The Contract of Letting and Hiring

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CHETCUTI CAUCHI
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Advice from an Alumna

By Dr Priscilla Mifsud Parker

The law course is a long journey, but one that, if well-travelled, will lead to beautiful destinations. In an industry which is today attracting many young individuals looking to develop their career in law, it is important to stay ON the beaten track and remain focused. It may go without saying that it is of great importance for all students to attain good academic grades, to be dedicated to their work, as well as to be determined in this highly-competitive industry in order to fulfil their dream of becoming lawyers one day. However what is crucial is that as students and later on as professionals we are innovative by being sensitive to the changes around us. These changes might be political, economic, environmental, socio-cultural or others; what is for sure is that they all have an impact on the profession of a lawyer. We are members of a dynamic profession which is very sensitive to its surroundings. The type and 'genre' of advice which is required from us is all affected by what is being experienced by the receivers of this advice.

Work experience is considered as a vital part of the staple diet of any prospective lawyer in order to put into practice and refine the knowledge gained from the theorethical reality of the lecture halls and lawbooks into the skills required for a successful career in law. An internship will not only show future recruiters that you have a genuine interest in pursuing a career in this sector, but that you have the practical knowledge and skills to the succeed in your role.

Here are some personal suggestions that I feel helped me during my journey:

1. *Being Ambitious*

A powerful trait in any competitive industry, ambition will help you in your law course, in your career as a lawyer, as well as in your life. Whilst the law course can be quite intimidating and challenging, an ambitious individual who is dedicated to learning new things has the potential to understand and realize long-term goals. Do not view the journey as one whole insurmountable mountain but focus on the next small goal and once achieved move on to the next and goal by goal you will reach your final target point.

In this respect, gaining valuable work experience through an internship is an important step taken by an ambitious young lawyer who wants to attain certain skillsets, and remain a step ahead of his/her peers. By being inquisitive, analytical and humble enough to accept guidance and mentoring one is guaranteed a fruitful experience in a law firm. It is also not only a means to start focusing on the direction of your career and to build upon your chosen path, but will undoubtedly expose you to the international world. This is crucial, as most of the traditional legal sectors have been intertwined with new areas of legislation and all these together now present much more opportunity for intra-jurisdictional work.

2. Networking

By engaging with counterparty students abroad and in international fora one gains an insight into another reality and is exposed to different cultures, ways of communicating and is able to bridge

the differences between parties to a mundane discussion which will eventually become a transaction or a major project in professional life.

3. *Organisational Skills*

Organisation is key in any industry. Good organisation skills always stand out to a recruiter when considering potential applicants. Such skills can be obtained by gaining experience either through organising one's own work, study plan,student events or cultural/philanthropic events.

Going hand-in-hand with this, is having a study plan. By planning your studies ahead, one will have a sufficient amount of time to meet all the demands, while also being able to participate in productive outside activities. Reviewing notes or case briefs before class can also help you follow and participate in class discussions better , whilst following case-law allows you to apply them for specific situations. In view of the amount of material involved summarising and carving out the most crucial points is essential to then build your argument in papers.

4. *Taking your own class notes*

It is always important to take down your own notes as laws are always evolving and passed-down notes would provide the context but are not ideally used for the detail. Researching the particular topic and comparing Malta's law with that of other jurisdiction gives one a completely different outlook and commenting on these variances in an exam paper, dissertation or assignment would distinguish one student from another. Not to be overlooked are also the consultation papers, commentaries and other official public documents that are issued by local authorities from time to time on different areas of law and industry. Being abreast of what is happening in industry will help putting the particular law or regulation in context.

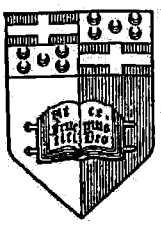
5. *Participation*

Participation is a main element of the learning process. Being actively involved during seminars and lectures and participating in legal debate sessions, mock trial competitions and moot courts are essential in order to improve your persuasive and presentation skills. If you find this very difficult (all of us have different characters and traits), then try to focus on participation in other events which will expose you to public speaking starting off in smaller groups in a more familiar environment and trying out new experiences and larger audiences as you go along.

6. *Practice is the key to success*

This leads us to our next point – practice. Attaining good grades is undoubtedly an important part of the law course, however, in themselves, they are not enough to show that you have substantial material to succeed. Working within a law firm introduces you to the world of work, and allows you to gainspecific industry-related skills which one will only ever be able to learn in a workplace setting.

Work experience can provide you with valuable insight which will help you decide what your career aspirations are and in which areas you would like to further delve into.



The University of Malta

FACULTY OF LAW

NOTES ON CIVIL LAW

VOLUME III

THE CONTRACT OF LETTING AND HIRING

(Pages 707 - 772)

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THE CONTRACT OF LETTING AND HIRING

This matter, originally, formed the object of Ordinance VII of 1867: it now forms part of Ordinance VII of 1868 incorporated in the Civil Code.

The specific obect of this contract which distinguishes it from all other similar contracts is the grant of the use of a thing or the performance of an act or a service in return for a rent or a salary. Hence the division of this contract into: letting and hiring of things, and letting and hiring of skill and labour.

No one is unaware of the importance of this contract by means of which those who have no house of their own, or cannot or do not want to make use of it if they have one, can obtain a tenement belonging to others as a dwelling place for themselves and for their family. All things and especially immovables are so applied in industry. When an owner does not dedicate himself to agriculture, industry or trade, he can, by letting his immovable property procure a benefit to himself and to the tenant and, indirectly, to society at largo. It is also by means of the letting of labour that men obtain and procure to others reciprocal assistance to the advantage of all.

Letting of Things

The letting of things is a contract by which one of the parties, called lessor, binds himself to allow to the other, called lessee, the use of a thing for a determinate period of time and for a specified rent, which the latter binds himself to pay to the former.

The formal and special element of the lease of things is designated by the words "binds himself to allow the use of a thing"; because the function of this contract is not to transfer the ownership or any other real right over the thing but only to create an obligation on the part of the lessor and a personal right in favour of the tenant of demanding the grant of the enjoyment.

In consideration of this enjoyment the tenant must pay a specified rent, because lease is an onerous and a commutative contract. The rent which the tenant is bound to pay to the lessor is the consideration or the equivalent to the enjoyment which the lessor is bound to grant.

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Comparison between Lease and Emphyteusis

Emphyteusis transfers to the emphyteuta the "quasi dominium" itself of the thing, whilst lease only confers a personal right on the lessee against the lessor for the use and enjoyment of the thing and for a specified period of time. In the event that the parties fail to establish the term, the law makes good this defect and fixes the term for them, whilst emphyteusis may be granted even in perpetuity. It is useful to recall here briefly the criteria which enables us to decide in case of doubt whether the contract be one of lease or emphyteusis. According to Section 1580 we must distinguish according as to whether the parties have expressly stated that the contract is lease or emphyteusis or have failed to mention the name of the contract. If the contract is given the name of emphyteusis, it is an emphyteutical grant notwithstanding the shortness of the period for which it is made and the nature of the agreements which are appended. If it is stated that the contract is that of lease it is regarded as a lease, unless the grant is to last, or may be made to last by the grantee for a term exceeding 16 years, and a relation similar to that created by the rules governing emphyteusis results from the agreements of the contract. In case the parties fail to give a name to the contract, it is to be regarded as a lease or an emphyteusis according to the duration of the grant and the agreements of the contract according to the criteria indicated for the second case.

Comparison with Usufruct and Other Real Rights of Use and Habitation

These are real rights which last for the whole of the life of the grantee, saving other limitations, whilst lease merely gives rise to a personal right and is limited in its duration.

The lease of a tenement which yields fruits is different from the sale of the fruits, and especially of future fruits, because in lease the lessor puts the tenant in the possession of the tenement, whilst in sale the seller transfers to the purchaser the ownership of the fruits and nothing more.

We shall divide this thesis into the following sections:-

1. Requisites of the Contract of Lease
2. Effects of this Contract
3. Dissolution
4. Right of preference
5. Subletting and assignment of lease

1. Requisites

The internal requisites are: capacity to contract, consent, object and duration, which is the special element of this contract.

As a bilateral one its object is twofold: the thing and the rent. The word "thing" is used here in its ordinary meaning which excludes the act of man, i.e. services, and includes only exterior things.

Thing. All things may be the object of lease, whether movable or immovable, corporal or incorporal, such as usufruct, the right of the emphyteuta, fishing and hunting rights. Praedial servitudes, however, cannot be given on lease because these cannot subsist independently of the dominant, and even of the servient tenement. The same thing applies to credits, because they are not susceptible of that enjoyment which is the formal object of lease: the enjoyment would be restricted to the right of receiving the interests of the credit and the lease would therefore be more properly called an assignment of such interests. This is probably the reason why Section 1615 lays down that any kind of corporal property, whether movables or immovables may be given on lease; though certain writers interpret this provision in the sense that incorporal property cannot form the object of lease. An exception must be made with regard to things "quae usu consumuntur" which cannot be given on lease owing to the fact that they cannot be used without being at the same time consumed, which necessarily presupposes the right of ownership. Lease, on the contrary, merely grants the enjoyment of the thing to the tenant, so that it must remain always the same thing throughout the duration of the lease in order to be returned to the lessor. We can only imagine a lease of "res consumabiles" made "ad pompam et ostentationem" as in the case mentioned by Troplong: a miser, being compelled to give a dinner on the occasion of his daughter's marriage, took on lease a strasbourg pie and put it on show on the table, but directed the servants not to distribute it among the guests: the next morning it was returned safe and sound to its owner.

Is it necessary that the thing given on lease be the property of the lessor? As lease is not a contract which transfers ownership but merely the enjoyment of the thing, it is sufficient that the lessor be in such a juridical position as to be able to transfer the enjoyment to the lessee. Consequently the emphyteuta, the usufructuary, the possessor of a thing subject to entail, the owner of a thing subject to retratto, may

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give the thing on lease. The lease granted by such persons is valid not only with regard to them but also vis-a-vis those who succeed to them either because of the termination or of the dissolution of their right or title. For this effect two conditions are necessary, i.e. the lease must have been granted under fair conditions and for a reasonable period of time. That the lease holds good vis-a-vis the heirs and the persons claiming through him need not be demonstrated; but with regard to those who succeed in the enjoyment of the thing without deriving their title from the lessor, it would seem "prima facie" that they cannot be bound by what he does since for them his acts are "res inter alios acta". The laws in force, however, have laid down that such a lease holds good even vis-a-vis such successors, not by reason of their succession but owing to the stability of leases, for the convenience of the lessees, especially the tenants of urban and rural tenements, and for the advantage of the persons having a right over the thing which is subject to dissolution. The abovementioned conditions have been imposed in order that the interest of such successors be protected. Such persons have the right to administer such property, and provided the said conditions concur the lease granted by them is regarded as an act of administration, and, therefore, as binding also on their successors. The law grants to these persons a wide power of administration.

As to the second condition, i.e. for a reasonable period of time, this is regulated by the law in conformity with custom, i.e. the normal period for which "boni patres familias" usually grant leases. With regard to rural tenements, the period is of eight years, with regard to urban tenements four years; as to movables, the period is regulated by custom according to the nature of the thing (Section 1619).

If the conditions under which the lease was granted were unfair, the consequence is that it does not bind the successor, who, therefore, may impugn it and obtain its annulment. If the duration exceeds the above terms, the lease is subject to be reduced to the legal terms, and the term so reduced begins to run from the day of the contract and not from the day in which the right of the lessor ceases or is dissolved, and he is succeeded by the new possessor.

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With regard to leases of ecclesiastical property, the provisions of Canon Law apply.

The tenant may also sublet the thing, provided such faculty be not expressly denied in the contract of lease, because in order to give the thing on lease it is sufficient that one be in a position to grant the enjoyment of the thing, and the lessee is in such a position because the principal lessor is bound to grant to him the enjoyment of the thing.

However, the persons having the right of use or habitation cannot give the thing on lease because these are strictly personal rights and cannot be separated from the person of their holder, not even if such separation be limited to the exercise of such rights.

Continuing the same argument, i.e. whether it is necessary that the thing given on lease be the property of the lessor, we must now examine the case of a thing belonging to several persons jointly. Section 1616 contains the following rules:

1. Each of the co-owners may give the entire thing on lease on a judgement from a competent Court and after summoning the other co-owners, i.e. those who do not want to let the thing. The Court grants such authority on condition that the thing be fit to be let, that the lease proposed be advantageous to the owners and that none of them has just grounds for opposition. The Court has the right to grant such authority both for economic reasons and as a homage to the principle that rivalry should be restrained. No one, simply because he is a co-owner, can prevent the others from deriving an advantage and of the thing because *quod mihi prodest et tibi non nocet non est impediendum".

2. A lease granted by one of the co-owners without the consent of all the others or without the authority of the Court may be annulled on a demand of those who made opposition, provided such demand be made within two months from the day on which they become aware of the letting of the thing. If this time elapses, the lease holds good even against them notwithstanding the defect of their consent and of the authority of the Court. We have said that on the demand of the dissenters made within two months the

lease may be annulled and not that the lease shall be annulled (Section 1624). The wording of the law seems to imply that the Court, before which the annulment is demanded, must take into account the conditions which according to the first rule, are required for the approval of the lease; the Court therefore will annul the lease only after considering whether those conditions concur or not.

3. The consent of the co-owners and the authority of the Court given in general terms do not deprive the co-owners of the right of preference, unless they have in some way or other renounced to it (Section 1618). If the consent is given in specific terms e.g. to let the thing to A it will necessarily put an end to the right of preference. Such intention is, however, perfectly consistent with a consent given in general terms, because the right of preference cannot be exercised except in case of lease. The same thing may be said with regard to the authority of the Court: if the co-owners have been condemned by a judgement authorizing the lease in relative terms, they cannot exercise the right of preference; but if the judgement, as often happens, is given in absolute terms, it does not put an end to the right of preference.

Rent. The other object of lease is the rent, which may consist in money or in a quantity of goods or in a part of the fruits produced by the thing. The last case is especially applicable to rural tenements, and the lease is then known as "colonia partiaria" or "mezzadria" or "mezzeria", and the tenant is called "colono parziario" or "mezzadro". It is very similar to a kind of partnership in which the lessor contributes the use of the tenement and sometimes a part of the capital which is necessary for procuring the tools and the seeds, and the tenant contributes his labour and the rest of the capital. The rent then, after deducting the expenses, i.e. the rent of the enterprise, is divided between the parties in equal or unequal portions. In case of doubt, and in the absence of proof to the contrary, the rent is presumed to have been agreed upon in money.

