1914

*March 4, 5.
*Oct. 13.

F. X. ST.-CHARLES & COMPANY (DEFENDANT)..... } APPELLANT;

AND

DAVID S. FRIEDMAN AND OTHERS (PLAINTIFFS)..... } RESPONDENTS.

ON APPEAL FROM THE SUPERIOR COURT OF THE PROVINCE OF QUEBEC, SITTING IN REVIEW AT MONTREAL.

Lease—Resiliation clause—Ejectment—Sale — Subrogation — Notice — Change—Registration—Articles 1608, 1609, 1642, 1657, 1663, 2128 *C.C.*

An unregistered written lease of real estate by H. to S. reserved the right to terminate the lease in case of a sale of the property, by giving three months' notice. At the expiration of the term, five years, the lease was extended for three years, terminating 1st of May, 1915, upon the same conditions. Subsequently H. sold the property to M. subject to the lease; and M. afterwards sold it to F. with subrogation in all his rights under the lease then current and an undertaking that the lease would be cancelled on 1st of May, 1913, and the premises then vacated. M. notified S. of this sale, requesting him to pay the rent to the purchaser, and, on the 29th of January, 1913, H. and M. gave notice to S. of cancellation of the lease to take place the 1st of May following. F. gave no notice but continued to collect the rent until the end of April following. In an action by F. for the ejectment of S.,

Held, Idington and Anglin dissenting, that the lease should be declared cancelled.

Per Fitzpatrick C.J. and Brodeur J.:—Under the provisions of Articles 1663 and 2128 C.C., the lease exceeding one year which has not been registered cannot be invoked against a subsequent purchaser. Idington and Anglin *contra.*

Per Fitzpatrick C. J., Idington, Anglin and Brodeur JJ.:—As the rights of the lessor had passed to the subsequent purchaser, cancelling could be demanded by him under the stipulation in the lease in favour of the original lessor; and

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PRESENT:—Sir Charles Fitzpatrick, C. J. and Idington, Duff, Anglin and Brodeur JJ.

1914

ST.-CHARLES AND COMPANY v. FRIEDMAN AND OTHERS.

Per Fitzpatrick C.J. and Brodeur J.—The notice of cancellation given by H. and M. was effective in favour of F., Idington and Anglin J.J. *contra*.

Per Anglin J.—The plaintiffs, having acquired the property expressly subject to the defendant's lease and taken subrogation to the lessor's rights thereunder, cannot invoke Article 2128 C.C. to avoid such lease.

Judgment of the Court of Review (21 R.L. n.s. 96) affirmed, Idington and Anglin JJ. dissenting.

APPEAL from the judgment of the Superior Court, sitting in review at Montreal (1), affirming the judgment of Dunlop J. at the trial and maintaining the respondent's action.

In March, 1907, Harris Vineberg leased property on Windsor Street in Montreal to the appellant for five years from the 1st May, 1907, reserving the right of terminating the lease in case of a sale of the property by three months' notice. On 29th June, 1911, while appellant was still in occupation of the premises under the lease, an agreement was made to extend the lease for another period of three years from 1st May, 1912, to 1st May, 1915, with the same conditions. In June, 1911, Harris Vineberg sold the premises to Moses Vineberg, subject to leases which the purchaser assumed and nothing was done to cancel the lease until the 2nd of May, 1912, when Moses Vineberg served a notice on appellant to terminate the lease on 3rd August, 1912. The appellant remained in possession after 3rd August, 1912, and Vineberg took no steps to have him ejected and continued to collect the rents until the 20th January, 1913, when he sold the property to the respondent subrogating them in all his rights and obligations under the lease then current and undertook to cancel the lease on the 1st of May, 1913, and have the appel-

(1) 21 R.L. N.S. 96.

1914

ST.-CHARLES AND COMPANY v. FRIEDMAN AND OTHERS.

lant vacate the premises on that date. On the same day, after the sale was made, Moses Vineberg notified the appellant of the sale to the respondents and requested him to pay the rent to them. On 29th January, 1913, Harris Vineberg and Moses Vineberg notified the appellants of cancellation of the lease to take place on the 1st of May following. The respondents, who were then proprietors, gave no notice, but continued to collect the rents up to the month of April. On May 5th, respondents took the present action to declare the lease cancelled and eject the appellant.

In the Superior Court the action was maintained and this judgment was affirmed by the Court of Review at Montreal.

Lafleur K.C., and *A. Perreault*, for appellant.

Jacobs K.C., and *Couture*, for respondents.

CHIEF JUSTICE.—I would dispose of this case on this very short ground:

At the time this action was brought, the defendants, now appellants, were in possession of the premises under a lease from Harris Vineberg, of 29th June, 1909, which was made subject to the following, among other conditions:

> The lessee will have the right to continue the present lease from year to year after the expiration of the said term, and until the property will be sold, upon the same condition and for the same rental as hereinbefore mentioned: and during such continuance of this lease, will have the right to bring the lease to a termination at the end of any year, by giving the lessor three months' notice in writing of its intention, as well as to continue this lease, as afterwards of terminating it. Failing such notice at the end of the said term, the lease will continue. And the lessor will have the right, in the event of the property being sold, to bring the lease to an end, at any time, *whether during the said term of three years*, or afterwards, by giving the lessee three months' notice in writing to that effect.

The lease, which was for a term of three years from May 1st, 1912, with a right of renewal, was not registered when the property was sold on the 1st of June, 1912, to Moses Vineberg, from whom the respondents Friedman et al. purchased. Moses Vineberg gave the required notice to cancel the lease *en temps utile.*

It appears to me obvious that, in these circumstances the case comes under article 2128 (C.C.) which reads as follows:

> The lease of an immovable for a period exceeding one year cannot be invoked against a subsequent purchaser unless it has been registered.

It is evident that, the lease not having been registered, the defendants (now appellants) cannot invoke its terms as against the plaintiffs (now respondents), subsequent purchasers of the property, and this is sufficient to dispose of the case.

