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The Liability of the Landlord for the Acts of Co-Tenants

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Introduction

It is of the essence of the contract of lease that the landlord furnish enjoyment of the premises leased.[1] All his other obligations flow from this.[2] One of these is that the enjoyment must be peaceable (article 1612(3) C.C.).[3] Thus, while the lease by a landlord of premises not belonging to him may be valid,[4] if a claim is made upon the property by one maintaining that he is owner or the holder of some other right, it is the landlord's duty to defend the tenant's enjoyment or to indemnify him if he should fail.

On the other hand, the Code naturally sets limits on the landlord's obligation in this area, for it would be unrealistic and unfair to make him responsible for all disturbances affecting the tenant's enjoyment.[5] Thus the Code contains article 1616:[6]

Art. 1616. Le locateur n'est pas tenu de garantir le locataire du trouble que des tiers apportent à sa jouissance par simple voie de fait sans prétendre aucun droit sur la chose louée; sauf au locataire son droit aux dommages-intérêts contre ces tiers, et sujet aux exceptions énoncées en l'article qui suit.

Art. 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.

While the expressions "mere trespass" and *"simple voie de fait"* have something of an air of mystery to them, it would seem that they refer to nothing more than acts causing damages. This is indi-

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[1] L. Faribault, *Traité de droit civil du Québec*, t. 12, (Montréal, 1951), p. 76; J.W. Durnford, *The Landlord's Obligation to Repair and the Recourses of the Tenant*, (1966), 44 Can. Bar Rev. 477 at p. 499; *Lemcovitch* v. *Daigneault*, [1957] C.S. 178 (Collins, J.).

[2] Planiol et Ripert, *Traité pratique de droit civil français*, 2e éd., t. 10, (Paris, 1956), no. 495, p. 635.

[3] Apart from differences in terminology, this provision is the same as that contained in article 1719 (3) C.N.

[4] See, *inter alia*, P.B. Mignault, *Le droit civil canadien*, t. 7, (Montréal, 1906), pp. 226-228; Snow's *Landlord and Tenant in the Province of Quebec*, 3rd ed., by L.C. Carroll, (Montreal, 1934), pp. 59 *et seq.*; *Paré* v. *Cowper*, [1957] B.R. 323. Just off-hand and *en passant*, one may be permitted to ask oneself whether this principle will always hold true. Thus if one were to lease premises for the opening of a store, it would be important to be able to rely on being able to remain in the same locality over a fairly long period of time. If it were discovered at or near the start of the lease that there would always exist the imminent possibility of eviction by the owner, might not this be a possible ground of resiliation, especially if changes and alterations in the premises were required?

[5] Planiol et Ripert, *op. cit.*, t. 10, no. 521, pp. 704-5.

[6] Article 1725 C.N. is to the same effect.

cated by Pothier,[7] who gave as examples of *"voies de fait"* the putting to pasture of their herd by neighbouring workmen in the field of a leased farm, though not claiming any right in it; burglars stealing grapes from vines by moonlight; and people throwing poison into ponds, thereby killing the fish. Modern life gives rise to similar examples.[8]

The reasons for the exclusion of the acts of third parties from the obligations of the landlord are not far to seek. Such third parties are not subject to the landlord's control, for they are strangers to him.[9] [10] Moreover, the tenant being in possession of the premises, is

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[7] *Oeuvres, Traité du contrat de louage,* 2e éd., by Bugnet, t. 4, (Paris, 1861), no. 81, pp. 35-36.

[8] *Jonas* v. *Arick,* [1950] B.R. 488 (theft); *Dodick* v. *Learmonth,* (1933), 54 B.R. 321 (a flood caused by a third party — not a co-tenant — by the drilling of a hole in a pipe in the ceiling between plaintiff tenant's premises and those above); *Fitzpatrick* v. *Lavallée,* (1904), 25 C.S. 298 (C. Rev.) (a third party cutting hay and hunting on part of leased land); see also *Great North-Western Telegraph Co. of Canada* v. *Montreal Telegraph Co.,* (1890), M.L.R. 6 C.S. 74, 13 L.N. 156, 34 L.C.J. 35 (Wurtele, J.); (1890), M.L.R. 6 B.R. 257, 14 L.N. 9; (1892), 20 S.C.R. 170. On the other hand, the lease will be resiliated on the demand of the tenant where the third party causing the trouble is the landlord's wife, who enters plaintiff tenant's store in a drunken condition and disturbs customers: *Masse* v. *Brunelle,* (1910), 16 R.L. n.s. 270 (C.S.) (Bruneau, J.).

[9] Thus it has been held that where there is a mere lease of space in a garage, the landlord will not be liable if the tenant's car is stolen by a third party: *St. Jean* v. *Vézina,* [1950] R.L. 406 (C.S.) (Marier, J.). See also *Coupey* v. *Mayor Building Ltd.,* (1929), 35 R.L. n.s. 494 (C.S.) (Martineau, J.). See the borderline case of *Brisker* v. *Larue,* (1903), 23 C.S. 447 (Mathieu, J.), in which the lessor was held liable for the damages caused by robbers who broke into an adjacent building belonging to the lessor and caused water to enter into plaintiff tenant's premises by upsetting a cistern.

[10] A contractor engaged by the owner of the building renders the landlord liable for damages caused to a tenant: the landlord cannot escape liability by arguing that the contractor is a third party under article 1616 (*Magee* v. *Montreal Realty & Construction Ltd.,* (1929), 35 R.L. n.s. 506 (C.S.) (Joseph Demers, J.); this case related to poisonous gas leaking from a central refrigeration system due to defective work). Another case with a similar fact pattern is *Ouimet* v. *Dame L'Abbé,* [1965] B.R. 62, where the landlady was held liable towards the tenant, and the refrigeration repairers were ordered, in warranty proceedings taken by the landlady, to reimburse her the amount of the damages she was condemned to pay to the tenant. Similarly, where a landlord's representative (a janitor) causes a radiator to leak, the landlord will be liable for the resulting damages, and this despite the presence in the lease of a stipulation excluding liability: *Ducros* v. *Feinstein,* [1964] R.L. 424 (C. Mag.) (Leduc, Chief Judge).

generally in a better position to do something about third parties, such as calling the police when the disturbances occur.[11] [12] [13]

The question that we must now pose and attempt to answer is whether a tenant who suffers damage by reason of the act of a co-tenant has a recourse against their landlord on the basis of the latter's obligation to furnish peaceable enjoyment under article 1612(3), or whether he is to be treated, under article 1616, as a third party for whose acts the landlord is not to be held responsible.[14] Since the Code contains no provision relating to the co-tenant as such, we are faced with a difficult task of interpretation of legal texts, which interpretation cannot be effectively carried out in the absence of a policy approach. For it is not enough simply to decide, as some judgments purport to do, that the co-tenant is, or is not, a third party under article 1616, because the result will be

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[11] It was suggested in *Fiset* v. *Dallaire*, (1924), 62 C.S. 538 (Surveyer, J.), that a tenant who is disturbed could obtain peace by having the offending party summoned to the Recorder's Court (now known as the Municipal Court). The fact that the person causing the disturbances was in this case the landlord would not seem to affect the principle laid down by the court that when the tenant has an effective recourse at his disposal to deal with troubles that do not have a character of permanence, he should use it, and if he sues for resiliation of the lease, his action will be dismissed. As to whether this principle should be applied so as to relieve the landlord of liability for the act of a co-tenant is not clear.

[12] The Code has not left the tenant entirely to his own devices, however, for article 1617, by a reference to article 1660, provides for a dissolution of the lease or a reduction of the rent should the tenant's right of action for damages against the third party be ineffectual by reason of the latter's insolvency or his being unknown. The French Code does not contain any similar article.

[13] It is to be noted that the landlord who pleads the defence that the act was that of a third party has the burden of proof of establishing such fact: *The W.H. Thornhill Co. Limited* v. *Avmor Ltd.*, [1959] C.S. 116 (Perrier, J.).