The rent must be fixed by the parties in the contract (Section 1623) either directly or indirectly, i.e. by referring to some other certain and determinate data. In defect of agreement, and if there is a rate established by law, it is presumed to have been agreed upon in terms of the law. If the rent is not fixed by the law or by an agreement, there is no lease owing to the defect of an essential requisite, i.e. the rent. However, in the event that parties have already begun the execution of the contract, the rent is fixed at the current

price, if any; in case there is no such current price, it is fixed on a valuation to be made by experts.

Term. Term is a special requisite of lease which is a continuous contract and must, therefore, have a final term which establishes the duration of its execution. Strictly speaking, the term should be expressly stated, because it should be the effect of the expressed intention of the parties. However, their silence is made good by the law and the duration of the lease may thus be presumed in two ways.

1. It may be presumed by the judge, i.e. inferred from circumstances tending to show the intention of the parties, such as if a lease has been granted for a given purpose it is natural to presume that the parties wanted to make the lease last for the time necessary for attaining that purpose.

2. In the absence of such circumstances, the duration is presumed to be made for the period on which the rent is calculated, i.e. for one year if the rent is fixed for so much a year, for one month if the rent is fixed at so much a month, for one week or for one day if the rent is fixed at so much a week or so much a day. When it cannot be proved whether the rent is fixed by the year, month, week or day, it is presumed to have been agreed upon according to custom; and, therefore, with regard to houses and shops it is regarded as fixed at so much a year.

b) In case of a rural tenement which yields fruits the duration presumed by law is the time necessary for the gathering of the produce of four years. The duration is, in this case, longer than that for urban tenements in order to give to the tenant sufficient time in which to derive a profit from the expenses he has incurred and from the work effected by him.

c) If the rural tenement is not capable of yielding fruits, the duration presumed by law is similar to that for urban tenements.

d) The same rules governing urban tenements apply also to movables.

e) In case of things subject to a particular usage with regard to the duration of the lease, such usage applies.

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External requisites. The rule is that the farm of the contract of lease is free (Section 1611). This rule had no exceptions before Ordinance XIV of 1913, which required a written form in case of leases of immovables for more than two years, if urban, and for more than four, if rural. A lease granted for more than two years, without a writing, is not reduced to two years, or to the period reckoned according to the way in which the rent is fixed, but it is entirely null, because the writing is required "ad substantiam" (Vide Judgement Court of Appeal, 1945).

Tacit re-letting is that lease which takes place after the expiration of a previous lease: it is a new lease of the same thing based on the tacit consent of the parties, whilst the original lease is bsed on their express consent. The requisites are:-

1. The existence of a previous lease and its termination (Section 1625).

2. The tacit consent of the parties. As regards the lessee, this consent is inferred from the fact that he has again set himself to enjoy the thing notwithstanding the expiration of the previous lease, and, as regards the lessor, from the fact that he has allowed the lessee to continue to enjoy the thing after the expiration of the term. Tacit re-letting, therefore, does not take place if the lessor has intimated to the lessee that he must return the thing on the expiration of the lease, because in this case the tacit consent of the lessor would be wanting, since it is excluded by his express intention to the contrary. If, notwithstanding such intimation, the tenant continues to enjoy the thing after the expiration of the lease, he may not plead against the demand of the lessor for the relinquishment of the tenement, the tacit re-letting of it, because the mere will of the lessor does not give rise to a contract.

The conditions of the re-letting are governed in terms of the previous lease (Section 1625). The rent will, therefore, be the same and payable at the same rate and terms. The same applies to all the other conditions of the original lease. This equality between the two leases applies to everything except to the duration, which, in re-letting, is regulated according to the duration presumed by law, with the following modifications:

1. With regard to rural tenements capable of yielding fruits, the duration of the re-letting is only of one year, i.e. the time necessary for gathering the produce of one year,

whilst the duration presumed by law in case of rural tenements capable of yielding fruits is of four years.

2. With regard to all other things, if the rent is payable by instalments, the duration of the tacit re-letting is that corresponding to an instalment and the time on which the rent had been calculated is immaterial.

Section 1627 deals with a difficulty which may arise with regard to a tacit re-letting in case there has been a surety of the lessee in the original lease. The tacit consent which gives rise to the re-letting is that of the lessor and of the lessee only, without there being any act on the part of the surety from which one can argue that he wanted to stand again as surety for the re-letting. His obligation, therefore, does not extend to the tacit re-letting unless he has expressly bound himself for the whole time until the thing is returned by the lessee to the lessor. In this case the obligation of the surety would be extended in virtue of his own expressed consent.

2. Effects of Lease

We may divide the effects of lease into three parts:

A. Obligation of the lessor.
B. Obligations of the lessee.
C. Nature of the right of the lessee.

A. Obligations of the lessor.

The obligations of the lessor derive from the principle which characterizes the function of lease, in virtue of which the lessor binds himself to allow the use of the thing to the lessee for a certain time. From this fundamental obligation the following obligations derive:

1. The obligations of deriving the thing to the lessee.

2. The obligation of keeping the thing during the whole duration of the lease, in such a state that it may be enjoyed by the lessee.

3. The obligation of warranting the lessee against molestations and evictions, latent defects and against the effects of accident and "forced majeure".

Since lease is not an instantaneous contract but a continuous one, the obligation of allowing the use of the thing

is not performed instantaneously by one act, because it is renewed continuously at every successive moment which together make up the duration of the lease. The three abovementioned obligations are natural to the contract because they have for their object the keeping of the thing in such a state that the lessee may enjoy it; the first obligation being essential to the contract because the enjoyment of the thing cannot be granted to the lessee without delivering the thing as well.

1. Delivery. The lessor is bound to deliver the thing to the lessee in a good state of repair in all respects (Section 1629) and must deliver it without any sort of damage. Therefore, all repairs at the beginning of the lease are at the charge of the lessor. Even the least important ones, such as the substitution of broken window panes, are included in order that the lessee may be granted the best possible enjoyment of the thing. It is to be noted, however, that this obligation of repairing the thing is essentially and solely natural. There is nothing, therefore, to prevent the lessee from receiving the thing even though not in a state of repair and from binding himself to make the initial repairs.

2. The keeping of the thing in good condition. The second obligation of the lessor is that of keeping the thing in such a state that it can serve the purpose for which it was let for the whole duration of the lease. Consequently, he must also effect the repairs subsequent to the initial phase of the lease, except that in leases of urban tenements certain repairs of slight and frequent damage (known as "riparazioni locative") are, as a rule, at the charge of the tenant owing to a presumption of fault, but if he can show that he is not at fault, such damages would also be borne by the lessor. Even this obligation of effecting successive repairs is only natural but not essential to the contract.

In case the lessor fails to perform this obligation, either with respect to the initial or to the subsequent repairs, the lessee may be authorized by the Court, on his demand, to execute the necessary repairs at the expense of the lessor, in accordance with the rule of the execution of obligations of doing something. He may also demand the dissolution of the lease in conformity with the rules of the "pactum commissorium".

Applying these principles, Section 1630 et seq. distinguishes between three kinds of repairs, i.e.

1. Non-urgent repairs:
2. Urgent repairs, the absence or the delay of which can cause grevious damage to the lessee (Section 1632);
3. Repairs the defect of which prevents or diminishes considerably the enjoyment of the thing (Section 1633).

1. Non-urgent repairs are dealt with by Section 1630, which attributes to the tenant an action against the lessor in order to be authorized to execute them at the expense of the lessor, after having constituted the lessor "in mora" by means of a judicial act containing an intimation to execute both the initial and the subsequent repairs. It is only if, notwithstanding such intimation, the lessor again fails to execute such repairs that the lessee may demand by way of writ of summons the authority of the Court to execute them himself at the expense of the lessor.

When such repairs are executed by the lessee, he has the right to deduct the expenses which he may have incurred from the rent which he will have to pay to the lessor. The lessee, moreover, has the right to the reimbursement of dilatory damages which he may have sustained in consequence of the delay in the execution of the repairs (Section 1631).

2. In case of urgent repairs, the lessee is authorized by the law itself to effect the repairs in question immediately at the expense of the lessor and to compensate them with the rent, without the necessity of sending beforehand any intimation to the lessor, and much less of making any judicial demand, because urgency does not allow any waste of time in such proceedings. The lessee, however, is bound to notify the lessor as soon as possible by means of a report by an expert ("perito") of the urgency of the repairs and of the damage which would have derived from any delay. Although he is not in any way bound to do anything before effecting the repairs, he is however bound to serve such notice as soon as possible. The lessor has the right to assume the continuation of the repairs which have already been started in order to ensure that the expenses be not higher than what is necessary.

3. With regard to the third kind of repairs the defect of which would prevent or notably diminish the enjoyment, Section 1633 grants an action to the lessee by which he may dissolve the lease after having put the lessor "in mora" by means of the establishment of a term, made not merely by an intimation to the lessor, but by a judgement of the Court on a demand made by the lessee to this effect.

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If the lessor allows such term to elapse, the lessee has the right to dissolve the contract, because the repairs are such that their defect prevents the enjoyment of the thing, and it implies a violation of the fundamental obligation of the lessor. The action of dissolution is, of course, optional for the lessee; and, whether he demands the dissolution of the contract or the execution of the repairs, he has the right to demand the reimbursement of damages which he may have sustained, e.g. the higher rent which he may have had to pay in order to obtain the lease of another tenement, the expenses for the transport of the furniture from one tenement to another, etc.

3. Warranties. The third obligation of the lessor is to give warranty in respect of:-

1. Molestations of right and evictions;
2. Hidden defects;
3. Accident and "force majeure". This is special to lease, and there is no warranty against such events in sale and in the contracts which transfer ownership in general.

1. The warranty of peaceful possession. According to the usual rules, this includes both the act of the lessor and that of third parties. In virtue of the warranty or his own acts the lessor has always a negative obligation consisting in the duty of abstaining from performing any act which may deprive the lessee of his enjoyment in whole or in part. Consequently, the lessor cannot, during the lease and without the consent of the lessee, alter the form of the thing let, because this would prevent the tenant from deriving that enjoyment which he aimed at obtaining in virtue of the lease, from the thing in the state in which it was at the time of the contract. This obligation of the lessor of abstaining from any molestation is subject to an exception with regard to urgent repairs which the thing let may be in need of owing to a supervening necessity during the lease.

Urgent repairs are those which cannot be delayed until the termination of the contract. The lessee, therefore, must allow their execution without standing the inconvenience and the loss of the enjoyment thus caused to him, because the interest of the lessee in not being molested must be reconciled with that of the lessor in executing the urgent reparis in order to preserve the thing which would otherwise be destroyed. Section 1637, therefore, reconciles the two interests and lays down the following rules:-

1. If such repairs last for more than forty days, the lessee has the right to a reduction of the rent in proportion to the time and to the part of the tenement or other thing of which he is deprived. In this way the interest of the lessee is again reconciled with that of the lessor.

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2. In case of an urban tenement destined for habitation repairs to which deprive the lessee of any part of the tenement necessary for his habitation and that of his family, the lessee may, according to circumstances, demand the dissolution of the lease.

3. With regard to movables, if the repairs are such as to prevent the use of the thing for any time, the lessee may also, in this case, obtain the dissolution of the lease.

The lessor must also give warranty against acts done by third parties, as a consequence of his fundamental obligation of allowing the enjoyment of the thing. The only condition required is that it be a molestation of right over the thing let or an opposition to the exercise by the lessee of a right which is a part of the lease as an accessory to the lease. On the other hand, the lessor owes no warranty against molestation of fact. The reason for this difference is that molestations of right affect the right itself of the lessee of enjoying the thing, i.e. that right which the lessor must grant and warrant; whilst molestations of fact have no connection with the right to which the lessee is entitled. The lessee may oppose such molestations by proceeding in his own name against the author of such molestation who very often will have been instigated by the lessor himself. It is natural, however, that the warranty is also due for molestations of fact when they are accompanied by such pretension to a right (Section 1640 and 1642).

In sale and in contracts which transfer ownership of things in general in order that the warranty be due another condition is required, viz. that the cause of eviction or of molestation existed at the time of the contract. This condition is not required in order to give rise to the warranty of the lessor, because lease is a successive contract and, therefore, it is not sufficient for the lessor to perform his obligation for a part of the time; he must perform it for the whole duration of the lease.

By effect of this warranty the lessee who is disturbed by a molestation of right has the right to call upon the lessor to defend him. Indeed, Sections 1641 and 1642 impose it as a duty. Section 1642 lays down expressly that if the lessee is sued by an action for the relinquishment of the thing or by an "actio confessoria", or is disturbed by any other pretension of right, he must call upon the lessor to defend him; and Section 1641 inflicts upon the lessee the penalty of the forfeiture of the right to the reimbursement of damages if he does not call upon the lessor in due time and the latter sustains a damage thereby. If the lessee is sued he has the right to be relieved from the suit "niminando auctorem", i.e. by naming the person through whom he claims in order that the judgement continue against him.

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In the case that eviction has already taken place, and the lessee is deprived of the use of the thing, whether in whole or in part, he has the following rights against the lessor:

1. In case of total eviction, he has the right to the reimbursement of damages (Section 1640). We cannot in this case talk of a reduction of the rent, because total eviction causes the dissolution of the contract "ipso jure".

2(a). In case of partial eviction, or a diminution in the enjoyment in any way whatsoever, or the subjection to any inconvenience, notwithstanding which the thing or that part which remains serves the purpose for which the lessee had taken the entire thing on lease, he has the right to a reduction of the rent. He may not demand the dissolution of the contract.

(b) If, however, the part left cannot serve the purpose for which the entire thing had been hired, he may, at his option, demand either the reduction of the rent or the dissolution of the lease and the reimbursement of damages owing to non-performance of the lessor's obligation.

There are finally cases in which though the obligation of warranty does not cease "per se", the right of the lessee, who has been evicted, to the reimbursement of damages ceases. These are the cases contemplated by Section 1641:

(i) If the lessee fails to give notice of the molestation to the lessor without delay and the lessor is prejudiced by such omission.

(ii) If the cause of eviction has only arisen after stipulation of the contract. In this case the lessor is not bound to make good the damages, because no fraud or fault is imputable, since he cannot be aware of a cause of eviction which did not exist at the moment when the lease was granted. An exception must be made when such supervening cause is due to an act of the lessor himself as e.g. a second lease which may have had its effects before the previous one.

(iii) If at the time of the contract the lessee was aware of the cause which could have given rise to the eviction.