It is quite true that, taken literally, it is difficult to conciliate the provisions of articles 1663 and 2128 C.C., but having considered the Report of the Codifiers (see 12 Bibliothèque du Code Civil, page 753, and 18 Bibliothèque du Code Civil, page 135) one may safely say that, after some discussion, the system adopted by the Legislature in the Code, as finally enacted, provided that leases were to be considered as charges on the immovables with respect to which they were passed and subject, as a consequence, to the ordinary rules as to registration of real rights.

I am of opinion that the appeal should be dismissed with costs.

1914

ST.-CHARLES AND COMPANY v. FRIEDMAN AND OTHERS.

Idington J.

IDINGTON J. (dissenting).—Harris Vineberg by a writing dated 28th June, 1909, "let and leased" to appellant the property in question herein for the term of three years to be reckoned from the 1st of May, 1912. The appellant happened to be in possession of the premises on the date of this lease, but as nothing, so far as I can see, turns upon the terms of that holding I will avoid the confusion apt to be created by referring thereto.

The inducement to the making of a lease nearly three years ahead of the time from which it was to run would seem to have been that the lessee agreed by this lease

> to put up a new front to the stone building on the property according to the plans prepared, to cost at least twenty-eight hundred dollars, and to have the said improvement done forthwith,

failing which the lessor had the right to demand cancellation of this lease.

Nothing unusual appears in this lease save the foregoing and the following clause:—

> The lessee will have the right to continue the present lease from year to year after the expiration of the said term, and until the property will be sold, upon the same conditions and for the same rental as hereinbefore mentioned; and during the continuation of this lease, will have the right to bring the lease to a termination at the end of any year by giving the lessor three months' notice in writing of its intention, as well to continue this lease, as afterwards of terminating it. Failing such notice at the end of the said term, the lease will continue. And the lessor will have the right, in the event of the property being sold, to bring the lease to an end, at any time, whether during the said term of three years, or afterwards, by giving the leassee three months' notice in writing to that effect.

It is upon the last sentence of this clause that the various questions arising herein must turn.

Harris Vineberg sold the property to Moses Vineberg on the 5th of June, 1911—over a year before the last sentence of this clause could become operative.

Having regard to the expected expenditure of $2,800 on the erection of a front in 1909, it could hardly be supposed that anyone could conceive of this clause on behalf of the lessor becoming operative before the term began to run. Besides that, the express language used as to bringing the lease to an end is

at any time whether during the said term of three years or afterwards.

I am, therefore, of the opinion that it never was competent for the lessor to bring the lease to an end by three months' notice until after the term had begun to run.

Then by the time the term had begun to run the original lessor had ceased for nearly a year to have any interest in the matter.

At that time the only person having a right to interfere with the appellant, the tenant, was the vendee, Moses Vineberg.

According to some notions prevalent in the minds of those concerned and, indeed, put forward in argument herein it was only the original lessor who could give notice or act in the matter. Such does not seem to me to be a position either in accord with the law when viewed historically or with the construction of this lease.

What has to be borne in mind is that it was originally the law that the vendee upon the sale taking place had the right to enter as a matter of course. It was for him to determine whether or not he should avail himself of this right. There was nothing binding him to do so. It might be for his advantage to continue the lease.

It is not necessary for our present purpose to define accurately the relative rights of such parties; which varied in many cases by custom and otherwise.

1914

ST.-CHARLES AND COMPANY v. FRIEDMAN AND OTHERS.

Idington J.

All I am concerned with here is to indicate the general nature of the relation which was existent before the code, in order to appreciate the use of the term "lessor" in this lease and also the provisions of the code which modified the relative rights of the landlord and tenant in such cases as sale by a lessor.

Now, in this case I may observe that the term "lessor" is used throughout the lease in relation to a number of things to be enjoyed by him as well as in the clause above quoted, and I see not the slightest reason to construe it in one sense in one place and in another sense in other places. It means the owner who is landlord for the time being in relation to any of the other things to be done or submitted to.

It cannot, therefore, be construed as meaning only the original landlord who may have died or disappeared. Hence, I think, Harris Vineberg had nothing to do with what Moses Vineberg or any succeeding landlord might do or wish to be done.

From this it seems to me that Moses Vineberg had the right to give the notice which he gave upon the 2nd of May, 1912, declaring the lease terminated in August following and, in the language of the clause in question, "to bring the lease to an end." The only condition precedent to his doing so was that there must have been a sale and that sale having taken place gave this vendee that right which he exercised at the earliest possible moment specified in the instrument.

Supposing the sale had taken place only a week before or the same day, he was the man to declare his intention and right and what difference can it make that the sale had taken place a year before? There must be some lapse of time long or short between the sale and the declaration of the vendee's intention.

1914

ST.-CHARLES AND COMPANY v. FRIEDMAN AND OTHERS.

Idington J.

I was at first blush inclined to think that only a sale within the term might be effective, but I do not think that view is tenable. Let us observe the provision binding the appellant, the lessee, to erect the new front in 1909, and the condition therein contained that in default "the lessor" could demand the cancellation of this lease, and ask ourselves what would have been the rights of Moses Vineberg in relation thereto in case of default had he purchased in 1909 soon after the execution of the lease?

Can there be a doubt that he would have had on such default the right in 1910, before the term had begun to run, to insist upon the cancellation of the lease?

It seems to me there could not and that illustrates the position of these parties in relation to each other at any time after Moses Vineberg became the landlord. By one term of it cancellation could have been insisted on by him before the term, or after for that matter, but by another term it clearly was not intended such a thing as termination upon notice was to take place until another time which must occur within the term.

Then it was argued that he had become bound by the deed to him to maintain the leases then subsisting as if that forbade him or his successor giving notice to terminate.

But the provision is only

> to maintain the leases of the said premises now subsisting *until the due termination of the same under the provisions thereof.*

And the question simply is whether or not the notice given on the second of May was a due termination thereof. I think it was, and there the matter should end but for what transpired later. It may well be that the parties in truth intended something else but, if I understand English, they have not so expressed it.

1914

ST.-CHARLES AND COMPANY v. FRIEDMAN AND OTHERS

Idington J.

It seems nothing more was said. The appellant stayed in possession, paid monthly the rent to Moses Vineberg till January following.

Five months' rent was thus paid and accepted after the lease had effectually been brought "to an end" in the terse language of the term providing therefor.

