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# The Putting in Default *

Robert P. Kouri **

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# 1- The Theory of Default

## INTRODUCTION

### A – Generalities

It is a basic legal principle that a debtor must execute his obligations at the time and in the manner agreed upon[1]. As a legal corollary to this statement one may add that a debtor who is tardy in fulfilling his obligations, or who does not execute them exposes himself to a recourse in damages[2]. Nevertheless, under Quebec civil law, before the claim in damages will succeed, the claimant must not only establish that a prejudice has been suffered, but also that said debtor was in default[3]. Thus, one of the effects of default is to give rise to an action for damages.

The goal of this paper is to examine, in detail, both from a doctrinal as well as from a jurisprudential point of view, that much neglected aspect of our civil law, *la demeure*[4]. Said study will be divided into two basic parts; the first dealing with the definition of *"la demeure"*, a brief description of the historical evolution of this notion, and finally a study of the basic rule *dies non interpellat pro homine*[5], as well as the exceptions to said rule. The second part will examine the form and conditions of the interpellatory putting in default, the effects of the default, and will conclude with the recommendations for the modification of the Civil Code with regards to those articles bearing on *la demeure.*

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1 M. Planiol et G. Ripert, (avec le concours de P. Esmein), *Traité pratique de droit civil français*, Paris, Librairie générale de droit et de jurisprudence, 1931, vol. 7 no 770.

2 Art. 1070 C.C.

3 *Ibid.*

4 I find that the word "default", does not seem to have the same precise connotation as the word "demeure". However, this word is its closest English equivalent. Thus in certain contexts, I shall be employing the French rather than the English expression. The following example illustrates the greater accuracy of the word "demeure": Le débiteur peut être en défaut d'exécuter son obligation, sans pour autant être en demeure".

5 Planiol et Ripert, *op. cit.* Vol. 7 no 771.

## B — Definition

*La demeure* may be described as an unwarranted delay in the execution of an obligation; said delay having been objected to legally, either expressly or tacitly[6]. An examination of the many definitions of *demeure* put forward by the authors indicates that there are two basic elements in this legal concept; a delay *(retard)*, which engages the responsibility of the debtor (*retard fautif*). A few of these definitions, given as examples will illustrate the lack of controversy on this point:

> "On peut définir la demeure un retard non exempt de faute"[7].
>
> "La demeure (mora) est le nom que prend le retard du débiteur quand la loi en tient compte pour apprécier sa responsabilité"[8].
>
> "La demeure (mora) est le retard, plus largement le défaut du débiteur, constaté dans les formes légales"[9].

As we may immediately notice, the fact that a debtor has not fulfilled his obligation once it has become due is not in itself sufficient to expose him to the rigors of the law providing sanctions for non-execution or delay in execution. In effect, even though the debtor's obligation is exigible, he may be led to believe that since his creditor does not object to his inaction, immediate execution is not required, and no damages are being suffered. As Laurent pointed out:

> "Pourquoi le débiteur n'est-il pas en demeure par cela seul qu'il est en retard? La demeure implique que le créancier éprouve un dommage et que le débiteur est tenu de le réparer. Or le retard seul ne prouve pas que le créancier souffre une perte, il peut n'avoir aucun intérêt pécuniaire à l'exécution immédiate de l'obligation; . . ."[10].

Therefore, unless otherwise provided by law or by convention, the creditor must notify his debtor of his intention of obtaining immediate execution of the

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6 Once again we may note the difficulty of defining in English the term demeure. In French it may be defined as: "le retard régulièrement et légalement constaté". C. Beudant, *Cours de Droit Civil,* 2e éd. (by R. Beudant and P. Lerebours-Pigeonnière), Paris, Rousseau et Cie, 1936, vol. 8 no 574. Although one may take exception to the word "tacitly" in my definition, since an objection usually implies a positive act; the fact that, for instance the law (art. 1069 C.C.) provides for default in commercial matters by the mere expiration of the term, establishes that in certain circumstances, no overt gesture is needed to give rise to a state of default.

7 R. Demogue, *Traité des obligations en général,* Paris, Librairie Arthur Rousseau, 1931, vol. 6, no 231.

8 M. Planiol, *Traité élémentaire de droit civil,* 3e éd., Paris, Librairie Générale de Droit et de Jurisprudence, 1905, vol. 2 no 167. A very similar definition may naturally be found in the following reference: G. Ripert and J. Boulanger, *Traité de droit civil d'après le traité de Planiol,* Paris, Librairie Générale de droit et de jurisprudence, 1957, vol. 2 no 1488.

9 J. Carbonnier, *Théorie des Obligations,* Paris, Presses Universitaires de France, 1963, p. 288.

10 F. Laurent, *Principes de droit civil français,* 3e éd., Brussels, Bruylant-Christophe et Cie, 1878, vol. 16, no 233.

obligation in question. Until this formality has been accomplished, a debtor cannot be held liable for his passive attitude[11].