(2) Warranty against hidden defects. The obligation of the lessor does not consist merely in transferring the thing

materially and to the lessee, but in giving it to him together with all that which is necessary for the enjoyment of the thing. This is the ground for this warranty, the conditions of which are the following:

(a) The seriousness of the defect, i.e. the defect must be such that it prevents or lessens the use of the thing (Section 1634).

(b) In case of defects existing at the time of the contract they must have been latent, i.e. the lessee could not at that time notice the defect by himself. It is not necessary that the defect existed at the time of the contract, because in lease it is indifferent whether the defect be initial or subsequent, since the obligation of the lessor to grant the enjoyment of the thing to the lessee lasts for the whole duration of the lease.

The effects of this warranty in lease are analogous to those of the same warranty in sale: just as the purchaser may choose between the "actio redhibitoria" and aestimatoria", so the lessee may either demand the dissolution of the contract by means of the "redhibitoria" or demand a reduction of the rent by means of the "aestimatoria". But he cannot claim the reimbursement of damages except in case of bad faith on the part of the lessor, i.e. in case the lessor did not reveal the defect which already existed at the time of the lease, of which he was since then aware, or had well-founded suspicions that it existed.

3. Warranty against accident and "force majeure". This warranty refers to the obstacles to, or the diminutions of, the enjoyment of the thing caused by accident or "force majeure", or by the acts of third parties performed within the limits of their rights. If for any of these causes the lessee sustains a diminution in the enjoyment of the thing, he is entitled, according to the common opinion of the jurists, to the right of suing the debtor in virtue of the warranty. Section 1631, which deals with the dissolution of lease, applies this rule to the case in which the thing let is totally or partially destroyed. In case of total destruction the lease is dissolved "ipso jure"; in case of partial destruction or unserviceability, the lessee may demand a reduction of the rent or the dissolution of the contract, according to circumstances. However, in these cases, the lessee is not entitled to any compensation because it is supposed that the destruction is not imputable to the lessor.

B. OBLIGATIONS OF THE LESSEE

His obligations are:

1. He must make use of the thing "uti bonus pater familias" and for the purpose agreed upon, i.e. he must make use of it as is established in the contract.

2. He must pay the rent.

3. In case of an urban tenement, he must execute the so-called "riparazioni locative".

4. He is to preserve the thing hired for the whole duration of the lease "uti bonus pater familias", and is, therefore, responsible for any damage caused through fraud or negligence on his part.

5. He is to report to the lessor without delay any usurpation or other damage.

6. He may not make any alteration in the thing let without the consent of the lessor.

7. He is bound to return the thing let on the expiration of the lease in the state in which he had received it.

1. This obligation refers to the way in which the lessee must enjoy the thing, with regard to which the law prescribes two rules:

(a) He must make use of it for the purpose which has been agreed upon. The agreement regarding the use of the thing may be either express or tacit: in the absence of an express declaration by the parties, the purpose may be presumed according to circumstances such as from:

(i) the previous destination of the thing;
(ii) the profession of the lessee;
(iii) the situation of the tenement.

The lessee, therefore, would violate his obligation if he makes use of the thing for a purpose different from that which has been expressly or tacitly agreed upon.

(b) However, it is not sufficient for the lessee to make use of the thing for the purpose agreed upon. He

must also make use of it "uti bonus pater familias" in such a way as not to damage the thing.

The sanctions to this obligation are:

(i) The lessor may, according to circumstances, demand the dissolution of the lease (Section 1644): this depends on the seriousness of the contravention. This is a question of fact which is left to the discretion of the Court.

(ii) In the second place, he has a right to the reimbursement of damages. The "pactum commissorium", therefore, does not always apply, but only when there is considerable damage, because if the damage is slight it would be unfair to deprive the lessee of his right.

Section 1644(2) applies this rule to the special case of a rural tenement in case the tenant fails to cultivate the tenement or does not take care of it "uti bonus pater familias", and therefore damage may be caused to the lessor for which the tenant has not given any security.

2. The second obligation of the lessee is to pay rent. The rent is the consideration for which the enjoyment is granted, and it is regarded as equivalent to it since lease is a commutative contract.

Owing to this characteristic of lease the law grants to the tenant of a rural tenement which is capable of yielding fruits, the benefit of the remission or the reduction of the rent in case of total or partial loss of the produce: we shall deal with this later on. With regard to rural tenements the generic word "fitto" assumes the special name "pigioni", and with regard to urban tenements, that of "pensione". It may sometimes be presumed both with regard to its quantity and quality; thus, unless the contrary is agreed to, it is presumed to have been established in money.

Similarly, in the absence of an express declaration of the parties, it is presumed to have been established according to the rate laid down by law; if execution is given to the contract, it is presumed to have been agreed upon at the current rate, and in the absence of a current rate it is to be established by experts.

The rent is to be paid in the amount and quality expressly or tacitly agreed upon by the parties and in the terms established by them. Even with regard to the terms, the agreement may be either express or tacit, according to usage. With regard to urban tenements, the rent is paid in advance; on the contrary according to usage in the case of rural tenements it is paid in arrears, i.e. on the termination of the term, because it is from the produce that the tenant obtains the means necessary for paying the rent. It is useful to recall here the local usages with regard to rural tenements. The rural year runs from August 15th of one year to August 14th of the following year, owing to the fact that the cultivation of the fields starts after the Feast of the Blessed Virgin and lasts up to a few weeks before August 15th. The rent, in the absence of an agreement to the contrary, is payable in arrears at the end of the rural year. Sometimes it is stipulated that the rent is to be paid in instalments. In such cases the instalments into which the rent is divided must not be considered as corresponding to the enjoyment of the field for the duration of one instalment, differently from urban tenements, the enjoyment of which is constant.

As to all other things with regard to payment of rent, the rules of payment apply. Thus the tenant must pay the rent at the residence of the creditor if both parties reside in the same island, because rent is due in money or in a quantity of goods and, therefore, can be easily carried. As to the time of payment, there is a special rule to be added which is laid down by Section 1624, which prohibits and declares null payments of rents in advance under certain conditions in the interest of hypothecary creditors of the lessor and of those who may succeed to the lessor in consequence of the dissolution of his right. The conditions under which the law provides for the nullity of such payments in advance are:

(a) In case of rural tenements any payment in advance is, in the interest of the abovementioned persons, null; therefore, if the hypothecary debtor has given on lease for one or more years the rural tenement which belongs to him but is subject to a hypothec, and has received from the tenant the payment in advance of one year's rent or even of one instalment, such payment is null vis-a-vis the hypothecary creditor, who may compel the tenant to pay again. In case of urban tenements the prohibition covers payments of rent for more than six

months and up to the amount only in which the payment made exceeds that due for six months' rent. The reason for this difference between urban and rural tenements is that with regard to rural tenements the rent is not usually paid in advance, whilst the rent of urban tenements is usually paid in advance.

(2) A prejudice must derive to the said persons, which consists in the fact that they cannot recover from the receiver the rent which he had exacted in advance.

If these conditions concur, any payment in advance is null vis-a-vis those persons, even though it may have been agreed upon and the tenant has paid in advance in execution of the agreement. This nullity is relative to those in whose interest it has been introduced and no other person, e.g. a chyrographic creditor may plead it.

We shall deal more fully with this sanction to this obligation of the payment of rent and especially with the "pactum commissorium" in the section on the dissolution of lease.

3. The third obligation of the tenant is to execute, in case of urban tenements, slight and frequent repairs known as "riparazioni locative". According to Section 1645, the repairs of stoves, panes of glass, shutters, window-frames, hinges, bolts and locks are at the charge of the tenant. They are to be borne by him because it is presumed that they were caused, as is generally the case, by the use which he or his dependants may have made of them or through their fault; and, therefore, they are not at his charge when such damage is caused by decay or "force majeure", or without any fault of the tenant.

The other repairs and expenses are not at his charge; such, especially, are those mentioned by law, i.e. the cleansing of cisterns and sinks (Section 1647). Of course, such repairs are not at the charge of the tenant, provided he be not at fault, because otherwise they would be at his charge in view of his obligation of keeping the thing "uti bonus pater familias".

4. His fourth obligation is that of preserving the thing during the lease with the diligence of a "bonus

pater familias". The thing is entrusted to him, it is in his possession during the lease, and, therefore, the interest of the owner in having the thing preserved becomes the object of an obligation of the tenant, which, according to general rules, he must perform with the diligence of a prudent father. He is, therefore, responsible for any deteriorations happening through his fraud or fault, whether "lata" or "levis" (Section 1650). In conformity with general principles, the fault of the tenant is presumed. If he alleges that there was no fault on his part, it is up to him to prove that the damage occurred accidentally or through "force majeure". The presumption is conformable to what generally happens because tenants and things usually sustain damage through the negligence of their holder.

Another special rule deriving from the special nature of lease is that the responsibility of the tenant extends to the acts of his dependants, and he is, therefore, bound to see that they cause no damage: these include the members of his family, his servants and his guests. He is also responsible for the acts of his sub-tenants who have not been acknowledged in his stead by the landlord, because vis-a-vis the latter the enjoyment of the sub-tenant is the enjoyment of the principal tenant.

Section 1651 forsees the special case of a fire breaking out in the tenement let and applies expressly the general rule. The tenant is responsible if it happens through his fault or through that of any of his dependants. As to the evidence of fault, it is presumed that it happened through his fault or through that of one of his dependants. Our Code, as well as all other Codes, has dealt with this special case in order to settle the question which was discussed before the promulgation of the Code Napoleon, i.e. whether in case of a fire the tenant and his dependants should be presumed to be at fault. The affirmative prevailed, because it is a case of "culpa contractualis", and, therefore, the principle "nemo presumitur in culpa", which is proper to "culpa extra contractualis", should not apply. Therefore, in order that the tenant may do away with responsibility he must prove that there was no fault on his part or on that of his dependants, i.e. he must show that the fire broke out through accident, or "force majeure", or a defect in the construction, or because it was communicated from a neighbouring tenement or in general without any fault of his or of his dependants.

5. The fifth obligation of the tenant is to give notice to the lessor of any encroachment or damage

affecting the thing let. The lessee is bound to give such notice without delay under pain of paying damages (Section 1654). If the lessor, owing to a delay in notification, or because the lessee has sent no notice at all, sustains damage, the tenant is answerable for it, and, as we have already seen when dealing with warranty due by the lessor against eviction, such delay may have for its consequences the forfeiture of the right and the reimbursement of damage in case of actual eviction.

6. The sixth obligation is that of not making any alterations in the thing let without the consent of the lessor. This is due to the fact that the tenant has no right to dispose of the thing in any way, and cannot, therefore, alter its form.

The law avails itself of this occasion in order to settle the question, which very often arises on the termination of the lease, with regard to any claim which the tenant may have for compensation for any improvements effected in the thing. Section 1603 provides that the tenant has no right to be compensated for improvements made without consent of the lessor, and in this way it prevents any abuse on the part of the tenant, who otherwise would be entitled to burden the lessor with useless expenses and expenses unnecessary for the enjoyment of the thing. However, if such improvements consist in materials which may be separated and may be of some pecuniary utility to the tenant when so separated, the tenant has, on ground of equity, the right to take them unless the landlord prefers to pay a sum corresponding to the abovementioned profit.

7. The last obligation is that of returning the thing thing on the termination of the lease in the state - which may sometimes result from a description which may have been made - in which he had received it at the beginning, saving the deteriorations which occurred through decay or "force majeure" (Section 1650). Any exception must also be made for deteriorations which are the consequence of the lawful use which the tenant may have made of the thing. If no description of the thing was made at the beginning of the lease, the presumption of Section 1648 applies: that the tenant had received the thing in a good state of repair in all respects, including the "riparazioni locative". Consequently, the tenant is bound to return it in a good state of repair as he is presumed to have received it, saving the deterioration happening through decay or "force majeure", or the lawful use of the thing. The presumption is based on the right of the tenant to demand that the thing be delivered to him

at the beginning of the lease in a good state of repair and on the supposition that he avails himself of his right. The presumption, however, is a "juris tantum", and evidence to the contrary is, therefore, admissible. These obligations of the tenant are secured by the privilege belonging to the lessor over the fruits and "super invectis etillatis" to whomsoever they may belong.

C. Nature of the Right of the Tenant

Is the right of enjoyment, to which the lessee is entitled, personal or real?

This question is of a great practical importance in considering whether third parties may oppose the right of the lessee or not. The laws in force, however (Section 1663), decide this question textually in the sense that the acquirer of the thing let cannot dissolve the lease. It was exactly this solution which raised doubts as to the nature of the right of the lessee, and gave rise to the question whether his right be real or personal. Personal rights are always rights which compel a specified debtor to perform something and are not available against other persons. In Roman Law it was undoubtedly personal, so much so that in case of sale or other alienation of the thing let the lessee could not avail himself of his right against the acquirer who could dismiss the lessee, saving the right of the latter to the reimbursement of damages from the lessor who thus failed to perform his obligation of allowing the use of the thing ("Lex emptori Cost." 9, Cod. "De locatio et commodato"). "Emptori quidem fundi necesse non est stare colonum qui prior dominus locavit nisi ea lege erunt", i.e. unless the lessor in transferring the tenement had imposed the obligation of respecting the lease in order to avoid the resort of the tenant for the reimbursement of damages.

The Code Napoleon abrogated the "lex emptori", and laid down that in case of sale or other alienation of the thing let, the acquirer cannot dissolve the lease, unless the lessor had reserved such right in the deed of lease. The other Codes, including our own (Section 1663) followed the rule of the French Code and, moreover, attribute to the tenant a right available, under certain conditions, even against those who succeed in the ownership of the thing owing to the cessation or dissolution of the right of the lessor even though they do not claim through him.

The purchaser or other acquirer is, after all, a person claiming through the lessor, but the right of

the lessee is made available not only against them but also against all, other successors in the ownership of the thing by their own right, independently of any transfer made by the lessor. From this innovation brought about by the Codes in force Troplong believed that he could argue that, under present law, the lessee has a real right over the thing let, because the effects of the right of the lessee extend not only vis-a-vis the lessor but also vis-a-vis third parties, even though they do not claim through the lessor.

The prevailing doctrine and jurisprudence, however, hold that the right of the lessee, even under the laws in force is still personal. The reasons are principally the following:

1. According to the notion of the law (Section 1615), the lessor binds himself to allow the use of the thing to the lessee: this expression implies a personal obligation of the lessor and not the transfer of a real right of enjoyment over the thing let to the lessee. If this were the intention of the legislator, he would have expressed himself differently as, e.g. in the definition of sale, by which the seller binds himself to give the thing to the purchaser.