What right has anyone to say it was restored? There was absolutely nothing in the conduct of the parties from which to imply a waiver of the notice. There simply arose as between them that relation which the law implies from the actual condition of things when a lease is at an end. It was not argued that this was a *tacite reconduction*, and probably to do so would not have helped in any view of this case.

I shall presently revert to the legal situation thus created in light of the provisions of the code.

Moses Vineberg sold the premises in question to respondents on the 20th January, 1913, and conveyed same to them by notarial deed of that date. And then, on same day, served on appellant written notice of said sale requesting it to pay its rent in future to the respondents

as I have nothing more to do with the rents.

In the vendor's declarations contained in the said deed is the following clause:—

(4) That he hereby transfers to the said purchasers the rental of said premises as and from the date hereof, hereby subrogating and substituting them in all his rights under the lease of said premises.

This is followed by the following provision under the caption "Possession":—

The purchasers will be the absolute owners of said property with immediate possession, subject to the existing lease which, however, the vendor undertakes to cancel not later than the first of May next and have the present tenant vacate on or before that date.

Under such facts and circumstances the said Harris Vineberg and Moses Vineberg, on the 29th January, 1913, gave notice, as if given pursuant to the clause above quoted from the lease, to the appellant to quit on the first of May then next.

It is upon such notice that this action is founded.

This action was begun on the 5th of May following. The appellant, tenant, proceeded to pay the rent monthly as it had been requested to the respondents, getting receipts from them which made no reference to the notice to quit or recognized it in any way.

The notice to quit contained the following:—

> That by deed of sale passed on the day of January instant, the said Moses Vineberg sold and transferred the said property to Charles Workman and David S. Friedman.

This reference to deed of sale probably refers to the deed of 20th of January, but does not so expressly state for no date is given but "on the day of January instant." And in terms it is otherwise inaccurate in referring thereto for that deed only contained the provision above quoted as to cancellation of the lease which might have bound the grantors to procure it in various other ways.

The provision is treated as if the respondents had been empowered thereby to give notice as agents of the vendors or as if the vendors had been authorized to give notice in name and on behalf of the vendees.

I assume it might have been quite competent for the vendor and vendees to have had the vendor constituted, as between them, the vendees' agents to use the names of the vendees or that of the vendors and vendees in giving notice, and to have provided for the vendor assuming the burden of the expense of giving proper notice and all that was needed to get possession. But it has not expressly done so and, with deference I submit, has not impliedly done so.

1914

ST.-CHARLES AND COMPANY v. FRIEDMAN AND OTHERS.

Idington J.

It is quite obvious the parties concerned had some such notion as I have already adverted to, that the notice had to be given in the name of the vendors who were no longer lessors and did not fall within the terms of the clause enabling the lessor to give notice in writing to put the lease at an end.

I have already given my reasons for thinking that it is only the actual lessor at the time who can under this lease give notice. Such is the express term of the provision and it seems, I respectfully submit, a perversion of the language used to try and make it express something else.

Besides that the tenant is entitled to have in black and white what his landlord demands and to know exactly with whom he is dealing and to have the lessor (*i.e.*, the actual landlord) clearly bound to abide by what is proffered.

If, by the 1st of May, the advantages of the situation had been reversed so that the respondents did not wish to eject the tenant and the appellant did not wish to continue tenant, how could it have availed itself of this notice as an answer to the continuation of the tenancy?

Though holding the opinion that Harris Vineberg had after his conveyance to Moses Vineberg no longer power to give notice, yet I can conceive of an interpretation of this peculiar contract which intended that the clause for termination was only to become operative by him and in his name in the event of a sale by him, and upon any such hypothesis he carefully eliminated himself and his personal power by the express stipulation that the leases were to be maintained by his vendee to whom he transmitted such rights as he had and reserved nothing for himself.

I think this notice was void and even the institution of this action cannot give it vitality.

But the many complications of this maze of going the wrong way about a very simple business are not yet ended.

The situation created by the first notice, and what ensued thereupon after the 2nd of August, has to be viewed in light of the obvious fact that thenceforward from that date the appellant held on sufferance.

To that situation article 1608 of the Civil Code may apply. But if we have regard to the acts of the parties they seem to have created a situation in which article 1642 is applicable and a monthly tenancy is to follow.

In either case, article 1657 is made applicable and no notice in accord therewith has ever been given.

It is answered that the notice of January is sufficient. I reply again there was no notice by the landlord at all; and that a landlord entitled to give a monthly notice cannot give one unsuitable to the tenancy and which would not bind both himself and the tenant. It is a notice that both can rely upon which the law requires if confusion is to be avoided.

Lastly, we have, if what I have said regarding the termination in August or otherwise is unfounded, the express language of article 1663 as follows:—

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.

I am unable to see why this very clear and express language is to be changed or discarded.

1914

ST.-CHARLES AND COMPANY v. FRIEDMAN AND OTHERS.

Idington J.

With that accepted there is a complete answer to the respondents' contention in any way it can be presented as there does not seem to have been registration of this lease.

With great respect, I cannot think that there is anything which renders it necessary to import article 2128 into the discussion. That was adopted for the very obvious reasons assigned, and finds its proper place under the 18th title of the Code which is devoted to the registration of real rights and has its analogue in, I suppose, all of such systems of registration.

This article 1663 is found in another place where the subjects of lease and hire dealt with are of an entirely different character.

I see no inconsistency and there is much that is cogently put forward in the argument of Mr. Lafleur to show that the ground taken in the judgment of Mr. Justice Delorimier is not satisfactory.

I think the appeal should be allowed with costs.

DUFF J.—I am of the opinion that this appeal should be dismissed with costs.