[14] It is to be noted that a tenant has a delictual recourse against his co-tenant in recovery of damages caused by the latter, such as those resulting from a flood arising from a failure on the part of the tenant to repair or to force the landlord to repair: *Paquet* v. *Nor-Mount Realty Company*, (1916), 49 C.S. 302 (C. Rev.) (in this case broken windows in the bathroom had caused a pipe to freeze). He may also sue an adjacent proprietor for damages where the latter is negligent in the exercise of his rights of construction in relation to a mitoyen wall, but he has no claim for damages against his lessor: *Russell* v. *Clay*, (1894), 6 C.S. 62 (C. Rev.); *Panneton* v. *Fraser*, (1893), 4 C.S. 355 (Doherty, J.). See also *Bonhomme* v. *The Montreal Water and Power Co.*, (1915), 48 C.S. 486 (C. Rev.). In *Iacurto* v. *Restaurant de la Porte St. Jean Incorporée*, [1965] C.S. 201 (Dorion, C.J.), a tenant who occupied premises on a monthly basis was denied an injunction against a co-tenant who operated a night club because under the balance of convenience principle, the co-tenant would stand to suffer a greater loss than a tenant whose lease could end at a month's notice.

an arbitrary one which will cause the landlord to be liable for every act of the co-tenant, or for none of them. No flexibility would remain with which to be able to handle the wide variety of acts that a co-tenant may do, for some of which the landlord should be responsible, and for some of which he should not be.

No uniform solution has been arrived at by our courts. In many instances they have granted the claims of tenants against landlords based on acts of co-tenants, but have done so on a wide variety of grounds. On many other occasions they have turned down the tenant who has sued his landlord. We shall study the grounds on which the decisions have been rendered to ascertain whether any general principles may be drawn from them. This alone will not suffice, however, for the absence of a consistent approach by the courts of Quebec is an indication that a more reliable criterion should be sought. In this connection, an examination will be made of the jurisprudence of the *Cour de Cassation,* which, in strong contrast to that of our own courts, has been remarkably consistent.

1. THE PRESENT STATE OF OUR JURISPRUDENCE AND DOCTRINE

There are judgments holding that because of article 1616 a landlord is not liable for the acts of a co-tenant, the rationale being that the co-tenant is a third party within the meaning of that article.[15] There are other judgments that declare that article 1616 does not apply, the co-tenant not being a third party.[16] A third category of judgments makes no reference to article 1616 when deciding whether the landlord should be liable for acts of co-tenants.[17]

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[15] *Peate Musical Supplies Limited* v. *Lazarus Realty Corporation,* [1957] R.L. 109 (C.S.) (Montpetit, J.); *Beaulieu* v. *Beaudry,* (1899), 16 C.S. 475 (Taschereau, J.); *Clerk* v. *Poissant,* (1920), 57 C.S. 528 (C. Rev.); *Grill* v. *Joannette,* (1941), 47 R.J. 39 (C.S.) (Rhéaume, J.); *Nantel* v. *Bounadère,* [1944] R.L. 51 (C.S.) (Forest, J.).

[16] *Tremblay* v. *Doddridge,* (1942), 48 R.L. n.s. 22 (C.S.) (Belleau, J.); *Leblanc* v. *Leclair,* (1934), 72 C.S. 491 (Forest, J.); *Cooper* v. *The Holden Company, Limited,* (1913), 44 C.S. 525 (Archibald, J.); *Dame Barre* v. *Dame Viau,* (1931), 69 C.S. 111 (Philippe Demers, J.); *Vezina* v. *Scales,* (1926), 64 C.S. 49 (de Lorimier, J.); *Taylor* v. *Frigon,* (1913), 44 C.S. 108 (C. Rev.). See also *Mt. Royal Furniture and T.V. Inc.* v. *Industrial Glass Company Limited,* [1964] C.S. 269 (Perrier, J.); *Pigeon* v. *Roussin,* (1881), 4 L.N. 326 (Circuit Court) (Johnson, J.); *Le Procureur Général* v. *Côté,* (1877), 3 Q.L.R. 235, 1 L.N. 179 (C.S.) (Casault, J.); *Bernard* v. *Côté,* (1892), 2 C.S. 82, 16 L.N. 87 (C. Rev.).

[17] *Fitzpatrick* v. *Darling,* (1896), 9 C.S. 247 (Curran, J.); *Larouche* v. *Leahy,* [1958] B.R. 247; *Benoit* v. *Smith,* (1899), 16 C.S. 591 (Doherty, J.); *Lion Fastener Company Limited* v. *Gross,* [1964] B.R. 475; *Scott* v. *Dame Newcomb,*

(a) *The grounds on which the landlord has been held to be liable.*

The foregoing shows that the problem of determining whether a landlord will be liable for the acts of a co-tenant cannot be solved by a mere reference to article 1616. It is therefore necessary to attempt a new approach to the question of the landlord's liability. One way to do this is to take the jurisprudence and to place the judgments into appropriate categories in the light of the various types of acts that co-tenants commit and the circumstances that may surround them.

The landlord has been held liable toward one of his tenants for the acts of a co-tenant on the following grounds:

(i) *Where the disturbances result in uninhabitability.* This may occur where the upstairs co-tenant is operating a bawdy house.[18] Uninterrupted disturbances generally also qualify, such as singing, screaming, dancing, banging on floors and constant abusive telephone calls.[19] Dangers to health will constitute uninhabitability, and these may result from bad smells, smoke and gasoline fumes from premises of co-tenants.[20]

[1958] B.R. 778; *The Great-West Life Assurance Company* v. *Raby*, [1960] C.S. 505 (Desmarais, J.); *Yonge* v. *Vineberg*, (1914), 45 C.S. 318 (C. Rev.); *Tom* v. *Singer*, (1916), 22 R.L. n.s. 49 (C. Rev.); *Lefebvre* v. *Chartrand*, (1929), 35 R.L. n.s. 405, (Circuit Court) (Archambault, J.); *Labbé* v. *Guay*, [1946] C.S. 228 (Gibsone, J.) (though the defendant lessor pleaded article 1616, the judge does not rely on it in the *dispositif* of his judgment); *Sigouin* v. *Taschereau*, (1921), 27 R.L. n.s. 376 (C. Rev.). It should be noted that the mere presence of a co-tenant does not mean that the case does not turn on some other point (such as the damage being found to have been caused by a defect in the premises); however, one sometimes suspects that while another ground purports to be the basis of the judgment, the reason for it is that in certain instances the court may be wishing to avoid having to rule on the co-tenant issue as such. See, for example, *Chabot* v. *Dame Paquin*, [1965] B.R. 425.

[18] *Tremblay* v. *Doddridge*, (1942), 48 R.L. n.s. 22 (C.S.) (Belleau, J.); *Fitzpatrick* v. *Darling*, (1896), 9 C.S. 247 (Curran, J.); *Tom* v. *Singer*, (1916), 22 R.L. n.s. 49 (C. Rev.). The fact that the leased premises were formerly used for a bawdy house is also a ground for resiliation because of their resulting bad reputation, visits being made by customers unaware of the change of destination of the place: *Lorio* v. *Morgan*, (1914), 46 C.S. 379 (Lafontaine, J.); *Levin* v. *Lalande*, (1906), 30 C.S. 481 (Dunlop, J.). On the other hand, it has been held that where a tenant sues to cancel his lease by reason of a co-tenant operating a bawdy house, he has no cause of action left where the co-tenant vacates during the proceedings: *St. Aubin* v. *Fernandez*, (1927), 42 B.R. 117.

[19] *Vezina* v. *Scales*, (1926), 64 C.S. 49 (de Lorimier, J.); *Leblanc* v. *Leclair*, (1934), 72 C.S. 491 (Forest, J.).

[20] *Beardmore* v. *The Bellevue Land Co.*, (1906), 15 B.R. 43; *Sigouin* v. *Taschereau*, (1921), 27 R.L. n.s. 376 (C. Rev.).

