerie etc. du Herald v. Cochenthaler*, S. C. 1882, 11 R. L. 605.

[3] *Penny v. Montreal Herald Co.*, S. C. 1883, 27 L. C. J. 83.

[4] Cassation, 21 July 1873, Sirey, 73-1-454.

[5] *Penny v. Montreal Herald Co., supra.*

[6] *Hamilton v. Dwyer*, Q. R. 16 S. C. 469. See *ante* p. 126.

after the transfer has been signified to the landlord or has been accepted by him; but the vendor is not released from his obligations to the landlord.[1] The principal tenant is only obliged to deliver the premises to his transferee in the condition in which they are at the date of the transfer.[2] He is not bound to make necessary repairs during the course of the lease,[3] nor to warrant him against disturbance by trespass.[4] The purchaser of the lease has a direct action against the landlord to compel him to execute the obligations imposed upon him in the original lease,[5] as he stands in the rights of his vendor. It is a much more difficult question to determine whether the landlord has a direct action against the purchaser of the lease, for he is not a party to the contract. This question is much disputed in France,[6] But where the principal tenant has the right to transfer his lease to another, by way of sale, the landlord can scarcely be in a worse position toward the purchaser of the lease than he would be toward a tenant by sufferance under Art. 1608, in which case the occupant and the landlord are governed by all the rules of law applicable to leases.[7] The weight of French doctrine and jurisprudence is decidedly in favor of the view that the landlord in such a case has a direct action against the purchaser of the lease for the fulfilment of its obli-

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[1] Baudry-Lacantinerie I., n. 1130-1131; Toulouse, 20 Juil. 1897; Sirey, 99-2-195; Guillouard I., n. 334, 335, 316; Aubry et Rau IV., p. 493; Laurent XXV., n. 194; Art. 1571 C. Code; Huc. X. n. 284 et 349; Planiol II., n. 1753.

[2] Art. 1498 C. C.; Baudry-Lacantinerie I., n. 1130.

[3] Baudry-Lacantinerie I., n. 1130; Guillouard I., n. 334.

[4] Baudry-Lacantinerie I., n. 1130; Toulouse 20 Juil. 1897, Sirey 99-2-195.

[5] *Smith v. Rosenberg*, Q. R. 41 S. C. 165 (C. R. 1911), confirming S. C.; Baudry-Lacantinerie I., n. 1139; Laurent XXV., n. 210; Guillouard I., n. 337; Huc X., n. 282.

[6] Baudry-Lacantinerie I., n. 1140.

[7] See also *Jilbert v. Bowen*, Q. R. 36 S. C. at p. 313.

gations.[1] If the principal tenant, who, as already stated, is still responsible to his landlord, is sued by the latter to fulfil his obligations under the lease, the tenant's recourse against the purchaser of the lease is limited to an action of *gestion d'affaires* or *de in rem verso*: He can exercise none of the remedies accorded to a landlord in an action against his tenant.[2]

Precautions in lease that should be taken by the undertenant.

It is highly advisable that a sub-tenant or transferee of a lease should have the sub-lease or transfer made in notarial form, and have the landlord made a party thereto. Not only do most leases now contain strict prohibitions against subletting without the express consent in writing of the landlord, but, as already pointed out, even in the absence of such a stipulation, the sub-tenant is always liable to be evicted upon the cancellation of the principal tenant's lease for breach of its obligations.

The notarial transfer usually declares the transferee subject to all the charges and conditions of the original lease, and to pay the rent to the landlord; he is also declared to be subrogated in all the rights of the transferor resulting from the original lease. The landlord, if agreeable, joins in the transfer, and declares his consent to its execution, but usually expressly declares that the original tenant shall remain as joint security and respondent of the sub-tenant for the payment of the rent and the execution of all the charges and conditions of the original lease which shall remain in full vigor and effect against the transferor.

[1] See authorities cited in Baudry-Lacantinerie I., n. 1140, p. 657; n. 1145, p. 661-662, where it is seen that the Court of Cassation has taken exclusively this view. Baudry-Lacantinerie takes a contrary view, but admits that the fact of occupation has been accepted by French jurisprudence as determining the right of the landlord to a direct action.

[2] Baudry-Lacantinerie I., p. 649, citing Trib. Civ. Niort, 14 Avril 1891, *Gaz. Trib.* 25 Avril 1891.

CHAPTER VI.

Termination of the Lease.

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1. IN GENERAL.

How terminated.

The lease of real estate is a temporary contract having for object the enjoyment of the premises by the tenant, and the enjoyment of the price or rent by the landlord.

The contract of lease or hire of things is terminated in the manner common to obligations, as declared in the eighth chapter of the title *Of Obligations* (Arts. 1138-1200 Civil Code) in so far as the rules therein contained can be applied, and subject to the special rules contained in Title VII Civil Code (*Of Lease and Hire*).[1]

In the absence of a resolutory clause in the lease, it can be resiliated for breach of its obligations on the part of the landlord or his tenant only upon a judgment being rendered pronouncing the rescission.[2] But leases often contain a resolutive condition, generally in favor of the landlord, expressly stipulating that upon the happening of a certain condition the lease shall *ipso facto* terminate.[3] Such a stipulation is valid and effective.[4] Where there is no such resolutive condition in the lease, it is discretionary with the Court to grant or refuse the demand of resiliation. For instance, where the landlord demands resiliation of the lease for the reason that the tenant has sublet, contrary to the terms of the lease, he will be denied his demand where the principal tenant had evicted his undertenant and cancelled the sub-lease after action taken and before judgment pro-

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[1] See Art. 1655 C. Code.

Where a lease of premises is passed for a stated rental, said rental to commence after the payment of the first instalment of a debt due by the landlord to the tenant, the lease will expire when the amount of the rent for the period of occupation will be sufficient to offset the landlord's debt. *Gifford v. Harvey*, Q. B. 1887, 15 R. L. 323.

[2] Arts. 1138 and 1655 C. Code; *Brunel v. Goldwater*, Q. R. 33 S. C. 240, 242 (S. C. 1908); Baudry-Lacantinerie I., n. 1381.

[3] See further as to effect of resolutive clause, *infra* "Resolutive clause."

[4] *Brunel v. Goldwater, supra;* Baudry-Lacantinerie I., n. 1381, 1385; Guillouard I., n. 223 and 440; Huc. X., n. 338. As to eviction of the tenant by the landlord under such a clause, see *infra* p. 282.

nounced.[1] The cause of resiliation must exist at the moment of declaring judgment.

The contract of lease is also terminated by rescission in the manner and for the causes declared in Articles 1624 and 1641 Civil Code.[2]

Article 1624 Civil Code gives the landlord a right of action in the ordinary course of law or by summary proceeding as prescribed in the Code of Civil Procedure, to rescind the lease,

1. When the tenant fails to furnish the premises leased, if a house, with sufficient furniture or moveable effects, and, if a farm, with sufficient stock to secure the rent as required by law—unless other security be given.

2. When the tenant commits waste upon the premises leased.

3. When the tenant uses the premises leased for illegal purposes, or contrary to the evident intent for which they are leased.

Article 1641 Civil Code, gives the tenant a right of action in the ordinary course of law, or by summary proceeding as provided in the Code of Civil Procedure,

1. To obtain the rescission of the lease in default of the landlord making the repairs and ameliorations stipulated in the lease, or to which he is obliged by law—unless he prefers to obtain authority to make the same at the expense of the landlord.

2. To rescind the lease for failure on the part of the landlord to perform any other obligations arising from the lease or devolving upon him by law.

The foregoing causes of resolution of the lease have been dealt with in preceding chapters.

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[1] *Brunet v. Goldwater*, Q. R. 33 S. C. 240 at p. 242.

[2] Art. 1656 C. Code.

The lease is also extinguished by the mutual consent of the contracting parties;[1] by the expiration of the term;[2] by destruction by irresistible force, or a fortuitous event, or the taking for purposes of public utility, of the whole of the leased property;[3] by the landlord re-letting the premises before the expiration of the current lease where the tenant has abandoned them;[4] by confusion or consolidation.[5] Alienation of the premises may also result in the eviction of the tenant—as to which see further *infra*.

The law makes a distinction between the "expiration" of the lease and its "resiliation" or "resolution."[6] This distinction becomes of moment in determining whether there has been tacit renewal.[7]

Where a landlord is induced to lease his property upon the false representations of a prospective tenant, and would not have agreed to the lease but for the deceit practiced, he will be entitled to obtain its resiliation.[8]

If one of the parties to a lease fails in the performance of his obligations, the other party is not bound to carry out his obligations.[9] In such a case the Court will order resiliation against the guiltier of the two.[10]

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[1] Baudry-Lacantinerie I., n. 1367; Guillouard I., n. 280; Art. 1662 C. Code provides that the landlord cannot put an end to the lease for the purpose of occupying himself the premises leased, unless the right to do so has been expressly stipulated, and in such case the landlord must give notice to the tenant according to the rules contained in Art. 1657 and the Articles therein referred to; unless it is otherwise stipulated.

[2] Arts. 1657, 1658 C. Code.

[3] Art. 1660 C. Code.

[4] *Vallerand v. Lachance*, Q. R. 43 S. C. 526 (S. C. 1913); *Jodoin v. Demers*, Q. R. 24 S. C. 189 (S. C. 1903).

[5] See *infra*.

[6] See *Wallace v. Honan*, Q. R. 32 S. C. at p. 247 (C. R. 1907); Arts. 1138, 1655, 1658, 1656.

[7] *Ibid*. See Art. 1609 C. Code.

[8] *Doucet v. Clerez*, Q. R. 23 S. C. 107 (C. R. 1902).

[9] Baudry-Lacantinerie I., n. 1378; Dalloz 89-2-247.

[10] Baudry-Lacantinerie I., n. 1378; Cass. Dalloz 93-1-120.

Effect of resiliation.

The judgment resiliating the lease has a retroactive effect to the date of institution of the action,[1] and the liability of a surety for the rent is extinguished at that date.[2]

With the principal lease, naturally falls the sub-lease,[3] and the undertenant has no recourse in damages against the principal landlord.[4] But he may have such recourse against the principal tenant, who leased to him.[5]

Death of the parties.

Article 1661 of the Civil Code declares that the contract of lease is not dissolved by the death of the landlord or his tenant. A person is deemed to have stipulated for himself, his heirs and legal representatives, unless the contrary is expressed, or result from the nature of the contract.[6] This rule applies even in the case of beneficiary heirs.[7]

A strict adherence to the above rule would often result in great hardship to the tenant's widow or the children who succeed to his estate. But, no doubt, the legislators considered this question when drawing up the article, and they made no distinction between the death of the landlord and the death of the tenant. The leading authors in France hold that the rule of Art. 1661 must be applied without distinction in all cases—even where a personal element enters into the

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[1] *Casey v. Janvier*, Q. R. 16 S. C. 43 (S. C. 1899); *Budland v. Valiquette*, Q. R. 24 S. C. 94 (S. C. 1903).

[2] *Ibid.*

[3] *Larocque v. Freeman's Ltd.*, Q. R. 50 S. C. 231. 25 Laurent 386; Baudry-Lacantinerie I., n. 1386; Guillouard I., n. 345 and 448; Huc. X., n. 285; Aubry et Rau IV., p. 498; sec. 369, note 15. Cass. Sirey, 73-1-454. See *ante* p. 221.

[4] Baudry-Lacantinerie I., n. 1386; Guillouard I., n. 345.

[5] Baudry-Lacantinerie I., n. 1387.

[6] Art. 1030 C. Code.

[7] Baudry-Lacantinerie I., n. 1261; Demolombe XV., n. 168 *bis*.; Fuzier-Herman, Art. 802, n. 9; Guillouard I., n. 358; Huc. X., n. 340.

lease.[1] Thus it is considered by weighty authority that the lease of premises to a professional man for a term of years, for the exercise of his profession, should not be rescinded by the Court at the instance of the heirs of the deceased tenant.[2] But there is a considerable weight of authority to the contrary.[3] The lease of a factory should not be resiliated on account of the death of the tenant;[4] or a store leased by a trader; or offices rented by a general agent.[5]

The lease subsists after the death of the parties thereto, even where there is a prohibition to transfer the lease.[6]

The heirs who renounce the succession are not chargeable with the lease, even where they occupy the leased property, except in so far as such occupation implies an acceptance of the succession.[7]

The parties can, of course, stipulate in the lease that the death of the landlord or the tenant shall terminate it.[8]

2. EFFECT OF INSOLVENCY OF TENANT.

The insolvency of the tenant does not of itself terminate the lease;[9] nor is it in itself a ground for resiliation of the lease.[10] Its effect is to render immediately due

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[1] Baudry-Lacantinerie I., n. 1263.

[2] Baudry-Lacantinerie I., n. 1263; Guillouard I., n. 351; Huc X., n. 340.

[3] Lyon, 12 Dec., 1884; Bruxelles, 20 Jan., 1877; Trib. Civ. Gand, 10 Mars., 1880; Laurent XXV., n. 319; Arntz IV., n. 1161.

[4] Baudry-Lacantinerie I., n. 1263; Guillouard I., n. 351.

[5] Baudry-Lacantinerie I., n. 1263.

[6] Baudry-Lacantinerie I., n. 1264.

[7] *Ibid*, n. 1266 *bis*.

[8] Baudry-Lacantinerie I., n. 1266 *ter*.

[9] *Rolland v. Tiffin*, Q. B. 1877, 22 L. C. J. 164; *Seybold v. Evans*, Q. B. 1882, Ram. Dig. 354; confirming S. C., 4 L. N. 138; Sirey 1865-1-201, see extensive note; 1 Guillouard 354; Baudry-Lacantinerie I., n. 1268.

[10] *Paul v. Mondou*, 13 Que. P. R. 185 (1912).

all the rent for the unexpired portion of the lease,[1] although one of our judges has taken a contrary view.[2] Leases in this province sometimes expressly provide that in the event of the tenant becoming insolvent the landlord shall be entitled to claim at once the rent for the whole unexpired portion of the lease.[3] This is probably a precautionary measure, in view of the uncertainty surrounding this question.

The voluntary winding-up of a company for the purpose of a merger into a combination of companies to carry on the same industry, though made under a judicial order, raises no presumption of insolvency that deprives it of benefit of term for the discharge of its obligations.[4]

As already pointed out in an earlier chapter,[5] the landlord has, for the payment of his rent and other obligations of the lease, two kinds of privileges respecting the effects of the tenant garnishing the leased premises —viz, a privileged right or lien, which confers upon the landlord a right to have such effects retained on the leased premises as security for his rent and other obligations of the lease; the other kind of privilege is a right which a creditor has of being preferred to other creditors according to the origin of his claim.[6] The former is a

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[1] Art. 1092 C. Code; *Pare v. Warwick Pants Co.*, Q. R. 47 S. C. 60, 63 (S. C. 1915) *Re Harte and Ontario Express & Transportation Co.*, 22 Ont. R. 510 (a Quebec claim. Company tenant wound up in Ontario); *Plante v. Robitaille*, S. C. 1878, 4 Q. L. R. 225; and even though the landlord's *gage* be not diminished (*Menard v. Pelletier*, S. C. 1883, 7 L. N. 15; *Hamilton v. Valade*, 30th Nov., 1882; Jette, J.).

The prevailing view in France is that rent to become due is a debt with a term and not a conditional debt. Baudry-Lacantinerie I., n. 859; Guillouard, I., n. 358; Cass. Dalloz, 65-1-201; 70-1-261; 92-1-345; *Contra* Thiercelin, *Rev. Crit.* XXV. 1867, p. 37; Mourlon, *Rev. Prat.* XXIII, 1867, p. 385; Laurent XXIX, n. 393.

[2] See per Doherty J. in *MacPherson v. Symonds*, Q. R. 29 S. C. at p. 121 (C. R. 1906) and *Rousseau v. Archibald*, Q. R. 12 K. B. at p. 16, reversed in appeal on another point.

[3] *Pare v. Warwick Pants Co. supra.*

[4] *McKinestry v. Irwin*, Q. R. 21 K. B. 139; Q. R. 39 S. C. 426 (1911).

[5] *Supra* p. 106.

[6] Art. 1983 C. Code.

temporary *jus in re*, the latter constitutes a *jus ad rem*.[1] In competition with other privileged creditors the landlord's privilege ranks in the eighth place,[2] and it affects only those moveable effects which garnish the leased property.

Now, Article 2005 of the Civil Code enacts that in the case of the liquidation of property abandoned by an insolvent trader who has made an abandonment in favor of his creditors, the landlord's privilege is restricted, in the case of a notarial lease, to twelve months' rent due and the rent to become due during the current year if there remain more than four months to complete the year, if there remain less than four months to complete the year, to the twelve months' rent due and the rent of the current year and the whole of the following year. If the lease be not in authentic form, the privilege can only be claimed for three overdue instalments and for the remainder of the current year.

It is to be noted that Article 2005 relates only to the landlord's preferential rights of payment in respect of the goods garnishing the leased premises, and in competition with other creditors of the tenant—that is to say, Art. 1994 C. C. declares in effect that the landlord shall have a privileged claim upon the effects furnishing the leased premises for his rent, but only to the extent permitted by Art. 2005. Article 2005 does not affect the extent of the landlord's lien as between the landlord and the tenant,[3] nor does it prevent the landlord from ranking as an ordinary creditor for the balance of the whole term of the lease;[4] the unexpired term of the lease being an asset of the insolvent estate.[4]

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[1] *Pare v. Warwick Pants Co.*, Q. R. 47 S. C. at p. 64.

[2] Art. 1994. See *ante* p. 135 as to ranking of landlord's privilege.

[3] *Pare v. Warwick Pants Co.*, Q. R. 47 S. C. 60 (S. C. 1914).

[4] See *Re Harte and Ontario Express and Transportation Co.*, 22 Ontario R. 510. (This was the claim of a Quebec landlord against his tenant, a company wound up in Ontario). See further as to this case *infra*.

If the rent for the unexpired portion of the lease—which becomes due in totality by reason of the insolvency of the tenant—is not paid, this is a ground for resiliation of the lease if the landlord so desires,[1] in which case no claim for future rent would arise; the landlord could only file his claim against the estate for damages caused by delay in reletting, as provided for in Art. 1637 Civil Code.[2] Leases frequently stipulate that the lease shall become null and void upon the insolvency of the tenant. Sometimes the lease stipulates that in such case it shall become void at the option of the landlord. Where the lease contains such an option and the landlord chooses to resume possession, the future rent ceases; if otherwise, then the liquidator holds an asset for the benefit of the creditors—the lease for the unexpired term.[3] But if the lease contains a clause prohibiting subletting or assignment of the lease there is now no provision in our law to enable the tenant's creditors to assign the lease without the landlord's consent,[4] although it was otherwise under a former Insolvent Act,[5] recognized in Article 1638 of the Civil Code as originally enacted.

[1] *Forsyth v. Beaupre*, Q. R. 10 S. C. 311, 313; Baudry-Lacantinerie L., n. 1268, 1269, n. 859; Cass. Dalloz, 51-1-237; Cass. Dalloz, 59-1-162; Cass. Dalloz 59-1-63 Cass. 1860, Dalloz, 60-1-35.

[2] 1 Guillouard 329; *Forsyth v. Beaupre, supra.* See *Joseph v. Penfold*, Q. R. 10 S. C. 152 (S. C. 1896).

[3] See *Re Harte and Ontario Express and Transportation Co.*, 22 Ont. R. 510 *supra*; Art. 863 C. P.

[4] Where the landlord agrees with the creditors to the cancellation of the insolvent's lease, and that having leased to another party at a superior price, he agrees to pay the surplus to the creditors, this agreement is cancelled upon destruction of the premises by fire, although the landlord repairs and relets at an equally advantageous price. *Browne v. Pinsonneault*, Supreme Ct., 3 Can. S. C. R. 102. Overruled as to a point of procedure by the Privy Council in *Porteous v. Reynar*, 13 App. Cas. 120.

Where the right to the unexpired term of a lease together with the moveables upon the premises were sold under an execution against the lessee, and the leased premises were afterwards destroyed by fire. *Held*—That the purchaser had no right of action against the lessor for the repetition of the rent which had been paid to him on the distribution of the proceeds of the sale. *Hayden & Bancroft v. The Heirs of H. M. Shiff*, Supreme Ct. of Louisiana, 12 La. Ann. 524.

[5] *Whyte v. Beaudry*, S. C. 1872, 2 R. C. 482. See *infra* as to this.

This present state of our law discloses a serious lacuna. In France the Civil Code, Art. 2102, and the Code of Commerce, as modified by the law of 1872, specially deal with this difficulty. Art. 2102 of the French Civil Code enacts that where the landlord exercises his privilege for farm-rent or house-rent, upon the fruits of the immoveable or the effects garnishing the leased premises, the other creditors have a right to assign or sublet the house or the farm for the balance of the lease, as their asset, at the charge, however, of paying the landlord what sums still remain due to him. Article 650 of the Code of Commerce, as above modified, enacts that where the lease contains a prohibition to assign the lease or to sublet, the tenant's creditors can only assign or sublet the premises for the period for which the landlord has been paid by anticipation, and the destination of the premises cannot be changed.

Under Art. 2102 of the French Civil Code, it has been held that the right of the creditors to assign the lease or sublet cannot be restricted by a provision in the lease expressly prohibiting assignment of the lease or subletting.[1] The landlord's remedy, in that case, if he so desires, is to have the lease cancelled for non-payment of rent, and to demand damages for the period required for re-letting, in which case such damages are substituted for future rent.[2]

There are no reported cases in this Province dealing with this point since the date of the Insolvent Acts.

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[1] Cass. Dalloz 59-1-63, 60-1-35; Delvincourt, III. p. 503; Persil. *Rep. hyp.* I, Art. 2102, paragraph 1, n. 20; Grenier *Tr. des priv. et hyp.*, II, n. 302; Rolland de Villargues, vo. *Priv. de creances*, n. 70; Mourlon, *Ex. du comm. de Troplong sur les priv.*, n. 70; Duranton, XVII, n. 89; Duvergier, I. n. 372; Troplong, I. n. 132 et *Tr. des priv. et hyp.*, n. 155; *Masse et Verge*, IV., p. 378, paragraph 703, note 5; Pont *Tr. des priv. et hyp.*, I, n. 128; Aubry et Rau, III p. 146 et IV. p. 491, et 492; Laurent, XXV. n. 225; Arntz, IV. n. 1152; Guillouard, I. n. 329; Baudry-Lacantinerie, *Louage*, I. n. 1195; Huc. X. n. 285—*Contra* Paris, 16 juin, 1812, Sirey Chro, Paris, 24 feb., 1825, Dalloz, 25-2-208.

[2] Guillouard, I. n. 329; Baudry-Lacantinerie, *Louage*, n. 1195.

By virtue of Article 1031 of our Civil Code creditors may exercise the rights and actions of their debtor, when to their prejudice he refuses or neglects to do so; with the exception of those rights which are exclusively attached to the person. It is admitted that a tenant's right to enjoy the property leased to him is not one which is exclusively attached to the person,[1] hence, by virtue of Article 1031, where a tenant abandons the property leased, his creditors can enjoy and exploit the property in his name.[2] But if the lease contains a strict prohibition to assign or sublet, this condition is opposable to the tenant's creditors who, *prima facie*, can have no greater rights than those of their debtor.[3] Such a prohibition must be "strictly observed," says Article 1638 of our Civil Code, as at present constituted. This Article did not always read thus, for originally there appeared after "strictly observed" the words "subject to the Insolvent Act of 1864." Here, then, we had special recognition of the difficulty which might present itself where a tenant becomes insolvent and there is a prohibition in the lease to assign it or to sublet. This difficulty has, as we have indicated, been specially provided for in France, and it was also provided for in Art. 1638 of our Civil Code, as originally enacted, for the Insolvent Act allowed of the assignment of the lease, and a prohibitory clause in the lease was held to be of no effect in the case of a sale in insolvency.[4]

The words "subject to the Insolvent Act of 1864" were struck out of the original Article by virtue of the

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[1] This is seen in Art. 1638 C. C., which recognizes a tenant's *prima facie* right to sublet or assign his lease, and in Art. 1661 C. C., which declares that the contract of lease or hire of things is not dissolved by the death of the tenant.