2. If the right of the lessee were real, in the case of immovables it would be immovable as well, and it should therefore have been included, together with usufruct and the use of immovables , among incorporeal immovables, whilst Section 347 does not include the right of the lessee of an immovable among the rights.

3. If the right of the lessee, in case of immovables, were real, the law would have required solemn formalities, at least in order that the lease be made known to third parties through the Public Registry. The form of lease is, on the contrary, free, saving the provisions of Ordinance XIV of 1913, which requires a private writing in leases of immovables for a certain period of time.

4. If the right of the lessee were real it would not be possible to explain why Section 1642 imposes on the lessee, sued by the "actio reivendicatoria" or "confessoria", the obligation to call the lessor to the suit and grants him the right to be relieved therefrom.

Neither is it difficult to answer the arguments of the opposite view. The abolition of the "Lex emptori" may be explained without the necessity of altering the nature of the right of the lessee. The purchaser or other acquirer who claims through the lessor cannot have greater rights than those of his author. Though he be a particular and not a universal successor, and is, therefore, not bound by the obligations which burden the estate of the lessor, still, as he is a successor to the thing let, it is natural that he should receive it in the same juridical condition in which the lessor had it. This is required by the principle of the stability of contracts and by the security of the lessee. No lessee would be certain of his right if the lessor could, at any time, by simply transferring the thing to others exclude him from the enjoyment of the thing. French commentators moreover point out that, though under the sway of Common Law, the rule was that of the "Lex Emptori", it constantly happened in practice that the agreement mentioned above was introduced, so that the exception of the "lex Emptori" had become the rule by custom and the Code Napoleon abolished the "lex Emptori" only formally, because practically it had already been abolished.

As to the innovation which has derogated to the principle "soluto jure dantis solvitur et jus accipientis", it is equally justified by the necessity of protecting the tenants and by the stability of leases; and, juridically it is explained by a wide power of administration granted by law to persons having a title subject to dissolution, and not by the fact that they thus transfer a real right to the tenant, for the simple reason that even real rights granted by such persons cannot survive after the dissolution of their right. Our jurisprudence, up to a certain time, sustained the influence of Troplong's view, and held that the right of the lessee had become a real right under the laws in force. (Vide Court of Appeal, 14th October, 1872, Vol. VI, p. 290, and 20th August, 1879, Vol. VIII, p. 823). More recent jurisprudence has, however, followed the prevalent view (vide Court of Appeal, 15th May, 1896, Vol. XV, p. 519, 15th November, 1907, 20th May, 1909, Vol. XX p. 84, 208).

Conflict between several successive lessees of the same thing

As a consequence of his having regarded the right of the tenant as a real right, Troplong held that the first lessee should prevail over the second, notwithstanding that the second may have obtained possession of the thing. According to this theory, the first tenant, having a real right, could avail himself of it even against the actual holder who is also the second lessee; and the judgements of the Court of Appeal of the years 1872 and 1897 referred precisely to those questions and settled

them in this sense. On the other hand, those who follow the contrary view, i.e. that the right is a personal one, unanimously agree that the first one is to be preferred if none of the successive lessees has obtained the possession of the tenement; but, in case the second or further tenant has obtained possession of it in good faith, some writers, followed by our Jurisprudence (Vide C. of A. 1896, 1909) give prevalence to him on the ground that the right of the first lessee, which is a personal one, cannot be availed of against the subsequent tenant who has obtained possession of the tenement, and has, therefore, no action by which he can expel him. Others, however, even in this case, give preference to the first tenant because once the thing has been let to him the lessor could not then grant it to others according to the principle "nemo plus juris in alium transferre potest quam ipse habet" and because, once the right of the tenant prevails over that of the acquirer, a portion of it should prevail over that of a successive tenant.

Dissolution of Lease

Besides the causes of dissolution with which we had occasion to deal in this thesis, such as hidden defects or a partial eviction of the thing, lease is dissolved by the following causes:

1. The expiration of the time for which it was contracted.

2. The occurrence of a dissolving condition.

3. Express or tacit "pactum commissorium".

4. The destruction of the thing through accident.

5. The death of the tenant in case of a "colonia parziaria".

1. The expiration of the term (Section 1319 et seq.). If the duration of the lease is expressly agreed upon, the lease is dissolved "ipso jure" upon the expiration of the term, whether the thing be movable or immovable, and whether the immovable be rural or urban, owing to the fact that the parties have expressly established the duration of the lease and each of them knows for certain that the other party did not want to bind himself (and did not actually bind himself) for a longer period. If, on the other hand, the duration of the lease is presumed in accordance with the rules laid down by law, a distinction must be made between a rural tenement or a movable thing on the one hand and an urban tenement on the other. In the first case the lease is determined

"ipso jure" as soon as the term expires, even though it be merely presumed, without the necessity of any notice being sent by either party to the other. With regard to urban tenements, on the contrary, the lease is not dissolved by the expiration of the term but it is necessary that a notice be sent by one of the parties to the other some time before: at least one month before if the presumed duration is one year, and fifteen days if such duration is less than one year. The reason for this difference is the difficulty which the tenant of an urban tenement may encounter in finding a new tenement and in contracting a new lease which is suitable to his needs, and also the difficulty which the landlord may encounter in finding a new tenant. Consequently, that party who wants to terminate the lease on the expiration of the term presumed must notify the other in order that the latter may find a new tenement in the meantime, if he is the tenant, and in order that he may find a new tenant, if he is the landlord.

Notwithstanding the expiration of the term, if the tenant continues to enjoy the thing and is allowed to do so, there would be tacit re-letting, which is based on the presumed intention of the parties and which, therefore, cannot take place in case of an express declaration to the contrary, i.e. a declaration made by either of the parties and notified to the other party.

Until when can this notice be served in order that it may prevent a tacit re-letting? If the duration of the lease had been expressly stablished, the notice may be served even at the last moment, because the law does not require that a notice be sent beforehand; if, on the contrary, the term is presumed and the object of the lease is a rural tenement or a movable thing, the notice may also be served at the last moment, but in the case of urban tenements, the abovementioned rules apply, viz. if the landlord does not notify the tenant of his intention one month or fifteen days before the expiration of the term, thus allowing him to continue in the enjoyment of the tenement, or if the tenant does not notify the landlord as stated above and keeps on enjoying the tenement, a tacit re-letting would automatically take place.

2. The occurrence of a resolutive condition expressly stipulated

This is a cause of a dissolution of all contracts and the general rules governing the effects of the unification of a dissolving condition apply.

3. Express or tacit "pactum commissorium". The "pactum commissorium", even though it be tacit, applies to lease, which is a bilateral contract, and it may bring about the dissolution of the lease in case of delay in the payment of the rent or of non-performance of any obligation of either party. According to Roman Law, the lease was not dissolved by this cause unless the delay amounted to two years (i.e. non-payment of rent for two years or of an equivalent sum) - L. 54, par. I, Dig. hoc. Lit. Under our law any delay is sufficient, even though it refers to a part of an instalment of the rent, for the dissolution of the lease in virtue of the "pactum commissorium tacitum". The general rules, saving some modifications, are applicable here, and we must therefore make a distinction between the tacit "pactum commissorium" and the express one; in the latter case no judgement is necessary because the lease is dissolved "ipso jure", and no further term can be granted by the Court. It is necessary, however, that notice be sent, by means of a judicial act, by the party who intends to avail himself of this cause of dissolution and the dissolution takes place from the moment this notice is served (Section 1665).

In Civil Law the "pactum commissorium tacitum" is not automatic and the Court has the discretion to grant relief according to the circumstances of the case. In Commercial law, "pactum commissorium tacitum" is as a rule automatic (Section 121 of the Commercial Code). However, even under commercial law, letting of immovable property is excepted from this rule and the "pactum commissorium tacitum" is not automatic.

Until when may the debtor who has not performed his obligation prevent the dissolution of the lease by performing such obligation? The judicial act in question may be also a judicial demand, and in this case the dissolution takes place "ipso jure" as soon as the writ of summons is served, and the judgement merely ascertains the fact that the lease is dissolved. On the other hand, if the "pactum commissorium" is tacit, the dissolution does not take place "ipso jure" but a judgement is necessary to dissolve the lease, and the Court may grant a short term to the debtor. Whether the "pactum" be express or tacit, the dissolution is always optional for the creditor, i.e. the party who has been adversely affected by the non-performance. In case he demands the dissolution of the lease he may also claim compensatory damages, i.e. those deriving from the non-performance of the contract (Sections 1658 and 1659).

4. Accidental destruction "in toto" of the thing during the lease. The destruction of the thing causes the dissolution of the lease because "casus sentit dominus", i.e. in this case the lessor. As a matter of fact, the tenant also sustains the consequences of such destruction as far as the enjoyment is concerned, because

on the premature cessation of the lease for this cause he is not entitled to recover any compensation or indemnity from the lessor. In case of accidental partial destruction the lessee may, according to circumstances, demand the reduction of the rent or the dissolution of the lease; the same thing takes place if the thing has accidentally become unserviceable. If, on the contrary, either of the parties is at fault, the effects of non-performance of obligations apply, i.e. the party at fault will have to make good the damages sustained by the other.

5. As a rule, the contract of lease is not dissolved upon the death of either party, because the general rule applies that the contracting are regarded as having entered into the contract not only for themselves but also for their heirs and persons claiming through them, since the nature of the rights of the parties is not strictly personal and they are therefore transferable to the heirs.

The "colonia parziaria" is, however, excepted and it is dissolved through the death of the "colono parziario", saving an agreement to the contrary; the reason is that this kind of lease is very similar to partnership, especially because it is based on the trust placed by the landlord in the tenant to whom the concern is entrusted, and trust is not transferable to the heirs.

There are two cases which were causes of dissolution under former laws but which have been abrogated by the present ones:

1. The landlord may not dissolve the lease on the ground that he wants to live in the premises let (Section 1662). This is a derogation from our former laws, because Roman Law acknowledged the right of the lessor of an urban tenement to dissolve the lease on the ground that he wanted to occupy the building himself (B. 3, Cod. Delocato et Conducto). Subsequent laws have abolished this right and have rigorously applied to lease the general rule governing all contracts, according to which contracts cannot be dissolved by the will of one only of the parties.

Of course, there is nothing which prevents such right from forming the object of an agreement between the parties. If the landlord has reserved this faculty, he must exercise it in such a way as to reconcile the tenant's interests with his requirements: he must, therefore, notify the tenant some time before in order that he may find in the meantime another dwelling-house. This term is of one month if the remaining duration of the lease is more than one year, and fifteen days if it is less than one year.

2. In case of sale or other alienation of the thing let the purchaser cannot dissolve the lease unless the lessor had reserved this right in the contract of lease (Section 1663). The reason being that the transferee cannot acquire rights greater than those of the transferor, i.e. in the case of the landlord, and also because the tenant should not be left at the mercy of the landlord, on whom the alienation of the tenement depends. However, though transferees have no such right by law, they may be empowered to dissolve the lease by virtue of the agreement. But even though such agreement exists, if the purchaser wants to avail himself of the right reserved in his favour, he is bound to abide by certain conditions in the interest of the tenant, who even if he is not protected by the agreement itself is protected by the following rules laid down by the law (Section 1664):

(a) In case of rural tenements the purchaser must notify the tenant a year before, and he may not compel him to quit before the lapse of one year.

(b) In case of urban tenements the term is of one month, if the remaining period of lease is one year, and fifteen days if it is less than one year.

(c) Finally, with regard to this reservation (Section 1664) lays down that the purchaser of a tenement subject to redemption or pre-emption cannot make use of this right, before he becomes owner irrevocably, i.e. before the lapse of the terms for the exercise of pre-emption on the ground that once this term has not yet expired the "retraente" may exercise pre-emption and he may not want to avail himself of the right to demand dissolution of the lease.

RIGHT OF PREFERENCE

This is a right given to certain persons for certain reasons in virtue of which they are preferred in the lease of a thing to any other person on the same conditions offered by such other person. We shall divide this section into four parts:

1. Subjects, Objects, and Rational and Juridical basis of the right of preference.

2. Concourse between several persons having the right of preference.

3. Way and time in which it is to be exercised.

4. Cessation of the right of preference.

1. Subjects, Objects and Basis

The persons to whom the right of preference is attributed are:

a) Co-Owners "pro indiviso" of the thing have the right to be preferred in the lease of the thing by reason of their co-ownership: just as an owner of a thing has the right to keep it for his exclusive use, so each of the co-owners must have the right to be preferred to any other person in the use of the thing.

b) The last preceding tenant of an urban tenement with regard to a new lease of the same tenement. The ground for this right is principally of an economic nature, because it is meant to spare him from the inconvenience and the expense of shifting from one house to another. There is also a sentimental reason, i.e. the affection of the tenant towards the tenement in which he has lived or carried on his business. In the latter case there is another reason in favour of the tenant, viz. a change of the place of business may cause a loss of customers.

c) The possessor or occupier of a part of an urban tenement with regard to a new lease of the underlying part of the same tenement. Also here the reason why this right is granted is economic and it tends to procure to the possessor or occupant of the upper part of the tenement two advantages; the extension of his dwelling-place and the prevention of molestation on the part of the occupiers of the lower part of the tenement. The two parts must be one above the other and portions of the same tenement. "Same" tenement is that which is such, regard being had to the particular block of buildings, and it is immaterial that the landlord of the lower part be different from that of the upper part or that the lower part has a door of its own.

In this regard Section 1683 was amended by Act VI of 1972 by the addition of a proviso in the sense that no right of preference shall apply in the case of any building constituted or used as a common tenement house ("kerrejja") or of any building consisting of flats which though having in common other parts of the building, are constructed, leased or occupied for use separately.

Object of this right in the first case may be anything, because it is attributed on grounds inherent in the subject of the right; on the other two cases the object is only an urban tenement, because the reasons for which the law attributes the right of preference in these two cases apply only to urban tenements.

2. Concourse of Several Persons having the Right of Preference

(a) In case such persons have different titles, the order of preference is determined by the order in which we have enumerated the different categories of persons to whom it is attributed. The right of co-owners is a consequence of the right of ownership and should, therefore, prevail over all other titles based on mere economic grounds. In case of a concourse between the last preceding tenant and the possessor or occupier of the upper part of a tenement, the former prevails, i.e. the last preceding tenant of the lower part of the same tenement.

2. There can be only two cases of concourse between persons having the same title, i.e. between several co-owners and between several possessors or occupants of the upper part of an urban tenement.