ANGLIN J. (dissenting).—The plaintiffs sue for a declaration that a certain unregistered lease made by their predecessor in title, one Harris Vineberg, to the defendants, dated the 29th June, 1909, for a term of three years from the 1st of May, 1912,

is resiliated and cancelled and came to an end on the 1st May, 1913

This lease contained the following clause:—

The lessee will have the right to continue the present lease from year to year after the expiration of the said term, and until the property will be sold, upon the same conditions and for the same rental as hereinbefore mentioned; and during such continuation of this lease, will have the right to bring the lease to a termination at the end of any

year by giving the lessor three months' notice in writing of its intention, as well to continue this lease, as afterwards of terminating it. Failing such notice at the end of the said term, the lease will continue. And the lessor will have the right, in the event of the property being sold, to bring the lease to an end, at any time, whether during the said term of three years, or afterwards, by giving the lessee three months' notice in writing to that effect.

By deed of the 5th of June, 1911, Harris Vineberg conveyed the property in question to Moses Vineberg, who covenanted to maintain the subsisting leases and was subrogated to his vendor's rights in respect of them.

By deed of the 20th January, 1913, Moses Vineberg conveyed the property to the plaintiffs. This deed contained the following clause as to possession:—

> The purchasers will be absolute owners of said property with immediate possession, subject to the existing lease which however the vendor undertakes to cancel not later than the first of May next and have the present tenant vacate on or before that date.

The purchasers were expressly subrogated to all the rights of the vendor under the lease. On the same day the vendor, Moses Vineberg, gave to the defendants written notice of the sale and required them thereafter, to pay their rent to the plaintiffs, who accordingly received the rent for the months of February, March and April, 1913.

The plaintiffs allege that the defendants' lease was terminated by two notarial notices given to them—the first on the 2nd of May, 1912, on behalf of Moses Vineberg, and the other on the 29th January, 1913, on behalf of Harris Vineberg and Moses Vineberg. They base their claim to the declaratory judgment above mentioned and to an order for possession against the *mis-en-cause*, who are sub-tenants, solely on this ground.

1914

ST.-CHARLES AND COMPANY v. FRIEDMAN AND OTHERS.

Anglin J.

The Superior Court decided in their favour, holding that the lease had been terminated by the notices and that the defendants, by their sub-tenants, were, therefore, illegally in possession of the premises.

In the Court of Review (1), this judgment was affirmed. But, in his opinion, Mr. Justice de Lorimier, who spoke for the court, said that the first notice was of little consequence because it had not been acted on by mutual consent, and the lease had been treated as still subsisting after the 3rd of August, 1912, the date fixed by the notice for its termination. He deemed the notice of the 29th of January, 1913, to have been validly given by Harris Vineberg and Moses Vineberg in their own interest as well as in that of the plaintiffs. He was also of the opinion that article 1663 C.C. was inapplicable, but that article 2128 C.C. applied, and that, under it, the lease was void as against the plaintiffs, as purchasers, because it had not been registered. On these grounds the appeal of the defendants was dismissed.

It is against that judgment that the present appeal is taken.

For the reasons stated at some length by Mr Justice de Lorimier, in upholding the validity of the notice given on behalf of Moses Vineberg on the 2nd May, 1912, I agree in his view that the right to terminate the lease in question was not personal to the original lessor, Harris Vineberg, but passed with the ownership of the property first to Moses Vineberg and afterwards to the plaintiffs, who became, each in turn, the "lessor" within the meaning of that term as used in the clause of the lease providing for resiliation. But I incline to think that the notice of May, 1912,

(1) 21 R.L. N.S. 96.

was ineffectual because it was given in respect of a sale which had taken place eleven months before the term of the lease began and before the notice itself was given. The resiliatory clause provides that the lessor may terminate the lease

> in the event of the property being sold * * * at any time, whether during the said term of three years or afterwards

by giving notice, etc. The notice could only be given during the term or afterwards. Moses Vineberg recognized that to be the case and therefore deferred giving notice in respect of the sale of the 5th June, 1911, until the 2nd May, 1912. It cannot have been in contemplation of the parties to the lease that the lessee should be kept in uncertainty for eleven months whether the landlord intended to exercise his option to cancel or meant to continue the lease. It was, I think, the clear intent that the option should be exercisable only at the time of the sale—a reasonable delay being allowable for the giving of notice. The fact that the notice could be given only during or after the three-year term affords a strong indication that it could not be given at all in respect of a sale which took place before the commencement of the term.

But, if I should be mistaken in thinking that the notice of the 2nd May, 1912, never was effectual, I agree with the Court of Review that it was waived and the lease continued by mutual consent. The plaintiffs recognized it as subsisting on the 20th January, 1913, by the very deed which they put in evidence to establish their title, and by the notarial notice of the 29th January, 1913, on which they also rely. The defendants plead that it is still in force. As put by the respondents themselves in their factum:—

1914

ST.-CHARLES AND COMPANY v. FRIEDMAN AND OTHERS.

Anglin J.

The notices of May, 1912, are of little importance as nothing was done in furtherance thereof and the appellant was allowed to continue its occupation until the sale to the present respondents.

On the whole evidence I am satisfied that after the 3rd August, 1912, the occupation of the defendants was not under a tacit renewal (Art. 1609 C.C.), or under a tenancy by sufferance (Art. 1608 C.C.). There was a waiver of the notice and a continuance of the three years' lease by mutual consent.

Applying the reasoning of Mr. Justice de Lorimier as to the rights of the purchaser under the clauses of the lease which provides for its resiliation, on the sale from Moses Vineberg to the present plaintiffs they became the lessors of the defendants and entitled to cancel the lease under that clause. The right to give the notice only arose on the sale, by which full ownership was vested in the purchasers. On the very day of the conveyance—the 20th January, 1913—Moses Vineberg notified the defendants of the sale and of the subrogation of the plaintiffs to his rights as landlord. Thereafter his status as landlord or lessor to the defendants was completely at an end. Assuming that the notarial notice of the 29th January, 1913, was in time and otherwise sufficient, (it abounds in mistakes and misrecitals) in my opinion it could not be lawfully given by or on behalf of Moses Vineberg but could be so given only by or on behalf of the plaintiffs, who were then the lessors. The notice does not purport to be given on behalf of the plaintiffs and there is nothing in evidence to show that Moses Vineberg had any power or authority to give a notice on their behalf. On the contrary, the special clause as to possession in the deed from Moses Vineberg to the plaintiffs, above quoted, is an undertaking by the former on his own account to cancel the lease and to

have the tenant vacate the premises. I cannot regard the notarial notice of the 29th January, 1913, as something done by Vineberg on the plaintiffs' behalf which they might ratify and adopt and thus obtain the benefit of. On his own behalf, Moses Vineberg had not the right to give the notice. His undertaking to cancel the lease and secure possession of the premises for the plaintiffs did not empower him to exercises rights which had passed to them and for any abuse of which they would be accountable. Harris Vineberg's right had ceased on the 5th June, 1911.