Generally speaking, this putting in default has been described as, ". . . la demande d'exécuter l'obligation, faite d'une manière légale"[12] or ". . . l'acte par lequel le créancier réclame son dû"[13]. Mazeaud and Mazeaud define putting in default as follows:

> "La mise en demeure (. . .) est une injonction qui est adressée par le créancier au débiteur, d'avoir à exécuter l'obligation, et qui constate officiellement le retard qu'apporte le débiteur à cette exécution"[14].

One may resume the putting in default as a measure generally required by law[15], by which a creditor indicates to his debtor, his desire that the latter fulfill his obligations. As Professor Baudouin indicates, this formalism has a double utility:

> "Il a pour but de fixer définitivement l'attitude des parties: celle du débiteur qui doit dès la mise en demeure dévoiler à son créancier les raisons réelles de l'inexécution; celle du créancier qui manifeste par la mise en demeure sa volonté d'obtenir ou de tenter d'obtenir l'exécution de son obligation"[16].

Thus, the putting in default is useful in order to clarify any ambiguous situation existing between the debtor and the creditor. The parties to a dispute should be certain that a source of disagreement exists between them, and that their legal positions are in opposition, prior to presenting themselves before the courts for a solution[17].

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11 *Labelle v. Dame Chapleau;* (1908) 14 L.R. n.s. 469
*Bannerman v. Consumers Cordage Company,* (1911) 18 L.R. n.s. 192, (confirmed by the Supreme Court); Civ., 19 fév. 1878, D.P. 1878.1.261; Req. 13 jan. 1909, G.P. 1909.1.457.

12 F. Langelier, *Cours de droit civil,* Montréal, Wilson et Lafleur Ltée, 1907, vol. 3, p. 512.

13 P. Azard, *La responsabilité contractuelle,* Ottawa, mimeographed notes by the Faculty of Law, Ottawa University, 1957, no 112.

14 H. Mazeaud, L. Mazeaud and J. Mazeaud, *Leçons de Droit Civil,* 2e éd., Paris, Editions Montchrestien, 1962, vol. 2, no 620.

15 The word "measure" is a less compromising translation of the word "geste" than could be the word "act" since this latter term can be employed to mean either a gesture or a document. Since the putting in default may be verbal (art. 1067 C.C.), the word "act" could be confusing. The putting in default is not always required by law (e.g. art. 1069 C.C.); thus the use of the word "generally" prevents this definition from being too absolute.

16 L. Baudouin, *Le droit civil de la Province de Québec,* Montréal, Wilson et Lafleur Ltée, 1953, p. 562.

17 Stated in a most absurd manner, we may conclude that the putting in default was adopted by the legislator in order to avoid the situation where the debtor may reply to his creditor, who asks him before the Court why the former did not pay his debt: "Because you didn't ask me". See also J.L. Baudouin, *Les obligations,* Montréal, Les Presses de l'Université de Montréal, 1970, nos. 535, 536, pp. 279 - 280.

## C — Historical evolution of the notion — Demeure

The theory of default *(mora)* is of Roman origin, introduced during a period when greater indulgence towards debtors was in vogue[18]. Originally, the tendency was to apply vigourously to debtors, and without any period of grace, the sanctions provided for by law, as soon as their obligations were due. The reasoning behind this strictness of approach was that persons who contracted obligations should suffer the consequences for breaking their word; a question of honor before mercy[19]. During the Imperial era, the harshness of this rule was modified by the establishment of a distinction between delay (*retard*) and fault[20]. Thus in contracts, greater latitude was afforded the debtor by the rule that *mora* (default) would not exist until the creditor had performed the *interpellatio,* or invitation to execute made in the presence of witnesses[21].

Thus the rule in Roman law was: *"Dies non interpellat pro homine"*[22]. Confusion subsequently arose over the question as to whether this rule applied to obligations with a certain term (*certo tempore*). The Glossators decided otherwise with the consequence that many subsequent authors affirmed that the *interpellatio* was required only in cases of obligations without terms or with uncertain terms for execution[23]. This erroneous interpretation was even reproduced by the Court of Review in the case of *Cardinal v. Lalonde,* where Mathieu J. stated as follows:

> "Le droit romain faisait entre l'un et l'autre cas une distinction remarquable: Dans le premier cas, c'est-à-dire si l'obligation avait été contractée purement et simplement, et si la convention ne fixait aucun terme pour l'exécution, le débiteur n'était point en demeure, tant qu'il n'avait pas été interpellé par le créancier. . . .
>
> Dans le second cas, au contraire, c'est-à-dire si l'obligation avait été contractée à terme, *certo tempore,* le débiteur était constitué en demeure par la seule fixation du terme; . . ."[24].

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18 E. Cuq, *Manuel des institutions juridiques des Romains,* 2e éd., Paris, Librairie Plon, 1928, p. 607.

19 *Ibid.,* 608

20 *Ibid.*

21 A. Giffard et R. Villiers; *Droit romain et ancien droit français (obligations),* Paris, Librairie Dalloz, 1958, no 490.