[2] Baudry-Lacantinerie, I. n. 1192; Guillouard, I. n. 302; Dalloz, 56-2-21.

[3] Baudry-Lacantinerie, I. n. 1195.

[4] *Whyte v. Beaudry*, 2 R. C. 482. (S. C. 1872), decided under the Insolvent Act of 1869.

Federal amendments to the Civil Code,[1] leaving the Article as it now stands.

It is therefore submitted that since nothing has been substituted in Art. 1638 C. Code or elsewhere for the repeal of the Insolvent Act, as incorporated by reference in that Article as originally enacted, the curator to an abandonment of property cannot sell the insolvent tenant's rights in his lease, where there is a clause in the lease prohibiting or subletting without the written consent of the landlord, and the landlord refuses to give that consent—even where he has been paid his privileged claim by anticipation. This, no doubt, is a very inequitable state of affairs, but seems to have arisen from the haphazard manner in which amendments to the Code are effected. We have had occasion in a former part of this work,[2] to point out another apparent defect in relation to Article 1994, paragraph 8, and Article 2005 C. Code.

In the unreported case of *Anderson v. Hood*,[3] the curator had petitioned the Court and the Court had granted the petition, authorizing the curator to sublet the leased premises of insolvent if the lease so permitted or with the consent of the landlord to so sublet. In this case the landlord had rented premises to a tailor for three years, commencing on 1st May, 1911. On the 9th August, 1911, the landlord caused a *saisie-gagerie* in expulsion to be issued against his tenant for rent then due for July and August, and a further sum as damages resulting from the resiliation of the lease. After this *saisie-gagerie* was returned into Court the insolvent tenant made an abandonment of his property for the benefit of his creditors. Thus the landlord's claim was left to be

[1] R. S. Q. 1888, Art. 6236; 43 Vict. (C.) c. 1; 49 Vict. "An Act to repeal the Acts respecting Insolvency now in force in Canada," 1 April, 1888 (C.), c. 4, s. 5, schedule A.

[2] *Ante* p. 108.

[3] Court of Review, Montreal, 21 May, 1913, No. 137, Tellier, De Lorimier and Greenshields J.J., modifying judgment of S. C. See judgment in this case reported in the Appendix Part II.

adjusted in the liquidation of the estate. It was to the advantage of the estate that the premises should be subrented as soon as possible. An order was obtained from the Court permitting this, and the premises were sublet, *with the landlord's consent*, for the same price and conditions as the principal lease, as from 1st October to the expiration of the original lease. The rent and taxes thus obtained from the new tenant belonged to the landlord, without any deductions, as the order of the Court permitting subletting with the consent of the landlord was in the interest of the mass of the creditors.

For the four months' rent due prior to October 1st, the landlord had to rely on his privilege on the proceeds of sale of the insolvent's stock in trade. The landlord's privilege, as already pointed out, is a special privilege, and the Court held that the only costs and expenses having priority over special privileges are those incurred in the interest of the privileged creditors and for the preservation and realization of their *gage*. Hence, the expenses incurred by the abandonment, the administration of the insolvent's estate and its liquidation, are not expenses, incurred for the benefit of the landlord, but are incurred for the benefit of the insolvent estate, in which the landlord is interested only as an ordinary creditor for any balance that may be due to him owing to the insufficiency of the tenant's effects to satisfy his privileged claim. The costs and expenses which were to be deducted from the proceeds of sale of the insolvent's stock before the landlord's privilege thereon could be satisfied are set out in the report of the judgment in this case in the second part of the appendix to this work. See further as to "Law costs and expenses incurred in the interest of the mass of the creditors" as affecting the landlord's privilege, *ante p.* 136.

In *Joseph v. Penfold*[1] the landlord, plaintiff, leased premises to the defendants for a term of six years at

[1] Q. R. 10 S. C. 152 (S. C. 1896)

the rate of $1,000 for the first year, with progressive increase for the succeeding years. During the first year the landlord brought an action to resiliate the lease, on the ground of non-payment of rent, and prayed judgment for the rent and taxes due, and for a further sum of $1,350, representing the rent and taxes for the second year, as damages for resiliation. The defendant confessed judgment for the rent due and to become due up to the end of the first year, being for three months' rent for the usual period of re-letting, viz., 1st February to 1st May. The defendant in the meantime made an abandonment of the estate to his creditors. There were upon the leased premises moveable effects greatly exceeding in value the rental due and to become due during the coming year. The Court held the confession of judgment sufficient, in view of the particular circumstances of the case, and reserving to plaintiff all rights privileged and other against the insolvent estate of defendant for rent not yet due under the authentic deed of lease. The Court said — "Under these circumstances, while plaintiff has a right to demand the resiliation of the lease, any loss of rent for the coming year is a loss which he voluntarily incurs, and which he might avoid by merely allowing said lease to continue during the said year; and that in consequence in making and persisting in his demand for resiliation and the entire rental for the coming year, he seeks to have, in effect, both the enjoyment of the premises and the rental thereof from defendants." And further, "Considering that the intention of the law, in allowing the lessor to claim damages for the resiliation of the lease resulting from the lessee's fault, is to enable the former to recoup himself for loss necessarily sustained where, in the enforcement of his rights, he finds it necessary to demand the resiliation of the lease, but not to enable him, where he is amply secured and protected against any loss, were the lease not resiliated, to create a loss by his own act in demanding the resiliation, and compel the lessee, who by reason of

such resiliation, is deprived of the enjoyment of the premises, to make good to him the loss which by his own act he has brought about."

The effect of a tenant's insolvency is also to suspend any proceeding by the landlord by way of seizure, attachment for rent or seizure in execution against the effects of his tenant.[1] But the judge may permit the continuance of proceedings already commenced, upon such terms as are deemed proper.[2]

The costs of any proceedings by way of attachment which a landlord may continue after he has had knowledge or notice of the insolvency cannot be collocated upon the property of the debtor, the proceeds whereof are distributed in consequence of the abandonment.[3]

Proceedings in attachment being suspended by the insolvency of the tenant, and the curator having the right to take possession of the tenant's effects, which are to be sold in the interest of the creditors,[4] the landlord can realize nothing on his claim for rent until the declaration of the dividend according to Art. 880 C. P., except that the judge may allow the payment in whole or in part of any claims or dividends which are not contested, upon being satisfied that a sufficient sum is retained to meet the contestation (Art. 881 C. P.).[5]

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[1] Art. 871 C. P.

[2] Art. 871 C. P. See *Loranger v. Clement*, C. R. 1878, 1 L. N. 326; *Thompson v. Kennedy*, M. L. R. 4 S. C. 443; *Canadian Mutual Fire Ins. Co. v. Blanchard*, M. L. R. 2 S. C. 61; *St. Jorre v. Morin*, 10 L. N. 14; *Plante v. Robitaille*, 4 Q. L. R. 225.

[3] Art. 871 C. P.

[4] Art. 863 C. P.

[5] Where a landlord thinks that he is prejudiced by the delay of the curator to bring to sale the effects garnishing the leased premises, and which are subject to his privilege, his remedy is by petition to the Judge for the immediate sale of the effects; he has no right to cause the same to be seized by writ of *saisie-gagerie*, *Forsyth v. Beaupre*, Q. R. 10 S. C. 311 (1896).

As a landlord has no privilege or lien on the proceeds of sale of an hotel license (*Paul v. Mondon*, 13 Que. P. R. 185 and *ante* p. 112), the Court cannot allow the sale *en bloc* of the moveables, the license and the lease of the insolvent tenant, as it would be impossible to make a precise allotment of the amount for which the landlord has the right to

Article 2005 Civil Code, as amended, applies to and includes claims for rent which have arisen under authentic leases made prior to the coming into force of the amending Act, 61 V., c. 46.[1]

Where tenant is a company—Winding-up Act.

In Quebec, as in Scotland, where the civil law obtains in such matters, the landlord is regarded as a secured creditor under the Winding-up Act, by virtue of the privileged right or lien which the law confers upon him, to the extent of the goods subject to his privileged claim, and to article 2005 C.C. Provided such privileged right or lien has not been lost to him he can enforce it just as a debenture holder would,[2] or the liquidator can allow the claim to him.[3] The obtaining of the consent of the Court to the proceedings would be necessary, but leave granted as of course.[4]

In *Parc v. Warwick Pants Manufacturing Co.*,[5] it was agreed, in a lease made to a joint stock company, that on default in paying the rent or fulfilling certain other obligations the landlord would have the right to claim the balance of the rent up to the end of the term, the lease being for five years, the price being $1,200 for the whole period, with the privilege to the tenant of paying in instalments of $20 a month in advance. The company had paid $200 on account of the price of the lease up to 1st September, 1914, which was all that was due at that date. On the 5th September, 1914, the landlord seized by attachment for rent all the effects garnish-

be collocated in preference to the other creditors. *Paul v. Mondon*, 13 Que. P. R. (S. C.) 185.

The curator to an insolvent estate has a right to attack a privileged claim of the landlord by showing that part of what is supposed to be rental price goes to the repayment of a loan, and therefore does not constitute a privileged claim. *In re Mercier, Pauze v. Lamarche*, 3 Que. P. R. 483.

[1] *Ross v. Beaudry*, Privy Council 1905, reported Q. R. 14 K. B. 544.

[2] *Re Wanzer*, 60 L. J., Ch., p. 495. *Contra* per MacLennan, J., in *Re Red Seal Spring Co.*, Montreal S. C., Jan. 11, 1917.

[3] *Re Harte and Ontario Express and Transportation Co.*, 22 O. R. 510.

[4] *Re Wanzer, supra.*

[5] Q. R. 47 S. C. 60 (S. C. 1914).

ing the leased premises for a claim of $1,000 on the ground, among others, of the insolvency of the company. A few days later a winding-up order was issued against the company. The liquidator who had taken possession of the estate, contested the attachment. The landlord had filed his claim with the liquidator, but claimed this was done mainly in affirmation of his right. At the time of the issue of the winding-up order, the effects which had been attached by the landlord were in the hands of the judicial guardian who had not been relieved of his charge. The Court maintained the attachment, and allowed it to proceed to sale of the effects.

Where a lease of property situated in the Province of Quebec, and entered into there, contained a provision making the same void, at the option of the landlord, on the insolvency of the tenant, and by virtue of Art. 1092 of the Civil Code and the jurisprudence of the Province on such insolvency the rent not yet exigible by the terms of the lease, becomes so, a claim for the whole rent, taxes, etc., to the end of the term was, on the insolvency of the tenant company allowed to the landlord in liquidation proceedings in Ontario under the Dominion Winding-up Act, the liquidator holding as an asset the unexpired term of the lease.[1]

3. Effect of Alienation of the Premises.

The tenant cannot, by reason of the alienation of the premises, be expelled[2] before the expiration of the lease, by a person who becomes owner of the property under a title derived from the landlord, unless the lease contains a special stipulation to that effect, and be regis-

[1] *Re Harte and Ontario Express and Transportation Co.* 22 O. R. 510. The Court followed the Quebec jurisprudence and the opinions of expert Quebec counsel.

[2] The word "expelled" is used in Art. 1663 of the Code, but this does not exclude the applicability of the article to the case where the tenant has not yet entered into possession, although the lease has been passed. Sirey 27-2-116; Sirey 63-2-87; Dalloz 71-2-78; 4 Aubry et Rau, sec. 369, text, and note 33, pp. 501, 502; 25 Laurent 393; 1 Guillouard 367.

tered;[1] and in such a case notice must be given to the tenant according to the rules laid down in Article 1657 Civil Code, and the Articles therein referred to; unless it is otherwise specially agreed.[2] But if the lease be for more than a year, it must be registered in order that it may be invoked against a subsequent purchaser.[3] There is an exception to the above provision of law. Where the leased property is sold at sheriff's sale by the landlord's hypothecary or other creditors, the tenant is subject to ejectment.[4] But the tenant can protect himself against such a consequence. The codifiers have declared that the effect of Art. 2128 Civil Code, protecting the tenant under a lease for more than a year, if registered, is to create a charge upon the immoveable, similar to other charges upon immoveables.[5] The inference from this Article is that, if a lease for more than a year be registered, the tenant's rights can be made available even in the case of a sale of the leased property either at private or forced sale.[6] The tenant's rights, however, under such circumstances, cannot displace or

[1] Art. 1663 C. Code.

Where a lease by a partnership to another person stipulates that the lease will become extinct upon alienation of the premises, this applies to the case of alienation by the partnership to a third party and not to the case where after dissolution of the partnership the property is transferred to one of the partners in the course of liquidation as being his share in the partnership. Such a transfer constitutes a partition under Art. 747 C. Code, and by Art. 746 C. Code, the partner so receiving the property would be deemed to have been the owner before the partition was made. Hence, there was no alienation in the sense of the above clause. *Langlois v. Dubray*, Q. R. 17 S. C. 328 (S. C. 1900).

[2] Art. 1663 C. Code.

[3] Art. 2128 C. Code.

[4] *Desjardins v. Gravel*, S. C. 1880, 25 L. C. J. 105; *Societe de Construction Metropolitaine v. Commissaires d'Ecoles, etc.*, Q. B. 1879, 24 L. C. J. 25; *Harte v. Bourgette*, K. B. 1846, 2 R. de L. 33; *Bagle v. Chinic*, Pyke's Rep., p. 20; *Dupuy v. McClanaghan*, C. R. 1880, 27 L. C. J. 72, reversing S. C., 24 L. C. J. 243; *Mowry v. Bowen*, C. R. 1884, M. L. R., 3 S. C. 417, following *McLaren v. Kirkwood*, 25 L. C. J. 107; *Phaneuf v. Smith*, Q. R. 11 S. C. 400 (S. C. 1897); Art. 778, 781 C. P.; *Desaulniers vs. Payette*, Q. R. 12 K. B. 445 (1903).

[5] Cod. Rep., Vol. 3, p. 64.

[6] See per Hall J. in *Desaulniers v. Payette*, Q. R. 12 K. B. at p. 448 (1903).

detract from the rights of a mortgagee whose hypothec upon the property has been registered prior to the execution of the lease.[1] The tenant, having so registered, and his lease being for more than a year, upon hearing that the property is advertised for sale, and no mention being made in the advertisement of his charge thereon, can file an opposition demanding that the sale be made at the charge of his lease.[2] But in this event, a seizing hypothecary creditor, whose hypothec was registered prior to the tenant's registration of his lease, can demand that the property be sold subject to such charge only on condition that the tenant furnish good and sufficient security that the property will be sold at a sufficient price to ensure payment of the amount due him.[3] Such creditor can demand that this security be given as soon as the opposition is filed; even before the advertisements for the sale have been given out; and without admitting the validity of the lease.[4] Hall, J., in rendering the judgment of the majority of the Court in *Desaulniers v. Payette*,[5] said, *inter alia*:—"The recognition of any adverse right in a lease made subsequent to the registration of a mortgage upon the same property is a violation *pro tanto* of the provisions of our law in regard to registration and the rights secured under it, and the conditions under which this violation may be exercised should be enforced in the strictest manner. Otherwise

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[1] *Ibid.*

[2] Art. 724 C. P.; *Keegan v. Raymond*, Q. R. 40 S. C. 371 (C. R. 1911).

Where the tenant, with a registered lease for five years, is also a promissee to a promise of sale of the property leased, and files an opposition to secure charges in respect both of the lease and of the promise of sale, the costs of such intervention should be borne by both parties. *Keegan v. Raymond*, Q. R. 40 S. C. 371, Fortin J. diss. (C. R. 1911).

[3] Art. 726 C. P. (See Article 2073 C. Code); *Desaulniers v. Payette*, Q. R. 12 K. B. 445 (1903); *Trust & Loan Co. v. Charlebois*, 5 Que. P. R. 365; *Dupuy v. Bourdeau*, S. C. 1881, 6 L. N. 12.

[4] *Desaulniers v. Payette*, Q. R. 12 K. B. 445 (1903). Sir A. Lacoste C. J. and Blanchet J. dissenting on the latter points.

[5] *Supra.*

there would be an encouragement to the collusory execution and registration of such leases, as a means of extorting compensation from a prior mortgagee. The only disadvantage which the present opposant and appellant can invoke is the, possibly, useless expense of putting in security in the event of his lease being held for any reason to be null—a mere matter of costs, which he deserves to pay if he invokes a fraudulent lease. On the other hand, the hypothecary creditor may be subjected, by the delays which appellant's pretensions would secure, to damages of a serious and substantial character from which the Courts should endeavour to protect him. Between the two methods of procedure, we have no difficulty in exercising a choice in favor of that adopted by the trial judge." Motion for leave to appeal this case to the Supreme Court of Canada was refused.[1]

A lease for a year, whether registered or not, does not constitute a charge on the immoveable leased and hence does not enable the tenant under such a lease to file an opposition to secure charges under Art. 724 Code of Civil Procedure, where the immoveable is advertised to be sold by the Sheriff.[2]

Articles 1663 and 2128 are merely special exceptions to the rule of law that the right of a tenant under his lease is a personal and not a real right.[3]

Under the French Code the protection of the tenant, as against a purchaser of the property, only applies to leases in authentic form, or which have an express date.[4] This distinction does not exist in our corresponding Art. 1663, which is applicable to all leases, even those

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[1] 33 Can. S. C. R. 340.

[2] *Lantaigne v. Skelling*, Q. R. 22 S. C. 304 (S. C. 1902); *Desjardins v. Gravel*, 25 L. C. J. 103 (S. C. 1880). *Contra Lachaine v. Desjardins*, Q. R. 12 S. C. 225 (S. C. 1897).

[3] Baudry-Lacantinerie I., n. 684; Guillouard I., n. 28 and 299; Laurent XXV., n. 9 *et seq.*, and XXX., n. 215; and jurisprudence of Court of Cassation; Art. 1601 C. Code; Q. R. 23 K. B. at p. 439-440.

[4] See Art. 1743 Code Napoleon.

which are presumed; but, clearly, none but written leases could be respected for more than a year.[1]

In this Province the law presumes a lease of a house to be yearly, beginning and ending on the first day of May.[2] If a tenant of premises, under a written lease for six years, registers the lease more than thirty days after it is made, and only by a memorial in which the term of years is not specified, he cannot invoke it against a subsequent purchaser under a deed passed before the registration of the lease, though registered after, but within thirty days of its date.[3].

Where the lease is for more than a year, it is a question as to the date from which such year is to be computed. The majority of the authors, and the weightier authorities, decide that it must be computed from the entering into possession by the tenant[4].

Where lease contains a special stipulation—Notice.

If the lease contains a special stipulation, to the effect that the tenant may be expelled, upon the premises being sold by the landlord, notice to quit must be given according to the usual rules in that respect, which are treated of in another part of this work,[5] unless it be otherwise specially agreed.[6] But if the lease contain

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[1] See Art. 2128 C. Code.

[2] Art. 1608 C. C.; *Trudeau v. Ressler*, Q. R. 36 S. C. at p. 20.

[3] *Trudeau v. Ressler, supra.*

[4] Troplong, *Transcription*, nos. 203 and 204; 2 Flandin, *Trans.*, nos. 1268 and 1269; Dalloz, Rep. Gen. vo. *Transcription*, no. 640; Pont, *Priv. et Hyp.*, no. 369; 29 Laurent, no. 200; Lesserne, *Commentaire*, no. 53; Sellier *Commentaire*, no. 68; *McGee vs. Larochelle*, C. R. 1891, 17 Q. L. R. at p. 214.

[5] *Infra*, p. 255.
Where a lease provides that "In the event of the above leased property being sold, this lease may be cancelled at the end of any year, provided three months' notice be given the lessee in writing," a notice by letter to the tenant posted on the 31 January and received on the 1st February, in the case of a lease terminating on the 1st May, is not sufficient notice under such condition. *Carter v. Urquhart*, Q. R. 15 K. B. 509 (1906).

[6] Art. 1663 C. Code.

no such stipulation, and being for more than a year, it is not registered, the prevailing jurisprudence is that the purchaser can evict the tenant without giving him notice to quit, provided a year has expired from the date of the tenant's occupation.[1]

Where the lease reserves the right to evict the tenant in the case of sale of the leased premises, this clause can be invoked by the purchaser only and not by the tenant.[2] The purchaser in such case can continue the lease if he finds it desirable to do so. Where the lease provides that it shall terminate upon the sale of the leased property, it is for the Court to decide in such a case as a matter of interpretation what are the respective rights of the parties as to terminating the lease.[3]

The eviction clause in a lease is sufficient to bind the purchaser; it need not be repeated in the deed of sale.[4]

Notice to the tenant of the purchaser's title is not necessary.[5] The notice to quit suffices. But the tenant can demand proof of the purchase.[6]

Position of the Purchaser.

The better opinion is that the position of the purchaser of the property towards the tenant is precisely that which existed between the latter and his landlord—that is to say, the purchaser succeeds to all his vendor's rights and obligations, other than those which are purely per-

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[1] *McGee v. Larochelle*, C. R. 1891, 17 Q. L. R. 212; Sirey 3-2-293; Sirey 65-2-293; Sirey 67-2-130; 25 Laurent 389. *Contra*, Pothier, *Louage*, 297; 1 Guillouard 365.

[2] Baudry-Lacantinerie I., n. 1296; Guillouard I., n. 370; Huc X. n. 344 and 346; Troplong II., n. 517; Duvergier I., n. 551; Agnel n. 815; Laurent XXV., n. 294.

[3] Baudry-Lacantinerie I., n. 1296; Guillouard I., n. 370.

[4] Baudry-Lacantinerie I., n. 1297; Guillouard I., n. 371; Laurent XXV., n. 395; Huc X., n. 344; Duvergier I., n. 543. See *Alley v. Canada Life Ass. Co.*, Q. R. 7 Q. B. at p. 298; Marcade, Art. 1744, no. I.

[5] Baudry-Lacantinerie I., n. 1298; Laurent XXV., n. 397; Huc X., n. 346; *Desy v. Damant*, 12 Que. P. R. 94.

[6] *Ibid.*

sonal, in respect of the existing lease of the property.[1] It has been doubted whether he can exercise a right which is merely optional with his vendor; for instance, the right the latter has to expel a sub-tenant who has rented a part of the premises, contrary to a stipulation in the lease prohibiting sub-letting and where the vendor did not specially transmit to his vendee in the deed of sale the right to exercise this option.[2]

But the better opinion seems to favor the view that the purchaser must respect all the clauses of the lease; for instance, clauses relating to the uses to which the premises are destined,[3] and to subletting.[4]

The purchaser of a property with immediate delivery buys with the implied agreement that he shall respect all existing yearly leases, and cannot demand the expulsion of all tenants of the property before signing the deed of purchase. He cannot, therefore, for the reason of

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[1] Per Lacoste C. J. in *Alley v. Canada Life Ass. Co.*, Q. R. 7 K. B. at p. 298; 25 Laurent 392; 7 Colmet de Santerre, p. 278; 1 Guilloüard 369; Baudry-Lacantinerie I., n. 1313, 1314; Pothier, *Louage*, 299; Dalloz 71-2-78; Dalloz 93-1-287; Dalloz 97-1-214. A stipulation by the landlord in the lease, that he will not pursue the same occupation as his tenants in the same neighborhood, is a personal obligation, and the purchaser of the property is not bound by it. (*Hebert & Damare v. Dupaty*, Supreme Ct., Louisiana, 1890, 42 La. Ann. 343).