But, if the notice of the 29th January could be deemed an exercise of the right of resiliation conferred by the lease, I would regard article 1663 C.C. as presenting a fatal obstacle to its efficacy. That article reads as follows:—

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 rule contained in article 1657 and the articles therein referred to; unless it is otherwise specially agreed.

The requirement of registration in this article is no doubt, difficult to understand. But the text is explicit and I am, with great respect, unable to restrict its application in the case of immovables to leases for a term not exceeding one year, as Mr. Justice de Lorimier thinks should be done. See Mignault, Droit Civil Canadien, Vol. 7, p. 357. The reference in the second paragraph of the article to

article 1657 and the articles therein referred to

was relied upon at bar as indicating that the application of article 1663 should be so restricted, it was said article 1657 and the articles therein referred to deal

1914

ST.-CHARLES AND COMPANY v. FRIEDMAN AND OTHERS.

Anglin J.

only with leases for one year or less. But, on reference to article 1657, it will be seen that it deals with leases where the term is uncertain, or where the lease is verbal whatever its duration. Sir François Langelier, C. J., in his "Cours de Droit Civil," Vol. 5, at p. 239, discussing Art. 1663, says:—

> C'est par erreur que les rédacteurs de notre code ont exigé cet enregistrement; il n'y avait aucune raison de le faire.

This view of the learned commentator may be correct. Mr. Mignault says in his valuable work, Vol. 7, at p. 356:

> Il y a une contradiction, du moins apparente, entre les articles 1663 et 2128.

The latter article is as follows:

> 2128. The lease of an immovable for a period exceeding one year cannot be invoked against a subsequent purchaser unless it has been registered.

Explicit as is the text of this article, that of article 1663 is equally so. I cannot find any satisfactory ground for holding that one must yield to the other, or that article 1663 should receive a construction which will confine its operation to leases not within article 2128. To so restrict its application would be to introduce into the article a qualification which there is nothing in the text to justify. As put by Mr. Mignault, at p. 357 of the 7th vol. of his work:

> Dans ce cas, l'article 1663 est une disposition inutile, puisque le tiers-acquéreur ne saurait avoir plus de droits que son auteur, le bailleur, et que celui-ci n'aurait pu expulser le locataire sous un bail annuel avant l'expiration de l'année.

It was by article 1663 that the purchaser's right to expel his vendor's tenant, recognized in the old jurisprudence, was done away with. If article 1663 applies in the case of immovables only to leases for terms not

exceeding one year, does the old right of expulsion still exist in regard to other leases? Was it the purpose of article 2128 to extinguish that right? In their report the codifiers tell us that by the adoption of article 1663 leases became charges on immovables and like other charges should be subjected to the publicity of registration. Hence, they say the introduction of article 2128. The statement is scarcely intelligible if the leases dealt with in article 2128 are not covered or affected by article 1663, since on that assumption, they do not become charges on the immovables leased and the reason assigned for requiring their registration does not exist.

The more article 1663 is considered the more apparent does it seem to be that its application cannot be restricted to leases for one year or less.

The contradiction between article 1663 and article 2128 is only apparent. Both may be given full effect although they do, no doubt, partly overlap. One makes registration a condition of the exercise of the right of resiliation by those claiming under the lessor; the other makes it a condition of the lessee and his assigns or sub-tenants claiming the protection of a lease for more than one year as against a transferee of the lessor's title, apart from any contractual provision requiring him to respect or maintain it. *McGee* v. *Larochelle* (1).

It may be, as Mr. Mignault suggests in his note at the foot of page 356, that the legislature in enacting article 1663 had in mind the protection of assigns and sub-tenants of the lessee and inadvertently made use of language broad enough to cover the lessee himself; it may be, as Sir François Langelier says, that the

(1) [1891] 17 Q.L.R. 212, at p. 216.

1914

ST.-CHARLES AND COMPANY v. FRIEDMAN AND OTHERS.

Anglin J.

provision requiring registration was inserted in article 1663 by mistake. But we may not on mere surmises deny to the lessee the advantage to which the plain and unambiguous words of the article entitle him.

In the present case article 2128 C.C. cannot be successfully invoked by the plaintiffs. In the first place they do not in their declaration rest their case on that article. No reference is made to the non-registration of the defendant's lease. On the contrary, they treat the lease as subsisting and binding on them and they claim relief not against it, but under it. Nor could they have done otherwise, because, by the deed on which they base their title and claim to possession, they expressly took "subject to the existing lease" and had themselves subrogated and substituted to all the rights of their grantors under that lease. While mere notice or knowledge of the lease before they acquired title would not prevent the plaintiffs taking advantage of its non-registration (Art. 2085 C. C.), having taken their title expressly subject to it, they cannot invoke article 2128 C.C. against it. They cannot thus escape from their express assumption of it. *Dunn* v. *Wiggins* (1). This seems to me to constitute a peremptory ground for the dismissal of this action.

For these reasons, I would, with the most profound respect, allow this appeal with costs in this court and in the Court of Review and would direct judgment dismissing the action with costs.

BRODEUR J.—Il s'agit dans cette cause d'une action en expulsion contre un locataire par un tiers acquéreur.

La cour supérieure a maintenu l'action.

(1) [1884] 4 Dor. Q.B. 89.

La cour de revision (1) a confirmé le jugement de la cour supérieure et la défenderesse appelle de cette décision de la cour de revision.

Certains points soulevés par l'appelante devant les cours inférieures ne sont pas mentionnés dans son factum et, par conséquent, je présume qu'ils sont abandonnés. Alors je ne vais référer qu'aux trois questions qu'elle a discutées dans la plaidoirie écrite et orale qu'elle a faite devant nous.