22 Cuq, *op. cit.,* p. 608.

23 For example, C. Toullier, *Le droit civil français,* 5e éd., Paris, Renouard, Gosselin, Bossange et Leconte, Imprimerie et Fonderie de Fain, 1830, vol. 6 no 241, 242. C. Demolombe, *Traité des contrats ou obligations conventionnelles en général,* Paris, Auguste Durand et L. Hachette et Cie, 1868, vol. 1, no 515; P.B. Mignault, *Droit civil Canadien,* Montréal, C. Théorêt Editeur, 1901, vol. 5, p. 410. Even the codifiers were misled when they state that Article 89 (95) (Art. 1069 C.C.) expresses the rule of the English law, which governs in commercial cases, *and is founded on the Roman law,* c.f. *Rapports des codificateurs,* (Rapport no 1), Québec, Georges E. Desbarats Imprimeur, 1865, p. 18.

24 (1907) 31 S.C. 322 at page 324.

It is now generally admitted that the opinion of the Glossators was incorrect as regards obligations with term[25]. Thus, except in cases expressly provided for by law in which default was incurred automatically (*mora ex re),*[26] the creditor was obliged, by means of the *interpellatio* to put his debtor in default (*mora ex persona*)[27].

As consequences of *mora,* the debtor in a state of default under Roman law was exposed to recourses for compensatory as well as for moratory damages. He also assumed the risks of the thing, in the case of a certain and determinate object[28].

In French law prior to the 18th century, the Roman law as described by the Glossators was adhered to[29], with the result that except in the case of obligations with fixed terms, a judicial demand was required in order to put the debtor in default. During the 18th century and up to the Codification, the basic rule *dies non interpellat pro homine* was reaffirmed and later incorporated in the *Code Napoléon* under article 1139, which provided: "Le débiteur est constitué en demeure, soit par une sommation, ou par autre acte équivalent. . ."

Immediately prior to the Napoleonic Code, the rule requiring an interpellatory putting in default was adhered to so religiously, that even in cases of stipulation in a contract providing for *mise en demeure* by the sole expiration of the term and without any further formality or notification, the courts felt that they had the right to modify said clauses or even set them aside. These *clauses comminatoires* could not take effect without the approval of the judge[30].

This jurisprudence was finally set aside by the provisions contained in article 1139 of the *Code Napoléon* to the effect that:

> "Le débiteur est constitué en demeure. . . par l'effet de la convention lorsqu'elle porte que, sans qu'il soit besoin d'acte et par la seule échéance du terme, le débiteur sera en demeure".

In the Province of Quebec, the Codifiers decided to adopt the rule concerning default as established by the Roman law and followed in France.

As they stated in their report:

> "Of the articles on the subject of default, 87 (art. 1067 C.C.) and 88 (art. 1068 C.C.) are based upon the articles 1139 and 1146, of the French Code, but the

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25 Cuq, *op. cit.,* p. 608; Giffard and Villiers, *op. cit.,* no 491; G. Beaudry-Lacantinerie, et L. Barde, *Traité théorique et pratique de droit civil,* 3e éd., Paris, Librairie de la société de recueil J.B. Sirey et du journal du Palais, 1906, vol. 1 no 1001.

26 e.g. the obligation of those persons (tutors, curators) who administer for others to pay interest on sums which are under their control; the obligations of thieves to restore that which they have stolen.

27 Cuq, *op. cit.* p. 610.

28 *Ibid.,* 609; Giffard and Villiers, *op. cit.* nos 493, 494.

29 cf. Mazeaud and Mazeaud, *op. cit.* no 620.

30 Toullier, *op. cit.* vol. 6 no 245.

> article 87 (art. 1067 C.C.) also declares that a party may be put in default by a simple demand. This goes beyond the *sommation ou autre acte équivalent* of the article 1139, and also exceeds the rule of the ancient law by which a judicial demand was necessary"[31].

Through this very summary examination of the evolution of *la demeure,* one may easily grasp the fact that the basic idea behind this notion is above all the protection of the debtor. This goal still predominates today in our civil law[32].

## THE RULE CONCERNING DEFAULT

Since the Quebec legislator adopted the principle, *Dies non interpellat pro homine,* the position of creditors appears to be aggravated by the rule that debtors must be formally placed in default before the non-fulfillment of their obligations may expose them to damages. Needless to say, to have this situation before us as an absolute rule would be highly unreasonable[33], since in certain circumstances, the rhythm of business and other legal transactions imply the need for celerity in the execution of obligations. This fact did not escape the attention of the codifiers, who not only established many exceptions to the general rule[34], but also recommended that the contracting parties be allowed to derogate from the rule by expressly stipulating the contrary[35]. Finally, in spite of the silence of the Code on these matters, one may come across many situations in which it would be either impossible or illogical to require the creditor to place his debtor in default.