Since it is of the essence of the contract of lease that the landlord furnish enjoyment of the premises [21] and since uninhabitability represents a total absence of enjoyment, the issue as to whether the co-tenant is the cause of the uninhabitability does not really arise, for the tenant is always entitled to a resiliation in the event of uninhabitability. The mere fact that uninhabitability is a ground for the rescission of the lease does not mean, however, that it is essential that it be present in all instances. While there must be uninhabitability if the tenant is to be successful in having a lease cancelled on the ground of a lack of repairs,[22] this is not so where there is a substantial diminution of enjoyment resulting from other causes.[23]

(ii) *Where the landlord authorizes the commission of the acts.* This authorization may result from the purpose for which the premises were leased, which may involve noise or other disturbance,[24] or it may take the form of permitting the co-tenant to perform alterations to the building which give rise to noise and dirt [25] or of changing the destination of the premises.[26] The authorization may consist of a simple acquiescence.[26a] This can result from the failure to act to cause disturbances to cease and from carelessness in the selection of the co-tenant.[27] The justification for the landlord being held liable where there is authorization on his part is that the act is then deemed to be his own.

While it would not seem essential that the disturbance authorized or acquiesced in by the landlord arise only after the tenant who is the victim enters into possession of his premises, one might wonder whether the tenant who can plainly see a source of potential disturbance before he enters into a lease (such as where he rents an apartment situated above a repair garage) will be in as strong a

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[21] Faribault, *op. cit.*, t. 12, p. 76; Durnford, *loc. cit.*, at p. 499; *Lemcovitch* v. *Daigneault*, [1957] C.S. 178 (Collins, J.).

[22] See, *inter alia*, Durnford, *loc. cit.*, at p. 505, together with the authorities therein cited.

[23] See, for example, *The Great-West Life Assurance Company* v. *Raby*, [1960] C.S. 505 (Desmarais, J.).

[24] *Taylor* v. *Frigon*, (1913), 44 C.S. 108 (C. Rev.); *Dame Barre* v. *Dame Viau*, (1931), 69 C.S. 111 (Philippe Demers, J.); *Pasquini* v. *Mainville*, (1917), 52 C.S. 22 at p. 23 (C. Rev.) (where the results of a preceding action are mentioned).

[25] *Scott* v. *Dame Newcomb*, [1958] B.R. 778.

[26] *Le Procureur Général* v. *Côté*, (1877), 3 Q.L.R. 235, 1 L.N. 179 (C.S.) (Casault, J.).

[26a] *Ibid.*

[27] *Vézina* v. *Scales*, (1926), 64 C.S. 49 (de Lorimier, J.); *The Great-West Life Assurance Company* v. *Raby*, [1960] C.S. 505 (Desmarais, J.).

position as if the cause of the disturbance only occurred or became evident after his entering into occupation. Much will depend on the nature of the locality and other circumstances.

(iii) *Where the landlord has not exercised reasonable care in the selection of the offending co-tenant.* A landlord who leases to a person who is notoriously unfit to be trusted with the care of premises will be liable for the damages caused to other tenants. Thus, in *Yonge* v. *Vineberg*,[28] the landlord was held responsible for damages caused by a co-tenant who was a habitual drunkard who four times in four months caused floods. The lessor must exercise reasonable care in his choice of tenants.

(iv) *Where the damage can be said to have been caused by a defect in the premises.* The landlord is obliged to warrant the lessee against defects in the thing leased (article 1614).[29] This will sometimes render the landlord liable for damages suffered by a tenant when the court might otherwise hesitate to hold the landlord liable for the act of a co-tenant. Thus, for example, in *Chabot* v. *Paquin*,[30] the upstairs co-tenant went out leaving the tap on, with the result that the sink overflowed and plaintiff tenant suffered damages in his ground floor store. The majority judgment held the landlord liable because the drain was defective and became blocked easily; Mr. Justice Pratte, dissenting, suggested that the landlord was not responsible as he could not have foreseen that the tenant would allow the drain to get blocked and then commit the act of gross negligence of going out and leaving the tap on — that even if the defect in the drain was a link in the chain which led to the flood, this was insufficient to render the landlord liable.[31]

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[28] (1914), 45 C.S. 318 (C. Rev.).

[29] It is not entirely clear when the landlord will owe damages caused by a defect.

[30] [1965] B.R. 425.

[31] Other examples of the landlord being held responsible for damages on the ground of defects include: *Cooper* v. *The Holden Company, Limited,* (1913), 44 C.S. 525 (Archibald, J.); *Mt. Royal Furniture and T.V. Inc.* v. *Industrial Glass Company Limited,* [1964] C.S. 269 (Perrier, J.); *Bernard* v. *Côté,* (1892), 2 C.S. 82, 16 L.N. 87 (C. Rev.); *Beaudoin* v. *The Dominion Clothing Company,* (1908), 34 C.S. 157 (C. Rev.) (this latter case does not, however, relate to the liability of the landlord for the act of a co-tenant). The presence of defects does not always render the landlord liable for the damages, however; where the defect is within the realm of responsibility of tenants, a claim against the landlord will be dismissed: *Julien* v. *Julien,* [1945] B.R. 189; *Peate Musical Supplies Limited* v. *Lazarus Realty Corporation,* [1957] R.L. 109 (C.S.) (Montpetit, J.); *Larouche* v. *Leahy,* [1958] B.R. 247. Moreover, a tenant has no recourse against the landlord on account of being disturbed early in the morning by the noise

(v) *Where the landlord is warned of impending trouble but has failed to act.* A good illustration of this is to be found in *Gorn* v. *Côte St. Luc Barbecue Inc.*[32] Plaintiff-tenant (the Barbecue establishment) occupied ground floor premises and suffered damages by reason of a flood resulting from a frozen pipe that burst in cold weather in a co-tenant's apartment on the second floor. The landlord was held liable for the damages even though the second floor co-tenant was responsible for keeping his premises heated (they were leased as cold flats), because the third floor tenant had called the agent of the building administrator on the Saturday to advise that the water was not running in her apartment, only to be told that nothing could be done before the Monday; the bursting and resulting flood occurred on the Sunday. The landlord, though warned of trouble, had not acted to avoid its occurrence.

(vi) *Where there is a clause in a commercial lease barring the landlord from leasing other premises to a competitor.* A tenant of a store in a building or in a shopping centre may wish to protect himself against a competitive business that might be carried on by a co-tenant in the same building or centre. He may do this by having a stipulation in his lease forbidding the landlord to let premises to a competitor. A tenant will accordingly have a recourse against his landlord where he is affected by such competition.[33]

What has been made abundantly clear by the jurisprudence however, is that the mere act of renting premises to a co-tenant in the same line of business (that is, to a competitor), will not alone render the landlord liable for damages to the tenant who is affected.[34] This kind of damage, with its effect of lowering prices, is considered as being beneficial to society, and is consequently not actionable.

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caused by upstairs co-tenants getting up even though the type of construction is not perfect, if it is similar to that used by the majority of architects: *Benoit* v. *Smith*, (1899), 16 C.S. 591 (Doherty, J.).

[32] [1963] B.R. 257. See also *Labbé* v. *Guay*, [1946] C.S. 228 (Gibsone, J.). The same principle applies where the co-tenant abandons the premises: *Bernard* v. *Côté*, (1892), 2 C.S. 82, 16 L.N. 87 (C. Rev.) — in the cold weather the landlord must heat the abandoned premises, if necessary, to avoid a pipe bursting.

[33] Aubry et Rau, *Droit civil français*, 6e éd., t. 5, (Paris, 1946), no. 366, p. 225, footnote 37; Paris, 22 déc. 1937, Gaz. Pal. 1938.1.235; Paris, 3 fév. 1942, D.1942.86.