[2] *Hough v. Cowan*, Q. B. 1892, remarks of Blanchet J., Q. R. 2 Q. B. at pp. 4, 5. *Contra Esciol vs. Larigne*, C. R. 1871, 16 L. C. J. 98. Where a landlord transfers his rights under a lease, such transfer is not presumed to include a claim of damages against his tenant for deterioration of the property before the transfer of the lease. (*Rheaume v. Panneton*, Q. B. 1879, 9 R. L. 594).

On the other hand, where two persons, joint owners of a certain property, leased it, reserving to themselves the right to give notice terminating the lease on their electing to build, and one of the joint owners sold his undivided half of the property, and notice to terminate the lease was given by the purchaser and the owner of the other half—*Held*, that the right to give notice was properly exercised by the purchaser who was substituted in the rights of his vendor. (*Mullin v. Archambault*, Q. B. 1867, 3 L. C. L. J. 90).

[3] Baudry-Lacantinerie I., n. 1301; Amiens 20 Jan. 1886.

[4] *Ibid.*

Where the purchaser of a house passes a new lease with the tenant thereof, with prohibition to sublet, he cannot demand resiliation of such lease on account of a sub-lease by such tenant under a former lease. *Venner v. Thienel*, Q. R. 37 S. C. 80 (C. R. 1909).

non-expulsion, demand the resiliation of the sale with damages against the vendor.[1]

The sale of an immoveable property under lease, with a transfer to the purchaser of all rentals due and to become due, "thereby subrogating him in all the rights of the seller." is creative of a privity of contract between the purchaser and the tenant, that gives the former the right to bring suit against the latter, not only to recover rent, but for the cancellation of the lease for any of the causes for which the seller could have done so.[2]

Where a tenant rents a house and adjoining lot for a stated rental for the whole, he has an action against the purchaser of the house alone, who purchased under condition of maintaining all existing leases, to have it declared what proportion of rent is due by him to the puchaser.[3]

Purchaser's waiver of right to expel tenant.

Where a purchaser has acquired the right to expel the tenant before the expiration of his lease, whether by virtue of a clause to that effect in the lease or by virtue of the law, he will be considered as renouncing such right where he receives the rent for several terms after the date of purchase, and gives receipts without reserving his rights.[4]

Damages for expulsion.

Where a tenant is expelled under a stipulation to that effect in the lease, he is not entitled to recover

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[1] *Alley v. Canada Life Ass. Co.*, Q. R. 7 Q. B. 293 (1897); Affirmed in Supreme Court 28 Can. S. C. R. 608.

[2] *Ettenberg v. Aronson*, Q. R. 45 S. C. 87 (C. R. 1913).
In an action for rent by the transferee of the original landlord, it is not necessary that service of the assignment and delivery of a copy of it should be made to the debtor before commencing said action. But said deed of sale must be set forth in the declaration and a copy thereof filed therewith. *Desy v. Damant*, 12 Que., P. R. 94.

[3] *Bronner v. Lapointe*, Q. R. 38 S. C.

[4] *Commissaires d'Ecoles, etc., v. City of Montreal*, Q. B. 1879. 24 L. C. J. 25, 2 L. N. 205; 1 Guillouard 375; 25 Laurent 396; Colmet de Santerre, p. 283; *Anderson v. Comeau*, 33 Louisiana Annual Rep., at p. 1121; Baudry-Lacantinerie I., n. 1299.

damages, unless the right to do so is expressly reserved in the lease.[1]

Rights of tenant where property sold subject to right of redemption.

When the property sold subject to the right of redemption is taken back by the seller, in the exercise of such right, the lease made by the buyer is thereby terminated, and the tenant has his recourse for damages upon the buyer only.[2]

Where tenant is given an option to purchase—Rights of tenant.

Mere written notice to the tenant to exercise his option, without particularizing the terms and conditions of the sale, is not a sufficient compliance with a provision in a lease whereby the tenant is given an option to purchase the property during the term of the lease, and that in the event of a proposed sale to any other person at whatsoever price, the landlord should notify the tenant to enable him, by preference, to exercise his option to purchase; and the rights of such tenant, where the lease is registered, will continue to subsist, even after a subsequent sale of the premises, during the currency of the lease.[3]

Alienation of property which is unseizable.

Property which is unseizable in virtue of the conditions of a will is not by that fact alone inalienable. And where such property is sold the tenant is justified in paying the rent to the purchaser.[4].

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[1] Art. 1664 C. Code.

Where a tenant occupies a lot in good faith, under a lease given legally or not, and builds upon it, the subsequent purchaser of the property cannot, without the authority of the Court, demolish the building and expose the goods stored in it to destruction. *Mongrain v. Canadian Carbonate Co.*, Q. R. 46 S. C. 535 (C. R. 1914).

[2] Art. 1665 C. Code.

[3] *St. Denis v. Quevillon*, 51 Can. S. C. R. 603, reversing *Payette v. Quevillon*, Q. R. 23 K. B. 436.

[4] *Skelly v. Laurendeau*, S. C. Lafontaine J., November, 1916.

4. EXPIRATION OF THE TERM AGREED UPON—NOTICE TO QUIT—DELAY FOR REMOVAL, ETC.

The lease, if written, terminates of course, and without notice, at the expiration of the term agreed upon.[1]

Where the term of a lease is uncertain, or the lease is verbal, or presumed,[2] neither of the parties can terminate it without giving notice to the other, with a delay of three months, if the rent be payable at terms of three or more months; if the rent be payable at terms of less than three months, the delay is to be regulated according to Art. 1642 Civil Code. *The whole, nevertheless, subject to that Article and to Articles 1608 and 1653.*[3] Article 1653 relates to farm leases; Article 1608 relates to leases by sufferance or presumed leases.

Article 1642 Civil Code declares that: "The lease or hire of a house or part of a house, when no time is specified for its duration, is held to be annual, terminating on the first day of May of each year, when the rent is at so much a year;

"For a month, when it is at so much a month;

"For a day when it is so much a day.

"If the rate of the rent for a certain time be not shown, the duration of the lease is regulated by the usage of the place."

A difficult question arises where a lease is verbal, but its duration is fixed. It has been held that where the period of the duration of the lease is fixed, whether written or verbal, notice is not required.[4] But Article

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[1] Art. 1658 C. Code, and see Art. 1138 C. Code.

[2] A presumed lease cannot be terminated without notice (*Jeffrey v. Ferns*, Q. B. Montreal, June, 1875). Nor a verbal lease where there is no agreement as to its termination, *Gougeon v. Yuile*, C. R. 1881, 26 L. C. J. 142.

[3] Art. 1657 C. C.

[4] *Jobin v. Morisset*, Q. B. 1846, 1 Rev. de Leg. 383; *Huot v. Garneau*, C. Ct. 1876, 2 Q. L. R. 87; see *Boudreau v. Dorais*, Q. B. 1880, 10 R. L. considerant at p. 469; Ramsey's Digest, p. 409. In France the test as to whether notice is to be given is not whether the lease is verbal or written, but whether the period of its duration is fixed or not. Baudry-Lacantinerie I, n. 1200, 1223.

1657, it is said, is explicit, and in 1907, Pagnuelo J. decided in *The Canada Newspaper Syndicate, Ltd., v. Gardner*,[1] that in the case of a verbal lease, even where the period of its duration is fixed, notice is necessary in accordance with Article 1657 Civil Code. And in *Marson v. Hughes*,[2] Lemieux J. rendering the judgment of the Court of Review, held that in matters of lease the only instance in which notice to quit is not required is that of Article 1658, the case of a written lease with a term agreed upon; in all other cases it is required. But these cases seem to ignore the last paragraph of Article 1657 (*supra* p. 255, in *italics*). Article 1642 deals only with the case of a lease "when no time is specified for its duration."

A lease by tacit renewal is not a verbal lease,[3] but requires notice to terminate it (*see infra*).

Annual basis of leases in Quebec.

Written leases of houses in this Province invariably stipulate for a duration of not less than a year. And this annual basis of house leases is presumed by the law where there is neither a written or a verbal lease, but a lease by sufferance;[4] or where a written annual lease has expired automatically[5] and the tenant remains on for more than eight days thereafter without any opposition or notice on the part of the landlord;[6] or where there is a written or verbal lease of a house, or part of a house, and no time is specified for its duration, but the rent is at so much a year.[7]

Lease of part of a house—lease of room—duration.

According to Art. 1642 Civil Code the lease of *part of a house* is governed as to its duration, where no time is specified therefor, by the same rules as in the case of

[1] Q. R. 32 S. C. 452, and see *Marson v. Hughes*, Q. R. 17 S. C. at p. 6 (C. R. 1899).
[2] Q. R. 17 S. C. 1 (C. R. 1899), at p. 7.
[3] *Pelletier v. Boyce*, Q. R. 21 S. C. 513 (S. C. 1902).
[4] Art. 1608 C. C.
[5] Art. 1658 C. C.
[6] Art. 1609 C. C.
[7] Art. 1642 C. C.

lease of a whole house. This Article follows in the lines of Art. 1758 of the Code Napoleon, with the principal exception that the latter relates only to the lease of furnished apartments. Our Art. 1642 gives no indication as to what is included in the term "part of a house." Article 1643 Civil Code which follows deals with the case of "lease of moveables for furnishing a house *or apartments*," when no time is indicated for its duration.

According to *Baudry-Lacantinerie*,[1] an "appartement meuble" occurring in Art. 1758 C. Nap., does not include a "chambre meublee." In the English language the word "apartment" used even in the singular sometimes means a suite of rooms.[2] Our Codifiers, in omitting the word "apartment" in the singular or plural, in Art. 1642 Civil Code, and using instead the words "or part of a house," would seem to have had in view the above use of the word "apartment" and desired to extend the Article to the case of a single rented room, whether furnished or unfurnished. *Prima facie*, a part of a house must include a room in that house. Some analogy may be found in the case of a prohibition to sublet. As already indicated,[3] such a prohibition may extend to the letting by the tenant of furnished rooms, or the taking of boarders.[4].

Table of delays for notice to quit where notice is required.

From the above statement of the law we get the fol-

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[1] *Louage*, n. 1236.

[2] "The word *apartment* meaning in effect, a compartment of a house, already includes, in its proper sense, a suite of rooms; and it is a mere vulgar error, arising out of the ambitious usage of lodging-house keepers, to talk of one family or one establishment occupying *apartments* in the plural. The queen's *apartment* at St. James' or at Versailles, not the queen's *apartments*, is the correct expression." De Quincy's Works (ed. 1863), vol. ii. *note*, p. 238.

[3] *Ante* pp. 211-211.

[4] Baudry-Lacantinerie, I n. 1085, 1086; Palais, 42-2-70; Laurent, XXV, n. 222; Guillouard, I. n. 328; Fugier-Herman, Art. 1717, n. 14.

lowing results from the decided cases, as to delays of notice to quit where notice is required.

1st. Occupation by sufferance, terminable by three months' notice.[1]

2nd. Tacit renewal. A lease by tacit renewal is a lease for an uncertain period, because, although the law presumes it to continue for another year if the lease was for not less than a year, yet it cannot be terminated by either party except by a notice given within the delay required by law. Hence, such a lease is governed by Art. 1642 Civil Code[2]. Thus, if the rental of the original lease be payable at so much a year or quarterly, three months' notice will be required to terminate the renewal.[3] If the rental be payable monthly, one month's notice will be required.[4]

3rd. If the rent be at the rate of so much a year, whether there be any stipulation as to the periods of payment or not, it has been held that notice of three months is required.[5] But it has since been held that a verbal lease for a year and four months, at so much a year, payable monthly, requires a notice of one month.[6]

4th. If the rent be at the rate of so much a quarter, three months' notice to quit is required.[7]

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[1] *Brunet v. Berthiaume*, S. C. 1892, Q. R. 2 S. C. 416.

[2] *Marson v. Hughes*, Q. R. 17 S. C. 1, 7. (C. R. 1899); *Comte v. Gissing*, Q. R. 28 S. C. 497 (S. C. 1905), confirmed in Review 19 June, 1905.

[3] *Marson v. Hughes*, Q. R. 17 S. C. 1, 7 (C. R. 1899), which thus apparently construed the following cases, *Webster v. Lamontagne*, Q. B. 1874, 19 L. C. J. 106; *Lacroix v. Fauteux*, Q. B., 21 R. L. 19; *Lake v. Wickliffe*, C. R. 1887, 22 L. C. J. 41; *Mowry v. Bowen*, C. R. 1884, M. L. R., 3 S. C. 417; *Lemay v. Kandstein*, 1896, 2 Rev. de Jur. 421.

[4] *Marson v. Hughes*, Q. R. 17 S. C. 1 (C. R. 1899); reversing Taschereau J.; *Comte v. Gissing*, Q. R. 28 S. C. 497 (S. C. 1905); affirmed in Review 19 June 1905.

[5] *Gougeon v. Yuile*, C. R. 1881, 26 L. C. J. 142. *Lemay v. Kandstein*, *supra*.

[6] *The Canada Newspaper Syndicate Ltd., v. Gardner*, Q. R. 32 S. C. 452 (S. C. 1907).

[7] *Boudreau v. Dorais*, Q. B. 1880, 10 R. L. 458; Art. 1657 C. C.

5th. If the rent be at the rate of so much per month, the delay of notice must be of one month.[1] And so held in the case of a verbal lease for a year at a stated price, where the rent was payable monthly.[2] In a verbal lease, where the landlord claimed the lease was for a year, and the tenant claimed a monthly lease, but the rent was admittedly payable monthly, the Court held that the lease of a house, when no time is specified for its duration, is presumed to be by the month, where the rent is payable monthly, and a month's notice was required. And in the present case this presumption of law had not been rebutted by proof of a positive, universal and acknowledged usage to the contrary.[3]

6th. If the rent be at the rate of so much a week or day, notice accordingly.

7th. If a house be leased in consideration of personal services to be performed by the tenant, dismissal from service of employer without notice, for cause, will not terminate lease of house; such lease, in absence of stipulation, terminates on 1st May, where notice is given on 1st February.[4] But if the employment be

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[1] *Mathieu v. Sylvestre*, C. R. 1889, 34 L. C. J. 71, 18 R. L. 266; *Bannerman v. Thompson*, Mag. Ct. 1889, 12 L. N. 146.

[2] *The Canada Newspaper Syndicate, Ltd., v. Gardner*, Q. R. 32 S. C. 452 (S. C. 1907).

[3] *Corbeil v. Marleau*, Q. R. 14 S. C. 201, confirmed in Review 30 June 1898.

[4] *Brunet v. Berthiaume*, S. C. 1892, Q. R. 2 S. C. 416; *Reid v. Smith*, C. R. 1872, 6 Q. L. R. 367; but see *School Commissioners of St. David v. DeVarennes*, C. Ct. 1878, 4 Q. L. R. 206; *Ville de Maisonneuve v. Lapierre*, C. R. 1890, M. L. R., 6 S. C. 144.

Defendant was employed as a school teacher by plaintiffs, with the privilege of occupying the school house as her residence. Her engagement having been declared at an end by a resolution of the plaintiffs, she persisted, against their will, in occupying the school-house. It was held that an action to eject her under Art. 887 C. C. P. (Art. 1150 C. P.) would have to be dismissed for want of jurisdiction, there being no lease and no occupation with the consent of the proprietors of the premises. *School Commissioners of St. David v. DeVarennes*, 4 Q. R. R. 206, (C. Ct. 1878).

at so much a month, and it was agreed that the lease of the house should be co-extensive with the employment, then one month's notice will terminate the lease.[1]

Delay of notice, how computed.

Where notice is required to be given to terminate a lease, in view of the uncertainty of the jurisprudence on the subject, where the lease is an annual one, or presumed to be annual, it would be safer in all cases to give three clear months' notice to terminate, whether the rent is payable monthly or quarterly (the better opinion seems to be that the delay of notice need not be conterminous with the expiration of the lease)—otherwise the lease may be held to continue for another year.[2] The notice must be given and received before the commencement of the delay required. Thus, where three months' notice is required, the notice must be given and received on or before the eve of the day on which the three months commence to run.[3] A notice posted on 31 January and received on 1 February is too late for a three months' notice expiring May 1st.[4]

Form of notice.

The notice should be in writing where the lease is in writing.[5] But it has been held that a verbal notice will suffice where the lease is verbal, where it can be proved[6]; for instance, where the adverse party admits,

[1] *Hart v. O'Brien*, C. R. 1866, 2 L. C. L. J. 187.

[2] *Luke v. Wickliffe*, C. R. 1877, 22 L. C. J. 41; *Lacroix v. Fauteux*, Q. B. 1891, 21 R. L. 19; *Webster v. Lamontagne*, Q. B. 1874, 19 L. C. J. 106; *John v. Morisset*, S. C. 1846, 1 R. de L. 383. See case of *Fife v. Bureau*, decided at St. Johns by Mr. Justice Charland in 1895, and confirmed in Review.

Baudry-Lacantinerie says that the notice can be given on the first day of the tenant taking possession, I., n. 1248.

[3] Baudry-Lacantinerie I., n. 1249; Dalloz 94-2-189; Huc X., n. 332.

[4] *Carter v. Urquhart*, Q. R. 15 K. B. 509 (1906).

[5] *Lacroix v. Fauteux*, Q. B. 1891, 21 R. L. 19.

[6] *Molleur v. Favreau*, C. R. 1865, 1 L. C. L. J. 28; *Marson v. Hughes*, Q. R. 17 S. C. 1 (C. R. 1899). See *Saunders v. Deom*, C. R. 1871, 15 L. C. J. 265.

by writing or under oath, having received the notice.[1] While the most satisfactory way of giving notice is to have it made notarially, notice by letter is valid, if its receipt and perusal *en temps utile* are proved,[2] and proof of receipt is generally effected by registering the letter. If the registered letter is refused by the tenant, who suspects its contents, he will nevertheless be deemed to have had notice.[3] The notice should be express and formal.[4]

Customary renting period in our cities.

It is customary in our cities for the tenant under a written lease, which expires automatically, to notify his landlord upon the latter's demand, about the 1st February, whether he intends to renew the lease or not.[5] The reason is that renting time for houses in our cities commences on the 1st February, and between that date and the following 1st May, the renting of the majority of the houses is negotiated. The tenant is obliged, if he does not wish to continue in the premises, after the expiration of his lease, to allow the premises to be visited by prospective tenants.[6] Leases, in conformity with usage, invariably stipulate that the tenant shall allow his premises to be visited, for the purpose of re-letting, during a period of three months before the expiration of the lease, and during reasonable hours.

Delay for removal.

By the law, jurisprudence and custom of this province, the outgoing tenant of a house is entitled to three days

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[1] *Marson v. Hughes, supra.*

[2] Baudry-Lacantinerie I., n. 1252; Guillouard I., n. 430; Laurent XXV., n. 327; Huc. X., n. 332.

[3] *Ibid.*

[4] *Canada Newspaper Syndicate Ltd. v. Gardner*, Q. R. 32 S. C. 452 (S. C. 1907).

[5] If the lease is verbal or by tacit renewal the tenant must give notice within the delays stated *ante* pp. 255, 256, 260, or the lease will run on for another year, if the landlord so desires.

[6] See *supra*, p. 86.

after the expiry of his lease, to remove his effects from the premises and put the premises in proper condition, during which time the incoming tenant has no right to take possession by force of any part of the premises, or to move or interfere with any of the effects of the outgoing tenant.[1] The incoming tenant has a right to move into the premises about to be vacated by the outgoing tenant on the first day of his lease, but this right is subject to the rights of the outgoing tenant to the three days' grace. During these three days the position of the incoming and outgoing tenant is left largely to mutual tolerance. The incoming tenant's right to move in on the first day of his lease is not an absolute one.[2]

Sundays and holidays are included in the said days of grace.[3]

5. TACIT RENEWAL—TACIT LEASES—PRESUMED LEASES.

Tacit renewal.

If the tenant remain in possession more than eight days after the expiration of the lease, without any opposition or notice on the part of the landlord, a tacit renewal of the lease takes place for another year, or the term for which such lease was made, if less than a year, and the tenant cannot thereafter leave the premises, or be ejected from them, unless notice has been given, with the delay required by law.[4]

There would not be tacit renewal if the remaining on the premises by the tenant after the expiration of the lease arose through the absolute inability of one of the parties, on or before the eighth day, to express his wish in regard to such occupancy,—where, for instance, one of the parties had become demented since the passing

[1] Art. 1624, paragraph 2 C. Code; *Beliveau vs. Burel*, Q. R. 12 S. C. 368 (S. C. 1897); *Landry v. Lafortune*, Q. R. 33 S. C. 126; Guillouard II. at p. 51.

[2] *Landry v. Lafortune*, Q. R. 33 S. C. 126, 135 (C. R. 1907), reversing Guerin J.

[3] Guillouard II., p. 51.

[4] Art. 1609 C. Code.

of the lease, and no curator or judicial adviser had been appointed to act for him.[1]

It has been held in this Province that there cannot be tacit renewal of a lease which has been cancelled by a judgment.[2] The law, it is said, distinguishes between the "expiration" of a lease and its "resiliation."[3] Thus, it has been said that where a lease is resiliated either by the consent of the parties, or by a judgment, there can be no tacit renewal of such lease.[4] Consequently, it has been held that where a lease is resiliated by a judgment, the landlord cannot, on the basis of a tacit reconduction, sue for rent and ejectment, the tenant, who has thereafter remained in possession; and if he proceeds under Article 1608 Civil Code to sue as for occupation by sufferance, three clear months' occupation by the tenant must have elapsed to enable the landlord to succeed.[5] *Baudry-Lacantinerie* holds otherwise.[6] He thinks that the compilers of Code Napoleon (Arts. 1738, 1759), in using the word "expiration" as in our Article, had in mind the usual mode in which a lease terminates, and that this word is not limitative, and that the Article applies even where a lease has been resiliated —for instance, by reason of a sale or by expropriation.[7] But French authors have a stronger reason for taking this view, as the parties in that country have not the equivalent of our Article 1608, providing for implied leases,

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[1] Pothier, *Louage*, 345; 3 Duvergier 24; 25 Laurent 336; 1 Guillouard 412; see *Delisle v. Sauvageau* (C. Ct. 1871, 15 L. C. J. 256), where assignee remained in possession after eighth day, but against the wish of the landlord—*Held*, no reconduction

[2] *Wallace v. Honan*, Q. R. 17 K. B. 289 (1907), affirming Q. R. 32 S. C. 236 (C. R.)

[3] See Articles 1138, 1655, 1658. Per Mathieu J. in *Wallace v. Honan supra*, in Review.

[4] Per Mathieu J., in *Wallace v. Honan supra*, in Review, citing Duranton XVII., n. 120; Sirey 75-2-70. Adjudication of the premises before 1st February will preclude possibility of tacit renewal after May 1st following. M. L. R., 3 S. C. 417.

[5] *Wallace v. Honan, supra;* Article 1608 C. C.

[6] I. n. 1408; Huc. X., n. 359.

[7] *Ibid.*

to fall back on in the case of failure to establish a lease by tacit renewal.