Since exceptions must always be applied restrictively, the generality of the rule requiring the creditor to put his debtor in default (or vice-versa)[36] is probably better emphasized by an examination of the exceptions to said rule. Thus, this chapter will be devoted to said derogatory provisions.

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31 *Premier rapport des codificateurs, op. cit.* p. 18.

32 A stiking example is the addition to the Civil Code of articles 1040A and following, which provide for "Equity in certain contracts". In fact, the notice of sixty days is just a special form of putting in default.

33 H. et L. Mazeaud et A. Tunc, *Traité théorique et pratique de la responsabilité civile,* 5e éd., Paris, Editions Montchrestien, 1960, vol. 3, no 2283.

34 e.g. arts. 1068, 1069, C.C.

35 c.f. Art. 1067 C.C. One may state that as a rule, public order is not involved, thereby permitting the parties to set aside conventionally, the provisions of the code dealing with default. Nevertheless, the one outstanding exception to this affirmation is article 1040a and following. In fact, article 1040e provides that "The provisions of this section shall apply notwithstanding any agreement to the contrary. Any renunciation of the notice prescribed above is of no effect".

36 cf. Laurent, *op. cit.* no 248 and 249.

## A – Legal dispensations to putting in default

There are four general situations in which the creditor is dispensed *de jure* from the obligation of putting his debtor in default; 1) By express provision of law[37]; 2) in commercial matters in which the time for performance is fixed[38]; 3) by expiry of the delay in which something could have been given or done[39]; and finally, by contravention of the obligation not to do[40].

**1) Express provision of law:** In many circumstances of strict application, the Civil Code reversed the rule *dies non interpellat pro homine* in order to facilitate the situation of the creditor by dispensing with the formal *mise en demeure.*

In the following examples taken from the Code, the debtor is in default automatically, as soon as his obligations are due: For instance, the tutor who neglects to invest the money of his pupil within the delays provided, owes interest on said sums (art. 296 C.C.).

The balance owed by the tutor to the pupil upon the closing of the tutorship account bears interest without demand (art. 313 C.C.).[41]

The usufructuary owes interest on sums advanced by the bare-owner in order to pay the debts during the continuance of the usufruct. (art. 474 paragraph 4).

In the case of returns, the heir owes the profits and interest of the things returned from the day when the succession devolves (art. 722 C.C.).

The person in bad faith who receives the sum or thing not due is liable for the profits and interest produced, from the time of receiving it or from the time when his bad faith began (art. 1049 C.C.).

The person in bad faith who receives that which is not due, is answerable for its loss for fortuitous event, unless said thing would have also perished in the possession of the owner (art. 1050 C.C.).

The thief or a person who knowingly receives the object stolen is answerable for the loss of it (art. 1200 paragraph 3).

The replacements and compensations involving the consorts and the community of property bear interest from the date of dissolution of said community (art. 1360 C.C.).

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37 Art. 1067 C.C.

38 Art. 1069 C.C.

39 Art. 1068 C.C.

40 Art. 1070 C.C.

41 The following cases provide for automatic default: *Franc v. Héritiers de dame Roy,* (1946) L.R. n.s. 422, the curator is in default to account. *Bouchard v. Ménard et al,* (1925) 32 R.L. n.s. 31 discusses the question of making an inventory.

The buyer is obliged to pay interest on the price when the thing sold is of a nature to produce fruits or other revenue, from the time he enters into possession of said object (art. 1534-2 C.C.).

The dissolution of the sale of moveables for non-payment of the price takes place of right upon expiration of the delay agreed upon to take the objects of the sale away (art. 1544 C.C.).

The mandatary is bound to render an account of his administration and pay over all that he has received (art. 1713 C.C.)[42].

The mandatary must pay interest upon moneys employed for his personal use, from the date of said use (art. 1714 C.C.).

The mandatary must pay interest on the money advanced by the mandatary in the execution of the mandate. Said interest is due from the date of the advance (art. 1724 C.C.).

In the case of loan for use, the borrower who uses the thing in a manner other than that for which it was destined, or who does not return the object within the delay agreed upon is answerable for the loss of said object by fortuitous event (art. 1767 C.C.).

The partner who makes personal use of partnership funds is bound to pay interest on said sums from the day that they were taken (art. 1840 paragraph 2).

One may readily notice that in each of these examples, it would have been quite exorbitant, given the circumstances, to require the creditor to expressly put his debtor in default. Naturally, being exceptions to the general rule, one cannot proceed by analogy.

**2) Commercial matters in which the time for performance is fixed:** In France as well as in Quebec, jurists were aware of the need for speed and efficiency in commercial transactions. As Professor Baudouin stated:

> "En matière commerciale, il faut débarrasser le contrat et son exécution de tout formalisme tendant à l'alourdir, ce qui pourrait se traduire par une perte de temps contraire à la rapidité des transactions. L'inexécution d'une obligation de nature commerciale doit être à l'abri de tout formalisme gênant"[43].