[34] *Gameroff and Grovedale Construction and Realty Co. Ltd.* v. *Voelkner*, [1965] B.R. 827; Cass. req. 9 janv. 1935, Gaz. Pal. 1935.1.320. See also the note commenting on the judgment rendered by the Court of Appeal of Paris, 22 déc. 1937, Gaz. Pal. 1938.1.235. In the absence of a clause prohibiting leasing to a competitor, there must be evidence of a conspiracy to create unfair competition. Presumably the underlying principle is that ours is still a basically free enterprise society.

Hence the clause that excludes the letting of premises to competitive businesses will only cause the landlord to be liable where the competition complained of comes squarely within the clause prohibiting it;[35] however, where a co-tenant sells items as a service to clients because the complaining tenant, who is meant to sell them, is unable to do so on account of being constantly out of stock, the tenant so affected will have no recourse against his landlord.[36]

(b) *The landlord has been held not to be liable under the following circumstances.*

The landlord has been held *not* to be liable towards one of his tenants for the acts of a co-tenant on the following grounds or in the following circumstances:

(i) *Where the damages result from isolated acts.* There are a number of reported judgments where the landlord has been held not to be liable for damages caused by the fault of a co-tenant where an isolated act has been committed. A typical example is a flood caused by the bursting of a pipe or the blocking of a drain and resulting from the co-tenant's negligence.[37] It is to be noted that in each instance these isolated acts could not have been foreseen by the landlord.

(ii) *Where the disturbances lack a character of permanence, or there is a direct recourse open to the tenant to make the trouble cease.* The view has occasionally been taken that the disturbance must be permanent with the result that the tenant has no hope of having peaceful enjoyment, and that should there be another effective recourse to force the cessation of the trouble, such as calling the police and laying a charge, he should exercise it.[38] This might be regarded as a principle forming part of the general rules of contract

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[35] *Norman Small Inc.* v. *Miller*, [1965] C.S. 348 (James Mitchell, J.); *Grover's Ltd.* v. *Dominion Square Corporation*, (1932), 70 C.S. 565 (Archer, J.); *Frego Construction Incorporated* v. *Mary Lee Candies Limitcd*, [1963] S.C.R. 429.

[36] *Moisan* v. *L'Auditorium Ltée*, (1927), 65 C.S. 442 (Lemieux, C.J.).

[37] *Beaulieu* v. *Beaudry*, (1899), 16 C.S. 475 (Taschereau, J.); *Grill* v. *Joannette*, (1941), 47 R.J. 39 (C.S.) (Rhéaume, J.); *Clerk* v. *Poissant*, (1920), 57 C.S. 528 (C. Rev.); *Larouche* v. *Leahy*, [1958] B.R. 247; *Nantel* v. *Bounadère*, [1944] R.L. 51 (C.S.) (Forest, J.). Reference may also be made to *Pigeon* v. *Roussin*, (1881), 4 L.N. 326 (Circuit Court) (Johnson, J.).

[38] *Fiset* v. *Dallaire*, (1924), 62 C.S. 538 (Surveyer, J.) (this case apparently involved disturbances by the lessor himself; the remark that the disturbance must have a character of permanence may only have been made in relation to the seriousness of making a demand in resiliation).

— that an agreement entered into by the parties is not to be put aside lightly.[39]

(iii) *Where the co-tenant has failed to carry out a tenant's repair.* This was the basis for the landlord being held not to be liable for damages suffered by a tenant as a result of a flood caused by a defective toilet washer, which was held to have been caused by the failure on the part of the co-tenant to attend to this repair.[40] It is to be noted that this situation represented another isolated act.

(iv) *Where the co-tenant's act is legitimate and reasonable.* It is not a defence, we have seen, for the landlord to claim that the co-tenant who is causing a disturbance is acting within the rights granted to him under his lease, for the landlord should not have leased premises for purposes the exercise of which would disturb other tenants. Where, however, the co-tenant is acting within his rights under the lease and at the same time is not infringing the rights of the complaining tenant, there is no recourse against the landlord to have the co-tenant cease his acts.[41]

(v) *Where there is a clause relieving the landlord of responsibility for the acts of co-tenants.* Our regime of freedom of contract enables

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[39] Another facet of the problem is seen in the case of *Iacurto* v. *Restaurant de la Porte St-Jean Incorporée*, [1965] C.S. 201 (Dorion, C.J.). A tenant applied for an injunction against a co-tenant who operated a restaurant and night club in order to have the noise late at night ordered to cease. It was held that since the complaining tenant's lease was on a month-to-month basis and it would take the co-tenant night club operator more than one month to relocate, under the balance of convenience rule that governs the issuing of injunctions, an injunction should not be granted because the night club owner would suffer a greater loss than the complaining tenant.

[40] *Peate Musical Supplies Limited* v. *Lazarus Realty Corporation*, [1957] R.L. 109 (C.S.) (Montpetit, J.). (This case is commented on in relation to the ground on which the replacement of a toilet washer is a tenant's repair in Durnford, *loc. cit.*, at pp. 490-492).

[41] *Saad* v. *Simard*, (1913), 43 C.S. 499 (C. Rev.). See also *Deguire* v. *Marchand*, (1878), 1 L.N. 326, 21 R.L. 1 (C. Rev.). In *Lefebvre* v. *Chartrand*, (1929), 35 R.L. n.s. 405 (C.S.) (Archambault, J.), the complaining tenant and the defendant co-tenant were both granted the use of the yard in the rear by their leases. Plaintiff tenant, on entering the yard, was bitten by defendant co-tenant's watchdog. It was held that since the leases conflicted in that both granted the right to use the yard, the co-tenant having been first put in possession, plaintiff tenant had no right to enter it and consequently had no claim for damages on being bitten. Where, however, a tenant has been given the right to run his vehicles through the courtyard to the rear of the premises of a co-tenant, and the latter interferes with the complaining tenant's exercise of his rights, denying their existence, the landlord is obliged to defend the victim tenant against such claim of the co-tenant, the same amounting to a *trouble de droit*: *Hamilton* v. *The Royal Land Company*, (1903), 24 C.S. 411 (C. Rev.).

the parties to draw their contracts as they see fit, with the traditional exceptions in favour of public order and good morals (article 13 C.C.) and mandatory provisions of the Civil Code (a rather apt example might be that article 1509 C.C. prohibits a seller from excluding warranty against eviction with respect to his own acts), to which must now be added the new articles on "Equity in Certain Contracts" (articles 1040a to 1040e C.C.). Thus, clauses in leases excluding responsibility for the acts of co-tenants are, in principle, valid.[42]

However, such clauses do not find much favour before the courts. It would be too easy for the landlord to collect the rent without assuming any obligations that should rightfully be his. The courts have a not inconsiderable arsenal with which to combat such clauses.

In the first place, if the clause is ambiguous, it is interpreted against the landlord (assuming that it was he who stipulated the conditions) (article 1019 C.C.). Secondly, where the landlord acquiesces in the act of the co-tenant, such as where the latter is remodelling premises, the lessor is bound because the act has become his *fait personnel*.[43] The same principle applies where the lessor's own negligence has caused the damage.[43a] Thirdly, the clause will at best cover a diminution in enjoyment but not an uninhabitability,[44] for it is of the essence of the contract of lease that the landlord must furnish enjoyment and this obligation cannot be excluded by a clause in the contract.[45]

(vi) *Where the defendant landlord is a sub-lessor.* It has been held that even if the landlord is liable toward a tenant for the acts of the co-tenant, the sub-lessor is not liable vis-à-vis his sub-tenant with respect to the acts of his (the sub-lessor's) co-tenant since the co-tenant (as opposed to a co-*sub*-tenant) obtains no rights from the sub-lessor, but only from the principal landlord and is hence

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[42] *Lion Fastener Company Limited* v. *Gross*, [1964] B.R. 475. See also Cass. civ., 16 juillet 1951, J.C.P. 1952.2.6717.

[43] *Vézina* v. *Scales*, (1926), 64 C.S. 49 (de Lorimier, J.); *Scott* v. *Dame Newcomb*, [1958] B.R. 778.