Voici ces trois points:—

1. Le nouveau propriétaire n'a pas le droit d'expulser le locataire parce que le bail n'a pas été enregistré suivant les exigences de l'article 1663 C.C.

2. Le privilège de résiliation stipulé dans le bail était personnel et ne pouvait être exercé que par le locateur originaire.

3. Les avis de congé requis par la loi et la convention n'ont pas été donnés.

Défaut d'enregistrement et portée de l'art. 1663 C.C.

Le bail est sous forme authentique et il couvre une période de trois ans. Il n'a pas été enregistré. Il contient une stipulation que le locateur pourra mettre fin au bail s'il vend la propriété. Le tiers acquéreur, s'autorisant de cette stipulation, demande l'expulsion de la défenderesse-appellante, mais cette dernière répond en disant: Vous ne pouvez me faire déguerpir parce que le bail n'est pas enregistré. Et elle se base sur l'article 1663 du Code Civil qui dit:

> Le locataire ne peut, à raison de l'aliénation de la chose louée, être expulsé avant l'expiration du bail, par une personne qui devient propriétaire de la chose louée en vertu d'un titre consenti par le locateur, à moins que le bail ne contienne une stipulation à cet effet et n'ait été enregistré.

(1) 21 R.L. N. S. 96.

1914

ST.-CHARLES AND COMPANY v. FRIEDMAN AND OTHERS.

Brodeur J.

La prétention de l'appelante sur ce point est mal fondée.

Le défaut d'enregistrement du bail ne peut être invoqué que par le tiers acquéreur et non pas par le locataire. Il est de principe que l'enregistrement n'est en général requis qu'à l'égard des tiers. On exige l'enregistrement d'un bail pour le rendre opposable au tiers acquéreur. Mais, si le bail n'a pas été enregistré, rien n'empêche ce tiers de se prévaloir de la clause de résiliation qui y est stipulée et de demander l'expulsion du locataire.

Il suffit d'ailleurs d'examiner l'historique de cette législation pour s'en convaincre.

Sous le droit romain, en vertu de la loi *emptorem*, le bail n'engendrait qu'un rapport particulier entre le preneur et le bailleur; il ne produisait que des obligations de personne à personne et le nouveau propriétaire pouvait expulser le locataire. Le contrat de louage était terminé par la vente que le propriétaire faisait de la chose louée.

Cette disposition de la loi romaine a été suivie en France jusqu'au Code Napoléon et dans la province de Québec jusqu'au Code Civil. L'ancien droit français et canadien, tout en maintenant ce droit d'expulsion pour l'acquéreur, obligeait le tiers acquéreur de laisser jouir le locataire pendant l'année courante. Il ne pouvait pas l'expulser immédiatement. Pothier, "Louage," No. 297; Troplong, "Louage," No. 505.

Le Code Napoléon adopta une règle différente de la loi romaine et il déclara que la vente de la propriété louée ne mettait pas nécessairement fin au bail, mais à la condition que le bail fût authentique ou eût date certaine; ou à moins que le bailleur se fût réservé le droit de le résilier.

L'article 1743 du Code énonça cette règle dans les termes suivants:

Si le bailleur vend la chose louée, l'acquéreur ne peut expulser le fermier ou le locataire *qui a un bail authentique ou dont la date est certaine*, à moins qu'il ne se soit réservé ce droit par le contrat de bail.

Lorsque nos codificateurs ont présenté leur rapport le 20 février 1863, ils ont recommandé d'adopter la règle du Code Napoléon; mais l'article qu'ils proposèrent différait de l'article 1743 sous le rapport de la rédaction

et dans l'omission des mots qui restreignent la règle aux baux par écrit et ayant date certaine. Cette restriction, (ajoutent-ils), paru inutile. Le mode de constater la véritable date est laissé à l'opération des dispositions générales concernant la preuve.

Il est très important de lire l'article que les codificateurs ont alors soumis car il nous donne la clef de la contradiction apparente que nous retrouvons dans les deux articles 1663 et 2128 de notre Code Civil.

Voici donc est article:

Le locataire ne peut à raison de l'aliénation de la chose louée être expulsé avant l'expiration du bail par une personne qui devient propriétaire de la chose louée en vertu d'un titre consenti par le locateur, à moins que le bail ne contienne une stipulation spéciale à cet effet.

Rapport des codificateurs, éd. 1863, vol. 2, p. 96.

Il n'est nullement question, comme on le voit, de l'enregistrement du bail.

Dans leur rapport subséquent, du 1er juillet 1864, sur l'Enregistrement, les codificateurs, après avoir dit qu'ils avaient suggéré au titre du louage que la vente de l'immeuble ne mettrait plus fin au bail, ajoutaient

L'adoption de cette disposition ferait du bail une charge sur l'immeuble qu'on doit soumettre, comme toute autre charge, à la publicité.

Il est donc suggéré d'amender l'article 39*a* en étendant la règle à tout bail pour un terme excédant un an.

1914

ST.-CHARLES AND COMPANY v. FRIEDMAN AND OTHERS.

Brodeur J.

Et ils ont proposé alors l'amendement suivant, qui fut adopté et qui est devenu le texte de notre article 2128:—

La bail d'immeubles pour un terme excédant un an ne peut être invoqué à l'encontre d'un tiers acquéreur, s'il n'a été enregistré.

Dans la seconde édition de leurs rapports, qui a été publiée en 1865, nous retrouvons de la part des codificateurs les mêmes observations sur l'article 1663 que nous avons reproduites plus haut, c'est-à-dire, que la vente ne mettait pas nécessairement fin au bail, mais qu'on ne devrait pas adopter la règle du Code Napoléon, qui exigeait un bail authentique, pour que le locatire pût rester sur la propriété.

Rapport des codificateurs, vol. 2, 2eme éd., (1865) p. 29.

Mais quand nous ouvrons ce même volume, à la page 92, nous trouvons qu'on a ajouté au texte de l'article quatre mots qui lui donnent un sens contraire à celui que les codificateurs proposaient.

Ces mots ont trait à l'enregistrement du bail.