To constitute a tacit renewal there must be a renewal of the old lease, at the same price and under the same conditions, except as to the term of the lease if for more than a year. [1]

A lease by tacit renewal is a lease for an uncertain period, because, although the law presumes it to continue for another year, if the lease was for not less than a year, yet it cannot be terminated by either party except by a notice given within the delay required by law. [2] But a lease by tacit renewal is not a verbal lease. [3]

Article 1610 provides that, when notice has been given, the tenant cannot claim the tacit renewal, although he has continued in possession. [4]

The notice mentioned in Article 1610 is not the same as that usually known as the notice to quit, although subject to the same rules in regard to form and proof; it is merely a notice on the one side or the other that either party does not wish to continue the lease which is about to expire or has expired. Consequently, this notice, even when given after the expiration of the lease, but before the expiration of the eighth day following, will have the effect of preventing tacit renewal. [5]

The basis of a tacit renewal is a new contract which is presumed to result from two causes: 1st, the remaining over by the tenant after the expiration of a lease for a

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[1] Per Blanchet J., rendering the judgment of the majority of the Court of Appeal in *Joseph v. Chouillou*, Q. R. 5 Q. B. at p. 262; *Hodgson v. Evans*, Q. B. 1880, 3 L. N. 300; Pothier, *Louage*, n. 366.

[2] *Marson v. Hughes*, Q. R. 17 S. C. 1 (C. R. 1899); *Comte v. Gissing* Q. R. 28 S. C. 497 (S. C. 1905). See *ante*, p. 258, as to such delay.

[3] *Pelletier v. Boyce*, 21 S. C. 513; *Lacroix v. Fauteux*, M. L. R., 7 Q. B., p. 55, per Bosse J.

[4] Adjudication of the premises before the 1st February will preclude possibility of tacit renewal after May 1st following. M. L. R., 3 S. C. 417.

[5] *Hickey v. Ewan*, C. R. 1893, Q. R. 6 S. C. 29; Baudry-Lacantinerie I., n. 1416; Pothier n. 349 s.; Guillouard I., n. 411, II. n. 600; Laurent XXV., n. 338; Troplong II.; n. 776; Duvergier I., n. 505 and II. n. 213, 214; Aubry et Rau IV., p. 499, sec. 369, note 20.

definite period; 2nd, the passive consent of the landlord for a period of eight days after such expiration.[1] If either party express his intention not to continue the lease when it expires, this puts an end to any presumption in favor of its continuance.

In France, some authors of weight maintain that, notwithstanding the formal terms of Art. 1739 Code Napoleon, which is the same as our Article 1610 Civil Code, if the landlord, after giving such notice of non-renewal before expiration of the lease to prevent tacit renewal, changes his mind, and by his acts clearly gives it to be understood that he is not opposed to a continuance of the old lease, the tenant remaining on, tacit renewal will take place.[2] But *Baudry-Lacantinerie*[3] and others disapprove of this view, and think there would be merely an implied lease in such a case, the tenant consenting. This should, *a fortiori*, be the view in this province where the parties to the lease have a lease by sufferance (Art. 1608) to fall back upon in the case of failure of a lease by tacit renewal. This is not the case in France where implied leases do not carry the privileges of a landlord.[4]

Sureties.

The surety given for the lease does not extend to the obligations arising from the prolongation of it by tacit renewal.[5] If the security given by the tenant personally be other than a hypothecary one, it will remain liable for the rent during the period of the tacit renewal;[6]

[1] Pothier, *Louage*, 342; Baudry-Lacantinerie I., n. 1401. There must be no act on the part of the landlord showing a contrary intention. (1 Guillouard 418; 25 Laurent 344).

[2] Duvergier I., n. 23 and 504; Aubry et Rau IV., p. 499, sec. 369, note 22; Guillouard I., n. 417, II., n. 600; Montpelier 22 Oct. 1897.

[3] N. 1414; Duranton XVII., n. 120, 123; Amiens 17 Jan., 1822; Lym. 23 July, Sirey. 75-2-70.

[4] Baudry-Lacantinerie I., n. 1418.

[5] Art. 1611 C. Code.

[6] *Kerr v. Hadrill*, S. C. 1879, 10 R. L. 192; 4 Pothier, *Louage*, 366.

but if it be a hypothec, it would not extend to the period of renewal, for the tacit renewal being a new lease, the new hypothec could only be created by a new authentic document.[1] And whereas the mere consent of a surety would suffice to continue the suretyship for the period of renewal,[2] yet the above restriction would apply if the security were a hypothec given by such surety. A person who is surety for a tenant holding under a lease terminable on giving six months' notice, cannot exercise the right given in favor of the tenant, if the latter fails to exercise it.[3] The surety for an absent tenant has no right of action for the resiliation of the lease, on the ground that the premises are out of repair; and cannot bring any such action in the name of the tenant.[4]

Tacit leases.

If the landlord allows the tenant to remain in occupation of the premises on payment of an increased or reduced rental, there is not tacit renewal of the old lease;[5] but there is a tacit lease, having for basis all the conditions of the old lease, barring the difference in rental and duration, unless it can be proved by the oath of the adverse party that there was a verbal lease, its duration and the terms thereof.[6]

A written lease was made of a store for a year, under the condition therein that the tenant should have the right to continue the lease for a further term of five years after the expiration of the said term of one year, at a rental of $1,200 per annum in lieu of $1,100 per

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[1] 4 Pothier, *Louage*, 367.

[2] Domat, Lois Civiles, L. 1, tit. 4, sec. 4, n. 9.

[3] *Leonard v. Lemieux*, 1 L. N. 614.

[4] *O'Donahue v. Moisan*, S. C. 1865, 1 L. C. L. J. 92.

[5] *Hodgson v. Evans*, Q. B. 1880, 3 L. N. 300; *Joseph v. Chouillou*, Q. R. 5 Q. B. at p. 262.

[6] *Tremblay v. Filteau*, C. Ct. 1872, 4 R. L. 384; *Joseph v. Chouillou*, Q. R. 5 Q. B. 259, 262; affirming S. C. Q. R. 8 S. C. 1, 3; *Vinette v. Panneton*, C. R. 1889, M. L. R., 5 S. C. at p. 324; Dalloz 58-1-453; 92-2-380.

annum, the price of the written lease, on giving to the landlord at least six months' previous notice in writing of his intention to that effect. Notice was not given, but the tenant remained on and paid rent at the rate of $1,200 a year for three consecutive years. He then gave notice to his landlord on the 29th January that he would leave the store and cease to occupy it after 1st May following. When he commenced to remove his effects from the store, the landlord issued a *saisie-gagerie* to secure his privilege thereon, on the ground that the lease was for five years, which period had not terminated. The majority of the Court of Appeal held that, as the required notice had not been given by the tenant to terminate the original lease, the above condition *ipso facto* became void. Thereafter the occupation of the tenant was an occupation by sufferance under Article 1608 Civil Code. There could be no tacit renewal because the rental of the extended lease was greater than that of the original lease. The majority of the Court also held that the presumptions derivable from the acts of the parties were not sufficient to establish a five-year lease.[1] According to Article 1608, a lease by sufferance is subject to tacit renewal, and the lease by sufferance in the above case was continued by tacit renewal.[2]

Leases for an uncertain period.

If a written or a verbal lease is made for an uncertain period, it can be put an end to by either party only by giving notice within the delay already indicated.[3] In the case of the lease of a house or part of a house, where no time is specified for its duration, it is held to be annual, terminating on the first day of May of each year, provided the rent is at so much a year.[4] But this does

[1] *Joseph v. Chouillou*, Q. R. 5 Q. B. 259, 261, 262, 263, 264 (Bosse and Hall JJ., dissenting), confirming Q. R. 8 S. C. 1.

[2] See Q. R. 8 S. C. 1.

[3] *Ante* p. 255.

[4] Article 1642.

not definitely fix the termination of the lease; for Article 1657 means that the holding is continuous until terminated by the notice of one of the parties.[1] If the tenant remains on as such, notwithstanding such notice, or is allowed to remain on more than eight days after the termination of such a lease by such notice, there should be tacit renewal, for Article 1608 says that a lease by sufferance is subject to tacit renewal,—although it is in the same position as a lease for an uncertain term may be as to presumed duration and notice to terminate. It is therefore difficult to avoid the conclusion that a lease for an uncertain term is also subject to tacit renewal. The question is whether the notice given to terminate the lease is a notice within the meaning of Art. 1610 C. C. (*supra p.* 264) to prevent tacit renewal. The weight of authority in France is against this view.[2] But *Baudry-Lacantinerie*[3] holds that there would be tacit renewal in such a case. If such a lease were terminated by the mutual consent of the parties, instead of a unilateral notice, there would apparently be no tacit renewal if the tenant remained on for more than eight days, but a lease by sufferance.[4]

Lease by sufferance—Art. 1608, C. C.

A lease by sufferance is regarded as an annual lease terminating on the first day of May of each year, if the property be a house, and on the first day of October if it be a farm or rural estate.[5] It is declared to be subject to tacit renewal.[6] But this presumed period of duration does not definitely fix the termination of such a lease,

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[1] See *Marson v. Hughes*, Q. R. 17 S. C. 1, 7 (C. R. 1899); *Comte v. Gissing*, Q. R. 28 S. C. 497, confirmed in Review 19 June, 1905.

[2] Laurent XXV. n. 331; Guillouard II., n. 501; Huc X. n. 334; Planiol II., n. 1732; Arntz IV., n. 1166; Nancy, 9 Mai, 1896.

[3] I. n. 1406.

[4] *Wallace v. Honan*, Q. R. 17 K. B. 289 (1907) affirming Q. R. 32 S. C. 236 (C. R.).

[5] Art. 1608 C. Code.

[6] Art. 1608 C. Code.

for Article 1657 means that the holding is continuous until terminated by the notice of one of the parties.[1] As to the delay for giving such notice see *ante* p. 258. When such notice has been duly given by one of the parties to the lease it comes to an end, if the property be a house, on the 1st May, with three additional days' grace for moving out and putting the house in order.[2] But Article 1610 Civil Code says that when notice has been given the tenant cannot claim the tacit renewal. Thus, if he remains on for eight days after 1st May, with the permission of the landlord, does the unilateral notice to terminate the lease suffice to prevent tacit renewal? As to this see *supra* p. 268.

A person holding real property by sufferance of the owner, without lease, can be ejected for non-payment of rent only where he has been in occupation for a period exceeding three months without paying rent.[3]

Joint and several tenants.

Tacit renewal being regarded as a new lease, if the premises have been rented to several tenants jointly and severally, the fact that one of them remains on the premises after the expiration of the lease will not give rise to tacit renewal in regard to the others.[4]

Where heirs are in possession.

If a tenant dies, leaving several heirs, and these are in possession of the property leased at the expiration of the lease, and remain so, they must be regarded as having leased the property *per capita*, and not in proportion to the share each has received in the estate of the tenant. The renewal being a new lease, the new contract is made with the heirs, not as representing the person of the former tenant, but acting in their own name, binding

[1] *Marson v. Hughes*, Q. R. 17 S. C. 1, 7 (C. R. 1899).

[2] Art. 1608 is subject to all the rules of law applicable to leases. As to days of grace see *ante* pp. 261-262.

[3] Art. 1608; *Wallace v. Honan*, Q. R. 17 K. B. p. 293.

[4] 1 Guillouard 413; Sirey 6-2-59; 25 Laurent 335.

themselves individually as in any other new obligation they might contract.[1]

Clause excluding tacit renewal.

If the lease contain an express clause, that it shall not, at its expiration, be continued by tacit renewal, this will have the desired effect, unless a new agreement intervene *expressly* or unequivocally declaring a contrary intention.[2]

Termination of tacit renewal.

A lease by tacit renewal is a lease for an uncertain period, because, although the law presumes it to continue for another year if the lease was for not less than a year, yet it cannot be terminated by either party except by a notice given with the delay required by law.[3] As to the delay of notice in such a case see *ante* p. 258. The question has already been discussed whether the notice of Art. 1610 to prevent tacit renewal is satisfied by notice to terminate the original lease. See *ante p.* 268.

As to how the notice should be given, our Court of Appeal has decided that it must be in writing; a verbal notice, even if proved, will not suffice.[4]

6. CONFUSION OR CONSOLIDATION.

Where the qualities of landlord and tenant become united in one person, confusion or consolidation takes place, and the lease is thereby extinguished.[5] Thus, where a landlord whose tenant has become insolvent, and who has filed his privileged claim for unearned rent with the curator of the estate, purchases at the auction sale of the insolvent's assets the unexpired portion of

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[1] 1 Guillouard 414; Sirey 31-2-205.

[2] 1 Guillouard 415; Pothier, *Louage*, 354.

[3] *Marson v. Hughes*, Q. R. 17 S. C. 1, 7 (C. R. 1899).

[4] *Lacroix v. Fauteux*, Q. B. 1891, M. L. R., 7 Q. B. 40; see *ante* p. 260.

[5] 1 Guillouard 379; 1 Duvergier, *Louage*, 514; *Bartels v. Creditors* 11 Louisiana Annual 433.

the latter's lease, he loses his right to the privilege, for by the act of purchase the lease became extinguished, and there would thus be no future rent on which to base the privilege.[1] But if, in such a case, the landlord makes the purchase "without prejudice, however, to any claim for rental to which the purchaser may be legally entitled under said lease" it has been held by the Court of Review that he would have a right to be collocated by privilege out of the proceeds of the moveable property garnishing the leased premises for a proportion of rental for the current year corresponding to the part of it elapsed at the date of the purchase,[2] although one of the judges,[3] would have held the landlord entitled to collocation for the whole year. In this view he was alone.

7. EXTINCTION BY MUTUAL CONSENT.

A contract of lease can be extinguished by mutual consent like any other contract. But in the measure that it is admittedly advisable that leases of immoveable property should always be in notarial form, so is it equally necessary and advisable that its termination before its period, by mutual consent, should be in the same form.

8. DESTRUCTION OF THE PREMISES.

If, during the lease, the premises be wholly destroyed by irresistible force or a fortuitous event,[4] the lease is dissolved of course. If they be destroyed in part only, the tenant may, according to circumstances, obtain a reduction of the rent or the dissolution of the lease;

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[1] *Shepperd v. Samuel*, S. C., April, 1896, confirmed in Review, 30th June, 1896; *Bartels v. Creditors*, 11 Louisiana Annual 433; *Macpherson v. Symonds*, Q. R. 29, S. C. at p. 120 (C. R. 1906).

[2] *Macpherson v. Symonds*, Q. R. 29 S. C. 119 (C. R. 1906).

[3] Doherty J. at p. 123.

[4] *Casus fortuitus non est sperandus, et nemo tenetur divinare*, 4 Coke 66. This is the sense in which it is used in the French law, 1 Guillouard 387.

but in either case he has no claim for damages against the landlord.[1] The lease will be immediately extinguished in any event, if the premises are for the greater part or totally destroyed; even if the destruction be caused by the fault of the tenant,[2] saving the landlord's recourse against the latter for damages. These damages, where caused by the mere fault of the tenant, will consist of the value of the property or the part of the property destroyed, the rental which the landlord has been deprived of during reconstruction, and which he will be deprived of during the period required for re-letting the premises.[3] If the damages are caused by the tenant's tortious act, he will be liable for all the damages directly resulting from his wrongful act.[4] Art. 1637 Civil Code applies to the case of resiliation by total loss as well as for all other causes of resiliation.[5]

Where the destruction is caused by an act absolutely beyond the control of either the landlord or his tenant, the landlord must support the consequence, so far as it is a question of cancelling the lease, or allowing instead a reduction of rent; but the cause of destruction being

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[1] Art. 1660 C. Code.

Where a party had leased, for a given time, certain described premises, including several houses and lots of ground in the city of New Orleans, and a fire broke out and destroyed the building on a portion of the leased premises, the lessee had the option, under Art. 1667 C. Code of Louisiana, to demand a revocation of the entire lease or a diminution *pro tanto* of the rent. He could not retain the portion of the leased property unaffected by the fire and have the lease revoked as to that which was destroyed. *Penn v. Kearney, Blois & Co.*, Louisiana Supreme Ct., 21 La. Ann. 21.

[2] Dalloz 45-2-172; Dalloz 74-5-319; Sirey 45-2-473; Baudry-Lacantinerie I., n. 344; Laurent XXV., 401; 1 Guillouard 393; Argument from Art. 1659.

See *ante* p. 180 as to presumption of law against the tenant in case of fire on the leased premises.

[3] Baudry-Lacantinerie I., n. 345, 347; Dalloz 45-2-172; Dalloz 74-5-319; Sirey 45-2 473; Guillouard I., n. 385; Huc X., n. 322; Art. 1637 C. Code.

[4] Baudry-Lacantinerie I., n. 345; Art. 1637 C. C.; Art. 1075 C. C.

[5] Baudry-Lacantinerie I., n. 346; Guillouard I., n. 385; Huc X., n. 322.

beyond his contol, he could not be held liable towards the tenant for damages arising through loss to the latter's personal property or business or from inconvenience.[1] If the total destruction has arisen through the mere fault of the landlord, then he is obliged to indemnify the tenant for such damages as might reasonably have been foreseen at the date of making the lease.[2] If the landlord was guilty of a wrongful act he would further be obliged to indemnify the tenant for all damages directly resulting from his wrongful act.[3] The landlord cannot be compelled to rebuild the leased premises in case of total loss;[4] nor can he require the tenant to continue the lease upon offering to rebuild, for Article 1659 says that the contract of lease is terminated by the loss of the thing leased.

Although a tenant cannot claim damages from his landlord on account of the partial destruction of the leased premises by fire, the landlord is none the less obliged to procure for his tenant peaceable enjoyment of the premises during the term of the lease, and to make the necessary repairs with all due diligence, in default of which he may be held liable in damages.[5]

Where the partial loss is sufficient to render enjoyment of the premises impossible, the tenant, even where the loss occurs through his fault, can demand the resiliation of the lease.[6] But it is doubted whether he can do so when in fault, and when the premises are still habitable.[7] Article 1637 Civil Code deals only with the effects of

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[1] Arts. 1660, 1200 C. Code; *nemo casum fortuitum præstat.*

[2] Guillouard I., n. 386; Baudry-Lacantinerie I., n. 354; Art. 1074 C. Code.

[3] Art. 1075 C. Code; Baudry-Lacantinerie I., n. 354.

[4] Baudry-Lacantinerie I., n. 354, 355; Guillouard I., n. 393, 394.

[5] *Ruthman v. Masse*, Q. R. 25, K. B. 193 (1914). As to landlord's warranty against the purchaser of such partially burnt building, see *ibid.*

[6] Baudry-Lacantinerie I., n. 356; Laurent XXV., n. 409; Palais 85-2-22; Palais 83-1-371.

[7] Baudry-Lacantinerie I., n. 356; *contra*, Guillouard I., n. 385.

resiliation, and not with causes of resiliation. Article 1659 decrees the termination of the lease only in case of total loss, and Article 1660 allows resiliation in case of partial loss "according to circumstances." The tenant, in case of partial loss, owing to his fault, and the premises being not uninhabitable, he should continue paying undiminished rent to the end of his lease.[1] In addition he should indemnify his landlord by paying costs of reconstruction and other expenses.[2]

If the thing be destroyed by a fortuitous event or taken in part only, the tenant has an option to demand resiliation; notwithstanding opposition of the landlord.[3] The landlord cannot demand in such case resiliation or diminution; the tenant alone has the right to make the option.[4] But the landlord can require resiliation of the lease if it becomes necessary that the whole premises be rebuilt, subject to his indemnifying the tenant for his enforced removal.[5]

It is for the Court to determine whether the case will be better met by resiliation or by reduction of rent.[6] If reduction of rent is desired, it should date from the time of the diminished enjoyment and not from the time the tenant made his demand.[7]

It is generally held that in case of partial loss by a fortuitous event, the tenant cannot compel the landlord

[1] Baudry-Lacantinerie I., n. 356; Caen, 28 Oct., 1904.

[2] *Ibid.* Trib. Civ. Lille, 18 Avril, 1887.

[3] Baudry-Lacantinerie I., n. 359; *Pand. Franc.* 88-2-83.

[4] Cass. Dalloz 47-1-250; Duvergier I., n. 522; Troplong I., n. 213; Aubry et Rau IV., p. 495, sec. 369, note 2; Laurent XXV., n. 404; Guillouard I., n. 397; Agnel n. 802 et 1106; Huc X., n. 294; Baudry-Lacantinerie I., n. 359.

[5] *Penny v. Montreal Herald Co.*, S. C. 1883, 27 L. C. J. 83; Baudry-Lacantinerie I., n. 359; Cass. Dalloz, 47-1-251.

If a sub-tenant's eviction is sought at the instance of the landlord, on the ground that the premises being partly destroyed by fire, it is necessary that the whole shall be rebuilt, the sub-tenant whose premises are not seriously injured, and who wishes to remain, can claim damages for his enforced removal. *Penny v. Montreal Herald, supra.*

[6] Baudry-Lacantinerie I., n. 359; Guillouard I., n. 397; Huc X., n. 294; Dalloz 77-2-52.

[7] Guillouard I., 398; Baudry-Lacantinerie I., n. 360.

to rebuild the part destroyed,[1] even where the latter has been indemnified by an insurance company.[2]

The act of the Government, whether Parliamentary or municipal, is a fortuitous event, even where it is not a question of direct expropriation, but rather one of damages arising out of work being performed on property contiguous to the leased premises.[3]

Article 1660 of our Code only mentions the cases of total or partial *destruction* of the premises, but just as our Courts have extended the meaning of Article 1055 Civil Code, which makes the owner of a building liable for the damage caused by its ruin, to the case where snow falls off the roof thereof, and injures a passer-by,[4] so Article 1660 must be extended to cases where the tenant is prevented from using the premises for the purpose for which they were leased; for instance, where dancing academies are closed by municipal ordinance; serious diminution in the supply of water to a water-power mill; government prohibition to manufacture matches by private industry.[5]

Where the object of the lease is a house to dwell in or to do business in, the lot on which it stands is only an incident of the lease; the real object of the lease is the house. Consequently, if the house be totally destroyed by fire or by a storm, the thing leased will be wholly destroyed within the meaning of Article 1660 Civil Code, although the lot necessarily remains.[6]

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[1] Baudry-Lacantinerie I., n. 363; Guillouard I., n. 107 et 394; Laurent XXV., n. 111 et 404, etc., etc.

[2] Baudry-Lacantinerie I., n. 364; Guillouard I., n. 394; Laurent XXV., n. 404.

[3] Dalloz 59-1-437; Sirey 60-1-453; Dalloz 60-5-226, 64-2-105; Sirey 64-2-200; Dalloz 66-2-243; Sirey 66-2-150; Dalloz 67-2-69; Dalloz 70-2-116; Sirey 71-2-166.

[4] See *supra*, p. 192 *et seq.*

[5] 1 Guillouard 392, and numerous decisions there cited. But the lessee of a mill will not be allowed a reduction of rent on the ground of the total failure of the surrounding crops for several seasons. (*Corriveau v. Pouliot*, Q. B. 1845, 1 R. de L. 184).

[6] Baudry-Lacantinerie I., n. 336; Trib. Civ. Tours, 7 Mars, 1905.

The distinction between repairs and reconstruction is sometimes a very fine one. *Baudry-Lacantinerie*[1] is of opinion that it is a matter of repairs where certain modifications are necessary to complete the remaining part; it is a matter of reconstruction where serious modifications have to be made, and where it is a question of making over a portion of the destroyed part. It has been held that the addition of a stairway in the remaining part to replace a stairway destroyed is a matter of repairs,[2] also repairs to a roof damaged by fire,[3] replacing a chimney thrown down by a gale.[4] The fall of part of a building owing to an earthquake, is a matter of partial destruction.[5]

Where the premises have been partly or wholly *destroyed*, the landlord can never be compelled to reconstruct, because there is no express or implied provision in the Code to that effect;[6] the tenant has the equivalent in a reduced rental or cancellation of the lease.[7].