[43a] *Mt. Royal Furniture and T.V. Inc.* v. *Industrial Glass Company Limited*, [1964] C.S. 269 (Perrier, J.).

[44] *Decary* v. *Normandin*, (1933), 71 C.S. 254 (Martineau, J.).

[45] Durnford, *loc. cit.*, at p. 499. It has been held in France that limited clauses of exclusion of liability on the part of the landlord are valid (Cass. civ. 16 juillet 1951, J.C.P. 1952.2.6717, overruling the Court of Appeal decision in the same case: Lyon, 2 déc. 1948, J.C.P. 1949.2.5044), but that general clauses that practically suppress the lessor's warranty are invalid (Cass. soc., 25 oct. 1946, J.C.P. 1947.2.3400). See the note by Paul Esmein, J.C.P. 1952.2.6717.

a third party.[46] It therefore follows that it would be unreasonable to hold the sub-lessor liable. However, if the acts were such as to render the premises uninhabitable, it would seem that the sub-tenant would be entitled to resiliation in any event on the overriding ground that it is of the essence of the contract of lease that enjoyment be furnished.

(c) *The conclusions that may be drawn from the jurisprudence.*

What conclusions are to be drawn from the foregoing review of the jurisprudence? The first is that while superficially the courts are badly split on the question of the liability of the landlord for acts of co-tenants, since they do not seem to be able to agree on whether the co-tenant is merely a third party under article 1616 C.C., the split in opinion would appear to be more theoretical than real. When the judgments are examined in the light of the factual backgrounds against which they were rendered, there is a remarkable consistency in the outcomes. The judges seem to a large extent to have been deciding on the basis of whether it would be reasonable in the various circumstances to hold the landlord liable or not, and then sometimes seeking to justify their solutions on the basis that the co-tenant is or is not covered by article 1616, which is where the confusion has arisen. As to the results obtained, the same would appear to be eminently reasonable.

What can be said to be the principles that underlie the jurisprudence? They seem to be that the landlord will not be held liable where he could not be expected to have prevented the act — thus, for example, isolated acts, such as a co-tenant causing a pipe to burst, will not render the landlord liable. Such occurrences could perhaps be described as fortuitous events. Where, however, the landlord could be said to have been negligent, such as in failing to show discretion in the selection of tenants, allowing repetitive acts to continue, or failing to act on receiving a warning of impending trouble, he will be liable for the acts of co-tenants. This is *a fortiori* so where such acts render the victim tenant's premises uninhabitable, such always being a cause for resiliation.

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[46] *Léger* v. *Langelier*, (1923), 61 C.S. 421 (Rinfret, J.) (it is surprising to note that the application for the cancellation of the lease was denied despite the uninhabitability of the premises). Similarly, a tenant will probably generally not have a recourse against a co-tenant by reason of the act of his sub-tenant; this was discussed in *Thurston* v. *Dawson*, (1908), 17 B.R. 148. On the other hand, a tenant who is disturbed by the acts of a sub-tenant of a co-tenant has a recourse in resiliation of the lease against the landlord (*Pasquini* v. *Mainville*, (1917), 52 C.S. 22 at p. 23 (where the results of a preceding action are mentioned)).

Another principle is that the landlord will be held liable where he is personally involved in the acts. This will occur where he acquiesces, by lease or otherwise, in the use made of the premises by the co-tenant (such as, for example, where the premises are leased for manufacturing purposes, or he fails to prevent the trouble). He will similarly be liable where he leases to a competitor in the same building or area in spite of a clearly expressed undertaking not to do so.

It would also appear true to say that where there may be doubt as to the landlord's liability for the acts of co-tenants, the landlord will be held liable anyway on another ground, such as that of the damage being caused by a defect.

What are the views of our authors? The subject has not been given lengthy treatment. Mignault [47] limits himself to raising the question as to whether the co-tenant is a third party under article 1616 and refers to French authority to the effect that he is not since the landlord introduced him to the premises (with the result that the landlord would always be liable).

Faribault,[48] after referring to the division of opinion in both the French authors and our jurisprudence, states his view as being that co-tenants are third persons under article 1616, so that landlords are not liable for their acts. Faribault suggests that a landlord no longer has any control over his tenants once the premises have been delivered to them, and that while he may have their leases resiliated when they exceed their rights, he cannot do so until the acts have been committed. Thus he fails to see how the landlord can be held to warrant against acts he could not foresee and could even less prevent. Consequently he would not hold the landlord responsible for a flood resulting from a tap being left on by a co-tenant, or noise made by him that prevents sleep.

The situation would be different, he says, where the acts were continual or frequently repeated without the landlord acting to prevent them after being put in default, or if the landlord had knowingly leased to undesirables. His liability would then rest on article 1612, but would be limited to cases of uninhabitability.

Snow [49] points out that while the landlord will not be liable for the acts of the co-tenant under article 1054 C.C., he will nevertheless be sometimes liable for the co-tenant's negligence; he will be liable if he leases premises for purposes likely to cause a nuisance, such

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[47] *Op. cit.*, t. 7, pp. 268-269.
[48] *Op. cit.*, t. 12, pp. 103-104.
[49] *Op. cit.*, pp. 192-197.

as to a drunkard or prostitutes or allows the use of machinery which causes disturbances.

Snow refers to the debate over the question of whether a co-tenant is a third person under article 1616 C.C. and feels that the weightier view is that he is not (so that the lessor would be liable for his acts). He also suggests, in support of that school of opinion, that by "mere trespass" (*simple voie de fait*) is meant the kind of thing referred to by Pothier, such as acts of theft, whereas in the case of the co-tenant the act is usually, he says, one of negligence. To this he adds that the lessor should be responsible since enjoyment is of the essence of the lease and the use and enjoyment may be impaired or destroyed by the damages caused by the co-tenant.

Finally, Snow declares that the clause in the lease relieving the landlord of liability for the acts of the co-tenant is valid only for diminution of enjoyment (as opposed to loss of enjoyment), and that the landlord remains liable for his personal act which may result from a failure to prevent trouble.

From the foregoing review of our jurisprudence and doctrine, we can only conclude that while the courts have shown a consistently reasonable approach to the problem of the co-tenant in the light of the facts of each case, no satisfactory supporting theory has yet been formulated. It is to this difficult task that we shall now address ourselves, and in so doing we shall review the position taken by the French authors and courts.

2. THE DILEMMA OF THE CONFLICTING PRINCIPLES AND A SEARCH FOR A NEW APPROACH.

Since article 1616 C.C. does not furnish us with a satisfactory solution to the question of whether the landlord is liable toward a tenant for the acts of a co-tenant, whether or not we say that a co-tenant is a third party within the meaning of that article, we are obliged to seek further for a principle. In so doing we shall act on the assumption that the tenant's recourse against his landlord is one that is based on contract.[50]

Even if one were to admit the possibility of there being a delictual recourse, it would not be without its difficulties, since a tenant is

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[50] Paul-André Crépeau, *Des régimes contractuel et délictuel de responsabilité civile en droit civil canadien,* (1962), 22 R. du B. 501. It is true that the landlord has been held liable under article 1053 C.C. for damages suffered by a tenant by reason of the acts of a co-tenant where the landlord has not shown reasonable care in the selection of such co-tenant (*Yonge* v. *Vineberg,* (1914), 45 C.S. 318 (C. Rev.)). While the result of the decision was certainly correct, it is open to question whether the recourse was properly treated as being a delictual one.

not normally considered to be the *préposé* of the landlord;[51] the latter will consequently not generally be liable for his acts (as opposed to the acts of his employees — article 1054 C.C.) unless there is an association of interests between them (such as where a quarry is leased and the owner shares in the profits of its exploitation).[52]

The contractual recourse would have to come within article 1612(3) C.C.:[53]

Art. 1612. Le locateur est obligé, par la nature du contrat:	Art. 1612. The lessor is obliged by the nature of the contract:
3. De procurer la jouissance paisible de la chose pendant la durée du bail.	3. To give peaceable enjoyment of the thing during the continuance of the lease.