This awareness of the need for less hindrances to commercial matters was translated into fact by different means. In France, the courts reduced formalities for putting in default by insisting that the usages of trade could derogate from the general rule[44]. As a result, the *mise en demeure* may be done by ordinary letter, by telegram or even verbally[45]. This is indeed

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42 Article 1993 c.civ.fr.; Req. 29 jan. 1930; G.P. 1930.1.587.

43 *op. cit.* p. 566.

44 Planiol et Ripert, *op. cit.* no 773 and the cases therein cited.

45 Ripert et Boulanger, *op. cit.* no 1489.

astounding in light of the French Civil Code which solemnly declares that: "Le débiteur est constitué en demeure, soit par une sommation ou par *acte* équivalent. . ."[46].

In Quebec on the other hand, it was the legislator who diluted the strength of the general rule by arriving at a compromise situation: In commercial contracts with terms for execution, default is automatic; However, for said contracts without terms, the putting in default is required, as in the case of ordinary contracts.

> "In all contracts of a commercial nature in which the time of performance is fixed, the debtor is put in default by the mere lapse of such time"[47].

As previously mentioned[48], the Codifiers were reverting to the Roman theory of *mora* as interpreted by the Glossators. Even though we subsequently learned of their being misled by the interpretation[49], the modification to the basic rule of putting in default was undoubtedly a step in the right direction.

According to article 1069 C.C., in order for the debtor to be automatically in default, two basic conditions must be encountered: (i) It must be a contract of a commercial nature and (ii) there must be a term fixed for execution of the obligation[50]. We shall examine these elements in details.

**(i) Contract of a commercial nature** – One must first determine whether or not the contract is totally or partially commercial or not. This in itself can be a very difficult task in certain situations, due to the debate raging around the question, "What is an *acte de commerce?* "

However, for the purposes of this paper, one may apply the criteria mentioned by Perrault:

> "C'est un contrat à titre onéreux, consenti dans le but de spéculer ou de réaliser un bénéfice et contribuant à la circulation des biens mobiliers"[51].

It is important to note that the contract may be of a commercial nature to both contracting parties, or commercial for one and civil for the other with

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46 Art. 1139 C.civ.fr.

47 Art. 1069 C.C.

48 See foot-note 23.

49 Cuq, *op cit.* p. 608, Giffard et Villiers, *op. cit.*, no 491; Beaudry-Lacantinière et Barde, *op. cit.* no 1001.

50 e.g. *Sénécal v. Geoffrion,* (1884) 4 Q.B.R. I (the delivery of shares or a sum of money on a certain day); *Palliser v. Lindsay,* (1890) 19 L.R. 536 (Note payable six months after date); *In re Moisan; Paradis et Veilleux* (1902) 22 S.C. 423; (sale of wood by measure); *Wrighton et al v. Hitch,* (1913) 44 S.C. 128, (sale of cut stone with date for delivery and penal clause); *Silverman v. Massé,* (1927) 65 S.C. 200, (Sale of suits with delivery "in a few days, at most, a week").

51 A. Perrault, *Traité de Droit Commercial,* Montréal, Editions Albert Lévesque, 1936, vol. 1, no 295.
L. Faribault, *Traité de droit civil du Québec,* Montréal, Wilson et Lafleur Ltée, 1957, vol. VII bis no 419;

the result that in the former case, article 1069 C.C. will apply to both parties whereas in the latter case, said article will apply only to the party for whom the matter is considered commercial[52]. As to the other party, the general rule governing default will prevail, with the resulting necessity of a gesture on the part of the creditor.

This doctrine is generally followed by the courts. As Dorion, J. once stated:

> "Le système qui reconnaît ainsi un double caractère à un contrat n'est rien autre que le système de la personnalité des lois, d'après lequel chacun doit être jugé suivant sa loi; le commerçant suivant le droit commercial, et le non-commerçant, suivant le droit civil . . . .
> Sur la demande reconventionnelle, c'est Boivin entrepreneur commerçant qui est défendeur. Il faut donc lui appliquer la règle du droit commercial. Le contrat pour lui est commercial. Un terme a été fixé pour l'accomplir et il était en demeure par le seul laps du temps"[53].

**(ii) Term fixed for execution of the obligation** – Once it has been determined that the contract is of a commercial nature for at least one of the contracting parties, the next step is to establish whether a term has been fixed for execution of the obligation[54]. Of course, there are no difficulties in the application of this aspect of art. 1069 C.C., when the parties involved clearly stipulated a term for execution[55]. By applying the same reasoning, recourse must be had to the basic rule requiring express *mise en demeure,* whenever there has been no term provided[56].

Nevertheless, controversy has arisen surrounding cases in which the parties have indicated, either expressly or implicitly, that the obligations stipulated would not be exigible immediately, or would be due some time in the future. In the presence of this type of situation, Quebec jurisprudence has demonstrated both conservative and liberal tendencies.