In the case of partial destruction, if the tenant demands resiliation of the lease, it is discretionary with the Court to determine whether the circumstances call for such a drastic remedy, or whether a reduction of rent will suffice, and to pronounce judgment accordingly.[8] The diminution of rent must be reckoned from the day the tenant has been deprived of his enjoyment.[9]

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[1] I., n. 366.

[2] Limoges, 9 Juil. 1889; Cass. *req.* 18 Nov., 1890; Dalloz 92-1-81.

[3] Poncet, note D. 92-1-181.

[4] Poncet, *ibid.*

[5] Alger, 10 Juil. 1868; Poncet *loc. cit.*

[6] By Art. 1612 C. Code, the landlord is obliged to "maintain" the premises, but not "reconstruct" them. See *ante* Ch. II.

[7] Art. 1660. C Cade.

[8] Sirey 72-2-235; Dalloz 77-2-52; 1 Guillouard 397. Even if the tenant concludes simply for resiliation of the lease, there is nothing to prevent the Court from granting less than the conclusion, viz.,—reduction of the rent. (See *Belanger v. De Montigny*, C. R. 1894, Q. R. 6 S. C. per Jette J. at p. 526.) And if the lesser demand, *i. e.*, reduction of rent, be raised for the first time in appeal, this will not be regarded as a *new demand*. (Sirey 1872-2-235.)

[9] 1 Guillouard 398.

9. EXPROPRIATION.

If the premises be taken in whole for purposes of public utility, the lease is dissolved of course;[1] if taken in part only, the tenant may, as in the case of destruction, obtain a reduction of the rent or dissolution of the lease,[2] but in either case the tenant has no claim for damages against the landlord.[3] It is therefore clear that any indemnity to which a tenant may be entitled by way of damages must be derived from the party expropriating.

It is a fundamental principle of our law that no one can be compelled to give up his property, except for purposes of public utility, and in consideration of a just indemnity *previously* paid.[4]

Where the whole of the leased property is expropriated, the lease is dissolved of course, says Article 1660 Civil Code. When the expropriation comes into effect, the tenant's right of possession is at an end, so far as the general law is concerned: his rights are converted into an indemnity[5]. And this is the case even where, after notice of expropriation has been served, the property is acquired by the expropriating party without recourse to arbitration.[6]

If the property is purchased by the party intending to expropriate, but outside of an expropriation Act, the tenant could not, by reason of the alienation of the property leased, be expelled before the expiration of the lease by the purchaser, unless the lease contained a special stipulation to that effect and was registered.[7]

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[1] Art. 1660 C. Code.

[2] *Ib.*

[3] *Ib.*

[4] Art. 407 C. Code.

[5] Baudry-Lacantinerie I., n. 1350; Guillouard I., n. 400; Cass. Dalloz, 71-1-251; Cass. 71-1-297; Cass. Sirey, 81-1-129.

[6] Baudry-Lacantinerie I., n. 1350; Cass. Sirey, 60-1-1005; Guillouard I., n. 400; Huc X., n. 295.

[7] Art. 1663 C. Code; Baudry-Lacantinerie I., n. 1360.

—except that, if the lease were for more than a year, it could not be invoked against such purchaser unless it were registered.[1] In order to divest the tenant of such rights, the expropriating party would have to resort to expropriation proceedings, if the tenant should refuse an amicable transfer of his right of possession.[2]

The restriction in Article 2128 Civil Code applies only to the question of possession and does not deprive a tenant under an unregistered lease of recourse for indemnity against the party expropriating under an expropriation Act.[3]

Where the tenant has a five-year lease of a property which is only partially expropriated, and does not demand the resiliation of the lease, the fact that his lease is not registered does not deprive him of recourse against the expropriating party for indemnity for damages suffered, where there is no question of possession in issue.[4]

So long as there is no express provision of the law which takes away the rights of tenants in the course of expropriation, Article 407 of the Civil Code must be given its full effect.[5] As said by Dorion C. J. in *Bourgoin v. Montreal Northern Colonization Ry.*[6]:—"Article 1660 of the Civil Code provides that, when a property under lease is taken for public purposes, the lease is dissolved and the tenant has no claim for damages against the landlord. It is impossible to suppose that the law-makers, after depriving the tenant of any recourse

[1] Art. 2128 C. Code.

[2] *Re Morgan Ry. Co.* 32 La. Ann. 371. (Arts. 2697, 2733 of the Louisiana Code are identical with our Arts. 1660, 1663); Dalloz 51-3-7; Dalloz 50-3-5.

[3] *Corporation of Verdun v. Grand Trunk Boating Club*, Q. R. 7 Q. B. 185 (1898).

[4] *Ibid.*

[5] *Corporation of Verdun v. Grand Trunk Boating Club*, Q. R. 7 Q. B. 185 (1898); *Bourgoin v. Montreal Northern Colonization Ry.*, Q. B. 1875, 19 L. C. J. 57; *Dupras v. Corporation of Hochelaga*, S. C. 1881, 12 R. L. 35.

[6] *Supra.*

against the landlord in such case, should also deprive him of his remedy against the parties acquiring the property for such public purposes, for no one can be compelled to give up his property except for public purposes, and in consideration of a just indemnity previously paid." (Civil Code 407). The above was a railway case, but the same reasoning applies to expropriation by a municipality.[1]

Such recourse may be exercised by a common law action independently of the expropriation proceedings — the common law remedy always existing unless specially excluded.[2] It is true that the Privy Council in *Mayor of Montreal* v. *Drummond*[3] decided that where there is a statute which requires that the compensation payable to any party, by reason of any act of the Council for which they are bound to make compensation, shall be ascertained in the manner prescribed by the statute, this excludes by necessary implication actions of indemnity for damage in respect of such acts. But this decision has never been adhered to in this Province, Judge Ramsay in *Morrison* v. *Mayor of Montreal*[4] giving sound reasons for not doing so. A statute of this kind merely provides a mode of procedure, and if the corporation desires to have the compensation estimated by commissioners, it must move the Court to appoint them. If it fails to do so, it acquiesces in the ordinary procedure, and is foreclosed from raising the question afterwards.[5]

A tenant whose lease has terminated by expiration of the term stated in the lease, and who, notwithstanding notice of expropriation one year before the expropriation

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[1] *Corporation of Verdun v. Grand Trunk Boating Club, supra.*

[2] *Corporation of Verdun v. Grand Trunk Boating Club, supra;* overruling on this point the opinion expressed by Pagnuelo J., in the case of *Hughes v. Corporation of Verdun*, Q. R. 12 S. C. 95.

[3] 22 L. C. J. 1.

[4] 4 L. N. 25.

[5] *Grenier v. City of Montreal*, Q. B. 1880, 3 L. N. 51.

took place, continued to occupy the premises from day to day with the permission of the landlord, who in view of the proposed expropriation had refused to continue the lease, has only a precarious occupation which can be put an end to at any day; consequently, he cannot be considered as an occupant under Article 1608 Civil Code and cannot exact an indemnity for interruption of his lease. He could only obtain damages for loss of profits from the sanction of the expropriation up to the date of the termination of the lease; he cannot claim the expenses of moving, the cost of transfer of a hotel license, and damages to furniture, etc., caused by moving. These losses were not occasioned by the expropriation, but were occasioned by the expiration of his precarious occupation.[1]

The right of expropriation in this Province is invariably regulated by statute, whether in favor of the Government, a municipality, town corporation, city or town having a special charter, or corporation. In this Province the right of tenants to indemnity, in the case of expropriation, is generally recognized, even though the statutes make no mention thereof. The words "owner or proprietor," as used in an expropriation Act, have no definite meaning. They may refer to owners having either the whole or partial interests. Such words include tenants for terms of years.[2] Under the Railway Acts it has been held that the words "parties.... interested in lands which may suffer damage" include

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[1] *Cite de Montreal v. Poudin*, Q. R. 26 S. C. 367. See also in same sense in expropriation under Railway Act (D) 1906. A tenant at will is not a "person interested" in the land within the meaning of sec. 155 of the Railway Act, R. S. C. 1906, c. 37, and is therefore not entitled to compensation. *Can. Pac. Ry. Co. v. Brown Milling & Elevator Co.*, 18 O. L. R. 85; affirmed in Supreme Ct., 42 Can. S. C. R. 600.

[2] Lord Denman C. J., in *Lister v. Lobley*, 7 A. & E. 124; *Hopkins v. Prov. Ins. Co.*, 18 U. C. C. P. 74; *McDougall v. McMillan*, 25 U. C. C. P., at p. 97; 57 N. H. 110; 36 N. J. L. 184; 4 N. Y. 66; 26 Pa. 238: Armand *Expr.* p. 36; 2 Christophe *Trav. pub.* n. 380; Dufour, n. 12, 262 and 263; Depeyronny et Delemarre, *Expr.* n. 512; Daffrey *Expr.*, pp. 134-138-139-142.

those interested as tenants.[1] Consequently, under the Railway Act, a tenant can enjoin a company from proceeding with its expropriation unless all the formalities required by those Acts have been fulfilled.[2]

Where the tenant has the option of purchasing the premises leased by him, he will not be deprived of his indemnity as a tenant because he has paid part of the purchase price and spent a considerable sum of money on the property.[3]

A change of level of the street by the municipal authorities constitutes a partial expropriation, and gives the tenant a right to demand a diminution of rent or the resiliation of the lease, and also a demand against the City Corporation for damages.[4]

Our Art. 1225 of the Civil Code, which provides that "private writings have no date against third parties but from the time of their registration," etc., goes further than the corresponding article of the Code Napoleon,[5] in providing that the date may nevertheless be established against third persons by legal proof.[6] Also, whereas in France occupancy by sufferance of the owner is not considered as a lease, under our law it is given *all* the effects of a valid lease,[7] and, in the case of a house, is estimated to last one year, terminating on the 1st May. Such a lease cannot be terminated without three months' notice, and if the tenant were expropriated before the

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[1] *Bourgoin v. Montreal Colonization Ry. Co.*, Q. B. 1875, 19 L. C. J. 57.

[2] *Ib.*

In a railway expropriation, a tenant is entitled to compensation different from that of the proprietor, and to have this compensation ascertained by a different board of arbitrators. *Canadian Northern Ontario Ry. Co. v. The Daniel J. M. McAnulty Realty Company*, 15 Que. P. R. 168.

[3] *Cite de Montreal v. Mathieu*, C. R. 1895, Q. R. 7 S. C. 500.

[4] *Motz v. Holliwell*, C. R. 1875, 1 Q. L. R. 65; Arts. 1616, 1660 C. Code.

[5] Art. 1328. See Sirey 38-2-106;

[6] *Eastern Townships Bank v. Bishop*, Q. B. 1889, M. L. R. 5 Q. B. 1889.

[7] Art. 1608 C. Code.

1st May, he would clearly have a claim for damages.[1] Respecting such occupancy, proof by testimony can be made.[2] But in France, and in Belgium where the law is identical with that of the former country, the question, although once controverted, is now outside the range of dispute, and it is held that the common law is not applicable to the case, and that it is sufficient that the lease be not fraudulent.[3]

10. Resolutive Condition.

The various causes giving rise to rescission of the lease have already been stated. It has also been stated in what cases a landlord must be put in default before the tenant demands dissolution of the lease for breach of obligation by the former.[4]

A resolutive condition, when accomplished, effects of right the dissolution of the contract.[5] Thus, where a tenant rents a house for a year, and the lease gives him the right to continue it for a further term of five years upon his giving the landlord six months' previous notice, if he fails to give this notice, the landlord's promise to continue the lease is absolutely terminated.[6]

The effect to be given to a resolutive condition has, from the earliest days, been a subject of much controversy.

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[1] *Cité de Montreal v. Poulin*, Q. R. 26, S. C. 367.

[2] Art. 1233.

[3] Baudry-Lacantinerie I., n. 1354; Guillouard I., n. 402; Huc. X., n. 296; Cass. Dalloz, 61-1-145; Pandectes Belges, vol. 41. *Expropriation d'utilité publique (indemnités)*, No. 1003 *et seq.* Dalloz 1861-1-145 extensive note; Sirey 55-2-637; Pallais 55-2-620; Sirey 58-2-111; Paillard-Devilleneuve *Gaz. des Trib.* 19 mai 1854; Cabantous, article in Pallais 54-2-1; Clamargeran *Rev. Prat.* t. 1 p. 80; Daffry *Expr.* p. 358; de Peyronny et Delamarre *Expr.* n. 525; Sabatier *Expr.* p. 335. As the intention to expropriate is always made public beforehand, the tenant can secure himself by at once registering his lease. (See Dalloz 1861-1-145 note at p. 146, citing a decree of the Court of Lyon 7 Aug. 1855).

[4] *Ante*, Ch. II.

[5] Art. 1088 C. C.; Art. 1138 C. C.

[6] *Joseph v. Chouillou*, Q. R. 5 Q. B. 259, 261 (1895). The notice must give a clear six months. See *Carter v. Urquhart*, Q. R. 15 K. B. 509.

The rule in relation to this matter is that parties to contracts have a right to insert in such contracts all clauses or conditions which are not *contra bonos mores*, or against law.[1] It becomes, therefore, a matter of interpretation to discover whether a resolutive condition in a deed is, upon the happening of the condition, to have the effect of resiliating the deed without any *mise en demeure* or action to resiliate, or whether, upon the happening of the condition, the deed is not resiliated *ipso facto*, but the defaulting party must be previously put *en demeure*, or an action taken to resiliate.

It is to be noted that our Code does not reproduce Art. 1184 Code Napoleon which requires in the case of synallagmatic contracts that resolution of the contract must be pronounced by the Court.

But even in France it is held that where a lease expressly stipulates that upon the happening of a certain condition the lease shall *ipso facto* terminate, it is not necessary to have recourse to the Courts to have the lease resiliated.[2]

In Quebec the Courts seem to have followed substantially the French doctrine and jurisprudence in this matter.

The leading case here is the Supreme Court decision in *Grange v. McLennan*.[3] In this case T. G. by promise of sale agreed to sell a farm to D. M., then a minor, the price of which was to be paid by instalments. D. M. was to have immediate possession, and to ratify the deed on coming of age, and to be entitled to a deed of sale if the instalments were paid as they became due, but if on the contrary D. M. failed or neglected to make such payments when they became due he was to forfeit all rights he had to obtain a deed of sale of said farm, and to forfeit all moneys paid, which were to be considered

[1] See per Duval J. in *Richards v. Fabrique de Notre Dame de Quebec*, 5 L. C. R. 3.

[2] Baudry-Lacantinerie, I. n. 1381; Guillouard, I. n. 440.

[3] 9 Can. S. C. R. 385 (1883).

as rent, the parties to be regarded as landlord and tenant and the promise of sale to be considered null and void. After D. M. became of age he left the country without ratifying the promise of sale; he paid none of the instalments which became due and T. G. regained possession of the farm. It was held by the Supreme Court (Taschereau and Strong J.J. dissenting), reversing the judgment of the Court below[1] that the condition precedent on which the promise of sale was made not having been complied with within the time specified in the contract, the contract and the law placed the plaintiff *en demeure* and there was no necessity for any demand, the necessity for a demand being inconsistent with the terms of the contract, which immediately on the failure of the performance of the condition *ipso facto* changed the relation of the parties from vendor and vendee to landlord and tenant.

As early as 1854 it was decided in *Richard v. Fabrique de Notre Dame de Quebec*,[2] that a covenant in the lease of a pew in a church by which covenant it was agreed that in default of payment of the rent to accrue at the period fixed by the lease such lease would immediately become null and void and of no effect, and that it would be lawful for the lessors forthwith to take possession of the pew leased and to proceed to re-let the same, without being bound to give any notice thereof to the lessee, is not a covenant which will be regarded as a comminatory clause, but is a covenant the execution of which will be enforced.

If the lease merely says that it shall be dissolved for default in carrying out of its conditions, it is a matter for the appreciation of the Court to declare whether ground for resiliation exists or not.[3] Thus, where the

[1] 6 L. N. 138, 28 L. C. J. 69.

[2] Q. B. 5 L. C. R. 3. Cited by Fournier J. in *Grange v. McLennan*, *supra*.

[3] *Brunet v. Goldwater*, Q. R. 33, S. C. 240, 242 (S. C. 1908); Baudry-Lacantinerie I., n. 1380, 1381, 1382; Guillouard I., n. 440; Huc. X., n. 338. See per Fournier J. in *Grange v. McLennan*, 9 Can. S. C. R. at p. 398, citing Laurent n. 130.

tenant has disregarded the prohibition to sublet, the Court will refuse a demand for resiliation by the landlord if the sub-lease has terminated before the landlord made his demand for resiliation.[1] Also, where it is covenanted in a lease that if the rental is not paid in the month of August of each year, the lease shall become void; this does not relieve the landlord from the necessity of demanding the said rental so as to put the tenant in default. As such a stipulation implies a doubt as to whether the tenant ought to have paid his rent on or before July 31st, or during the month of August, the tenant is entitled to the benefit of the doubt.[2] Moreover, it did not appear to have been the intention of the parties that said covenant as to payment of rent was *a peine de dechcance*.[3] And further, defendant had deposited in Court the amount then due. For these reasons, the defendant's plea was maintained.[4] Unless the lease declares to the contrary the tenant may pay the rent with interest and costs of suit and thereby avoid the rescission at any time before the rendering of the judgment.[5]

It is otherwise where the lease stipulates that it shall be dissolved as of right (*de plein droit*) upon default of the tenant to fulfil the conditions or a condition thereof.[6] In such a case the lease terminates *ipso facto* upon the non-fulfilment of the condition or conditions; even where the tenant has performed the obligation or obligations

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[1] *Brunet v. Goldwater*, *supra*.

[2] *Goudreault v. Fournier*, Q. R. 49 S. C. 450 (S. C. 1916).

[3] *Ibid*.

[4] *Ibid*.

[5] See Art. 1625 C. Code.

[6] *Brunet v. Goldwater*, Q. R. 33 S. C. at p. 242 (S. C. 1908); Baudry-Lacantinerie I., n. 1381; Cass. Sirey 60-1-705; Guillouard I., n. 440; Aubry et Rau IV., p. 496, sec. 369, note 70. Cass. Sirey, 60-1-705; Liege, 1er aout, 1810, Sirey, chr.; Sirey, 61-2-144; Sirey, 64-2-263; Sirey, 74-2-197; Sirey, 79-2-325. *Grange v. McLennan*, 9 Can. S. C. R. 385, 398. See, however, Laurent XXV., n. 369.

before the resolutive condition has been invoked by the landlord. [1]

But it is generally admitted in France that, notwithstanding a clause in the lease entailing resiliation as of right in the event of non-fulfilment of the obligations of the lease, the Court will not give judgment to that effect where it is a question of non-payment of rent and the tenant claims a right of action in warranty against the landlord as his reason for not paying. [2]

It has been held the tenant need not be put in default by the landlord before the latter takes proceedings to resiliate the lease. [3] But there are decisions to the contrary. [4]

In no case can the landlord himself expel the tenant for cause, or put his effects on the sidewalk; he must have recourse to the officers of the law. [5] No such stipulation in a lease can deprive a tenant of his recourse to the Courts for the decision of his rights. [6]

A clause stipulating dissolution *de plein droit* for violation of a condition of the lease by the tenant is not comminatory, but must be strictly observed. [7]

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[1] Baudry-Lacantinerie I., n. 1381; Cass. Sirey, 92-1-229.

[2] Baudry-Lacantinerie I., n. 1382; Guillouard I., n. 442; Aubry et Rau IV., p. 496, sec. 369, note 8; Cass. Sirey, 79-1-412; Dalloz, 83-1-415. See Article 1625 C. Code *supra*.

[3] Baudry-Lacantinerie I., n. 1383; Cass. Sirey, 53-1-361; Dalloz, *Rep.* vo. *Louage*, n. 553; Sirey 48-2-190; 57-2-209; 65-2-199; Demolombe, XXIV., n. 544; Laurent, XXV., n. 758. Guillouard I., n. 430; *Grange v. McLennan*, 9 Can. S. C. R. 385, 398.

[4] *Goudreault v. Fournier*, Q. R. 49 S. C. 450 (S. C. 1916) *supra*; Trib. Civ. Bruxelles, 19 March, 1883, *Journ. trib. belg.* 84-438; Masse et Verge, IV., paragraph 704, note 6; Troplong II., n. 316; Huc. X., n. 337.

[5] Baudry-Lacantinerie I., n. 1383 *bis*, and n. 1397.

[6] *Anchor Marine Insurance Co. v. Allen*, Q. B. 1886, 13 Q. L. R. 4; *Scott v. Avery*, 5 H. L. Cas. 811.

[7] *Richard v. Fabrique de Notre Dame de Quebec*, Q. B. 1854, 5 L. C. R. 3; and *Grange v. McLennan*, Supreme Ct. 1882, 9 Can. S. C. R. at p. 399.

11. INDEMNITY DUE THE LANDLORD WHERE THE LEASE IS RESILIATED FOR FAULT OF THE TENANT.

In case of ejectment or rescission of the lease for the fault of the tenant, he is obliged to pay the rent up to the time of vacating the premises, and also damages, as well for loss of rent afterwards, during the time necessary for re-letting, as for any other loss resulting from the wrongful act of the tenant.[1]

Article 1637 Civil Code contains an adaptation to the subject-matter of lease of the principles of Article 1065, relating to obligations.[2] Article 1065 states that every obligation renders the debtor liable in damages in case of a breach of it on his part.

Although Article 1637 Civil Code, relating to damages in case of the resiliation of the lease for the fault of the tenant, contains a modification of the general rule that a person who fails in the execution of his obligation is liable for all the damages resulting from the inexecution,[3] it has been held, nevertheless, that this Article should be interpreted according to the circumstances of each case. Thus the damages for loss of rent after the tenant vacates the premises, which damages are based on the time necessary for re-letting, will be deemed to vary according to whether, for instance, the property in question may consist in a dwelling-house renting at a moderate rental, or in business or manufacturing premises renting for a large rental.[4] Again, the Court will grant less damages where the lease is cancelled in winter instead of in autumn or winter.[5] Where a tenant

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[1] Art. 1637 C. Code.

[2] See per Bruneau J. in *Guardian Assurance Co. v. Humphrey*, Q. R. 33, S. C. at p. 395 (C. R. 1908).

[3] Art. 1073 C. Code; Per Beaudin J. in *McGauran v. Bolte*, Q. R. 46 S. C. 513 (1914).

[4] Per Beaudin J., in *McGauran v. Bolte, supra.*

[5] *Ibid.*

rents a store at a rental of $275 a month and abandons the store in the month of May, which is after the usual renting season, the Court will consider that the landlord will be unlikely to find a new tenant for the premises before the 1st May of the following year, and will allow him twelve months' rent by way of damages, subject to his accounting to the defendant for such sums as he (the landlord) may receive during that period for the rent received from a new tenant should he succeed in re-letting during that period—such sums to go in reduction of judgment, if it remains unpaid, or to be reimbursed to defendant if judgment paid.[1]

In *Guardian Assurance Co. v. Humphrey*,[2] a four-year lease from May 1st had still five months to run when defendant was evicted for non-payment of rent—the rental being $665 a year. The time considered necessary for re-letting was estimated at three months, and judgment was rendered for three months' rent at the rate stipulated in the lease, subject to the landlord accounting to the tenant, defendant, for any moneys received in case of re-letting during that period.