In article 1612 we find the very general obligation imposed on the landlord to give peaceable enjoyment. It is true that the tenant is not receiving peaceable enjoyment where the co-tenant causes a flood or operates a bawdy house. Can, however, the landlord be held liable for this? If he maintains the premises in good repair, heats them properly and so forth, how can he be made liable if one tenant bothers another?

If the landlord is to be made responsible for every act of a co-tenant, the onus on him will be substantially greater than that imposed on an employer who hires his employees, dismisses them, and controls them. The landlord does not directly control his tenants;

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[51] See, *inter alia*, André Nadeau, *Traité de droit civil du Québec*, t. 8, (Montréal, 1949), no. 395, p. 348; *Vannier* v. *Larche dit Larchévêque*, (1858), 2 L.C.J. 220 (C.S.) (Badgley, J.); *Kieffer* v. *Les Ecclésiastiques du Séminaire des Missions étrangères*, (1904), 13 B.R. 89 (P.C.); *Mattocks* v. *Supertest Petroleum Corporation Ltd.*, (1941), 47 R.L. n.s. 160 (C.S.) (McDougall, J.); *Dufour* v. *Roy*, (1885), 11 Q.L.R. 192, 8 L.N. 75 (B.R.); *Gruman* v. *Grothe*, (1938), 44 R.J. 462 (C.S.) (Forest, J.); *Dupont* v. *Leaside Engineering Company*, (1931), 50 B.R. 91; *Moore* v. *Nadeau*, (1939), 77 C.S. 357 (Verret, J.; a footuote discloses that the Court of Appeal maintained this judgment). On the other hand, in *Bernard* v. *Côté*, (1892), 2 C.S. 82, 16 L.N. 87 (C. Rev.), the landlord was held responsible for the damages caused by a pipe that burst after the upstairs co-tenant had abandoned the premises in midwinter and consequently had ceased heating them, the statement being made that the co-tenant was the landlord's *préposé* for this limited purpose. It would not seem that too much significance should be attached to this statement.

[52] *Lachance* v. *Cauchon*, (1915), 24 B.R. 421. The mere fact of the rent being composed of a part of the lessee's revenues does not, however, result in an association of interests rendering the lessor liable for the lessee's acts: *Moore* v. *Nadeau*, (1939), 77 C.S. 357 (Verret, J.; a footuote discloses that the Court of Appeal maintained this judgment). This last case may be contrasted with that of *Antecol* v. *British American Oil Co. Ltd.*, (1940), 78 C.S. 21 (Forest, J.).

[53] The reference to article 1612 is not meant as ruling out other particular recourses such as, for example, that based on the lessor's warranty against defects.

the most he can do is to apply to the courts for resiliation of the lease. Such application is not well founded unless damage has already been done, so how could the landlord have prevented it? Moreover, legal proceedings can be long and drawn out — is the landlord to be liable for every further act that occurs pending the rendering of judgment and until the tenant can be evicted? On the other hand, would it be reasonable for a landlord to be allowed to plead that his obligations are limited to the delivery and maintenance of the premises and that the acts of co-tenants are no concern of his?[54]

Where a satisfactory solution has not been evolved in our own Province, we naturally turn to French authority. *La doctrine,* generally and broadly speaking, seems to take the view that where the co-tenant claims he is authorized by his lease to create a disturbance (such as by carrying on a noisy trade), this is to be considered as analogous to a *trouble de droit* for which the landlord will be liable. Apart from this, however, the opinion of the French authors seems to be that the landlord will not be liable unless the acts are repetitive, since the landlord does not have control over his tenants.[55]

The French jurisprudence, especially that of the *Cour de Cassation,* not only does not accept the distinctions suggested by the authors, but is remarkable for its consistently tough line in almost invariably holding the landlord liable toward a tenant by reason of the acts of a co-tenant, and this even when the act is an isolated one.[56] One of

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[54] For a general discussion on the intensity of the various types of obligations, the reader is referred to Paul-André Crépeau, *Le contenu obligationnel d'un contrat,* (1965), 43 Can. Bar Rev. 1.

[55] Planiol et Ripert, *op. cit.,* t. 10, no. 495, p. 635, no. 520, p. 704, no. 521, pp. 704-705, no. 526, pp. 717-718, no. 527, pp. 719-722; H., L. & J. Mazeaud, *Leçons de droit civil,* 2e éd., t. 3, (Paris, 1963), no. 1115, pp. 910-911; Aubry et Rau, *op. cit.,* t. 5, no. 366, p. 225, including footnote 37; L. Guillouard, *Traité du contrat de louage,* 2e éd., t. 1, (Paris, 1887), no. 165, pp. 170-171; Ripert et Boulanger, *Traité pratique de droit civil,* t. 3, (Paris, 1958), no. 1733, p. 572.

[56] Paris, 13 août 1875, S. 1876.2.146 (flooding damage due to overflowing of upstairs co-tenant's fountain); Lyon, 25 janv. 1881, S.1881.2.219 (a tenant leasing residential* premises was disturbed by the operation of a school by a co-tenant) — see also Trib. régional supérieur de Cologne, 19 oct. 1894, S. 1896.4.11; Cass. req., 16 nov. 1881, S. 1882.1.225 (tenant disturbed by the co-tenant's burning of rubbish causing smoke to enter victim's premises and the shaking of carpets out of the window causing dust to fall on his flowerbed); Cass. req., 17 juin 1890, S.1890.1.321 (upstairs co-tenant banged on the floor whenever the victim tenant had guests in for the playing of music); Paris, 18 janv. 1901, S.1903.2.78 (a tenant leasing residential* premises was disturbed by the leasing of other premises to a club); Paris, 5 juillet 1910, S.1911.2.214 (a tenant leasing residential* premises was disturbed by the leasing of other premises to a sewing woman who there carried on her business and hung out signs); Cass. civ., 21 mai 1930, S. 1930.1.285 (a tenant operating a workshop was disturbed by a co-tenant

the few exceptions was made in a case where a tenant fell over a suitcase left by a co-tenant in the hallway outside the apartment of the janitor while he went to give instructions to the latter before departing on holiday; the Paris Court of Appeal held that the landlord could not be held liable under such circumstances, since the momentary placing of a suitcase in the hallway had no connection with the lease.[57] However, it is to be noted that this case did not go to the *Cour de Cassation*, where the result might have been different in view of the fact that a landlord was held liable toward a tenant by that Court for an explosion caused by a co-tenant who turned on the gas as a means of committing suicide,[58] which would appear just

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to whom a lease was granted to enable him to exercise his profession of weaver); Cass. civ., 20 juillet 1932, S.1932.1.382 (flooding damages due to bursting of pipe in apartment of upstairs co-tenant); Paris, 22 déc. 1937, Gaz. Pal. 1938.1.235 (lessor allowed co-tenant to compete in the same line of business as that of the victim tenant despite a clause in the lease prohibiting competition); Paris, 30 mars 1938, Gaz. Pal. 1938.1.907 (flood caused by co-tenant's negligence); Cass. soc., 25 oct. 1946, J.C.P. 1947.2.3400 (flood caused by upstairs co-tenant); Cass. civ., 15 mars 1948, D.1948.241 (smoke entered leased premises from stove pipes on the front of the building that served the premises of the downstairs co-tenants); Cass. civ., 10 juin 1949, J.C.P. 1949.2.5203 (explosion of gas furnace in basement of co-tenant operating a patisserie); Paris, 5 nov. 1956, Gaz. Pal. 1956.2.334 (explosion resulting from defective gas pipes); Cass. civ., 24 janv. 1961, J.C.P. 1961.2.12078 (explosion resulting from a co-tenant turning on the gas as a means to commit suicide); Cass. civ., 29 mai 1967, Bull. civ. 1967.1.184, (disturbances until late hours caused by the operation of a café, including brawls).

* The adjective used is "bourgeois", e.g. "habitation bourgeoise"; in this connection, see Michel Dagot, *La clause d'habitation bourgeoise*, J.C.P. 1967.1.2108.