(i) In the first case the concourse is settled by means of a licitation between the co-owners, each of whom has the right to demand that the tenement be let by auction ("licitato") to the highest bidder and that strangers be not allowed to bid. So that their right of preference is equal since their right of ownership is equal, and consequently each of them has the right to make use of the thing whatever be his share (Section 1682).

(ii) In the second case the concourse is settled according to the following rules:

(a) The possessor or occupier of that part of the building which is immediately above the part in question is preferred to the possessor or occupant of another part of the building.

(b) Between two possessors or occupants of as many parts of the building which are all immediately above the part in question, that one is preferred whose part extends to a greater measure over the lower part.

(c) "Caeteris paribus" the landlord of the lower part has the right to choose any one of the competing parties (Sections 1700 and 1701).

3. Way and Time for the exercise of the right of Preference

With regard to co-owners, the law does not require any special procedure and it merely states that their right of preference cannot be exercised after that the common thing has been validly given on lease to others vis-a-vis the co-owners and especially that co-owner who wants to exercise the right of preference.

With regard to the other two cases, the Ordinance contains a system of rules which govern the way and time in which such right is to be exercised. These rules are based on the fact that the right of preference is a right which is to be given priority in case a thing is let, not on any condition whatsoever but on the same conditions offered by others. Now, in order that the preceding tenant or the possessor or occupier of the upper part of a tenement to whom the right is attributed may become aware of the conditions under which the landlord intends to enter into the new lease, the latter is bound to notify the conditions agreed upon with others or offered by others, by means of a judicial act. If there is a written instrument which contains such conditions and such writing is a private one, it is sufficient that reference to it be made in the judicial act by inserting a copy of it, i.e. it is not necessary for the landlord to repeat in the judicial act itself the conditions in question one by one; if the conditions are contained in a notarial deed or in a minute of a notarial deed, it is sufficient that reference to it be made and the name of the notary and his office address be specified. Moreover, in the judicial act, the person notified must be intimated to declare within fifteen days (if the person having the right of preference is present) or within one month (if he is absent) whether he intends or not to accept the new lease under those conditions and he must be warned that in the absence of such acceptance within the said term, he will perfect his right of preference. If the person entitled to this right is absent, the judicial act must be served on his attorney, if any, otherwise it must be sent to the person charged with the custody of the tenement or in possession of the keys, or occupier of the tenement in any title without his consent; in defect of this, a notice published in the Government Gazette will serve this purpose.

If the person having the right of preference and notified in the above manner wants to exercise his right he must, within fifteen days or one month from the date of service, as the case may be, make a declaration of acceptance of the new lease under those conditions, by means of a judicial act under the sanction of nullity. If, among the conditions agreed upon or offered by others, there is the giving of a security by the tenant in order to ensure the performance of his obligations, and if the landlord, together with the notice containing the conditions, demands the giving of a security from the person notified, such person must, within the same term, exhibit the security by means of a judicial act, i.e. either in the same act in which he declares to accept the new lease under the same conditions offered by others or in a separate judicial act, provided it is presented within the same term (Section 1688).

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If the landlord is not satisfied with the security thus exhibited, he must refuse it within fifteen days from the date of service and such refusal must also be made by a judicial act. When the person entitled to the right of preferences is notified of the refusal he may, within four days from date of service, demand by way of summons that the security given be declared sufficient and that effect be given to his right of preference; the Court will then decide whether the security is actually sufficient and if the person entitled to the right of preference will have validly exercised his right. If the Court decides that it is not sufficient, it may, before giving judgement which would deprive the plaintiff of his right, grant him a further term of eight days in which he may give another security, and if the plaintiff produces such security and it is regarded as adequate by the Court, whether by itself or together with the former security, the right of preference will have been validly exercised; otherwise the Court will declare the extinction of the right.

4. Extinction of the Right of Preference

A. The right of preference attributed to co-owners is extinguished:

(i) When the thing owned in common has already been validly given on lease to others.

(ii) By renunciation of the co-owner to his right.

B. The right of preference given to the last preceding tenant of an urban tenement is extinguished by the causes enumerated in Sections 1696 and 1698 which may be grouped under three headings from the point of view of the notice.

(i) If the tenement has not been occupied by the tenant during the preceding lease or if he has left it before the new lease. The right would in this case be extinguished because the reason for which it is granted is wanting, since it is based on the tenant's affection towards the tenement and it is meant to spare him the inconveniences and expenses caused by a change of residence or of his place of business.

(ii) If the tenant has failed to fulfil his obligations during the preceding lease. He is in this case deprived of his right as a penalty for having contravened his obligation, because it is not fair to extend the right of preference to the landlord's detriment.

(iii) The limits within which the right of preference must be restricted in view of the right of ownership of the landlord and especially of his right to expel the tenant on the expiration of the lease.

The cases enumerated in Section 1696, which are based on the first two motives, are:-

(a) If the tenant does not reside in these islands, i.e. does not occupy the tenement.

(b) If at the time of the new lease the tenant is absent from these islands, and has been so absent for two years or more.

(c) If neither the tenant nor anyone of his family dwells in the premises or has dwelt therein during the last two years preceding the new lease, and the premises are mainly destined for dwelling purposes.

(d) If, before the new lease, the tenant has given up, or has been compelled to give up, the premises.

(e) If the tenant, during the last preceding lease, was not punctual in the payment of rent for two or more than two terms. For the purpose of this provision the tenant shall not be regarded as having failed to be punctual if the delay has not exceeded 15 days from the day on which the landlord had, even verbally, called upon him for payment.

(f) If he has failed to perform or has violated, any of his other obligations arising from the contract of the last preceding lease, or has not performed them until he was compelled to do so by legal proceedings.

(g) If the last preceding lease was dissolved for any cause other than that of the expiration of the time during which it was to continue.

(h) If the tenant, without the express consent of the landlord, has wholly given on sub-lease the premises, or has assigned the lease, and the premises, at the time of the new lease, are found to be held by the sub-tenant or assignee, notwithstanding that the faculty of such letting or of assigning the lease had not been excluded. If the tenant has only sub-let or assigned a part of the tenement, his right of preference is extinguished with respect to the part only, but it subsists for the remaining part,

unless the landlord is unwilling to give on lease the various parts of the tenement separately and the tenant is unwilling to accept the new lease of the entire tenement under the conditions offered by others.

In view of the rights of the landlord the tenant cannot oppose his right of preference in the cases contemplated by Sections 1697 and 1698.

1. Section 1697. If the landlord has proposed certain conditions to the tenant for the new lease, which the tenant has refused to accept, but which the Court regards as reasonable, and this notwithstanding that it results that the landlord intends to let the premises to others under less onerous conditions. These conditions are not agreed to or offered by others, but they are conditions proposed by the landlord himself and refused by the tenant, who in this case cannot enter an opposition to the demand of expulson by offering to accept the conditions offered by others. The law sanctions the liberty of the landlord by acknowledging to him the right of imposing on the tenant any reasonable condition, notwithstanding that he may intend to impose less burdensome ones on others.

2. Section 1698. If the landlord has similarly proposed new conditions whatever they be, even though exorbitant, and the tenant has refused to accept them, provided the landlord declares on oath that he does not want to give the tenement on lease for a year to be reckoned from the day of the demand under less rigorous conditions than those proposed to the tenant.

3. If the landlord declares on oath that he does not want to give the tenement on lease for a period of one year to be reckoned from the day of the demand (Section 1698).

C. The right of preference attributed to the possessor or occupier of an urban tenement, i.e. of the upper part of a tenement, with regard to the lease of the lower part of the tenement, ceases whenever he does not make use of the upper part of the tenement as his or his family's dwelling-place (Section 1699).

It ceases also when the lower part is demanded on lease by the last peceding tenant of the lower part itself.

There is, finally, a cause of cessation of the right of preference which is common to both the last preceding tenant and to

the possessor or occupier of the upper part of a tenement and it refers to the case in which the base (Section 1695) is granted for a period of not less than one year to a person related to the landlord by consanguinity or affinity up to the degree of cousin inclusively, because the landlord should have the right to prefer a relative of his to an outsider.

Actions. We shall now deal with the actions given by law to the person entitled to the right of preference in order to protect him against the frauds which the landlord may make use of in order to evade this right or to render its exercise more difficult.

In the case contemplated by Section 1694, i.e. that of a simulation or of a fraudulent representation of false conditions, if the person entitled to the right of preference, being notified of these conditions and deceived thereby, has accepted the lease under the new conditions, he may, on discovery of the fraud, sue the landlord for the annulment of the conditions and for reimbursement by way of damages: he may thus demand that the conditions be annulled for the remaining duration of the lease which will continue to subsist under the same conditions of the previous lease, except with regard to the rent, which is established by experts, regard being had to the time of the contract. With regard then to that part of the lease which has already lapsed the tenant is entitled to demand the reimbursement of his loss in consequence of the fraud during the interval between the conclusion of the contract and the judgement. As is evident, the action for annulment can only be instituted during the continuance of the lease; the action for damages, on the contrary, may be instituted even after the dissolution of the lease up to one year after such dissolution.

Another sort of simulation is contemplated in Section 1695, i.e. when the landlord simulates that he has given the tenement on lease to a relative up to the degree of cousin, whilst in reality the lease was granted to an outsider. In this case the tenant who, on account of the simulation, did not exercise his right of preference may, on the discovery of the fraud, exercise an action for damages, which is to be instituted within one year from the day in which he left the premises.

Finally, in case the landlord has proposed certain conditions and has declared that he does not want to let the premises for a period of one year under less onerous conditions (Section 1698) or has declared on oath that he does not want to let the premises for a period of not less than one year, if, in contravention to such declaration, the landlord gives the tenement on

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lease, the previous tenant who may have quitted the tenement in view of that declaration is entitled also to an action for damages, which is to be instituted within one year from the day in which such lease was agreed upon. An exception must be made in case the lease was granted to a relative up to the degree of cousin, because the landlord has the right to prefer such a person.

(N.B. - Repealed by Ordinance XXXIX of 1939) - Besides this right of preference the Ordinance makes mention of another right given to the possessor or occupier of the upper part of a tenement, provided he himself or his family lives there, with regard to the lease of the lower part of the same tenement: when the lower part is to let to a public prostitute he has the right to have her expelled notwithstanding that the lease be still current, provided he assumes the lease and gives, when required, a sufficient security to the landlord.

By Section 11 of Chapter 109 of the Laws of Malta, any right of preference granted by the Civil Code shall, so far as the tenant is concerned, remain in abeyance during the time in which the said Chapter 109 is in force. This provision is presumably due to the consideration that Chapter 109 grants the tenant a wider form of protection.

SUB-LETTING AND ASSIGNMENT OF LEASE

Sub-letting is a lease subordinate to another lease or a lease which is in a subordinate relation to that constituted by the principal lease. It is a contract by which the lessee of a thing binds himself to grant its enjoyment to another for a specified period and for a specified rent, which the other party binds himself to pay: between the lessee and the third party there arises a juridical relation similar to that intervening between lessor and lessee. Therefore, the lessee of the thing who binds himself to grant the enjoyment of the thing to another is known as sub-lessor and the third party to whom the thing is sub-let is known as sub-lessee or sub-tenant.

Assignment of lease is an assignment which has for its object all the rights and all the obligations of the lessee vis-a-vis the lessor: it is a contract by which the lessee of a thing transfers to another, for a price or any other consideration, or on a gratuitous title, his rights of enjoyment over the thing in whole or in part, together with the respective obligations.

The difference between sub-letting and assignment of tenancy is that sub-letting is very similar to granting on lease: indeed, it is a true lease, but subordinate to another, i.e. the

sub-lessee binds himself to pay the rent, which is paid periodically like the rent in the principal lease; whilst in case of assignment any consideration agreed upon is to be paid only once, unless it be divided into instalments and if the assignment is made gratuitously, the assignee pays nothing saving the assumption on his part of the obligations of the lessee unless such burden is retained by the assignor himself.

We shall divide this part into three sections:

1) Has the lessee the right to dispose of his right in this way?

2) Effects of sub-letting or assignment in the relations between the parties and vis-a-vis the principal lessor;

3) Right of Preference in sub-letting.

(1) Can the lessee dispose of his right in this way?

By law the lessee may do so in view of the general principle sanctioning the free disposal of all property: the right of the lessee is a "property right" and he is therefore entitled to dispose of it notwithstanding that he is not authorized expressly by the contract of lease. However, since this is granted to him by law in his private interest it may be excluded by agreement, i.e. the right to sub-let and/or to assign the tenancy may be disallowed, either in whole or in part, by an express clause.

In case the prohibition is not explicitly limited to one of the two faculties, it is presumed to extend to both, even though mention is made only of one faculty, because the mere prohibition shows the intention of the lessor to prevent the thing let from passing into the hands of another person, which intention is equally incompatible with sub-letting and with assignment. With regard to the intention of sub-letting the thing or of assigning the lease, jurists and jurisprudence accept the distinction between a prohibition conceived in absolute terms and a prohibition qualified by the clause "without the lessor's consent": if this clause is inserted, the lessor has no right to refuse his consent unless a just cause concurs, e.g. the insolvency of the proposed sub-lessee. When, on the contrary, the prohibition is conceived in absolute terms, the lessor may veto at his discretion any sub-letting or assignment.

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The effects of such prohibition are limited by the following rules (Section 1704):

(a) It does not imply the prohibition of making use of the thing, if it is an urban tenement, as an hotel or a lodging-house, saving any agreement to the contrary or unless the tenement has been explicitly or implicitly let for a different use, e.g. as a dwelling-house of the lessee and of his family;

(b) It neither denies to the tenant the faculty of allowing another person to live with him, even on payment, saving of course the ffects of an agreement to the contrary.

The right to sub-let or to assign the lease to which as a rule the lessee is entitled, does not hold good in the following cases:-

(a) A tenant cultivating land under the covenant of sharing the produce with the lessor, cannot sub-let the tenement or assign the lease, unless such power had been expressly granted to him by the landlord (Section 1705). This exception derives from the nature of the "colonia parziaria", which rests on the trust placed by the landlord on the tenant and which, therefore, the latter can not transfer to others.

(b) The occupier of a part of an urban tenement, not separated from other parts of the building, or having access by the same entrance as other parts of the same tenement, may not sub-let or assign the lease without the consent of the landlord (Section 1706). This prohibition is intended to prevent a sub-letting of an assignment of the lease to a person who may be a cause of molestation to the other tenants.

(c) Notwithstanding that the right to sub-let the tenement or to assign the lease has not been expressly excluded, the lessor has the right to recover possession of the tenement if such promises are sub-let or the lease thereof is assigned to any person using, causing or suffering the same to be used for purposes of prostitution or for other immoral purposes (Section 1707).