In *Joseph v. Penfold*[3] the landlord, plaintiff, leased premises to the defendants for a term of six years at the rate of $1,000 for the first year, with progressive increase for the succeeding years. During the first year the landlord brought an action to resiliate the lease, on the ground of non-payment of rent, and prayed judgment for the rent and taxes due, and for a further sum of $1,350, representing the rent and taxes for the second year, as damages for resiliation. The defendant confessed judgment for the rent due and to become due up to the end of the first year, being for three months'

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[1] *McGauran v. Bolte*, Q. R. 46 S. C. at p. 514 (S. C. 1914); and see *Guardian Insurance Co. v. Humphrey*, Q. R. 33 S. C. 393, 394, 395 (C. R. 1908).

[2] *Supra*.

[3] Q. R. 10 S. C. 152 (S. C. 1896).

rent for the usual period of re-letting, viz., 1st February to 1st May. The defendant in the meantime made an abandonment of the estate to his creditors. There were upon the leased premises' moveable effects greatly exceeding in value the rental due and to become due during the coming year. The Court held the confession of judgment sufficient, in view of the particular circumstances of the case, and reserving to plaintiff all rights privileged and other against the insolvent estate of defendant for rent not yet due under the authentic deed of lease. The Court said:—"Under these circumstances, while plaintiff has a right to demand the resiliation of the lease, any loss of rent for the coming year is a loss which he voluntarily incurs, and which he might avoid by merely allowing said lease to continue during the said year; and that in consequence, in making and presisting in his demand for resiliation and the entire rental for the coming year, he seeks to have, in effect, both the enjoyment of the premises and the rental thereof from defendants." And further, "Considering that the intention of the law, in allowing the lessor to claim damages for the resiliation of the lease resulting from the lessee's fault, is to enable the former to recoup himself for loss necessarily sustained where, in the enforcement of his rights, he finds it necessary to demand the resiliation of the lease, but not to enable him, where he is amply secured and protected against any loss, were the lease not resiliated, to create a loss by his own act in demanding the resiliation, and compel the lessee, who by reason of such resiliation, is deprived of the enjoyment of the premises, to make good to him the loss which by his own act he has brought about."

In ordinary cases an indemnity equal to three months' rent is considered sufficient.[1]

[1] *Darwent v. Montbriand*, Q. R. 31 S. C. 54, 58 (S. C. 1907); *Joseph v. Penfold*, Q. R. 10 S. C. 152 (S. C. 1896); *Guardian Insurance Co. v. Humphrey*, Q. R. 33 S. C. 393, 394, 395 (C. R. 1908); *Trudeau v. Ressler*, Q. R. 36 S. C. at p. 21 (S. C. 1909); *Lemay v. Kandstein*, 12

Where the plaintiff, in an action accompanied by an attachment in recaption for rent, concludes for payment of damages for loss of rent which he may suffer in finding a new tenant, the present tenant having left the premises, without owing any rent, but does not conclude for resiliation of the lease, the Court will not grant such damages, the attachment for rent not having been maintained. [1]

In *Vanier v. Bonenfant*, [2] the number of months (five) allowed by way of damages was stated to be greater than that usually allowed, but the judgment was only rendered after the total period of the lease had expired, and after it became a matter of proof that the plaintiff had not leased the premises and that he had actually suffered the whole of the damages which the judgment gave.

Where the lease of a barber shop was resiliated for non-payment of rent, five months' rent (April, May, June, July and August) was allowed by way of indemnity or damages, and $25 as representing the damages suffered by the diminution in the good-will of the barber shop. [3]

Where a tenant abandons the leased premises and the landlord re-lets them to a new tenant, there is an implied resiliation of the lease, but as the resiliation is due to the fault of the tenant, the latter will be ordered to pay the landlord the difference between the old and the new rent. [4]

June, 1896; Pagnuelo J., 2 Rev. de Jur. 421. See *Theoret v. Trudeau*, six months, 12 Que. P. R. 92.

A landlord who asks for resiliation of a lease for non-payment of rent may make allegations outside of the proof, in view of the rent to accrue and damages, and he is not obliged to limit his demand to three months' rent to become due. *Belanger v. Dubois*, 5 Que. P. R. 342.

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[1] *Amiot v. Bonin*, Q. R. 23 S. C. 42 (S. C. 1902).

[2] Q. R. 48 S. C. at p. 366 (C. R. 1915).

[3] *Darwent v. Montbriand*, Q. R. 31 S. C. 54, 58, 59 (S. C. 1907).

[4] *Jodoin v. Demers*, Q. R. 24 S. C. 189 (S. C. 1903). See *Beaudry v. Boucherie*, C. R. 1883, 30 L. C. J. 329; *Land & Loan Co. v. Long*, S. C. 1890, 20 R. L. 135.

12. EVICTION OF THE LANDLORD.

The landlord's right to the property leased may become extinguished by the superior title of a third party; non-payment of the purchase price, where the deed contains a resolutive condition; nullity of the deed of purchase for error, fraud, violence or incapacity of the vendor; exercise of the right of redemption by the vendor. In the last of these cases the Code expressly declares that the lease is thereby terminated, and the tenant has his recourse for damages upon the buyer only.[1] This is contrary to the rule adopted by the Code Napoleon, Art. 1673; but the Commissioners thought that in the case put in our article it would be easy for an intending tenant to ascertain the nature and extent of the title of the ostensible owner of the property, and if he failed to do so, there was no sufficient reason why he should be relieved against his negligence at the expense of the vendor.[2] This is evidently the clue that should be followed, as far as it is applicable, in regard to the other cases,—that is to say, it was clearly the intention of the codifiers to place upon the tenant the burden of discovering the nature of his landlord's title where it is possible, rather than that he should presume it from the latter's apparent ownership. Applying this rule to the somewhat analogous case where the landlord loses his title for non-payment of the purchase price, an event which can only happen under our law where the deed of sale contains a stipulation to that effect,[3] it would be the duty of the tenant to ascertain, after an inspection of his landlord's title, whether such a condition existed and the purchase price had been paid. If such a condition did exist and the purchase price had not been paid, the prospective tenant would take the lease subject to a risk well known to him.

[1] Art. 1665 C. Code; and see Art. 1547 C. Code.
[2] Cod. Rep., vol. 2, p. 28.
[3] Art. 1536 C. Code.

There is not much difficulty in the way of determining the effect, upon a lease, of eviction of the landlord by a party proving a superior title, and where the landlord having the apparent ownership leases the property in good faith.

Some of the French authors in that case presume the apparent owner to be the mandatory of the actual owner, and as having the power to administrate the property and therefore to pass a lease thereof for a period not exceeding nine years.[1] But many hold a contrary view,[2] and it is to be remarked that the principal argument used by those who adopt the former view is, that the Code Napoleon expressly so provides in Art. 1673, viz.:—that a vendor with a condition of repurchase must maintain an existing lease when entering into possession of the property in exercise of the condition. This is regarded as the application to a particular article of a general principle of law.[3] As already stated, our law is diametrically the opposite,[4] and in view of this, the argument of those authorities who hold that a lease by a person in possession, without title, need not be maintained by the proprietor who has the title, is irresistibly adaptable to our law.

With the principal lease, naturally falls the sub-lease.[5]

[1] 1 Guillouard 448; 2 Demolombe, *Contrats*, 137; 1 Troplong, *Louage*, 98; Marcadé, Art. 1713 IV.

[2] 25 Laurent 381.

[3] 1 Troplong, *Louage*, at p. 215; 6 Toullier 576; 1 Duvergier, *Louage*, 83; 1 Guillouard n. 50; Baudry-Lacantinerie I., n. 83; Aubry et Rau, IV., p. 497, sec. 369; *Contra* Laurent XXIV., n. 358, XXV., No. 46, et 383; Huc. X., n. 172, et 286; Sirey 65-2-42.

[4] *Supra* p. 291; Art. 1665 C. Code.

[5] See *supra* p. 221; 25 Laurent 386.

CHAPTER VII.

Actions and Remedies between Landlord and Tenant.

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1. Rights of Landlord under the Civil Code.

Right to rescind lease—Right to recover possession—Right to recover damages—Right to join demand for rent, with or without attachment.

The landlord has a right of action in the ordinary course of law, or by summary proceeding, as prescribed in the Code of Civil Procedure:—

1. To rescind the lease: First, When the tenant fails to furnish the premises leased, if a house, with sufficient

furniture or moveable effects, and if a farm, with sufficient stock to secure the rent as required by law,—unless other security be given; Secondly, When the tenant commits waste upon the premises leased; Thirdly, When the tenant uses the premises leased for illegal purposes, or contrary to the evident intent for which they are leased.

2. To recover possession of the premises leased in all cases where there is a cause for rescission, and where the tenant continues in possession, against the will of the landlord, more than three days after the expiration of the lease, or without paying the rent according to the stipulation of the lease, if there be one, or according to Article 1608, when there is no lease;

3. To recover damages for violation of the obligations arising from the lease or from the relation of landlord and tenant.

He has also a right to join with any action for the purposes above specified, a demand for rent, with or without attachment, and attachment in recaption when necessary.[1]

The remedies above enumerated are not limitative. Thus, where a tenant is using the premises in a manner contrary to the evident intent for which they are leased the landlord can restrain him by injunction, without demanding resiliation of the lease.[2]

Where there has been a judgment resiliating the lease, and the defendant tenant remains on the premises for a long while, against the will of the landlord, by prolonging the litigation, the landlord can ultimately institute a

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[1] See Article 1624 Civil Code.

By Article 1152 C. P. the landlord may join with his action a demand for such rent as he is entitled to, with or without an attachment for rent, an attachment in recaption, an attachment before judgment in the hands of the tenant or of garnishees.

An action for rent and resiliation of lease, which is accompanied by a *saisie-gagerie*, cannot be dismissed on an exception to the form based solely on alleged irregularities in connection with the seizure. *Brewster v. Campbell*, Q. R. 2 S. C. 48.

[2] *Audet v. Jolicoeur*, Q. R. 22 K. B. 36, 41 (1912); 5 D. L. R. 68.

second action by summary proceeding by virtue of Article 1624 Civil Code, paragraph 2, to recover possession of the premises, and can join to such action a demand for the value of the use and occupation thereof since the first action, where it is alleged that the defendant remained on the premises more than three days after the expiration of the lease, and against the will of the plaintiff.[1]

The defendant to an action for resiliation of a lease and for damages may properly plead that the premises leased have become uninhabitable by reason of a fire which occurred before the institution of the action.[2]

Judgment rescinding lease.

The judgment rescinding the lease by reason of the non-payment of the rent is pronounced at once without any delay being granted by it for the payment; nevertheless the tenant may pay the rent with interest and costs of suit and thereby avoid the rescission at any time before the rendering of the judgment.[3]

Where the lease contains a resolutive condition *de plein droit*, see *ante* p. 282.

Landlord's Privileged right or lien under the Civil Code.

The landlord has, for the payment of his rent and other obligations of the lease, a privileged right upon the moveable effects which are found upon the property leased.[4] As to what that right includes see Articles 1620, 1621, 1622 Civil Code, *ante* Chapter III, Privilege of the Landlord.

In the exercise of the privileged right the landlord may seize the things which are subject to it, upon the premises, or within eight days after they are taken away.

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[1] *Wallee v. Honan*, Q. R. 34 S. C. 28 (C. R. 1908). And see *McBean v. Blatchford*, Q. B. 1890, M. L. R. 6 Q. B. 273, confirmed in Supreme Court, 20 Can. S. C. R. 269.

[2] *Lauder v. Hammond*, 8 Que. P. R. 408.

[3] Article 1625 Civil Code.

[4] Article 1619 Civil Code.

If the things consist of merchandise, they can be seized only while they continue to be the property of the tenant.[1]

This privileged right or lien is created by the Civil Code, and not by the Code of Procedure. The latter merely directs the manner in which the privileged right is put into effect.[2] This privileged right or lien extends under the Civil Code to the payment of rent not yet due.[3] The Code of Procedure in dealing with attachment for rent (Article 952), limits the seizure of the effects which are subject to the privilege, to rent etc. "due in virtue of the lease" where the effects have not been removed. The word corresponding to "due" in the French version is "exigible." In the old Code of Procedure this was translated as "payable" but this was changed in compiling the present Code of Procedure to "due." This seems to have overlooked the fact that rent not yet due may, by reason of insolvency become due and exigible.[4] If a tenant becomes insolvent the whole remaining price of the lease becomes due,[5] and if he has not then made an abandonment of his property, it has been held that his landlord can attach and sell the tenant's effects which are subject to the privilege, for the whole future rent thus accrued due by reason of the insolvency, although the tenant may owe him nothing by virtue of the lease at the date of the attachment.[6]

Also, where a tenant or some other person is about to remove the effects which are subject to the landlord's *gage*, the landlord can issue a conservatory attachment for rent to secure his privilege for rent to become due.[7]

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[1] Article 1623 Civil Code.

[2] Per Pouliot J. in *Pare v. Warwick Pants Co.*, Q. R. 47 S. C. at p. 65 (S. C. 1914).

[3] *Pare v. Warwick Pants Co.*, Q. R. 47 S. C. 60, and see *ante* p. 107.

[4] *Pare v. Warwick Pants Co.*, Q. R. 47 S. C. 60; *ante* p. 235.

[5] See *ante* p. 235.

[6] *Pare v. Warwick Pants Co.*, Q. R. 47 S. C. 60.

[7] See *ante* p. 107 *et seq.*

2. REMEDIES OF THE LANDLORD UNDER THE CODE OF PROCEDURE.

Landlord's Privileged right or lien under the Code of Procedure—Attachment for rent—Attachment in recaption.

Article 952 of the Code of Procedure enacts that the owner or landlord may cause the effects and fruits in or upon the house, premises or land leased, and subject to his privilege, to be seized for the rent, farm dues, or other sums due in virtue of the lease. The effect of the word "due" in this article has been explained *supra* p. 296. As to rent accruing due by reason of insolvency; also the case where no rent is due but the landlord's gage is threatened by imminent removal of the effects garnishing the leased premises, see *ante* pp. 107, 235.

By Article 953 of the Code of Procedure the owner or landlord may likewise follow and seize in recaption, even for amounts not yet due, the moveable effects which were in the house or premises leased, when they have been removed without his consent; but he must do so within eight days after their removal. An attachment in recaption must be served upon the new landlord, who must also be summoned to show cause against its execution.

The provisions contained in Article 935 as well as those contained in Article 909, respecting the service of the declaration, apply likewise to attachment for rent.

The landlord cannot oppose the seizure and sale of the moveable property subject to his privilege; he can only exercise such privilege upon the proceeds of sale.[1]

The landlord may join with his action a demand for such rent as he is entitled to, with or without an attachment for rent, an attachment in recaption, an attachment before judgment in the hands of the tenant or of garnishees.[2]

See further, *infra* "Summary Procedure."

[1] Article 646 C. P.
[2] Art. 1152 C. P. paragraph 2.

Where an opposition for payment is filed containing an allegation of insolvency, and a demand for the calling in of the creditors, the monies received from the sale of the goods under the landlord's privilege, must be returned into Court and the creditors called in, and the monies formally distributed. Such an opposition cannot be summarily dismissed on the ground that the monies levied are insufficient to cover the plaintiff's privileged claims for rent and costs of suit.[1]

Landlord's remedy where quick eviction is sought.

Article 1089 of the Code of Procedure enacts that whenever any rent is due by a tenant and is not paid when due the proprietor or landlord may notify the tenant in writing, to quit the premises leased within a delay which shall not be less than three clear days; and if he quits within the said delay the rent due is remitted him.

If the tenant refuses or neglects to comply with the said notice within the specified delay, the landlord may, by suit before a competent Court, have all the moveables, garnishing the leased premises, and which have not been removed within the specified delay, attached, and have them sold in the ordinary manner, without the said tenant having any right to avail himself of the exemption from seizure provided for under Articles 598 and 599, paragraph 2.[2]

The landlord need not avail himself of the benefit of this Article, and in that case he retains all his rights and recourse as though this Article did not exist.[3]

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[1] *Hull v. McFadden*, Q. R. 37 S. C. 430 (C. R. 1909).
Where the effects furnishing the leased premises have been attached for rent by the landlord, and the attachment upheld, and the guardian has sold all the effects so attached, the landlord can, even in Review, petition the Court to order the guardian to pay the monies and commercial paper received by him into Court. *Leduc v. Finnie*, Q. R. 11 S. C. 401 (S. C. 1897).

[2] See *ante* Ch. III. as to things exempt from seizure.

[3] Art. 1089 C. P.

In reckoning the above three clear days, non-juridical days must be included, so if the third day falls upon a legal holiday or Sunday, the tenant cannot delay his departure until the day following.[1]

The following notice meets all the requirements of Article 1089, *supra:*—"The house having been rented from the 1st July next, we take the liberty of notifying you that we wish you to quit the premises at that date."[2]

3. RIGHTS AND REMEDIES OF TENANT UNDER THE CIVIL CODE AND THE CODE OF PROCEDURE.

Right to compel landlord to make repairs and ameliorations —Right to rescind the lease—Right to recover damages.

The tenant has a right of action in the ordinary course of law, or by summary proceeding as provided in the Code of Civil Procedure:—

1. To compel the landlord to make the repairs and ameliorations stipulated in the lease, or to which he is obliged by law; or to obtain authority to make the same at the expense of such landlord; or, if the tenant so declare his option, to obtain the rescission of the lease in default of such repairs or ameliorations being made;

2. To rescind the lease for failure on the part of the landlord to perform any other of the obligations arising from the lease or devolving upon him by law;

3. To recover damages for violation of the obligations arising from the lease, or from the relation of landlord and tenant.[3]

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[1] *Beaudry v. Hannigan*, Q. R. 23 S. C. 232 (C. R. 1902); 5 Que. P. R. 366; Art. 8 C. P.; see *contra* in same case upon an inscription in law Q. R. 19 S. C. 421, reversed upon the merits by the trial judge.

[2] *Pontbriand Co. v. Chateauvert*, 11 Que. P. R. 242.

[3] See Article 1641 Civil Code.

The tenant who sues for resiliation of the lease can only avail himself of the same grounds which furnished the basis of his protest to, or *mise en demeure* of, the landlord. *Fauteux v. Beauvais*, Q. R. 49 S. C. 141 (C. R. 1915).

The remedies above enumerated are not limitative and therefore do not exclude other remedies which a tenant may have against his landlord.[1] Thus, it will be noted that Article 1641 Civil Code does not provide for the case where a tenant takes action against his landlord to compel him to secure to the plaintiff the peaceable and undisturbed enjoyment of the premises.[2] But Article 1150 of the Code of Procedure provides that *all* actions arising from the *relation of lessor and lessee* (*i e.* landlord and tenant) are deemed to be summary matters and are tried as such according to the rules set forth in Articles 1151-1162 Code of Procedure.

And Article 1162 of the Code of Procedure provides that the provisions of the Chapter relating to summary matters (Chapter 55, secs. 1150-1162) must be interpreted so as not to take away the right of proceeding under the ordinary rules of procedure.

4. SUMMARY PROCEDURE.

Where the remedy by summary procedure lies.

Article 1150 read with paragraph 1 thereof states that actions arising from the relation of lessor and lessee are deemed to be summary matters and are tried as such according to the rules set forth in Chapter 55 of that Code. But Article 1162 C. P. says that the provisions of Chapter 55 relating to summary procedure must be interpreted so as not to take away the right of proceeding under the ordinary rules of procedure. It has also been shown (*ante* pp. 293, 299) that actions by summary proceeding under the Code of Procedure or in the ordinary course of law are optional under Articles

[1] See *Audet v. Jolicoeur*, Q. R. 22 K. B. 36, 41 (1912); 5 D. L. R. 68.

[2] See *Attorney General v. Cote*, S. C. 1877, 3 Q. R. L. at p. 236.

The power of the Court to hear actions under the Lessor and Lessee Act in vacation will include a special demand to compel the landlord to secure to the tenant the peaceable enjoyment of the premises leased. (*Ibid.*)

1624, 1641 Civil Code. There is a still more summary proceeding where the landlord prefers to avail himself of the remedy for quick eviction contained in Article 1089 C. P. (*ante* p. 298).

It is only where the relation of landlord and tenant exists that summary proceedings can be taken under paragraph 1 of Article 1150. As to the relation of landlord and tenant, see also *ante* p. 36.

An action under Article 1624 Civil Code, to recover possession of the premises leased, where the tenant continues in possession after the expiration of the lease, may be brought by summary proceedings under Article 1150 Code of Procedure. This is not a possessory action, but a question between landlord and tenant.[1] It is similarly held where there has been a judgment resiliating the lease, and the tenant, by prolonging the litigation, remains on the premises for a long time after expiration of his lease, against the will of the landlord. In such a case the landlord can ultimately take an action of ejectment by summary procedure, joining thereto a demand for value of use and occupation since the first action, where he alleges, according to Article 1624, paragraph 2, that the defendant has been in occupation more than three days after the expiration of the lease, and against the will of plaintiff.[2]

A tenant may bring an action under the summary procedure to compel the landlord to deliver over the property leased by him to the plaintiff.[3]

An action of ejectment by summary procedure may be brought by a tenant against a sub-tenant.[4]

An action of ejectment will not lie under Article 1150 C. P. unless the defendant has occupied under a lease

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[1] *McBain v. Blatchford*, Q. B. 1890, M. L. R. 6 Q. B. 273, confirmed in Supreme Court, 20 Can. S. C. R. 269.

[2] *Wallace v. Honan*, Q. R. 34 S. C. 28.

[3] *Morgan v. Dubois*, C. R. 1888, 32 L. C. J. 204.

[4] *Jaeger v. Sauve*, S. C. 1878, 1 L. N. 139.

from, or by sufferance of, the plaintiff. By the term "sufferance" in Article 1608 Civil Code, permission either express or implied is meant. Even at common law, where a person holds property for himself adversely to another, who claims to be the owner, a principal action will not lie against the holder for the value of the use and occupation, which can only be recovered subsidiarily in an action to recover the property itself.[1]

Where a deed contains an option to purchase it is sometimes difficult to ascertain whether it contains *ab initio* a conditional promise of sale, or whether the relation of landlord and tenant does *bona fide* exist until the tenant has exercised his option to purchase the property. This question has been considered (*ante* p. 11). If the full relation of landlord and tenant exists, so that the landlord can sue in ejectment for non-performance of a condition of the lease, then the action could undoubtedly be by summary procedure.[2] But if the deed contains all the elements of a conditional promise of sale, although some of the incidents of a lease are present, then the summary procedure would not be applicable.[3]

Where the purchaser of a property recognizes an existing lease thereof, and he wishes to get possession at the period when the lease expires, according to his contention, his action should be one of ejectment as

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[1] *Parent v. Oisel*, S. C. 1883, 9 Q. L. R. 135; confirmed in Review, 31st May, 1883, because occupation was not by sufferance; *Doran v. Duggan*, 2 L. C. L. J. 127. See *School Commissioners of St. David v. DeVarennes*, C. Ct. 1878, 4 Q. L. R. 206, *ante* p. 259 note.

[2] See *Grange v. McLennan*, per Dorion C. J. (3 Dorion's Rep. 242) whose dissenting opinion was confirmed by the Supreme Court, 9 Can. S. C. R. 385.

[3] *Evans v. Champagne*, C. R. 1895 Q. R. 7 S. C. 189.
In an action under the Lessor and Lessee's Act, where a portion of the demand is for rent payable for a house, and another portion is for rent payable for moveables, the demand for rent is maintainable under the Act as an accessory. *Viger v. Belliveau*, Q. B. 1863, 7 L. C. J. 199; and see *Lusignan v. Rielle*, Q. B. 1888, M. L. R. 4 Q. B. at pp. 269-270.

between landlord and tenant;[1] if he has not recognized the lease, his action should be petitory.[2]

Actions between parties to an emphyteutic lease are not subject to summary procedure.[3]

Proceedings under summary procedure.