[57] Paris, 27 janv. 1955, D.1955.527.

[58] Cass. civ., 24 janv. 1961, J.C.P. 1961.2.12078. It is true that the *Cour de Cassation* did dismiss an action by a tenant against a landlord in which damages were claimed by reason of the loss of a tenant's moveable effects, it being alleged that the loss was due to theft on the part of co-tenants (Cass. civ., 1 mars 1960, S.1961.1.233). However, it is to be noted that the facts of the case rendered the court skeptical of this allegation. Plaintiff was an Italian who rented a villa in Cannes in 1938, put effects in it, returned to Italy, and claimed damages on the ground of theft in 1954. The Italian army had been in occupation during the war. Apart from the foregoing facts, it would not appear to be in contradiction with the rest of the jurisprudence of the *Cour de Cassation*, which so readily holds the landlord liable for the acts of co-tenants, to exclude a possible theft, especially in the light of the circumstances of the present case. The co-tenant who commits theft is not only not purporting to exercise a right under his lease — he is stepping right out of his role as tenant — unlike the co-tenant who turns on the gas to commit suicide, where a facility of the leased premises is at least being used, thus providing a thread of connection between the person committing the act and his position as tenant (though this thread is slender indeed and not particularly logical).

as foreign to a tenant's rights under his lease as the action of a tenant who left his suitcase outside the janitor's office while giving instructions (presumably in connection with the leased premises) before going away for a vacation.[59]

The *Cour de Cassation,* as justification for its decisions, has taken the stand that the co-tenant is not a third person under article 1725 C.N., which is the equivalent of our article 1616.[60] Consequently the landlord cannot evade responsibility on the basis of this article, which is considered as a defence for the landlord only where the third person is a stranger. Not being able to invoke article 1725 C.N., the landlord is then faced with article 1719 C.N., which is the equivalent of our article 1612.[61] The court has pointed out that the landlord has a recourse in warranty against the offending co-tenant for reimbursement of the damages he has had to pay.[62] A corollary of this is that it is no defence for the landlord to plead, when sued by a tenant on the ground of disturbances caused by a co-tenant, that in the latter's lease it was stipulated that he was to avoid causing a disturbance. The violation by a co-tenant of an obligation imposed on him in his lease (in this instance, that of not causing disturbance to other tenants) is not an excuse for the landlord.[63]

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[59] A recent decision seems to have sided with *la doctrine* rather than with the *Cour de Cassation*: Colmar, 27 avril 1966, D. 1967. Somm. 5. This case involved an agreement whereby the landlord would no longer supply water in the usual way to a particular tenant, who would thenceforth have to obtain his supplies from the sole remaining tap in the basement. This tenant, unknown to the landlord, re-installed a water pipe which froze in the cold weather and caused water damage to another tenant. The landlord was held not to be responsible because the tenant had stepped outside of the contractual relationship. It is questionable whether the *Cour de Cassation* would maintain this judgment. See also Lyon, 10 févr. 1882, Gaz. Pal. 1881-1882.2.109.

[60] Art. 1725 C.N.: Le bailleur n'est pas tenu de garantir le preneur du trouble que des tiers apportent par voies de fait à sa jouissance, sans prétendre d'ailleurs aucun droit sur la chose louée; sauf au preneur à les poursuivre en son nom personnel.

[61] Art. 1719 C.N. (excerpt):

Le bailleur est obligé, par la nature du contrat, et sans qu'il soit besoin d'aucune stipulation particulière:

3. D'en faire jouir paisiblement le preneur pendant la durée du bail.

[62] This would, of course, only be maintained outside of those instances in which the landlord had authorized the commission of the disturbance (e.g. the leasing of the premises for the carrying on of a profession involving noise). An example of a situation where a tenant will have a claim against a landlord by reason of the disturbances caused by a co-tenant but where the landlord himself will have no recourse against the co-tenant is seen in *Pasquini* v. *Mainville,* (1917), 52 C.S. 22 (the head note is not on point).

[63] Cass. civ., 21 mai 1930, S. 1930.1.285.

The holding by the *Cour de Cassation* that a co-tenant will not be considered a third person under article 1725 C.N. results in an unusual severity from various points of view. The first is the landlord's liability for the damages caused by even an isolated act of a co-tenant, such as the causing of a flood by the leaving on of a tap, or the bursting of a pipe through freezing. The responsibility of an employer for the negligence of his employee is a severe one that is justified on the basis of the right of the employer to select his men, to control them and give them orders, and to dismiss them if he discovers they are unsuitable (he thus has a chance to put an end to the relationship before something serious occurs). Moreover, he is only liable where his employee has committed a fault.

Secondly, the landlord, once he has accepted a tenant, has very little control over him. Moreover, once he discovers he has made a mistake, how is he to evict him? He may only do so through a court judgment, and will probably only have the grounds for it once the disturbances have been made — that is, too late. Furthermore, the mere fact of a tenant having caused a single flood would rarely be a ground for the cancellation of his lease.

In third place must be added the fact that the *Cour de Cassation* does not appear to distinguish between acts of co-tenants that constitute fault and those that do not. A landlord may very well, as a result, be liable even in the absence of fault, in contrast to the employer.

Fourthly, the flat holding that the landlord is responsible for acts of co-tenants results in liability being imposed on the landlord in instances where there is only the remotest connection between the act and the lease. A blatant example is where the landlord has been held liable for the damage caused to a tenant by an explosion resulting from a co-tenant committing suicide by leaving the gas turned on.[63a]

The result of the jurisprudence of the *Cour de Cassation* is that the landlord is held to warrant the tenant against the acts of a co-tenant, with the only effective recourse left to the landlord being that of claiming reimbursement from the co-tenant, which claim will only lie in certain instances.

The very strictness of the solution of the French courts is all the more surprising in that France has long had such rigid rent controls that it is virtually impossible for the landlord to ever evict a tenant, and the rent has been kept at such low levels that real

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[63a] *Supra*, note 58.

estate has in many instances ceased to be a profitable investment,[64] and the view has even been entertained that the landlord is not obliged to carry out repairs when the cost of the same would be out of proportion with the rate of rent being paid.[65] This is very different from the view taken in Quebec, where a landlord is always bound to carry out repairs when premises become uninhabitable, regardless of lease stipulations relieving the landlord of his obligation to repair, as the view is held that enjoyment is of the essence of the contract of lease, to which may be added an element of public order.[66]

The mere severity of the rule laid down by the French courts is not, however, sufficient justification in itself for condemning it out of hand.[67] Even if the landlord is not able to exercise an effective control over his tenants, especially with respect to isolated acts, several powerful arguments can undoubtedly be made in favour of his always being held liable. Firstly, the proposition can be made that it is the landlord who should always bear the brunt, even where he did not authorize the act or was not otherwise responsible for its happening, since it was he who granted the lease to the co-tenant.

Secondly, one might argue that it is only right that tenants should have a greater degree of certainty of being able to exercise an effective recourse, which will be the situation if the landlord is held liable, since he is more likely to be solvent than the co-tenant and is less prone to move away leaving no assets. The effect of this is to render the landlord the guarantor of the solvency of his tenants, as it is he who will suffer the loss if his proceedings against the co-tenant in recovery of the damages he has been condemned to pay are worthless.

Thirdly, it can also be suggested that a person who takes on the business enterprise of operating an apartment house for a profit must assume the risks arising out of the management of the same, and that the acts of co-tenants are included in those risks. In other words, just as the landlord is liable for defects in the physical prem-

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[64] Note Paul Esmein, J.C.P. 1961.2.12301.

[65] Mazeaud, *op. cit.*, t. 3, no. 1110, pp. 908-909; Planiol et Ripert, *op. cit.*, t. 10, no. 509 *bis*, pp. 665 *et seq.*

[66] Durnford, *loc. cit.*, at pp. 499-504.