(2) Effects

In the relations between the parties, i.e. between the sub-lessor and the sub-lessee, or assignor and assignee,

the contract produces all the effects which are proper to it; the sub-letting produces the effects of a lease which is governed by the laws which regulate the lease itself. Similarly, the assignment of a lease produces its effects between the parties like any other assignment, i.e. it transfers to the assignee the rights of the lessee together with the relative obligations, unless such obligations remain at the charge of the assignor.

Vis-a-vis the lessor, a sub-letting or an assignment of lease does not produce the effect of transferring to the sub-lessee or assignee the rights and obligations of the lessee until the lessor expressly discharges the lessee and acknowledges the sub-lessee or the assignee in his stead (Sections 1708 to 1710), because sub-letting and assignment are contracts which take place between the lessee and another person, and, consequently, are "res inter alios acta" for the lessor and, therefore, "neque nocunt neque prosunt". Consequently, until the lessor acknowledges the sub-lessee or assignee, the following rules are applicable:-

(a) The sub-tenant or assignee is in no direct relation with the lessor and has no direct action against him: he can only avail himself of his right against the sub-lessor or the assignor, saving his right to turn against the lessor by the "actio indirecta", i.e. by exercising the rights of his author.

(b) The same applies to the obligations of the lessee towards the lessor: the lessee who remains the lessor's debtor until the lessor gives his consent to his substitution by another debtor; consequently, the lessor has a direct action only against the lessee and never against the sub-lessee or assignee, saving, of course, the "actio indirecta".

(c) The lessor, however, has a real action over the fruits of the thing let and "super invectis et illatis" notwithstanding that the tenement is occupied by the sub-tenant or assignee, that the fruits and the things subject to the real action belong to him and that he may have paid the rent or the price of the assignment to the sub-lessor: the reason being that this privilege and the real action deriving therefrom belong to the lessor over the fruits "et super invectis et illatis", even though the things belong to a completely extraneous person.

(3) Right of Preference

The right of preference in sub-letting is granted to the following persons:-

(a) The co-tenants of a thing have the right to be preferred in the sub-letting of a thing: when two or more of them exercise their right of preference, they can demand that the tenement be sub-let by auction to the highest bidder to the exclusion of extraneous persons;

(b) The last preceding sub-tenant of an urban tenement with regard to a new sub-letting of the same tenement;

(c) The sub-tenant of the upper part of an urban tenement has the right to be preferred in the sub-letting of the lower part of the same building, on condition, however, that the two parts be sub-let by the same person. With regard to all other things, the right of preference in sub-letting is governed by the rules which regulate this right in lease (Section 1711).

Special Rules as to Leases of Rural Tenements Yielding Fruits

These rules refer to the institute of remission or reduction of the rent in case the harvest is destroyed through accident, and to "colonia parziaria".

Benefit of Remission: This institute derives from Roman Law where it was regulated by a perfect system of rules (V. Fr. 15.25. D.B. XIX, Locati et Conducti. T. 2., and Const. VIII. Cod. De Loc. et Cond.) which have been reproduced by the laws now obtaining.

The rational basis of this benefit is to be found in the commutative nature of the contract of lease: the rent is the consideration and the equivalent of the enjoyment and, therefore, if the enjoyment is wanting there is no reason why the rent should be due. In this sense the landlord must warrant to the tenant the enjoyment and is responsible for non-enjoyment. Now in case of rural tenements which are capable of yielding fruits, the object of the lease is not merely the soil as such but rather its potentiality of producing fruits, and the tenant takes the field on lease "ut frui possit" (Ulpian, Fr. 15, para. 2) and not merely to occupy it; consequently, the loss or destruction of the fruits is equivalent to a loss of the enjoyment which the landlord is bound to grant.

We shall divide this treatise into three parts:-

(1) Conditions;
(2) Effects; and
(3) Cessation

(1) Conditions.

A. The total destruction of the produce of one year or at least the destruction of a "considerable" part thereof (Section 1666), i.e. when the net value of the remaining part (after deducting the expenses incurred in gathering the fruits and the cost of the seeds), does not amount to half the rent. If the loss is not as heavy as that, the tenant will have to sustain it, and he has no remedy against the landlord because, as Caius observes: "Modicum damnum aequo animo ferre debet colonus cui in modicum lucrum non aufertur" (Fr. 25, ibid.). The loss must refer to one year only, i.e. it is not lawful for the tenant to group together the losses of two or more years in order to constitute the amount of loss required in order that he be entitled to this benefit.

B. The destruction must have been caused by accident or "force majeure": the landlord is answerable only for such causes, e.g. snow-storms, scarcity of water, flooding, invasion of locusts, plant diseases, etc. On the contrary, the benefit is not granted if the destruction happens through negligence on the part of the tenant: "si raucis aut herbis segetese corruptae sint" (Fr. 15), i.e. if the tenant has not destroyed poisonous weeds.

C. The destruction must take place before the fruits are separated from the soil (Section 1675), because once the fruits have been produced and gathered, the warranty of enjoyment, i.e. of the productivity of the land is fully served; when the fruits are separated from the soil they become the property of the tenant, and, therefore, the risk weighs upon him.

These are the conditions for the existence of this benefit if the duration of the lease is of one year only; if, however, the duration of the lease is of more than one year, and the loss takes place in the last year, account is to be taken not only of the loss of such year but also of the deficiencies and the excesses of the previous years, and there is no remission or reduction of the rent of the last year unless on a computation of such excesses and deficiencies it results that the tenant has sustained such a considerable loss as to entitle him to the benefit of reduction.

This mode of compensation is required by equity. The landlord has no right to claim any part of the profit which the tenant derives from cultivation of the tenement, but when the latter in view of the loss of the produce claims the benefit of remission or reduction, equity demands that the profits derived by him during the previous years should be

taken into account for the assessment of the loss sustained during the last year. For the purpose of assessing the loss, the principle holds good that the tenant may not demand that the losses sustained by him during the previous years be taken into account. If the losses sustained in the year in regard to which he makes his demand do not of themselves entitle him to the benefit granted by law, he cannot become so entitled by reason of former losses that fall short of the limit established by the law.

Similarly, if the duration of the lease is of more than one year, and the loss takes place during one of the years preceding the last one, the benefit can be availed of previously if, account being taken of the harvests of the previous years, it results that the tenant has sustained the amount of loss required by law and the definitive account is delayed until the termination of the lease. The account is then examined again in view of the possibility that the loss sustained during the previous year or years be compensated by the excessive profits in the subsequent years: if from such calculations it results definitely that the tenant has sustained the specific amount of loss, the remission or reduction already granted is confirmed: otherwise it is revoked and the tenant will have to pay the rent which has been remitted, or that part of the rent by which it has been reduced. This revision of the accounts on the termination of the lease does not take place if the remission or the reduction of the rent has been granted by the landlord to the tenant extra-judicially and without reservations (Section 1672), because any voluntary remission of a debt is regarded as having been made irrevocably, saving a reservation to the contrary effect. It is hardly necessary to point out that the years which can be taken into consideration for the purposes of compensation are only those which precede or succeed the year of the loss during the same lease. The landlord cannot pretend the compensation of the losses sustained during the present lease with the profits derived by the tenant during a former lease.

(2) Effects

In case of total destruction of the produce, the rent is remitted "in toto"; in case of partial loss, provided it be "considerable" in accordance with the law, the effect is the reduction of the rent corresponding to the difference between the value of the remaining fruits and the amount of the rent for one year: so that the tenant will only pay the value of what remains of the fruits.

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(3) Extinction.

The causes which extinguish this benefit are:-

(i) If the tenant fails to have the loss ascertained before gathering the fruits (Section 1667). This is known as a precautionary measure ("cautela") because it is the indispensable means for preserving the rights to the remission or reduction of the rent: the reason being that, on the one hand, the loss must take place before the fruits are gathered and, on the other, this condition is imposed in order to prevent frauds, which can be more easily made use of after the fruits are gathered. The tenant must proceed by way of summons against the landlord and demand that the loss be ascertained judicially, unless, of course, the landlord acknowledges the loss without the necessity of such formalities, and grants the benefit spontaneously.

(ii) If the tenant pays the rent, because he is then presumed to have renounced to this benefit, unless he has preserved this right expressly, or had paid the rent in advance.

(iii) If the cause of the damage existed and was known to the tenant at the time of the contract, because in such a case it is to be presumed that the tenant wanted to assume the risk of the loss, and that he took this circumstance into account when he agreed on the rent.

(iv) If the tenant undertakes to bear any loss caused through accident. This undertaking is evidently allowed because it refers to private interests. Such a clause is, however, interpreted as restricted to ordinary accidents, because it is assumed that the parties had only such accidents in mind, and it is, therefore, not extended to extraordinary accidents, unless these, too, are envisaged. The distinction between ordinary and extraordinary accidents depends on the conditions of the region in question: thus, an invasion by locusts would be an extraordinary event, whilst scarcity or abundance of water is an ordinary one.

Rules relating to "Colonia Parziaria"

These rules are based on the special nature of this contract, which is similar to a partnership between tenant and landlord: as in all partnerships in general, we have here a division of the profits and losses and the element of trust. In partnership trust is reciprocal as between the partners, whilst in this kind of tenancy it is only necessary that the landlord should trust the tenant who may or may not reciprocate such trust because the administration of the concern and

especially the gathering of the fruits is in the hands of the tenant. From these two characteristics that lie at the root of this contract, the following consequences derive:-

(1) Any loss, whether total or partial, caused through accident is borne by both, i.e. by the landlord and tenant pro rata, whatever be the amount of the loss, even though slight, and whether it happens before or after the lease, because the tenant sustains his share of the loss not on a title of lease but "jure societatis".

(2) The contract is dissolved by the death of the tenant because the trust placed in him by the landlord does not necessarily pass to the heirs; as in partnership, however, the parties may agree that the contract is to continue with the heirs.

(3) The tenant cannot sub-let the tenement nor assign the lease unless he has stipulated this right in the deed of lease.

LETTING AND HIRING OF SKILL AND LABOUR

The letting of skill and labour is a contract by which a person places his own activity at the disposal and to the benefit of another in return for a salary: the exercise of human activity may form the object of a contract in two ways: either principally in itself, or principally in its results. When the work of man is regarded "per se" in the way in which it is executed, and from the point of view of the diligence and the other qualities accompanying its execution, or, in other words, when regard is principally had to the labour in itself and only a secondary importance is attributed to the result of such work, we have a "locatio operarum" of Roman Law or a contract of letting of work or industry (of services). When, on the contrary, regard is principally had to the results which derive from labour, i.e. when the execution of some work is entrusted to someone, e.g. the building of a house; i.e. when the work of man forms the object of a contract not principally in itself but in view of the object which is to be executed, we have the "locatio" or the "redemptio operis" of Roman Law, or task-work.

Both figures, according to the present system of law, are included under the generic designation "letting and hiring of labour and skill", which is defined by our Code in

Section 1712 as "a contract whereby one of the contracting parties binds himself to do some thing for the other for a reward which the latter ...." The lessor is, therefore, the person who binds himself to do some thing, i.e. who puts his skill and labour at the disposal of the other party, who, therefore, is the lessee.

Though these two contracts are in part subject to the same principles, their nature is not identical: the first one is a pure lease of services, whilst in the second one very often some elements of sale or of other contracts are present together with those of lease, and it has a very important system of rules which are proper to it: consequently, it is more reasonable to keep the notion of each of these figures separate from one another, and to define them separately. The "locatio operarum" may be defined as that contract in virtue of which a person (the lessor) binds himself towards another (the lessee) to perform a certain work or service, or certain works or services for a specified time and in return for a specified salary. The "locatio operis" may be defined as that contract whereby one of the parties (the lessor) binds himself to do a specified piece of work ("opera"), or to have it done for the other party (the lessee) in return for a specified salary.

The Civil Code divides this matter into a preliminary part, which contains certain rules common to all letting of work and industry; these rules are few in number and are of slight importance, and the majority are merely applications of the general principles governing all contracts; then three sections follow which deal with the several kinds of lease:-

(1) The hiring of servants, workmen and other persons employed in the service of others;
(2) Carriers by land and sea;
(3) Task-works

Letting of Labour and Industry in General

The contract, which we have already defined, is bilateral, onerous and commutative, because the services rendered and the salary are regarded as equivalent to one another.

The internal requisites are governed by the general principles, which Section 1714 applies to the case of unlawful objects, i.e. of services prohibited by law or contrary to public morals. As, in this case, the contract is null, no action arises therefrom, neither in favour of the lessee for the execution of the work, nor in favour of the lessor for the payment of the wages: in case these have already been paid, they can be recovered only in case the "accipiens", alone was in bad faith. Besides being lawful, the work must also be negotiable or "in commercio", i.e. such as, according to human practice, forms the object of contracts for wages. The following would be "extra commercium": a recommendation made in favour of a person to the Head of a Department, etc. The other object of the contract is the salary or the wage which may be specified in the agreement or fixed by law or by usage. In defect of such determination, it is fixed by the Court on a valuation by experts, or even without such valuation, according to circumstances.

A requisite proper to this contract is the limitation of the time for which one's own services are placed at the disposal of others: no person can bind his activities for life, because this would be tantamount to slavery; but he may do so for a specified time or a specified undertaking.

The form of this contract is free.

Effects in General

These effects consist in the reciprocal obligations of the parties. The obligations of the lessor are:-

(a) He must perform the services which he has promised, in the way promised and during the time agreed upon. He must, as a rule, perform such services personally, because the lessee employs a given person in view of his trustworthiness and ability.

(b) He is bound to perform such services with the diligence of a "bonus paterfamilias".

(c) He is answerable for his own incompetence.

If the lessor does not fulfil his obligations, there is no other means to compel him to perform them apart from the warrant "in factum" contemplated by the Laws of Procedure, which is the order of the Court that the debtor be arrested and kept in prison until he decides to fulfil his promise or

until the Court deems it necessary for ensuring the performance of the obligation. This notwithstanding, if the lessor still refuses to perform it, the only remedy at the disposal of the lessee is the reimbursement of damages: if, however, it is indifferent for the lessee that the services be rendered by others, he may be authorised to obtain the rendering of such services by others at the expense of the lessor.

The obligations of the lessee are:-

(a) He must pay the wages and fulfil all other promises, for example, maintenance;

(b) He is bound to do all that which depends on him in order to put the lessor in a position to perform the work promised. Therefore, if the lessee has to furnish the necessary materials and instruments, he is bound to supply them in a state suitable for the object for which they are required, and is responsible towards the lessor for any defect and for the consequences of such defect.