Voici, d'ailleurs, le texte de l'article tel que nous le retrouvons à cette page 92:—

Le locataire ne peut à raison de l'aliénation de la chose louée être expulsé avant l'expiration du bail, par une personne qui devient propriétaire de la chose louée en vertu d'un titre consenti par le locataire, à moins que le bail ne contienne une stipulation à cet effet et *n'ait été enregistré.*

Comment ces quatre derniers mots se sont-ils glissés là? J'ai été incapable de le découvrir. Est-ce une erreur d'impression? C'est possible. Car, avec cette addition, l'article ne reproduit plus l'intention des codificateurs telle qu'ils l'ont exprimée dans leur rapport.

Et ensuite, cet article semble irréconciliable avec l'article 2128, qui traite de la même matière au titre de l'Enregistrement.

Les codificateurs, comme on le sait, après avoir présenté leurs premiers sept rapports sur les différentes parties du Code Civil, avaient préparé, le 21 Novembre 1864, un rapport supplémentaire pour expliquer certaines corrections qu'ils désiraient faire. Voici ce qu'ils disent au commencement de ce rapport supplémentaire:—

> Les commissaires, ayant terminé leurs travaux en tant que le Code Civil est concerné, auraient regardé ce travail comme imparfait s'ils ne l'eussent revisé en entier et avec soin, dans le but de faire au texte imprimé et soumis successivement de temps à autre les changements et additions nécessaires * * * *
>
> Le texte de ces changements proposés * * * se trouve ci-après dans l'ordre qui devra être finalement donné aux livres et aux titres du Code.

Nous examinons les changements faits au titre du louage et rien n'apparaît concernant l'article 1663 qui portait alors dans leurs rapports le No 56.

Alors on peut dire avec beaucoup de raison que cette référence à l'enregistrement dans l'article 1663 est due à une erreur. Nos commentateurs, Mignault et Langelier, trouvent cet article peu satisfaisant.

Cette différence que je viens de signaler entre le texte originaire et le dernier leur paraissait inconnue; du moins, ils n'en parlent pas dans leur ouvrage. Ce n'est pas étonnant, car cette première édition des rapports est très peu connue. J'en avais un exemplaire dans ma bibliothèque privée et je remarque que cette édition ne se trouvait pas ni à la Bibliothèque du Parlement, à Ottawa, ni dans celle de la cour suprême. La cour suprême cependant a pu se la procurer avec beaucoup de difficulté et a maintenant l'exemplaire qui paraît avoir appartenu au juge Beaudry, l'un des codificateurs.

1914

ST.-CHARLES AND COMPANY v. FRIEDMAN AND OTHERS.

Brodeur J.

Mais cet article 1663 se trouve dans le Code avec ces quatre mots ajoutés et nous devons l'interpréter et le concilier, si possible, avec les autres dispositions de la loi et surtout avec l'article 2128.

Si nous lisons littéralement l'article 1663, nous voyons que le locataire ne peut être expulsé par le tiers acquéreur, à moins que le bail ne contienne une stipulation à cet effet et à moins qu'il ne soit enregistré.

Cela veut-il dire que si le bail ne contient pas la réserve d'expulser au cas de vente le locateur ne pourra pas expulser le locataire? Certainement non.

Le locataire a le droit de rester sur la propriété, à moins qu'il n'y ait une clause qui pourvoit à son expulsion. Cette clause est stipulée dans l'intérêt du propriétaire. Et si elle ne se trouve pas dans le bail, alors le nouvel acquéreur ne peut expulser son locataire de suite.

Il résulte que cette clause étant stipulée en faveur du propriétaire, ce dernier seul peut s'en prévaloir.

C'est ce qu'enseigne Baudry-Lacantinerie dans son premier volume du Traité du Louage, au n° 1296, où il dit:

> Lorsque le bail contient la réserve du droit d'expulser le preneur au cas de vente, la clause ne peut être invoquée que par l'acquéreur; elle ne peut pas l'être par le preneur.

Le même principe doit s'appliquer quant à l'enregistrement. Il n'y a que le nouveau propriétaire qui puisse se prévaloir du défaut d'enregistrement du bail.

On a voulu, au cours de l'argument, interpréter l'article 1663 suivant son sens grammatical et littéraire.

Je préfère donner à cet article une interprétation conforme aux idées générales de notre Code et suivre en cela l'opinion de M. de Chassat, "Interprétation des Lois," p. 101, où il dit:—

L'interprétation grammaticale et l'interprétation logique étant admises, quelle est celle des deux qui, dans le doute, doit l'emporter?

Lorsqu'elles concourent pour nous retracer les mêmes objets, la solution est facile; le sens naturel des mots étant aussi la pensée de la loi, il suffit à l'esprit d'en obtenir la certitude. Mais lorsqu'elles ne concourent pas, quelle est celle des deux qui est obligatoire pour le juge? Il est évident que les mots ne font pas le droit; c'est la volonté du législateur; les mots ne servent qu'à les manifester: *Non enim lex quod scriptum est, sed quod legislator voluit, quod judicio suo probavit et recepit. L. de quibus ff. de legibus.* Toutes les fois donc qu'il y aura une différence entre le sens des mots et la pensée du législateur, il faudra abandonner les mots, puisque ce n'est pas là qu'est le droit. De là l'obligation pour le juge de rechercher le vrai sens de la loi.

Que ces quatre mots de l'article 1663 soient le produit de l'erreur, ou qu'on ait voulu par là énoncer la règle du Code Napoléon quant à l'authenticité du bail, je crois qu'il faut faire prévaloir les dispositions de l'article 2128 sur celles de l'article 1663 et décider que dans le *bail d'immeuble d'un an le tiers acquéreur est obligé de maintenir ce bail: mais si le bail excède un an, il ne peut être invoqué contre le tiers acquéreur à moins qu'il ne soit enregistré.*

Sur son premier point, l'appellante doit donc faillir. L'opinion savante et élaborée de l'honorable juge deLorimier, qui a rendu le jugement de la cour de revision, est bien fondée.

II.

Le droit de demander la résiliation du bail est-il personnel au propriétaire qui a consenti le bail?

C'est la seconde question que nous soumet l'appellante qui prétend que ce droit est personnel au locateur originaire, c'est-à-dire à Harris Vineberg.