Article 1151 Code of Procedure declares that the rules of ordinary procedure apply to summary matters wherever express provisions are not made in the chapter (55) on summary procedure.

The class of action and the jurisdiction of the Court are determined by the value or the amount of the rent or the amount of the damages alleged.[4]

The landlord may join with his action a demand for such rent as he is entitled to, with or without an attachment for rent, an attachment in recaption, or an attachment before judgment in the hands of the tenant or of garnishees.[5]

The delay upon summons is only one intermediate day where the place of service is within a distance of

[1] *Boudreau v. Dorais*, Q. B. 1880, 10 R. L. 458.

[2] *Desallier v. Giguere*, Q. B. 1845, 1 R. de L. 388.

[3] *Lepine v. Building Society*, Q. B. 1876, 20 L. C. J. 300.

[4] Article 1152 C. P.

Plaintiff leased a property from defendant for an annual rental of $108, payable $9.00 a month, the lease being for five years, with option to the tenant to terminate it any year by giving three months' notice. The plaintiff, in the month of August of the first year of the lease, demanded by action the resiliation of the lease, and succeeded with damages of $24.00 and costs. *Held*, in an action to revise the taxation of costs of such action that, under the circumstances, the lease being an annual one as towards the plaintiff, tenant, the class of action, so far as the defendant's costs were concerned, was as of an action for $81.00, being the rent for nine months since the date of instituting the action, viz., Aug. 1st. *Chartrand v. Ouimet*, Q. R. 17 S. C. 164.

In an action for rescission of a lease, with a demand for damages, costs are due and should be adjudged according to the amount of damages awarded. *Theoret v. Trudeau*, Q. R. 38 S. C. 520 (C. R. 1910).

[5] Article 1152 C. P. See *ante* Ch. III. as to attachment for rent, attachment in recaption, attachment by garnishment.

The concluding paragraph of Article 1624 C. Code says:—"He (the landlord) has also a right to join with any action for the purposes above specified, a demand for rent, with or without attachment, and attachment in recaption when necessary."

fifteen miles, with an additional day for every fifty miles in addition; provided always that the delay need never exceed twenty days, whatever the distance.[1] Delays continue to run upon Sundays and holidays; but if a delay expires on a Sunday or a holiday, it is of right extended to the next following juridical day.[2]

Notice of motions urging preliminary exceptions must be given to the opposite party within two days from the return, saving the cases mentioned by Articles 177, paragraph 6, 178 and 181.[3]

The defence must be filed within two days of the return of the action. Nevertheless, whenever preliminary exceptions have been filed, this delay runs from the time of judgment upon such exceptions, except where it is otherwise provided in the first section of the sixteenth chapter of the Code of Procedure.[4]

Any other pleading which may be necessary to complete the issues must be filed on the judicial day following the filing of the pleading immediately preceding it.[5]

The hearing upon an inscription in law can only be had upon the expiry of one day from its service upon the opposite party. Nevertheless, in cases not susceptible of review or of appeal, the case may be inscribed for proof and hearing, reserving the argument on the law issues until after the proof.[6]

As soon as issue is joined, or judgment has been rendered on the inscription in law, if there is one, the case may be inscribed for proof and hearing.[7]

A notice of at least three days must be given to the opposite party of the day fixed for proof and hearing.[8]

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[1] Article 1153 C. P.
[2] Article 9 C. P.
[3] Article 1154 C. P.
[4] Article 1155 C. P.
[5] Article 1156 C. P.
[6] Article 1157 C. P.
[7] Article 1158 C. P.
[8] Article 1159 C. P.

Judgment may be rendered either in term or out of term. It is executory eight days after it is rendered. The delay for ejectment, however, in landlord and tenant cases is within the discretion of the Court,[1] three days being the usual allowance.

Where the lease contains a condition the breach of which shall resiliate the lease *de plein droit*, see *ante* p. 282.

The delays respecting summons and pleadings also apply to all interventions, oppositions or other incidental proceedings of the same nature.[2]

The words "summary procedure" must be written or printed at the head of each original and copy of the writ of summons issued under the provisions of the Chapter (55), relating to summary matters, which provisions must be interpreted so as not to take away the right of proceeding under the ordinary rules of procedure.[3]

Long vacation.

Actions arising from the relation of landlord and tenant may be heard during the long vacation, between June 30th and September 1st.[4] This applies to proceedings following upon the execution of judgments—for instance, contestations of oppositions—in cases between landlord and tenant;[5] such proceedings are incidents in the case.[6] Where a portion of the rent consists in the furnishing of supplies, the obligation to furnish them forms part of the consideration for the lease, and an action based on enforcement thereof will be heard in

[1] Article 1160 C. P.
The judgment rescinding the lease by reason of the non-payment of the rent is pronounced at once without any delay being granted by it for the payment, nevertheless the tenant may pay the rent with interest and costs of suit and thereby avoid the rescission at any time before the rendering of the judgment. Article 1625 C. Code.

[2] Article 1161 C. P.

[3] Article 1162 C. P.

[4] Article 15 (1) C. P.

[5] *Hull v. McFadden*, Q. R. 37 S. C. 431 (C. R. 1909).

[6] *Ibid.*

the long vacation.[1] As to when the relation of landlord and tenant exists, see *ante* pp. 36, 301, 302.

5. INJUNCTIONS.

The remedies enumerated in Article 1624 Civil Code are not limitative. Thus, where a tenant is using the premises in a manner contrary to the evident intent for which they are leased, the landlord can restrain him by injunction, without demanding resiliation of the lease.[2]

Where a proprietor leases his premises for a purpose which is likely to cause a nuisance of a particular character, and such nuisance results, an injunction will lie against him as well as his tenant to restrain the nuisance. Especially is this the case where the proprietor participates in the exploitation of the property leased, by receiving a royalty from its exploitation.[3]

6. CONFESSION OF JUDGMENT.

If the defendant confesses judgment, and the plaintiff accepts such confession, the latter may inscribe the case forthwith for judgment, and the prothonotary draws up in conformity with such confession a judgment which is held to be the judgment of the Court.[4] But in such case the defendant who has appeared by attorney, and confessed judgment, is entitled to notice of said inscription for judgment on such confession at least one clear day before that fixed for judgment.[5] Where the defendant is sued for rent due and to become due, with attachment for rent and concluding for the resiliation of the lease, and he confesses judgment for the amount of rent due, the prothonotary cannot, upon such confession, maintain the attachment for rent; nor can he declare the lease to be resiliated.[6]

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[1] *Imperial Ice Cream Co. v. Cunningham*, 8 Que. P. R. 391.
[2] *Audet v. Jolicoeur*, Q. R. 22 K. B. 36, 41 (1912); 5 D. L. R. 68.
[3] *Lachance v. Cauchon*, Q. R. 24 K. B. 421. Appeal to Supreme Court of Canada quashed.
[4] Art. 529 C. P.
[5] *Boulrice v. Rheaume*, Q. R. 15 S. C. 20 (C. R. 1898).
[6] *Ibid.*

7. AMENDMENTS.

An action demanding resiliation of the lease is of a different nature to one only demanding rent, and where a landlord merely demands the payment of a certain sum due for rent, he cannot amend his declaration with a view to demanding resiliation of the lease, for such an amendment would change the nature of his action.[1]

8. JURISDICTION.

General provision—Art. 1152 Code of Procedure—Interpretation.

In actions arising from the relation of landlord and tenant, the class of action and the jurisdiction of the Court are determined by the value or the amount of the rent or the amount of the damages alleged.[2] The word "alleged" applies to the words "by the value or the amount of the rent, as well as to the word "damages," so that the sentence should read "by the value or the amount of the rent alleged or the amount of the damages also alleged or sued for."[3]

The original source of Articles 1150 and 1152 Code of Procedure was 25 Victoria c. 12 (1862).[4] The preamble to this Act shows that the object intended to be attained was the reducing of the costs in proceedings between landlord and tenant, and that the means adopted to reach that end was the creation of a sort of artificial jurisdiction (if it might so be called) with respect to the Courts wherein such proceedings were brought. The common law rule was set aside and replaced by a fictitious or artificial one, which the Legislature intended

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[1] *Lachance v. Desbiens*, Q. R. 23 S. C. 524; Art. 522 C. P.

[2] Arts. 1150, 1152 C. P.

[3] Per Davidson J. in *Marcotte v. Lapierre*, Q. R. 37 S. C. at p. 255 (C. R. 1909), reversing S. C.; *Blatchford v. McBain*, 20 Can. S. C. R. 269; *Voisard v. Saunders*, Q. B. 1877, 22 L. C. J. 43; *Lafranchise v. Caty*, Q. R. 19 S. C. 185; *Poire v. Lavigne*, Q. R. 38 S. C per Tellier J., at p. 22.

[4] *Ibid* at p. 256.

should apply in all cases arising out of the relations between landlord and tenant. The jurisdiction of the Court, they said, was to be fixed and determined either by the amount of the rent actually claimed, or by the amount of the damages alleged, leaving aside and ignoring all other incidents which might interfere with that rule; and the law has not since been changed in this respect.[1]

If an action in ejectment concludes neither for rent nor for damages, the jurisdiction must be determined by the total value of the lease, less what has been paid thereon.[2]

It was held under Arts. 887, 888 and 890 of the former Code of Procedure, as amended,—relating to summary procedure—that these articles did not create a special Court for the hearing of cases between landlords and tenants,[3] so that objections to summary procedure must be pleaded by exception to the form.[4]

Circuit Court.

The Circuit Court has ultimate jurisdiction in landlord and tenant cases, to the exclusion of the Superior Court, in all suits up to $99.99, when such suits are taken at the "chef lieu" of a district, such as Montreal is.[5] When the suit is not taken at the "chef lieu" of the district, the Circuit Court in such cases has original jurisdiction, to the exclusion of the Superior Court, but

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[1] *Ibid* at pp. 256-257; and see per Tellier J. in *Poire v. Larigne*, Q. R. 38 S. C. at p. 20 *et seq.*, for history of legislation regarding actions between landlord and tenant.

[2] *Poire v. Larigne*, Q. R. 38 S. C. per Charbonneau J. at p. 26 (C. R. 1909); Per Dorion C. J., in *Voisard v. Saunders*, Q. B. 1877, 22 L. C. J. at p. 45; *Wood v. Varin*, S. C. 1886; 13 R. L. 537; M. L. R. 3 S. C. 110; *Thivierge v. Moineau*, Q. R. 2 S. C. 415 (S. C. 1892); *McPherson v. Gadbois*, S. C. 1895, Q. R. 8 S. C. 428; *Blatchford v. McBain*, 20 Can. S. C. R. at p. 276.

[3] *Lusignan v. Rielle* (1888), M. L. R. 4 Q. B. 265, 268; *Morgan v. Dubois*, C. R. 1888, 32 L. C. J. 110; *Contra Hinds v. Donovan*, C. R. 1886, 13 Q. L. R. 225.

[4] *Ibid; Cadieux v. Porlier*, S. C. 1887, M. L. R. 3 S. C. 453.

[5] Art. 54 C. P.; Art. 55 C. P.

subject to appeal, where the sum claimed or the value of the thing demanded amounts to or exceeds $100, but does not exceed $200;[1] and where rights in future may be bound, even though the amount claimed be under $100.[2]

Thus, applying the principles already stated, *supra*, the Superior Court has no jurisdiction to try and determine an action arising from the relation of landlord and tenant in which the amount of damages claimed is under $100, even though, in addition thereto, the conclusions are for the specific performance of work alleged in the declaration to cost $100.[3] An action for resiliation of the lease and damages, valued at $85, is of the exclusive jurisdiction of the Circuit Court.[4] An action by a tenant demanding that repairs be made, or in default the resiliation of the lease, and in any event $12.50 as damages, is of the exclusive jurisdiction of the Circuit Court.[5] The Circuit Court has exclusive jurisdiction in an action based on an annual lease at the rate of $780 for the year, and which demands $30 balance of rent due by the tenant, and resiliation of the lease.[6]

Evoking action from Circuit Court to Superior Court.

The Superior Court has original jurisdiction by means of evocation in all suits and actions instituted in the Circuit Court, relating *inter alia* to annual rents *or other matters by which rights in future may be affected.*[7]

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[1] Art. 55 C. P.

[2] *Ibid.*

[3] *Marcotte v. Lapierre*, Q. R. 37 S. C. 251 (C. R. 1909); and see *Blatchford v. McBain*, 20 Can. S. C. R. 269, which held, under Articles 887 and 888 of the old Code of Procedure (now Articles 1150, 1152 C. P.) that, where in an action by the landlord to recover possession of premises, a demand of $46 is joined for their use and occupation since the expiration of the lease, the action must be brought in the Circuit Court, the amount claimed being under $100.

[4] *Yon v. Vallee*, Q. R. 17 S. C. 446 (S. C. 1900).

[5] *Lafranchise v. Caty*, Q. R. 19 S. C. 185 (C. R. 1901).

[6] *Stewart v. Jubb*, Q. R. 47 S. C. 366 (C. R. 1913), and see *Morneau v. Verret*, Q. R. 20 S. C. 399 (S. C. 1901).

[7] Art. 49 C. P.

The provision in Article 1152 Code of Procedure that the amount of the rent or the damages determines the class of the action and the jurisdiction of the Court in actions between landlords and tenants, forms no obstacle to their evocation from the Circuit Court to the Superior Court in the cases provided for by Article 49 Code of Procedure.[1]

Where the lease is of a saw-mill and flour mill, the rental being based on one-half the fruits or revenues, and there are still three years to run, and it appears from the action to resiliate the lease that the half of the said fruits and revenues which would accrue to the defendant for the remaining three years would amount to more than $100, the defendant may evoke the case to the Superior Court, because his future rights at stake are over $100.[2] The landlord, suing in the Circuit Court for rent, cannot evoke the case to the Superior Court on the ground that the defendant pleads that the rental value of the premises is not as much as alleged in plaintiff's declaration.[3]

In *Poire v. Lavigne*[4] there was a lease of premises for eighteen months, the total value of the lease being $2,000. The tenant undertook, 1st, to pay one-half of the cost of lighting the flat on which the leased premises were situated; 2nd, to keep the flat clean and pay for washing the floor, etc.; 3rd, to furnish meals for the landlord's employees; 4th, to keep a restaurant and quick-lunch counter open and ready for business daily from 8 o'clock in the morning to 8 o'clock at night. Plaintiff sued in resiliation of the lease for default on the part of the tenant to carry out the obligations of the lease, and further demanded that the defendant be ordered to pay the sum of $43.86 made up as follows:—$14.86 for lighting charges, $13.50 for cleaning-up expenses and

[1] *Poire v. Lavigne*, Q. R. 38 S. C. 19 (C. R. 1909).
[2] *Morneau v. Verrel*, Q. R. 20 S. C. 399 (S. C. 1901).
[3] *Shearer v. Marks*, Q. R. 22 S. C. 472 (S. C. 1902).
[4] Q. R. 38 S. C. 19 (C. R. 1909).

$15.50 for cost of employees' meals. The action was brought in the Circuit Court, and defendant moved to have the case evoked to the Superior Court on the grounds that future rights were involved to an amount exceeding $100, and that the amount which was really in issue between the parties was far in excess of that amount. The Superior Court (Fortin J.) dismissed the demand for evocation, and the defendant inscribed in review. The Court of Review reversed the judgment of the Superior Court and allowed the evocation; but Mr. Justice Charbonneau, while assenting to the judgment rendered by the Court, thought fit to explain that he did so on special grounds. In his view of the case there was, whether rightly or wrongly, a joinder of four different causes of action. Under the fourth head, viz., the obligation of the tenant to keep the restaurant and quick lunch counter open every day during certain hours, which obligation the tenant had defaulted in, the plaintiff again concluded for the resiliation of the lease, but without claiming any damages or indemnity therefor. On this ground, taken alone, the defendant could demand evocation, for there were future rights at stake far exceeding the jurisdiction of the Circuit Court. Further, evocation could not be refused as to the other heads already set out *supra*, merely because the amount claimed was less than $100, for this would amount to giving the Circuit Court exclusive jurisdiction, although a larger amount than $100 was at stake. On the whole, the learned judge was of opinion that, notwithstanding the more or less justifiable joinder of causes which gave the Circuit Court jurisdiction, the case should be evoked to the Superior Court. Tellier J., rendering the judgment of the Court, held that Article 1152 Code of Procedure formed no obstacle to the evocation of actions from the Circuit Court to the Superior Court, and that, in view of the fact that future rights far in excess of $100 were at stake, evocation to the Superior Court should be allowed.

Superior Court.

The Superior Court has original jurisdiction in all suits or actions which are not exclusively within the jurisdiction of the Circuit or of the Exchequer Court of Canada; and in the district of Quebec it has exclusive original jurisdiction in cases of petition of right.[1] As to jurisdiction of Circuit Court see *supra*.

The Superior Court has original jurisdiction by means of evocation in all suits and actions instituted in the Circuit Court relating to, *inter alia*, annual rents or *other matters by which rights in future may be effected*.[2] As to such evocation see *supra*.

The Superior Court has jurisdiction to hear a case between landlord and tenant when it is alleged that the latter did not sufficiently furnish the premises leased and had taken away certain moveables subject to the landlord's lien.[3]

District Magistrate's Court.

When the amount of rent claimed or the amount of damages alleged does not exceed $50, the Magistrate's Court has jurisdiction in actions to annul or rescind a lease, or to recover damages resulting from the contravention of any of the stipulations of the lease, or the non-fulfilment of any of the obligations which the law attaches to it, or which result from the relation of landlord and tenant.[4]

Recorder's Courts.

In certain localities the Recorder's Court has also jurisdiction in matters of dispute between landlords and tenants.[5]

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[1] Art. 48 C. P.

[2] Art. 49 C. P.

[3] *Devlin v. Robb*, 8 Que. P. R. 417, and see per Charbonneau J. in *Poire v. Lavigne*, Q. R. 38 S. C. 19 at p. 26, 27 (C. R. 1909).

[4] Art. 62 C. P.

[5] Art. 64 C. P. As to evocation, see *Desautels v. Parker*, S. C. 1894, Q. R. 7 S. C. 469.

Section 485 of the Montreal Charter enacts that:—"The Recorder's Court has concurrent jurisdiction with the Circuit Court, or with any judge of the Superior Court, in matters between lessors and lessees, and has to that end all necessary powers and authority, including that of issuing writs of summons, execution and possession, and of fixing and determining the costs to be paid by the losing party, which costs, however, shall not include any attorney's fees: Provided, always, that the jurisdiction of the Recorder's Court shall be limited to cases where the amount claimed shall not exceed $50, and where the consideration or annual value of the immoveables occupied shall not exceed the sum of $100, and that the said immoveables are situated in the city."

Section 486 enacts that:—"After judgment ordering eviction of a tenant in virtue of the next preceding article, the plaintiff may, after the expiration of three days from the service of such judgment on the defendant, obtain from the Recorder's Court a warrant or order of possession which shall be executed by a bailiff of the Superior Court or Recorder's Court or by a constable or member of the police force, each of whom is vested with all necessary authority."

APPENDIX

PART I.

ARTICLES OF THE CIVIL CODE RELATING TO LANDLORD AND TENANT.

TITLE SEVENTH
OF LEASE AND HIRE.

CHAPTER FIRST.
GENERAL PROVISIONS.

1600. The contract of lease or hire has for its object either things or work, or both combined.

1601. The lease or hire of things is a contract by which one of the parties, called the lessor, grants to the other, called the lessee, the enjoyment of a thing, during a certain time, for a rent or price which the latter obliges himself to pay.

1602. The lease or hire of work is a contract by which one of the parties, called the lessor, obliges himself to do certain work for the other, called the lessee, for a price which the latter obliges himself to pay.

1603. The letting out of cattle on shares is a contract of lease or hire combined with a contract of partnership.

1604. The capacity to enter into a contract of lease or hire is governed by the general rules relating to the capacity to contract, contained in chapter one of the title *Of Obligations*.

CHAPTER SECOND.
OF THE LEASE OR HIRE OF THINGS.

SECTION I.
GENERAL PROVISIONS.

1605. All corporeal things may be leased or hired, except such as are excluded by their special destination, and those which are necessarily consumed by the use made of them.

1606. Incorporeal things may also be leased or hired, except such as are inseparably attached to the person. If attached to a corporeal thing, as a right of servitude, they can only be leased with such thing.

1607. The lease or hire of houses and the lease or hire of farms and rural estates are subject to the rules common to contracts of lease or hire, and also to particular rules applicable only to the one or the other of them.

1608. Persons holding real property by sufferance of the owner, without lease, are held to be lessees, and bound to pay the annual value of the property.

Such holding is regarded as an annual lease or hire terminating on the first day of May of each year, if the property be a house, and on the [first day of October, if it be a farm or rural estate.]

It is subject to tacit renewal and to all the rules of law applicable to leases.

Persons so holding are liable to ejectment for non-payment of rent for a period exceeding three months, and for any other causes for which a lease may be rescinded.

1609. If the lessee remain in possession more than eight days after the expiration of the lease, without any opposition or notice on the part of the lessor, a tacit renewal of the lease takes place for another year, or the term for which such lease was made, if less than a year, and the lessee cannot thereafter leave the premises, or be ejected from them, unless notice has been given with the delay required by law.

1610. When notice has been given the lessee cannot claim the tacit renewal, although he has continued in possession.

1611. The surety given for the lease does not extend to the obligations arising from the prolongation of it by tacit renewal.

SECTION II.

OF THE OBLIGATIONS AND RIGHTS OF THE LESSOR.

1612. The lessor is obliged by the nature of the contract:

1. To deliver to the lessee the thing leased;

2. To maintain the thing in a fit condition for the use for which it has been leased;

3. To give peaceable enjoyment of the thing during the continuance of the lease.

1613. The thing must be delivered in a good state of repair in all respects, and the lessor is obliged, during the lease, to make all necessary repairs, except those which the tenant is bound to make, as hereinafter declared.

1614. The lessor is obliged to warrant the lessee against all defects and faults in the thing leased, which prevent or diminish its use, whether known to the lessor or not.

1615. The lessor cannot, during the lease, change the form of the thing leased.

1616. The lessor is not obliged to warrant the lessee against disturbance by the mere trespass of a third party not pretending to have any right upon the thing leased; saving to the lessee his right of damages against the trespasser, and subject to the exceptions declared in the following article.

1617. If the lessee's right of action for damages against the trespasser be ineffectual, by reason of the insolvency of the latter, or of his being unknown, his rights against the lessor are regulated according to article 1660.

1618. If the disturbance be in consequence of a claim concerning the right of property, or other right in and upon the thing leased, the lessor is obliged to suffer a reduction in the rent, proportional to the diminution in the enjoyment of the thing, and to pay damages according to circumstances, provided the lessor be duly notified of the disturbance by the lessee; and upon any action brought by reason of such claim, the lessee is entitled to be dismissed from the cause, upon declaring to the plaintiff the name of the lessor.

1619. The lessor has, for the payment of his rent and other obligations of the lease, a privileged right upon the moveable effects which are found upon the property leased.

1620. In the lease of houses the privileged right includes the furniture and moveable effects of the lessee, and if the lease be of a store, shop or mnaufactory, the merchandise contained in it. In the

lease of farms and rural estates the privileged right includes every thing which serves for the labor of the farm, the furniture and moveable effects in the house and dependencies, and the fruits produced during the lease.