An Act of 1929, known as the "Workmen's Compensation Act", enacted in order to protect workmen against accidents, imposes on the lessor and the lessee the registration of the workmen in the Public Works Office and to pay a penny each at the beginning of the lease and on every subsequent week by means of a stamp bearing the relative date on a book given to the workmen for this purpose. Any contravention on the part of either is punished by a penalty not exceeding £5, and in case the provisions of the Act are transgressed, the owner is personally responsible towards the workmen in case of accident for the compensation to which the latter would be entitled to receive from the Government had such provisions been complied with.

Dissolution

The causes of dissolution are:-

(1) The completion of the enterprise in case the lessor has given his services on lease for a specified enterprise;

(2) The expiration of the time;

(3) The death of the lessor, because this contract is based on personal considerations which refer to the lessor and do not pass to the heirs;

(4) The verification of a dissolving condition;

(5) The "pactum commissorium". With regard to this cause of extinction, Section 1716 applies to this contract the rules governing the lease of things.

Kinds of "Locatio Operarum" mentioned by Law

The Civil Code deals with "locatio operarum" in two sections:-

(1) The hiring of domestic servants and other employees; this is now regulated by the Conditions of Employment Act, 1952.

(2) The services of carriers by land and sea.

This enumeration is merely demonstrative. There are other kinds of "locatio operarum" which are governed either by the general rules already explained or by particular laws. A much discussed question refers to the nature of that contract which has for its object the performance of work of an intellectual or moral order, e.g. the employment of teachers, architects, doctors and lawyers. In Roman Law "locatio operarum" was held to refer only to manual workers who were remunerated by means of wages ("mercede" - this is why they were also known as "mercenarie". Intellectual activity, on the contrary, was not rewarded by wages but by a compensation called "honorarium". Wages could be claimed by the "actio locati", whilst the right to an "honorarium" was protected not by an action properly called but by an "extraordinaria cognitio" (V.D. "De Extraordinaria Cognitione", B. 50, T. 13).

Some modern authors do not hesitate to regard intellectual and liberal work as on an equal footing with manual work and they regard a contract having intellectual work for its object as any other contract of "locatio operarum"; others, on the contrary, disagree with this equalization of intellectual and manual work, and regard this contract either as a salaried mandate or as a contract "sui generis", belonging to the class "do ut facias".

The theory that this contract is a salaried mandate was propounded by Troplong and Marcade', and it seems that it has been followed by the Codes now in force, as is evinced by Sections 1963 and 1970 of the Civil Code and the corresponding Articles of the Continental Codes; such Articles form part of the provisions of Mandate where the law contemplates exactly the case of a charge entrusted to a person exercising a public

profession. This theory has, however, been justly criticised by Pacifici Mazzoni (Cod. Civ. Ital. Comm. Delle Locazioni, par. 268 et seq.) on the ground that the exercise of such professions does not imply any representation of the person in whose favour the intellectual work is performed, whilst the notion of representation or agency is essential to Mandate.

SECTION I. EMPLOYEES

The provisions under the heading of "Servants, Workmen and Employees" in the Civil Code were abrogated by the Conditions of Employment Act 1952 which regulated this subject in a more detailed and comprehensive manner.

The main characteristic is that an employer or employee may at any time terminate the contract although a specific period of employment may have been agreed upon. It is considered that it is contrary to the basic rights of the human personality to force an employer to keep in his employment a person whom he does not trust or to force an employee to continue to work against his will. Therefore, a unilateral termination of the contract of service will be effective, even if there is no valid ground for such termination. The sanction consists normally in the payment of damages. If no period of employment had been agreed upon, the law imposes the obligation on either party to give notice of termination. The length of the period of notice depends on the duration of past service but the maximum period of notice is one month. In default of notice, the party terminating the employment must pay compensation in lieu of notice. If there was a stipulated period of employment, the party terminating the contract must pay one-half of the wages or salary payable during the one and fixed position of the contract.

The Act also subjects to the control of the Director of Labour the inclusion of certain conditions such as fines for violation of regulations committed by employees.

It also provides for the creation of Wages Councils in order to establish the minimum conditions of work in the various fields of employment.

A detailed study of this subject forms part of the study of Labour Legislation to which reference is made.

SECTION II. CARRIERS BY LAND AND SEA

The conveyance by sea contemplated by the Civil Code is the executed by means of a boat or other sea-going vessel within the limits of these islands that is from one island to the other, or from one part of one island to another part of the same island (Section 1725).

The special rules laid down by law refer to the obligations of the carriers with regard to the custody and preservation of the things entrusted to them in order to be carried from one place to another. A carrier by land or by sea has two characteristics which correspond to the two functions which he must assume in the rendering of the services promised: in so far as he has to transport persons or things from one place to another, he is a lessor of labour, and his obligations are governed by the general rules of letting and hiring of labour; in so far as he is bound to take care of and to preserve the things which he has to carry during the time in which they are in his possession, he assumes the character of a depositary with the relative obligations: as a depositary he is bound to take care of the things deposited, whether such things have been delivered on the cab or the boat which he makes use of for the transport of things, or delivered to him in any other way and are placed on the means of transport by him; and these obligations arise not from the moment the thing is placed on the means of transport, but as soon as they are entrusted to the carrier in any way whatsoever.

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However, though he acquires the nature and assumes the duties of a depositary with regard to the custody and preservation of the things, he is only bound to observe in the execution of his obligations, the diligence of a "bonus paterfamilias" "in abstracto", and is responsible only for "culpa lata" and "levis", according to the principles governing obligations: he is not, therefore, responsible for accident or "force majeure", or for any damage caused without any fault on his part. This rule derogates from the special rule of the contract of deposit, that the depositary must observe the "diligentia ut in suis rebus"; the reason being that whilst the ordinary depositary is chosen freely by the depositor, things are entrusted to a carrier in view of his trade and because it is supposed that he can carry the things safely.

The provisions of the Code derogate also from the Police Laws.

"LOCATIO OPERIS"

We have defined "locatio operis" as that contract whereby one of the parties binds himself to do or to execute for another some specified work in return for compensation or wages, by means of materials supplied by the former or by means of materials furnished by the latter. Contractor ("appaltatore") or undertaker is the person who performs "in appalto" the execution of the work for the other party. The word "appalto", or task work, if often used in the sense of a contract whereby a person binds himself to furnish goods, merchandise or materials either to a public establishment or to private persons, and also in the sense of a contract which was formerly very much in use and which is still very common in certain countries, whereby the State assigns to a person ("pubblicano"), the right to exact all custom duties in consideration of a certain sum of money. Though they are known by the same name ("appalto"), both these contracts are different from that contract which has for its object the execution of a piece of work. The

"appalto" of supplies is a kind of sale, and the "appalto" of public revenues is an assignment of the rights of the State of exacting the public duties.

The words "to do" or "to execute" a specified work which we have made use of in the definition, are meant to distinguish between a contractor who, being an artificer, binds himself to perform the work promised personally, from a contractor who, being a mere businessman, does do the work himself, and it is, therefore, immaterial to the other party whether the work promised is executed by him or by others.

In Roman Law this contract was known as "locatio" or "redemptio operis" when the contractor was an artificer who employed his individual skill, and therefore bound himself to "opus facere"; in the other case, the object of the contract was "operis faciendi", and the obligation of the contractor was that of "opus praestare". According to the laws now in force, this distinction does not exist any longer, because it does not partake of the essence of this contract, that the contractor be a skilled person who performs the work personally, and, therefore, even though the contractor cannot execute personally the work promised for lack of skill, the contract is still known by the same name, i.e. task-work or "appalto". This, however, does not mean that it is always immaterial whether the work is performed by the contractor personally or through others; this is a question of fact which depends on the intention of the parties according to circumstances.

The object of the contract with regard to the contractor is a specified work: the word "work" must be taken here objectively, i.e. not in the sense of labour but of its product (that is, in the sense of "opus"). The importance of the work is immaterial: whatever it be, it can always be the object of task work, provided it be a material work.

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The other object of the contract is the price or wages, which may be determined in two ways: it may be agreed upon either "en masse" or "a farfait", i.e. for one price for the entire work, or at so much a measure, i.e. at so much for every unit of measure or of kind. Thus, for instance, with regard to the construction of a building, the price may be agreed upon at 12s/- per square cane with regard to double walls, at 6s/- per square cane with regard to single walls, 2s/- for every step, and so on.

The material may, as we have seen, be furnished either by the employer or by the contractor. In the latter case the question arises whether this be a real task work or the sale of a future thing, because the contract implies the transfer of the ownership of the product of the contractor's labour to the employer for a price. In Roman Law Cassius held that in this case there is a double transaction, i.e. a sale with regard to the materials and a "locatio operis" as to the work. Sabinus, on the contrary, held that it is a single transaction, i.e. a sale, and his opinion was confirmed by Justinian: "unum esse negotium emptionem et venditionem esse" (Par. IV. Inst. De Loc. et Cond.).

Some modern authors, among whom Pacifici Mazzoni and Aubrey et Rau, follow the opinion of Cassius, others that of Sabinus: however, some of those authors who follow the opinion of Sabinus, though they hold that the transaction is one, refuse to admit that such transaction is always a sale, and they opine that regard must be had to the intention of the parties and that the contract is a sale when the parties had principally in mind the materials and the future product of the work, and that it is a "locatio operis" when the parties had principally the work in mind.

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Characteristics:

The contract of task work is bilateral and onerous. There is also an element of hazard, i.e. the probability of profit or loss and the risk, especially with regard to the contractor, is much more serious than in any other transaction. The price is in fact established before the work is started, and it is calculated according to the probable cost of the materials, the wages of the workmen, the time required for the execution of the work, etc. Such calculations may be more or less exact and prudent, but during the interval of time require for the execution of the work, the conditions may alter and the calculations made at the start may be proved to have been fallacious. This is why some contractors have made large profits, and others have sustained heavy losses.

We shall divide this treatise into three parts:-

(1) Requisites;
(2) Effects; and
(3) Dissolution

1. Requisites The internal requisites are, as usual, capacity, consent, object and cause. The form is free, but this becomes doubtful when the contract has for its object the transfer of the ownership of an immovable.

2. Effects: There are three kinds of effects and they refer to:-

(1) The ownership of the work;
(2) The "periculum et commodum rei";
(3) The reciprocal obligations

1. With regard to ownership, the distinction between the case when the materials are furnished by the contractor and that in which they are furnished by the employer is of capital importance. In the first case whilst the work is being executed, the thing belongs to the contractor and there is no question on the transfer of ownership because this has been, from the outset, vested in the contractor. If, however, the materials are furnished by the employer, the work is his from the

very outset. This is not a case in which we can apply the rules of "specificatio", because this presupposes the want of authority in virtue of which the future product or the new species belongs to the employer.

In case, however, the employer has furnished the contractor not with materials but with money in order to acquire materials, the materials so bought by the contractor in his name, even though by means of the money of the employer, belong to him: "qui aliena pecunia comperat non ei cujus nomini ferunt sed sibi domium quaerit".

With regard to the construction of a building, in case the employer has only supplied the ground and the materials are to be supplied by the contractor, the building belongs from the outset to the employer by right of accession.

The contractor must execute the "opus" by means of the materials furnished by the employer, and the latter is not bound to accept the work if it is executed with different materials, except in case of fungible materials which are handed over to the contractor in such a way that he may make use of those same materials or others of the same kind. In this case the employer transfers the ownership of the materials as the contractor acquires a credit for the restitution of the same amount of materials of the same quality against him (V.B. 31, D. De Loc. et Conduc.). In this case the contractor, instead of delivering the work executed with the materials furnished by the employer, may keep it for himself or deliver it to the third party, because neither the materials nor the work are his, unless the materials are of a fungible nature.

When the materials are furnished by the contractor, the "opus" which must result by effect of labour is destined for the employer and the contract is therefore meant to produce the transfer of ownership from the contractor to the employer just as if it were a sale or other contract which transfers ownership. According to general principles, the transfer of ownership takes place as soon as object is specified when, as in this case, it is uncertain at the time of the conclusion of the contract. Now the object does not become certain except when it is inspected and approved by the employer, and it is exactly at this moment that the transfer of ownership takes place.

The law does not use the words "inspection" and "approval" but the word "delivery". This does not mean that we have here a derogation from the principle that ownership is not transferred by delivery but by the contract itself, because the word "delivery" has been used here because in the majority of cases the inspection and approval of the work by the employer takes place when the delivery is effected and become one and the same thing with delivery.

Supposing, therefore, that the materials belong to the contractor: until the "opus" is approved the ownership of it remains his and he may, therefore, dispose of it, i.e. he may keep it for himself or deliver it to others because he would be disposing of his own things, saving, of course, the right of the employer for the execution of the works and the reimbursement of damages. The creditor of the contractor has, in this case, an action on the "opus" until it is inspected and approved, because it is the property of his debtor and, therefore, forms the object of his warranty.

(2) "Periculum et commodum rei": We must adopt here the same distinction: when the materials belong to the employer, the "opus" is at his risk from the outset. However, the labour of the workmen is at the risk of the contractor who, therefore, is not entitled to the price in case the thing is destroyed by accident or "force majeure". If, however, the thing is lost through the fault of the contractor, he is bound to make good the damages, and sometimes even in a specific form, i.e. by executing the "opus" by materials of his own. If then the cause of destruction is imputable to the employer, e.g. if it is due to a defect in the materials furnished by him, the contractor does not sustain the loss of labour but has a right to the price. The same thing applies to the case in which the thing is destroyed during the "mora accipiendi" of the employer, because by effect of such delay the risk passes to the employer even with regard to labour.

When the materials belong to the contractor, the "opus" is at his risk until it is inspected and approved, not only with regard to the labour but also with regard to the materials, because both are his. An exception is made in case of "mora" on the part of the employer in inspecting and approving the work (Section 1718); for the same reason his delay places the thing at his risk, even though it was before at the risk of the contractor.

(3) Reciprocal Obligations: The obligations of the contractor are:-

(1) To execute the work promised;
(2) To deliver the "opus"; and
(3) To warrant, in certain cases, the solidarity of the thing even after its inspection and approval.

(1) The contractor must execute the work well and according to the rules of art and of the agreement. Notwithstanding, however, that the agreement contains rules with regard to the execution of the work, if, during the execution or even before it is started but after the conclusion of the contract, the employer wants to make alterations or additions to the original plan, the contractor cannot refuse to perform these unless they be burdensome and demand an increase in the price merely on account of the change. This is an application of the principle that contracts must be executed in good faith, and they are binding not only for that which is expressly stated but also for all the consequences dictated by equity. This rule holds good even though the "opus" be a building or other considerable work of magnitude.