Le bail contient la clause suivante:—

The lessor will have the right, in the event of the property being sold, to bring the lease to an end at any time, whether during the said term of three years of afterwards, by giving the lessee three months' notice in writing to that effect.

1914

ST.-CHARLES AND COMPANY v. FRIEDMAN AND OTHERS.

Brodeur J.

On a dit que les mots "at any time" dans cette clause donnaient au locateur le droit de mettre fin au bail en tout temps après la vente, qu'il pourrait laisser passer six mois, un an, ou plus après qu'il aurait été disposé de la propriété, et ensuite donner avis de résiliation.

Je suis d'opinion avec l'appellante que ces mots "at any time" se rapportent au cas où le propriétaire viendrait à vendre sa propriété, soit pendant les trois années du bail, soit pendant les années subséquentes.

Mais je ne puis partager son opinion que le bailleur seul puisse exercer ce privilège de résilier le bail et qu'il ne pourrait en vendant sa propriété transférer ce privilège au nouvel acquéreur. Tous les auteurs sont unanimes à dire que les droits stipulés dans un bail passent au nouvel acquéreur s'il désire continuer le bail. Voici ce qui dit Laurent, vol. 25, n° 395.

> L'acheteur est subrogé aux droits et aux obligations du bailleur; donc, si le bailleur a stipulé la faculté d'expulsion l'acheteur est aussi subrogé à ce droit. C'est sans doute pour ce motif que la loi n'exige pas que le contrat de vente investisse l'acheteur d'une faculté dont il jouit de plein droit en vertu de la subrogation. Il devient bailleur et il a tous les droits qui appartenaient au bailleur en vertu de son contrat. Enfin, on peut invoquer, à l'appui de l'opinion générale, le principe de l'article 1121; le bailleur qui stipule le droit d'expulsion fait une stipulation au profit d'un tiers, ce que la loi permet quand telle est la condition d'une stipulation que l'on fait pour soi-même; or, dans l'espèce, la faculté d'expulser, réservée par le bailleur dans l'intérêt de l'acquéreur, est la condition du bail, il faut dire plus, elle est stipulée dans l'intérêt du bailleur autant que dans l'intérêt de l'acquéreur, car elle a pour objet de faciliter la vente de la chose louée. On a dit que c'était une question d'intention; cela est certain en théorie, puisqu'il s'agit d'une convention; mais, en fait, l'intention des parties n'est guère douteuse. Pourquoi le bailleur a-t-il stipulé le droit d'expulsion? En faveur de l'acquéreur; donc cette faculté doit passer à l'acheteur, à moins que le vendeur ne déclare que l'acquéreur n'en pourra pas user.

Quand Harris Vineberg a vendu, le 5 juin, 1911, à Moses A. Vineberg, il aurait eu parfaitement le droit

de stipuler la résiliation du bail avec son acheteur. Mais il n'en a rien fait. Au contraire, il a déclaré dans l'acte de vente que l'acheteur s'obligeait

to maintain the leases of the said premises now subsisting, until the due termination of the same under the provisions thereof.

Les droits et obligations relevant du bail en question en cette cause sont donc passés entre les mains de l'acheteur et dès ce moment là Moses A. Vineberg devenait le créancier du droit de mettre fin à ce bail s'il venait à son tour à vendre la propriété.

III.

L'appellante prétend que les avis requis par la loi ou la convention n'ont pas été donnés.

En devenant acquéreur de la propriété, Moses A. Vineberg est devenu, comme je l'ai dit dans le paragraphe précédent, acquéreur de tous les droits et privilèges attachés au bail. L'un de ces privilèges était qu'il pouvait le résilier au cas où il la vendrait.

Le 20 janvier 1913, il a vendu aux intimés, Friedman et Workman, et il est stipulé dans l'acte de vente que le bail prendra fin, et ce dans les termes suivants:—

The purchaser will be the absolute owners of said property with immediate possession, *subject to the existing lease, which, however, the vendor undertakes to cancel not later than the first of May next and have the present tenant vacate on or before that date.*

Les nouveaux acquéreurs auraient pu parfaitement procéder à résilier eux-mêmes le bail; mais ils ont préféré en faire une condition de la vente que le vendeur lui-même donnerait l'avis de résiliation. Ils étaient bien prêts, je suppose, à se rendre acquéreurs de l'immeuble et à payer le prix élevé qui était convenu, mais à la condition que le bail fut annulé.

1914

ST.-CHARLES AND COMPANY v. FRIEDMAN AND OTHERS.

Brodeur J.

Leur vendeur représentait que le bail pouvait se terminer; alors il s'est chargé d'en faire faire la résiliation de là au premier mai, 1913. C'était d'ailleurs une convention absolument conforme au bail qui avait stipulé que le bailleur en cas de vente pouvait mettre fin au bail.

Le bail devait cependant se continuer jusqu'au premier mai. Il ne pouvait pas d'ailleurs être résilié avant cela parce que la convention stipulait un avis de trois mois. Alors Moses A. Vineberg auquel s'est joint, suivant moi inutilement, Harris Vineberg, le premier bailleur, donne l'avis de congé de trois mois mentionné au bail à la compagnie appelante par protêt notarié.

Il allègue dans son protêt la vente qu'il a faite quelques jours avant à Friedman et Workman et il ajoute ceci:

> That it is one of the conditions of the said sale that the said F. X. St. Charles and Co., Ltd., the tenant of the said property, will by notification be obliged to vacate the same under the terms of the said lease.

En donnant cet avis, il est évident que Harris Vineberg et Moses A. Vineberg agissaient alors tant dans leur propre intérêt que dans celui des nouveaux acquéreurs. Il n'y a pas de doute que l'intention de tous les bailleurs passés et présents était de mettre fin à ce bail. L'appelant ne peut donc pas prétendre que l'avis de congé ne lui a pas été dûment donné.

Pour toutes ces raisons, l'appel doit être renvoyé avec dépens.

Appeal dismissed with costs.

Solicitors for the appellant: *Gouin, Lemieux, Murphy, Bérard & Perrault.*

Solicitors for the respondents: *Jacobs, Hall, Couture & Fitch.*