An example of the conservative approach towards this problem is the case of *American Bag Loaning Co. v. Steidleman*[57] in which the plaintiff company leased cargo bags to Steidleman, a ship's master. The parties provided alternative

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52 A. Perrault, *Ibid,* no 438. Langelier also holds this position. c.f. *op. cit.* p. 517 - 518. However in one of the examples which he gives, the rule is incorrectly applied. From the context, we may certainly state that this is a typographical error.

53 *Boivin v. Paquet et Paquet v. Boivin,* (1914) 46 S.C. 461. For further examples, one may examine *La Cie d'Aqueduc de la Jeune Lorette v. Dame Turner,* (1921) 33 K.B.I, and *Dame Pelletier et al v. Ducharme,* (1933) 71 S.C. 216.

54 Perrault, *op. cit.* no 439.

55 For instance one may refer to the cases cited in foot-note 50.

56 Perrault, *op. cit.,* no 440.

57 (1889) M.L.R. 5 S.C. 398.

modalities for the return of the bags with the result that American Bag, after waiting for an extended period of time, took action in order to recover the price of the bags without having previously put defendant in default. Davidson, J. while admitting that this was a commercial matter, held that the time of performance was not fixed and consequently, defendant could not be in default by the mere lapse of time.

As a matter of fact, the contract of lease and hire stipulated that the bags were to be used only for the present voyage and were to be delivered, upon discharge of the cargo, to the company agent in Lisbon. The master also had the right to carry the empty bags with him on the return voyage in consideration of a freight charge, and deliver the bags to certain ports in the United States. This, Steidleman decided to do. However, the return voyage was delayed since Steidleman had to visit many ports in Europe before finding a cargo. Upon his return to Montreal, he was in the process of preparing the bags for shipment when he received the action. He sent out the bags just the same and the company took delivery under protest.

One cannot deny that in this case there was a term provided for execution of the obligation, albeit tacitly:[58] The bags were to be delivered at the end of the return voyage to the United States. Where the conflict arose is over the haste with which this return voyage was to have been made. The plaintiff felt that Steidleman should have returned immediately whereas Steidleman believed he could make the return voyage as soon as it was economically feasible for him to do so. Since Steidleman was executing his obligation when he received the action, the judgment rejecting said action must be viewed sympathetically because in fact, the defendant was not yet in default to deliver.

In the case of *Laberge v. Lepage*[59], defendant agreed to sell to plaintiff, a certain quantity of hay. Delivery was to be made as soon as plaintiff arranged to have cars at the railhead. Plaintiff's employee advised defendant of the arrival of the freight cars, but the latter refused to deliver until he was paid the sale price. Believing that the refusal to prepay had the effect of resolving the sale, defendant sold his hay to another person. Plaintiff then brought an action for damages. Defendant, by cross-demand, asked that the sale be declared resolved, due to the fact that in this commercial matter (as regards plaintiff), said plaintiff was *de jure* in default to execute his part of the bargain. The Court of Review received the principal action and rejected the cross-demand on the basis that a formal putting in default was necessary.

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58 Mignault, *op. cit.* p. 462.

59 (1919) 56 S.C. 207.

Finally, in the case of *La Cie d'Aqueduc de la Jeune Lorette v. Dame Turner*[60], Dorion, J., discussed whether the word "*printemps*" constituted a certain term. In this case, respondent was suing for damages resulting from a lack of water for domestic use. The appellant company promised to return the flow of water in the spring. In his notes Dorion J. stated:

> "Il apparaît par toutes les conversations, que l'on a voulu dire que l'aqueduc serait réparé aussitôt que le dégel du printemps le permettrait. C'est une date incertaine"[61].

Since the Court of Appeal decided the case on the basis of art. 1068, this *obiter* is of little value in the final solution of the problem. Nevertheless, one must debate whether in fact the delay for execution was indeed uncertain, since one could argue that "spring" runs until the 21st day of June.

The cases hereinabove examined clearly illustrate the tendency of a certain area of Quebec jurisprudence to require a very strict compliance with the letter of the law requiring that the time for performance be "fixed"[61A].

Just as striking, however, are a group of cases which applied article 1069 C.C. to certain situations in a broad and liberal manner. For example, in the case of *Thompson et al v. Currie et al*[62], plaintiff agreed to sell to Currie a certain quantity of pipe, some of which was deliverable immediately and the balance to be turned over "shortly". Three months later (and after the price of pipe fell 45%), Thompson sued for payment after tendering the balance of the shipment due. Torrence, J. of the Superior Court held that an offer made three months after the contract was not made within a "reasonable time". Thus plaintiff was in default to deliver by the sole expiration of a "reasonable" delay during which said delivery should have been made.

An analogous situation arose in the case of *Bigaouette Limitée v. Gagnon*[63]. In this action for recovery of the sale price, De Lorimier, J. followed the same reasoning as Mr. Justice Torrence, in finding that the vendor-trader who did not deliver the merchandise within a reasonable delay would be in default by this mere fact.