The contractor is not bound as a rule to execute the "opus" personally; nay, he may even give the "opus" to another on sub-taskwork. Sub-taskwork is a contract whereby the principal contractor entrusts to another the execution of the work for a price which naturally will be less than that for which the principal contractor stipulated with the principal employer. Between him and the sub-contractor similar relations exist as between the principal employer and the contractor. The contractor, evidently, does not thereby deprive himself of the quality of a contractor and is not discharged from his obligations, unless the employer acknowledges the sub-contractor. This sub-taskwork may be contracted provided the contrary has not been expressly or tacitly agreed upon, i.e. that the contractor has to execute the work himself by employing his own activity. This, however, does not prevent him from making use of the labour of other persons dependent on him or subordinate to him, because even in this case it remains always true that the principal art and skill are his and the other workmen employed by him are nothing else but the executors of his orders.

This obligation of executing the work may be accompanied by other secondary obligations, e.g. in case the contractor must supply the materials, he is bound to supply good materials, and in case the materials are furnished by the employer, he is bound to make use of them "uti bonus pater familias", and he is responsible for the acts committed by the persons employed by him (Section 1736).

(2) We shall deal with the obligation of delivering the "opus" in the treatise on the obligations of the employer of inspecting and approving the work.

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(3) The third obligation of the contractor, i.e. his obligation of warranting the solidarity of the work even after its inspection and approval, takes place only in certain cases, that is with regard to building and any other considerable work of masonry (Section 1732). If the "opus" is destroyed or if one of the events contemplated in Section 1732 takes place within fifteen years from the completion or delivery of the work, the architect or the contractor are responsible if the conditions required by law concur. This condition does not apply to movables, because defects with regard to movables can be easily detected at the time of delivery. In case of buildings and other considerable works of masonry, experience shows that certain defects may escape the notice of the employer, and, therefore, his approval at the time of the delivery is not sufficient; it is necessary that it be confirmed by them. The conditions for this responsibility are:-

(i) That the building or other piece of masonry has been totally or partially destroyed or that there be an evident manifestation that it is in danger of falling to ruin.

(ii) That this be due to a defect in the construction or to defects in the ground, i.e. due to the fault of the architect or contractor who are responsible therefor. A defect in the ground is also included because it is a part of the profession of these persons to know the defects in the ground and, if possible, to correct them and to take all the necessary precautions in order to avoid all future damages.

(iii) That the abovementioned facts take place within fifteen years from the day of the completion of the work, because there should be a limit to any responsibility. It is to be noted, however, that the responsibility of the architect and of the contractor is regarded by jurists as individuals and as of public policy, so that it cannot be derogated from, because the solidarity of buildings is required in the interests of the public. From this responsibility an action arises in favour of the employer against the architect and the contractor for damages and interest, and the term for the exercise of the action is of two years from the day in which the cause which gives rise to the action takes place.

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The obligations of the employer ar:-

(i) To inspect the work and to receive it if it is in conformity with the agreement;

(ii) To pay the price; and

(iii) To make good any defects in case he supplies the materials.

(i) The inspection of the works is that act or the sum of those acts by which the employer sees whether the works are in accordance with the agreement. The approval (or "collando") is that act by which the employer acknowledges that the work has been done well and in conformity with the agreement. In practice, as a rule, the inspection and the approval become one and the same thing with the delivery or the material acceptance of the work, so that the taking of possession amounts to everything.

In inspecting and approving the work the employer cannot proceed arbitrarily: his decision that the work is not in accordance with the agreement is not definitive and if the contractor deems this decision to be unjust, he may demand from the Court that the work be judged by it with the help of experts. In case the Court decides that the work is good and in accordance with the agreement, the judicial approval is imposed on the employer and it takes the place of the voluntary approval. The employer is only bound to inspect the work on its completion, even though it be made of parts, measures or pieces: this is an application of the general principle that the creditor is not bound to receive partial payment of a debt. The law, however, does not prohibit an agreement in the sense that the parts should be inspected on completion (Section 1731).

The same Section lays down a presumption of inspection and approval if the employer pays the contractor in proportion to the work performed: in this case the parts paid for are

presumed to have been inspected and approved, because a person does not pay if he disapproves. There is no reason, however, why this presumption should be absolute and it can be rebutted especially by means of a reservation to the contrary. In order that the presumption may hold good, it is necessary that the partial payment be made with an imputation in particular to the part of the work performed and not on account of the price of the work in general. A payment made in this way in no way prejudices the employer.

The effects of the inspection and approval of the work are very important: they discharge the contractor from his obligations because it is presumed that he has executed the work promised according to the agreement. There is an exception to this effect in case of the construction of a building or other considerable work of masonry. Moreover, they effect, according to the rules already established, the transfer of ownership of the "opus", when the materials are supplied by the contractor.

In case of a work to be executed in parts, as soon as each part is inspected and approved, these effects apply to such parts, i.e. the different parts pass one by one to the employer both with regard to ownership and to risk. In case the employer does not comply with this obligation of inspecting the work, the contractor has the right to compel him to do so by means of a judgement given on his demand that the works be judicially inspected and approved and that the employer be condemned to receive the work from the contractor. The contractor will demand the approval of the Court to deposit it under the Court's authority as payment. All these demands may form the object of one writ of summons; moreover, the contractor may demand dilatory damages, such as the expenses incurred for the custody of the thing. Another consequence of non-performance on his part is the general consequence that delay transfers the "periculum rei" to the debtor. From that moment the "opus" is entirely at his risk, even though it may have been before at the risk of the contractor: of course, it is necessary that he be put in "mora" according to the general rules.

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(ii) The other obligation of the employer is to pay the price, which is inalterable (Section 1733) because it forms part of the contract. It remains inalterable notwithstanding the fluctuations in the price, whether of the materials or of labour, and notwithstanding any alterations or additions which are not onerous to the contractor. The creditor of the price is the contractor who, therefore, should be the only person entitled to a direct action against the employer for claiming it; but Section 1737 grants an action against the employer to the masons, carpenters and other artificers employed by the contractor for the payment of the wages due to them by the contractor. Their action is limited to the amount due to them by the contractor up to the time in which they institute this action. This is not an application of the ordinary "actio surrogatoria", because the employees of the contractor do not exercise his action but their own action, which is granted to them against the principles of law, because they are in no relation with the employer from which a direct obligation, and hence a direct action, may arise. This is a special favour granted by law to those who live on their work in order to assure payment of their wages and it is justified by equity and by the fact that their labour turns to the advantage of the employer. The benefit of this direct action is evident when the contractor has other credits: by means of it his employees avoid the concourse of the other creditors, who would be otherwise entitled to exact their credits from the proceeds of the "actio indirecta", which, as they form part of the estate of the common debtor, would form the object of the warranty of all his creditors. The action is limited to what may be due to the contractor at the time when the employer is notified of the demand of the employees, because their interests must be reconciled with those of the employer, who, when paying the contractor will be paying his creditor, and is, therefore, discharged within the limits of the payment effected by him, and where there is no debt there is no action.

(iii) The third obligation of the employer takes place when he is bound to supply the materials. He must supply good materials and they must be adequate for the work to which they are destined; otherwise the contractor may compel him to substitute other materials. And in case the work is totally or partially destroyed on accounts of defects in the materials, the destruction is borne by the employer not only with regard to the materials but also with regard to the wages of the workmen.

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Besides these obligations arising from the nature of the contract, there may be others arising from the agreement.

III. Dissolution: Besides the ordinary causes of dissolution, the contract of task-work is dissolved:

(a) By the death of the contractor, because it can not be said that once the employer entrusted the work to the contractor, he wanted also to entrust it to his heirs, who may lack those personal considerations in view of which the execution of the work was entrusted to the contractor. The employer is bound to pay to the heirs of the contractor for the work done and for the materials prepared when such work and materials may be useful to him;

(b) By the will of the employer: this is a rule particular to task-work, in opposition to the general principle that the dissolution of the contract requires mutual consent. This exceptional right is attributed to the employer owing to the special nature of task-work, either because the employer does not trust the contractor any longer, or because the work, instead of resulting in the advantages and profit which he hoped to obtain, may be the cause of a more or less serious loss. The right of the employer must be exercised without prejudice to the contractor, and he must, therefore, compensate him for all the expenses incurred and the work done, i.e. he must reimburse all that which the contractor may have spent - the "damnum emergens", and moreover, he is bound to pay a sum of money to make up for the profit lost by the contractor - the "lucrum cessans": this sum is fixed by the Court and can never exceed the amount which the contractor could have gained by means of the contract.

RELETTING OF PROPERTY AND REGULATION OF RENTS

The crisis brought about by the war of 1914-18 rendered necessary temporary legislation (late becoming permanent) in order to protect tenants, especially with regard to the right of the landlord to recover possession of the tenement from the tenant and to increase the rent or to alter the conditions of the lease at the end of the stipulated or presumed period of the lease.

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The initial law was Ord. XXXI of 1931 (which repeated and re-enacted with amendments Act XXIII of 1929) and is now incorporated in Chap. 109 Ord. XVI of 1944 refused specifically to this regulation of rent and was amply amended by Ord. XXIX of 1947, Act V of 1945 and Act I of 1957. Agricultural laws are protected by Act XVI of 1967 which supplanted the Agricultural Leases (Restriction of Rent) Emergency Regulations 1943.

The benefits introduced by the Ordinance are in favour of a tenant or sub-tenant of an urban tenement, and, in case of his death, in favour of the surviving spouse who must not have been separated from him or her either "de jure" or "de facto"; and, in defect of a surviving spouse, in favour of the members of his family who resides with the tenant at the time of his death; and, in case of shops, even in favour of persons related to the tenant by consanguinity or affinity if they are his heirs, up to the degree of cousins inclusively.

With regard to tenements belonging to the Government or administered by the Government, the restrictions to the right of taking back the tenement on the expiration of the lease do not apply.

The restrictions imposed on the landlord refer:-

(1) To the right of fixing by agreement the rent of a dwelling house.

(2) To the right of increasing the rent and of imposing new conditions for the new lease of any urban tenement protected by the law.

(3) The right to retake possession of the tenement.

In these cases the landlord must, as a rule, go before the Rent Regulation Board composed of a Judge or Magistrate, as Chairman, and two Members, one of whom is an architect and civil engineer employed with the Government and the other not so employed, who is appointed periodically. The latter Member of the Board must be in possession of a warrant issued by the Governor of Malta and must have exercised his profession for at least seven years.

An increase in the rent and the imposition of new conditions are granted only in the following cases:-

(i) If the landlord is compelled or has just reasons for effecting alterations or improvements and, in this case, in determining the increase of the rent, regard is had to the importance of the improvements.

(ii) On the basis of the level of rents in 1939 the tenant is regarded as having accepted the rent and the conditions imposed by the Board unless within fifteen days from the judgement he refuses to accept them by means of an official letter. In case of refusal he will have to quit the tenement within a term fixed by the Board.

The demand for retaking possession of the tenement is granted only if the tenant has been, during the previous lease, unpunctual in the payment of the rent or has caused considerable damages to the tenement, or failed to perform the conditions of the lease or made a different use of the tenement than that for which it was let, or sub-let the tenement or assigned the lease without the express consent of the lessor. In order that the tenant be deemed to have been unpunctual in the payment of the rent it is necessary that he has failed to pay rent for two or more instalments within fifteen days from a demand made by the landlord. Moreover, the Board will allow the landlord to retake possession of the tenement if he "requires" the premises (other than a shop) for his own occupation or for that of any of his ascendants, or descendants, whether by consanguinity or affinity or of a brother or sister and the Board is satisfied that alternative accommodation is available which is reasonably suitable to the means of the tenant and his family as regards extent, character and proximity to place of word (if any). However, the existence of alternative accomodation shall not be necessary if the Board is satisfied, that the landlord's hardship is greater than the tenant's.

The interpretation of the word "requires" aforementioned has caused difficulties and conflicts between judgements. Up to a few years ago, it was held that if the landlord wants to occupy a dwelling house belonging to him and offers the tenant suitable alternative accomodation, the Board should accept the landlord's request, without enquiring into the relative hardship of both parties. In recent years, the word "requires" has been understood not in the sense of the Italian original "chiede" but in the sense of "needs" and, therefore, it has been helped that the landlord must prove that he needs the tenement for his occupation and for this purpose the Board must enquire into the hardship involved.

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With regard to shops, this right of the landlord of retaking the tenement is not admitted except for causes mentioned in the first place, i.e. the infringement on the part of the tenant of his obligations and in case of sub-letting or assignment of the lease without the express consent of the landlord, through a false statement made by him, the tenant shall have the right to ask for a new trial and may recover damages and any agreement, whether made before or after the promulgation of the Ordinance, made to deprive the tenant of the benefits conferred upon him, is null.

PROCEDURE: The landlord must ask the permission of the Board by means of an application which, in case of increase of rent or alteration of conditions, besides the similar demand and the relative reasons, must contain an indication of the actual lease. The application for retaking the tenement must contain the relative demand and give the reasons. Two formulae, A and B, relating to such demand, are annexed to the Ordinance. However, any other formula may be used provided it contains the elements required. When the rent is higher than £40 per annum, the lessor, instead of applying to the Board by means of a "ricorso", will intimate his intention of increasing the rent or of altering the conditions by means of a judicial letter to the tenant, and it is the duty of the latter, if he wants to refuse the demand, to apply to the Board for the rejection of such increase or alteration according to form C attached to the Ordinance. If he fails to do so, he is regarded as having accepted. The "ricorso", both of the landlord and of the tenant, must be presented in duplicate in order that a copy be served on the other party.

The landlord must present his application or judicial letter at least one month before the expiration of the lease; otherwise there would be a renewal of the lease under the same conditions according to the ordinary law. In case of opposition, the Board will hold a sitting in which the parties may be present personally or with the assistance of a friend.

The Board decides on a majority of votes and its decision is final, saving the remedy of a new trial when the decision in favour of one of the parties has been obtained in consequence of false declarations made by such party and in other cases in which a new trial is allowed according to the Code of Civil Procedure.

The Registry of the Board is that of the Superior Courts, or of the Court of Magistrates of Gozo and Comino. The Board has all the powers conferred by law on the First Hall, and enforces its own decisions according to law.

From the decisions there is a right of appeal to the Court of Appeal from decisions relating to a request of the eviction of the tenant. In all other cases, there is a right of appeal from judgements containing or involving decisions of one or more points of law.

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