1621. The right includes also the effects of the undertenant, in so far as he is indebted to the lessee.

1622. It includes also moveable effects belonging to third persons, and being on the premises by their consent, expressed or implied, for sums which have become due by the lessee prior to the notification given to the lessor of the property rights of third persons or before the knowledge acquired by the lessor of such rights of third persons, but not if such effects be only transiently or accidentally on the premises, as the baggage of a traveller in an inn, or articles sent to a workman to be repaired or to an auctioneer to be sold.

The notification in due time to the lessor shall avail against a subsequent acquirer of the leased premises.

1623. In the exercise of the privileged right the lessor may seize the things which are subject to it, upon the premises, or within eight days after they are taken away. If the things consist of merchandise, they can be seized only while they continue to be the property of the lessee.

1624. The lessor has a right of action in the ordinary course of law, or by summary proceeding, as prescribed in the Code of Civil Procedure:

1. To rescind the lease: First, When the lessee fails to furnish the premises leased, if a house, with sufficient furniture or moveable effects, and, if a farm, with sufficient stock to secure the rent as required by law,—unless other security be given; Secondly, When the lessee commits waste upon the premises leased; Thirdly, When the lessee uses the premises leased for illegal purposes, or contrary to the evident intent for which they are leased;

2. To recover possession of the premises leased in all cases where there is a cause for rescission, and where the lessee continues in possession, against the will of the lessor, more than three days after the expiration of the lease, or without paying the rent according to the stipulations of the lease, if there be one, or according to article 1608, when there is no lease;

3. To recover damages for violation of the obligations arising from the lease or from the relation of lessor and lessee.

He has also a right to join with any action for the purposes above specified, a demand for rent, with or without attachment, and attachment in recaption when necessary.

1625. The judgment rescinding the lease by reason of the non-payment of the rent is pronounced at once without any delay being granted by it for the payment; nevertheless the lessee may pay the rent with interest and costs of suit and thereby avoid the rescission at any time before the rendering of the judgment.

SECTION III.

OF THE OBLIGATIONS AND RIGHTS OF THE LESSEE.

1626. The principal obligations of the lessee are:

1. To use the thing leased as a prudent administrator, for the purposes only for which it is designed and according to the terms and intention of the lease;

2. To pay the rent or hire of the thing leased.

1627. The lessee is responsible for injuries and loss which hap-

pen to the thing leased during his enjoyment of it, unless he proves that he is without fault.

1628. He is answerable also for the injuries and losses which happen from the acts of persons of his family or of his subtenants.

1629. When loss by fire occurs in the premises leased, there is a legal presumption in favor of the lessor, that it was caused by the fault of the lessee or of the persons for whom he is responsible; and unless he proves the contrary he is answerable to the lessor for such loss.

1630. The presumption against the lessee declared in the last preceding article exists in favor of the lessor only, and not in favor of the proprietor of a neighbouring property who suffers loss by fire which has originated in the premises occupied by such lessee.

1631. If there be two or more lessees of separate parts of the same property, each is answerable for loss by fire, according to the proportion of his rent to the rent of the whole property; unless it is proved that the fire began in the habitation of one of them, in which case he alone is answerable for it; or some of them prove that the fire could not have begun with them, in which case they are not answerable.

1632. If a statement have been made between the lessor and lessee, of the condition of the premises, the latter is obliged to restore them in the condition in which the statement shews them to have been; with the exception of the changes caused by age or irresistible force.

1633. If no such statement as is mentioned in the preceding article have been made, the lessee is presumed to have received the premises in good condition, and is obliged to restore them in the same condition; saving his right to prove the contrary.

1634. If during the lease the thing leased be in urgent want of repairs, which cannot be deferred, the lessee is obliged to suffer them to be made, whatever inconvenience they may cause him, and although he may be deprived, during the making of them, of the enjoyment of a part of the thing;

If such repairs became necessary before the making of the lease he is entitled to a diminution of the rent according to the time and circumstances; and in any case, if more than forty days be spent in making such repairs, the rent must be diminished in proportion to the time and the part of the thing leased of which he has been deprived.

If the repairs be of a nature to render the premises uninhabitable for the lessee and his family, he may cause the lease to be rescinded.

1635. The tenant is obliged to make certain lesser repairs which become necessary in the house or its dependencies, during his occupancy. These repairs, if not specified in the lease, are regulated by the usage of the place. The following, among others, are deemed to be tenant's repairs, namely, repairs:

To hearths, chimney-backs, chimney-casings and grates;

To the plastering of interior walls and ceilings;

To floors, when partially broken, but not when in a state of decay;

To window-glass, unless it is broken by hail or other inevitable accident, for which the tenant cannot be holden;

To doors, windows, shutters, blinds, partitions, hinges, locks, hasps and other fastenings.

1636. The tenant is not obliged to make the repairs deemed tenant's repairs when they are rendered necessary by age or by irresistible force.

1637. In case of ejectment or rescission of the lease for the fault of the lessee, he is obliged to pay the rent up to the time of vacating

the premises and also damages, as well for loss of rent afterwards, during the time necessary for reletting, as for any other loss resulting from the wrongful act of the lessee.

1638. The lessee has a right to sublet, or to assign his lease, unless there is a stipulation to the contrary.

If there be such a stipulation, it may apply to the whole or a part only of the premises leased, and in either case it is to be strictly observed.

1639. The undertenant is held towards the principal lessor for the amount only of the rent which he may owe at the time of seizure;

He cannot set up payments made in advance;

Payments made by the undertenant, either in virtue of a stipulation in the lease, or in accordance with the usage of the place, are not deemed to be made in advance.

1640. The lessee has a right to remove, before the expiration of the lease, the improvements and additions which he has made to the thing leased, provided he leaves it in the state in which he has received it; nevertheless if the improvements or additions be incorporated with the thing leased, with nails, lime, or cement, the lessor may retain them on paying the value.

1641. The lessee has a right of action in the ordinary course of law, or by summary proceeding as provided in the Code of Civil Procedure:

1. To compel the lessor to make the repairs and ameliorations stipulated in the lease, or to which he is obliged by law; or to obtain authority to make the same at the expense of such lessor; or, if the lessee so declare his option, to obtain the rescission of the lease in default of such repairs or ameliorations being made;

2. To rescind the lease for failure on the part of the lessor to perform any other of the obligations arising from the lease or devolving upon him by law;

3. To recover damages for violation of the obligations arising from the lease, or from the relation of lessor and lessee.

SECTION IV.

RULES PARTICULAR TO THE LEASE OR HIRE OF HOUSES.

1642. The lease or hire of a house or part of a house, when no time is specified for its duration, is held to be annual, terminating on the first day of May of each year, when the rent is at so much a year;

For a month, when it is at so much a month;

For a day, when it is at so much a day.

If the rate of the rent for a certain time be not shown, the duration of the lease is regulated by the usage of the place.

1643. The lease of moveables for furnishing a house or apartments, when no time is indicated for its duration, is governed by the rules contained in the last preceding article, and when these do not apply, is deemed to be made for the usual duration of leases of houses or apartments, according to the usage of the place.

1644. The cleansing of wells and of the vaults of privies is at the charge of the lessor, if there be no stipulation to the contrary.

1645. The rules contained in this chapter, relating to houses, extend also to warehouses, shops and manufactories, and to all immoveable property other than farms and rural estates, in so far as they can be made to apply.

SECTION V.

RULES PARTICULAR TO THE LEASE AND HIRE OF FARMS AND RURAL ESTATES.

1646. He who cultivates land on condition of sharing the produce with the lessor can neither sublet nor assign his lease, unless the right to do so has been expressly stipulated.

If he sublet or assign, without such stipulation, the lessor may eject him, and recover damages resulting from the violation of the lease.

1647. The lessee is obliged to furnish the farm with sufficient stock and the implements necessary for its cultivation, and to cultivate it with reasonable care and skill.

1648. If the farm be found to contain a greater or less quantity than that specified in the lease, the rights of the parties to an increase or diminution of the rent are governed by the rules on that subject contained in the title *Of Sale*.

1649. The lessee of a farm or rural estate is bound to give notice to the lessor, with reasonable diligence, of any encroachment made upon it; in default of so doing he is liable for all damages and expense.

1650. If the lease be for one year only, and, during the year, the harvest be wholly or in great part lost by a fortuitous event or by irresistible force, the lessee is discharged from his obligation for the rent in proportion to such loss.

1651. [If the lease be for a term of two or more years, the lessee is not entitled to claim any reduction of rent in the case stated in the last preceding article.]

1652. When the loss happens after the harvest is separated from the land, the lessee is not entitled to any reduction of the rent payable in money. If the rent consist of a share in the harvest, the lessor must bear his proportion of the loss, unless the loss is caused by the fault of the lessee, or he be in default of delivering such share.

1653. The lease of a farm or rural estate, when no term is specified, is presumed to be an annual lease, terminating on the first day of October of each year, subject to notice as hereinafter provided.

1654. The lessee of a farm or rural estate must leave, at the termination of his lease, the manure, and the straw and other substances intended for manure, if he have received them on taking possession; if he have not so received them, the owner may nevertheless retain them on paying their value.

SECTION VI.

OF THE TERMINATION OF THE LEASE OR HIRE OF THINGS.

1655. The contract of lease or hire of things is terminated in the manner common to obligations, as declared in the eighth chapter of the title *Of Obligations*, in so far as the rules therein contained can be applied, and subject to the special rules contained in this title.

1656. It is also terminated by rescission in the manner and for the causes declared in articles 1624 and 1641.

1657. When the term of a lease is uncertain, or the lease is verbal, or presumed as provided in article 1608, neither of the parties can terminate it without giving notice to the other, with a delay of three months, if the rent be payable at terms of three or more months; if the rent be payable at terms of less than three months, the delay is to be regulated according to article 1642.

The whole nevertheless subject to that article and to articles 1608 and 1653.

1658. The lease, if written, terminates of course, and without notice, at the expiration of the term agreed upon.

1659. The contract of lease or hire of things is terminated by the loss of the thing leased.

1660. If, during the lease, the thing be wholly destroyed by irresistible force, or a fortuitous event, or taken for purposes of public utility, the lease is dissolved of course. If the thing be destroyed or taken in part only, the lessee may, according to circumstances, obtain a reduction of the rent or the dissolution of the lease; but in either case he has no claim for damages against the lessor.

1661. The contract of lease or hire of things is not dissolved by the death of the lessor or lessee.

1662. The lessor cannot put an end to the lease, for the purpose of occupying himself the premises leased, unless the right to do so has been expressly stipulated, (and in such case the lessor must give notice to the lessee according to the rules contained in article 1657 and the articles therein referred to; unless it is otherwise stipulated.)

1663. [The lessee cannot, by reason of the alienation of the thing leased, be expelled before the expiration of the lease, by a person who becomes owner of the thing leased under a title derived from the lessor; unless the lease contains a special stipulation to that effect and be registered.

In such case notice must be given to the lessee according to the rules contained in article 1657 and the articles therein referred to; unless it is otherwise specially agreed.]

1664. [The lessee who is expelled under a stipulation to that effect is not entitled to recover damages, unless the right to do so is expressly reserved in the lease.]

1665. When property sold subject to the right of redemption is taken back by the seller, in the exercise of such right, the lease made by the buyer is thereby terminated and the lessee has his recourse for damages upon the buyer only.

PART II.

Canada
Province de Québec
District de Montréal.

COUR SUPÉRIEURE
(EN REVISION).

Le vingt-et-unième jour de mai, mil neuf cent treize.

PRÉSENTS:

L'HON. JUGE TELLIER
L'HON. JUGE DELORIMIER
L'HON. JUGE GREENSHIELDS

No. 137

Dans la cession de biens de
R. C. ANDERSON, marchand-tailleur, des Cité et district de Montréal,

Débiteur-failli,

vs.

WILLIAM T. HOOD, en sa qualité de curateur, nommé sur la dite cession de biens,

Curateur,

ET

JOSEPH COCHENTHALER, marchand de tabac, des Cité et district de Montréal, créancier contestant le bordereau de collocation préparé par le dit curateur,

Contestant.

LA COUR, après avoir entendu les parties par leurs avocats respectifs sur la demande du curateur, William T. Hood, pour faire reviser le jugement rendu par la Cour Supérieure, siégeant dans le district de Montréal, le neuvième jour de novembre, mil neuf cent douze; après avoir examiné le dossier et la procédure en cette cause, et avoir sur le tout murement délibéré:—

ATTENDU que, dans sa contestation, le contestant allègue:—

1.—That by authentic lease passed before Norval Dickson, Notary, on the 16th February, 1911, he leased to said insolvent that certain dwelling house situate in the City of Montreal and known as civic number 134a Peel Street, with the appurtenances thereto belonging for a term of three years to commence on the 1st May, 1911, at an annual rental of $700.00 per annum, payable in monthly instalments of $58.34 each, the first payment whereof became due and payable on the 1st June, 1911;

2.—That by the lease aforesaid said insolvent was further to pay part of the school taxes, yearly assessments and all other taxes, general and special, which might be levied on the property, and his proportion of the said taxes for the year amounts to $130.00;

3.—That on the 9th August last past, 1911, contestant caused a saisie-gagerie in expulsion to be issued against defendant for rent then due for July and August, and a further sum of $525.01, as damages, which said contestant would suffer by the resiliation of the said lease, and also claimed the sum of $130.00 as proportion of taxes due by the said insolvent on the aforesaid property;

4.—That after the said saisie-gagerie hereinbefore mentioned was returned into court said insolvent made an abandonment of his property for the benefit of his creditors and said William T. Hood was duly appointed curator to the said insolvent estate.

5.—That the said contestant received no rent for the months of June, July, August, September and October, 1911, for the premises leased to the said insolvent, and the Contestant managed to re-let the premises in question on the same terms and also to receive $65.00 as a portion of taxes due by the new tenant;

6.—That in consequence there is now actually due to the said contestant for rent the sum of $291.70 and a further sum of $65.00 portion of taxes due by the said insolvent estate, for which said contestant has a right to be collocated by privilege out of the assets sold belonging to the said insolvent;

7.—That the sale of the goods seized in virtue of the saisie-gagerie hereinbefore mentioned made by the curator and upon which contestant had a privilege, realized the sum of $666.92, and contestant has a right to be collocated for the full sum due in virtue of the premises out of such sale;

8.—That the said Contestant had a privilege over the tweeds in question which were sold in the manner and for the sum aforesaid for the amount of his rent and taxes;

9.—That in the dividend sheet prepared by the curator herein, the said Curator under the heading of "Receipts" pretends to have received the sum of $473.31 on rent settlement which is untrue;

10.—That under privileged claims the said Curator pretends to collocate the contestant for $349.92 and $7.31 on the transfer of rent and accepted by the contestant, which collocation in the manner described as above, is incorrect and which transfer and acceptance as therein stated is untrue;

11.—That the contestant agreed to accept transfer from the 1st October, 1911, of his new lessee and to receive the rent from that date as well as a portion of the taxes;

12.—That as the dividend sheet has been prepared by the said Curator, the said contestant is not collocated for any sum of money whatever;

13.—That said curator declares that he will not pay said contestant any sums for his privileged claim;

14.—That the contestant has a right to ask that he be collocated by privilege out of the assets sold belonging to the said insolvent for the sum of $291.70, plus $65.00 as proportion of taxes, forming a total of $356.70, and this in preference of other claims even of the costs of administration incurred by the said Curator excepting the costs of selling the merchandise which was in the premises at the time of the abandonment of property made by the insolvent and costs of inventory thereof and distribution.

ATTENDU que, par sa réponse, le curateur déclarant admettre certaines allégations de la dite contestation du contestant, et nier les autres, ajoute que la feuille de dividende préparée par lui est correcte et conforme aux faits, et que le contestant était inspecteur; à la dite faillite et qu'il a ratifié et approuvé les procédures en liquidation tel qu'il sera prouvé en temps et lieu;

ATTENDU que le contestant a prouvé les allégations essentielles de sa contestation; et que le jugement a quo déclare que les seules créances, primant celles du contestant, sont les frais faites pour l'avantage du locateur et dont il doit prendre sa part, savoir; les frais de vente, $75.70; les taxes dues à la Cité de Montréal, $67.25; les frais

d'inventaire, $50.00; les frais d'assurance, $7.60; les frais de transport du fonds de commerce du magasin à la salle d'encan où il a été vendu $25.00; les frais de la saisie-gagerie, $47.85; les frais de distribution, environ $35.00 formant en tout un total de $308.40 qu'il faut déduire de la somme réalisée à même le fonds de commerce, savoir, la somme de $606.92 (et non pas $692.92 ainsi que porté au dit jugement) ce qui laissait entre les mains du curateur une somme disponible de $298.52 (et non pas $385.12 ainsi que dit au jugement à quo) pour payer la créance du contestant;

CONSIDERANT qu'il résulte de la preuve et des documents de la cause qu'en outre des sommes ci-dessus mentionnées formant un total de $308.40, qui doit être pris sur et à même la dite somme de $606.92, le curateur a payé d'autres sommes et fait d'autres dépenses, dans l'intérêt particulier du contestant, et qu'il est en droit de les prendre et retenir sur la dite balance de $298.52; qu'en effet le curateur a payé $11.00 pour les services du gardien d'office, J. P. Beaupré, sur la dite saisie-gagerie du contestant Cochenthaler contre son locataire Anderson; $8.00 pour les frais de l'autorisation judiciaire accordée au curateur de vendre les marchandises et effets sujets au privilège du contestant comme locateur; $14.00 pour les frais de garde des dites marchandises par le gardien, J. J. Dolan; et enfin $8.20 pour les frais de MM. Trihey, Bercovitch et Kearney, avocats du contestant sur l'ordonnance au curateur de distribuer les deniers réalisés par lui; que ces quatre dernières sommes qui ont été déboursées par le curateur dans l'intérêt du contestant, forment un total de $41.20 qu'il faut déduire de la dite somme de $298.52, ce qui ne laisse entre les mains du curateur qu'une balance disponible de $257.32 pour satisfaire en partie la créance de $298.34 du contestant, comme locateur, savoir: $233.34 pour le loyer des mois de juin, juillet, août et septembre, 1911, et $65.00, pour ½ de la part proportionnelle de taxes reclamée par la contestation; l'autre moitié ayant été retirée par le curateur, du nouveau locataire, tel qu'il sera ci-après expliqué;

Considérant que l'ordonnance rendue le 11 septembre, 1911, sur la requête du curateur et sur l'avis des inspecteurs à la faillite du dit R. C. Anderson, autorise le curateur à louer, si le bail le lui permet ou avec le consentement du propriétaire Cochenthaler, l'immeuble occupé par le failli portant le numéro 134a de la rue Peel, à Montréal, à raison de $58.33 par mois, à compter du premier octobre, 1911, jusqu'au premier mai, 1912, le sous-locataire devant payer sa part de taxes et de chauffage, conformément au bail existant; que cette ordonnance a été ainsi obtenue dans l'intérêt, non pas du contestant, mais bien de la masse de la faillite qui doit seule en supporter les dépens; et qu'en conformité de cette ordonnance, le contestant a consenti, le 15 septembre, 1911, un bail authentique des lieux y mentionnés, au nommé Jean Satre qui a assumé, envers le contestant, toutes les obligations et charges du failli, locataire originaire, et ce, à compter du premier octobre, 1911, jusqu'à l'expiration du bail originaire.

CONSIDERANT que le curateur Hood a, de son propre aveu, collecté et perçu du nouveau locataire, John Satre, une somme de $123.33 dont $58.33 pour son loyer du mois d'octobre 1911, et $65.00 pour la moitié de la part proportionnelle de taxes; qu'il a perçu, sans droit, cette some de $123.33 qui appartient au contestant, et non pas à la masse de la faillite, et qu'il doit la rendre au contestant, sans aucune déduction ni charge;

CONSIDERANT que les seuls frais de justice primant les privilèges spéciaux sont ceux faits dans l'intérêt de ces créanciers privilégiés et pour la conservation et la réalisation de leur gage;

CONSIDERANT que les frais nécessités par la cession de biens, l'administration de la masse en faillite et sa liquidation, n'ont pas été encourus pour le bénéfice du locateur, mais au profit de cette masse de faillite dans laquelle le locateur n'avait d'autre intérêt que celui de créancier chirographaire pour la balance qui pourrait lui rester due après épuisement du produit de la vente des choses sujettes à son gage;

CONSIDERANT que, dans l'espèce, les seuls frais de justice et créances primant le locateur Cochenthaler sont ceux de $308.40 mentionnés dans le jugement a quo dont le contestant ne se plaint pas, et aussi les frais additionnels de $41.20, mentionnés dans les considérants ci-dessus, le tout formant un total de $349.60 qui doit être pris sur et à même la somme de $606.92, étant le produit de la vente des marchandises sujettes au privilège de locateur du contestant, et que le jugement a quo doit être modifié en conséquence.

CONSIDERANT qu'il n'y a dans la cause aucune allégation ni aucune raison pouvant entrainer une condamnation personnelle contre le curateur pour les dépens de la contestation du contestant; par ces motifs, REVISE et MODIFIE, le dit jugement a quo et procédant à rendre celui qui aurait dû être rendu par le tribunal de première instance, MAINTIENT la contestation du contestant, DECLARE irrégulier et illégal et met de côté le bordereau de collocation préparé en cette cause, ORDONNE au curateur d'en préparer un nouveau, d'après lequel le contestant sera, pour les causes et considérations ci-dessus mentionnées, colloqué et payé: 1o. pour la dite somme de $123.33, sans aucune déduction ni charge, étant le loyer du mois d'octobre, 1911, et la part de taxes perçues, sans droit, par le curateur, du nouveau locataire John Satre; et 2o. pour la dite somme de $257.32 comme paiement partiel des sommes de $233.34 pour son loyer des mois de juin, juillet, août et septembre, 1911, et des $65.00 restant dues sur la part proportionnelle de taxes lui revenant, et ce, sur et à même la somme de $606.92, étant le produit de la vente des marchandises sujettes à son privilège de locateur; le surplus de cette somme de $606.92 devant être et ayant été employé par le curateur à payer les frais et créances primant la créance du contestant.

Et la Cour CONDAMNE le dit curateur ès-qualité à payer les dépens en Cour de première instance de la contestation du contestant, et CONDAMNE le contestant aux dépens en Cour de Révision.

Et il est ordonné que la présente sentence soit renvoyée avec le dossier au tribunal de première instance.

(Signé) LOUIS TELLIER,
J. C. S.

Produit de Vente des marchandises sujettes au privilège du contestant est de		$606.92
Frais et sommes primant la créance du contestant par le Jugement, à Quo:		
Frais de vente	$75.70	
Taxes de Montréal	67.25	
Frais d'inventaire	50.00	
Frais d'assurance	7.60	
Transport à salle d'encan	25.00	
Frais de saisie-gagerie	47.85	
Frais de distribution, environ	35.00	
		308.40
		$298.52

Par le Jugement en révision:		
Gardien sur saisie-gagerie	$11.00	
Frais d'aut. à vendre	8.00	
Frais du gardien Dolan	14.00	
Frais de requête pour distribution	8.20	
		41.20
Balance		$257.32
Doit être allouée au contestant sur son loyer de juin, juillet, août et septembre, 1911		$233.34
et sur sa proportion de taxes		65.00
		$298.34
En créditant ces		257.32
Contestant reste créancier chirographaire		$41.02

Curateur doit rendre au Contestant les $58.33 et les $65.00 qu'il a collectées, sans droit du nouveau locataire Satre, et il doit rendre ces deux sommes, soit $123.33, sans aucune déduction ni charge.

Curateur ès-qualité est condamné aux dépens de la contestation du contestant en cour de première instance. Contestant est condamné aux dépens de Révision.

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