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60 *Loc. cit.* (1921) 33 K.B. 1.

61 *ibid,* p. 3. There was a disagreement between the parties as to whether the term was simply "spring" or "spring thaw".

61A More recently, the Court of Appeal in *Zaor v. Fontaine Auto Parts Inc.* (1969) Q.B. 708 held that a contract stipulating delivery of an automobile "le ou vers le 17 février" was indefinite and thus required a putting in default.

62 (1881) 4 L.N. 139.

63 (1928) 34 L.R. n.s. 72. (It should be noted that no delay was mentioned in the contract of sale).

The Court of Review decided the case of *Mahaffy v. Baril*[64] along the same lines as the *Bigaouette* case except that in the latter, delivery was not made until fifteen months later whereas in the former case, Mahaffy did not deliver until two months after agreeing to sell a car-load of flour.

These three cases have one fact in common; that the debtor of the obligation to deliver was in default by the sole expiration of a "reasonable time", which varied according to the circumstances of the case and the opinion of the judges.

Perhaps one could justify these conclusions by stating that in matters of trade, usage and custom may be employed to cover those aspects of the contract not specifically determined in advance[65]. Nevertheless, one could not deny that in having recourse to custom or usage to determine the term required for the performance of an obligation, the effect would be haphazard at best. For instance one could say that in the clothing trade, it is usual to deliver within about two weeks. However if the clothing merchant delivers after two weeks and a day, would he be already in default? Absolutely not. In matter of usage and custom, as a rule, one cannot maintain that a delay runs for an exact number of hours, days or weeks. These delays are at best an approximation of a reasonable delay. Certainly, one must agree with Mr. Justice De Lorimier who felt that fifteen months for the delivery of merchandise was unreasonable[66]. But, could one state at exactly which point the delay would not be unreasonable? Very unlikely since these cases are decided in retrospect; in other words a judge may affirm that in certain circumstances a delay of fifteen months is highly unreasonable, without stating or even knowing exactly what a reasonable delay would be under those conditions.

Therefore I feel that in the above-mentioned cases, the times for the performance of the obligations were uncertain and as such could not give rise to a *de jure* state of default.

Finally, in *Lambert v. Comeau*[67] the facts may be resumed as follows: By authentic deed Lambert sold to Comeau a timber-cut provided the latter furnish

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64 (1896) 11 S.C. 475. See also *Marcotte v. Moreau,* (1961) C.S. 460.

65 Art. 1024 C.C. would certainly permit this. "The obligation of a contract extends not only to what is expressed in it, but also to all the consequences which, by equity, usage or law, are incident to the contract according to its nature". One may also refer to the judgment of the Court of Review in *Brousseau v. Ménard,* [ (1912) 43 S.C. 165 ] in which Mr. Justice Archibald states at p. 168: "It is true, in this instance that no particular date is fixed for the accomplishment of the obligation other than that a certain portion is to be accomplished each year. One must then take into account the *custom* in such matters. Where large trees are to be cut down and conveyed to the mill, it is usual, it is, in fact, a universal custom that the cutting must be done in the autum and winter so as to enable the logs to be hauled out of the woods before the snow disappears".
See also Perrault, *op. cit.* vol. I, nos 206, 208.

66 *Bigaouette Limitée v. Gagnon, Loc. cit.*

67 (1920) 59 S.C. 425.

him with enough finished wood to build a barn to be completed during the summer of 1917. When Lambert asked Comeau to deliver, the 9th of March 1918, the latter refused to do so until he was paid the sum of one hundred dollars (actually payable upon delivery according to the contract). Lambert then brought an action for damages. The Superior Court (Bruneau J.) received the action but for reasons other than those which would interest us here. The Court of Review confirmed this judgment on the grounds that this was a commercial matter and defendant was in default by the sole expiration of term to deliver the wood.

I am inclined to agree that "the summer of 1917" would constitute a certain term for the performance of an obligation. Since "the term is always presumed to be stipulated in favour of the debtor. . ."[68], in this case the debtor would have been in default on the first day of fall.

Before concluding this section dealing with article 1069 C.C., there is one additional point which must be stressed. Although said article applies both to obligations to do *(obligations de faire)* and obligations to give *(obligations de donner),* there are particular circumstances under which default will not be automatic even though the case in point conforms with all the conditions of article 1069 C.C. With obligations to do, there are no exceptions, but with obligations to give, one must distinguish whether the debt is *portable* or *quérable* i.e. whether the debtor must play the active role by seeking out his creditor in order to give, or on the other hand, whether the creditor must take the initiative and present himself before his debtor to receive payment[69].

In the former case, article 1069 C.C. will apply without any additional difficulty since the whole operation for payment rests entire upon the debtor – once he is ready to pay, he will have to go to his creditor.

With the "demandable" or *quérable* debt, article 1069 C.C. will not apply unless the creditor has presented himself to his debtor in order to receive payment. If this is not done, default in commercial matters with terms for execution can never be automatic since the debtor may always plead that on the day for payment, he was ready to execute his share of the bargain, and that if in fact payment was not made, it was the fault of the creditor who was legally bound to come and ask for it.