[67] Interesting notes have been written commenting on some of the leading cases, e.g. by Paul Esmein with reference to Cass. civ., 24 janv. 1961, J.C.P. 1961.2. 12078; Cass. civ., 16 juillet 1951, J.C.P. 1952.2.6717; Cass. civ, 10 juin 1949, J.C.P. 1949.2.5203; Cass. soc., 25 oct. 1946, J.C.P. 1947.2.3400; and by André Tunc with reference to Paris, 27 janv. 1955, D.1955.527.

ises under article 1614 C.C., he is considered as likewise responsible for defects in the persons of his tenants.[68]

Nor is it an answer to the foregoing arguments to say, as do the French authors *(supra)*, that a distinction should be made between those instances where the co-tenant is acting or pretending to act within the scope of the terms of his lease and those where he commits acts outside of the contractual relationship, with the landlord being held liable only in the former situations. For the tenant cannot be expected to know what are the terms of the lease between the landlord and the co-tenant, or what interpretation will be put on them by the courts, for these constitute *res inter alios acta;* nor will he necessarily know until the plea is filed, if he sues his co-tenant, whether the latter will even be claiming that his acts were within his rights under the lease, and additional proceedings against the landlord may then be necessary. It can be argued that it is preferable to allow the tenant to sue the landlord, and leave it up to the latter to obtain reimbursement from the co-tenant where applicable.

The foregoing arguments, powerful though they may be, do not mean that the solution of the *Cour de Cassation,* that the landlord is always held liable for the damage suffered by a tenant as a result of the act of a co-tenant, is necessarily the most reasonable one. It can be unreasonably harsh in some circumstances, and even ridiculous in others.

Is it just to hold the landlord liable whenever a co-tenant commits an isolated act causing damage? When we consider that the landlord has neither the effective right of control nor that of dismissal that the employer has over his employee and that isolated acts are frequently unforeseeable (such as a co-tenant causing a flood by leaving a tap on), we may suggest that the landlord should not be automatically held responsible in all circumstances. In effect, this would be rendering him liable for fortuitous events.

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[68] This, however, overlooks the school of thought that says that the landlord is only liable for damages caused by defects when it can be shown that he was aware of them or had been put in default to remedy them. In this connection, see *inter alia, Clerk* v. *Poissant,* (1920), 57 C.S. 528 (C. Rev.); *Bernard* v. *Cymbalista,* [1955] C.S. 434 (A. I. Smith, J.).

Such knowledge, on the other hand, is probably only necessary in order to make the landlord liable for damages, and not for the resiliation of the lease alone.

When, then, should the landlord be liable for the acts of co-tenants ?[69] He should clearly be responsible for those acts that disturb the peaceable enjoyment that are both repetitive and constitute sufficient grounds for him to obtain a cancellation of the lease. Until the first act has occurred, he is not even aware that the tenant is an unsuitable one (save in those cases where he has shown imprudence in accepting a tenant who is clearly unfit), and until there is justifiable cause for him to have the lease resiliated (which will not always result from the co-tenant's having committed an isolated act), he is helpless to do anything and should therefore not be held liable.

Thus, where there is an uninterrupted series of acts, the landlord should be liable when these continue, and up to the time of his taking action in cancellation of the lease.[70]

The foregoing does not mean, however, that the landlord will not be liable for the consequences of an isolated act of a co-tenant. Hence where uninhabitability results, the same is always a ground for cancellation. Other grounds would include those already applied by our courts (see *supra*), such as instances where the landlord has authorized the commission of the act either by his lease to the co-tenant or otherwise, where the landlord has not exercised reasonable care in the selection of the offending co-tenant, where the trouble can be said to have been caused by a defect in the premises just as much as by the co-tenant, where the landlord has been warned of impending trouble but has not acted to prevent it, and where he has leased to a competitor despite a clear undertaking not to. In all these instances the landlord will be liable even though only an isolated act

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[69] The reader is referred, in this connection, to the discussion on intensities of the different categories of obligations in Paul-André Crépeau, *Le contenu obligationnel d'un contrat*, (1965), 43 Can. Bar Rev. 1. One may perhaps be permitted to conclude that the landlord is subject to an obligation of result, i.e., that he will be liable for the acts of co-tenants except where the same constitute fortuiteus events, the burden being on him to establish that the act complained of does constitute such an event (e.g. that the act was isolated and, in other respects as well, unforeseeable).

[70] If he has shown diligence in taking action, the lessor would presumably not be held liable for disturbances occurring between the commencement of the action and the obtaining of eviction following the rendering of judgment, unless it was a case such as having imprudently accepted a tenant who was clearly unsuitable in the first place. It is to be noted that the *Cour de Cassation*, which has taken a tough line in holding the landlord liable *(supra)*, dismissed a defence that was based on the fact that the landlord should not be held liable for acts of co-tenants where those acts were the only grounds on which the landlord could take action to have the lease resiliated, so that the landlord was helpless until the very acts for which he was being held responsible had been committed: Cass. civ., 29 mai 1967, Bull. civ. 1967.1.134.

is committed, since he has made himself liable by his own actions (with the possible exception of a defect for which he is liable anyway, though not always for the resulting damages).

On what grounds should the landlord be allowed to escape liability other than that of an isolated act that could not have been foreseen? They should be few in number, because the landlord must not be allowed to evade his responsibility for furnishing peaceable enjoyment; he is in a better position to control the acts of his tenants than they are able to control each other, and he not only selects them but also stipulates the conditions under which they will occupy their premises and knows what rights have been granted to each tenant and of which the other tenants are not aware. Consequently, while our courts have not often denied tenants a recourse against their landlords based on acts of co-tenants without good cause, it is respectfully submitted that some of the grounds should only be accepted with some degree of reserve. In particular, the landlord's defence that the damage was due to the failure of the co-tenant to effect tenant's repairs would scarcely appear to be a valid ground, for how is the tenant who has suffered damage to know what are the conditions as to responsibility for repairs contained in the co-tenant's lease? It would appear more reasonable not to allow the landlord to avail himself of such a defence but to reserve to him a right to obtain reimbursement from the co-tenant who had failed to perform his contractual obligations toward him.

It would also seem that in only very exceptional cases should the landlord be able to escape responsibility on the ground that the tenant should have called the police and laid a charge in the Municipal Court in order to have a disturbance cease.

Conclusion

Article 1616 C.C., which was designed to absolve the landlord of responsibility for the acts of strangers not claiming any right on the property,[71] has failed to provide a solution insofar as acts of co-tenants are concerned. It has frequently been invoked both for and against holding the landlord liable for the acts of co-tenants, so that it is largely useless as a guide. It has no reliability, since the courts seem to decide the cases on the basis of what is reasonable under the circumstances, and then sometimes invoke article 1616 in whichever way it supports their judgments.

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[71] This is subject to the exception of article 1617 C.C., which does provide the tenant with some recourse where the third party is insolvent or unknown.

The confusion is not, however, the fault of our courts, for if article 1616 were applied consistently either in one way or the other to the problem of the co-tenant, injustice would often result. It would not be fair to absolve the landlord for every act of co-tenants, for he is responsible for furnishing peaceable enjoyment to each tenant, and this will not occur where the landlord does not have any responsibility for the acts of his tenants. On the other hand, the inequity that arises from the position taken by the *Cour de Cassation* that the co-tenant is not a third party under article 1725 C.N.[72] (thus making the landlord liable for all disturbances caused by him), is seen in the judgment holding the landlord liable for damages due to an explosion resulting from a co-tenant's turning on the gas with a view to committing suicide.

The solution to the problem of the co-tenant is not to be found in article 1616. The liability of the landlord for the acts of co-tenants is based on his obligation to furnish peaceable enjoyment under article 1612(3) C.C. Thus he will be liable for the consequences of such acts. He cannot be liable, however, for everything the co-tenant does because, being human, he lacks clairvoyance. He will therefore not be responsible for isolated acts which he could not reasonably have foreseen or prevented.

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[72] The equivalent of our article 1616 C.C.