Since the rule in the Civil Code[70] has it that unless otherwise provided, payment must be made at the domicile of the debtor, the problem which we are examining may be encountered much more often than anticipated.

The cases we have examined dealing with article 1069 C.C. illustrate some of the difficulties involved in determining whether the debtor could be held in

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68 Article 1091 C.C.

69 Laurent, *op. cit.* no 239.

70 Article 1152 C. C.

default or not. However, since the legislator felt, as far back as one hundred years ago, that an exception to the rule *dies non interpellat pro homine* was necessary in certain commercial matters, one may readily imagine the even greater need for flexibility today with the rapidity and ease of communications. I strongly believe that this half-measure of article 1069 C.C. has outlived its usefulness and should be set aside in favour of the positive rule, *dies interpellat pro homine;* that is to day, default *de jure* in all commercial matters.

**3) Things which could only have been done within a certain time:** This rule providing for putting in default *de jure* may be found at article 1069 C.C., which reads as follows:

> "The debtor is also in default when the thing which he has obliged himself to give or to do could only have been given or done within a certain time which he has allowed to expire".

According to doctrine, there are three basic conditions to which a given situation must conform in order for said article 1068 C.C. to take effect: (A) It must be materially impossible to execute the obligation after a given period; (B) the debtor must have knowledge that after said period, execution will no longer be possible, and finally, (C) the debt must be *portable.* We shall examine these elements in order.

**A – Impossibility to execute after a certain period –**

We are dealing with a question of fact left to the appreciation of the courts rather than with a question of law[71], since the judge must decide whether, in a given set of circumstances, execution of an obligation has become materially impossible or not[72].

Following the codification, article 1146 *in fine* of the *Code civil français* (analogous to article 1068 C.C.) was applied in a strict manner to cases in which physical impossibility prevented execution of the obligation[73].

> "Il faut que l'exécution soit devenue impossible en totalité ou en partie, et, par là, nous entendons qu'il doit y avoir un obstacle matériel et définitif à cette exécution, et non pas simplement un empêchement moral résultant de la mauvaise volonté du débiteur. Il faut, en un mot, que désormais, l'exécution ne puisse pas avoir lieu, le débiteur voulût-il l'accomplir"[74].

One may give as examples of the application of this article, the mandate one gives to his lawyer to collect the amount due on a promissory note. If the lawyer fails to take action before prescription is acquired, he is in default to

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71 Toullier, *op. cit.* no 251.

72 Laurent, *op. cit.* no 239; Mazeaud, Mazeaud and Tunc, *op. cit.* no 2275.

73 Beaudry-Lacantinerie, *op. cit.* no 471.

74 *Idem* no 472.

execute his mandate by this mere fact[75]. Another example is the hiring of a mason to reinforce the wall of a building threatened with collapse. If the mason does not do his work and the wall collapses, he is in default at the moment and by the fact of said collapse[76].

Jurisprudence also furnishes us clear applications of article 1068 C.C. (art. 1146 C.civ.fr.). In *Beaudry v. Tate*[77], plaintiff hired defendant to refloat the former's ship which had run aground. Tate did not execute immediately and the ship was destroyed by ice and by fire.

The Superior Court held that Tate could not invoke a lack of express putting in default since by the nature of the contract, he could execute his obligations only during a certain time.

One may also examine the French case of *Chemin de fer P.L.M. c. Barthe*[78] in which the railway company delivered Barthe's grave-vines dead, after the prescribed time for delivery had expired. The Cour de Cassation held that the company was in default and stated:

> "Mais attendu que si la compagnie ne pouvait être constituée en état de retard que par une mise en demeure régulière, le fait par le destinataire de n'avoir accompli cette formalité, demeurée d'ailleurs sans effet, que plusieurs jours après l'expiration des délais impartis à la compagnie pour le transport de la marchandise, ne saurait même partiellement, exonérer celle-ci des conséquences dommageables d'un évènement, imputable aux termes de l'arrêt à l'inexécution constatée de ses obligations contractuelles. . ."

French doctrine extended the application of article 1146 C.civ.fr. *in fine* to cover not only cases in which execution is physically impossible, but also to cases in which execution though still possible, would be only slightly useful for the creditor or would render his position more onerous[79]. As Demogue states:

> "Ce texte vise non seulement le cas où il y a désormais impossibilité physique de remplir l'obligation, mais encore les cas fréquents où l'exécution tardive n'aurait plus qu'une faible utilité pour le créancier. Il en est ainsi si l'exécution est plus onéreuse pour le créancier"[80].

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75 Langelier, *op. cit.* p.515.

76 Larombière, *op. cit.* p. 479.

77 (1867) 3 L.C.L.J. 143.

78 Civ. 3 déc. 1930; S.1931.1.101.

79 Cf. Duraton, *op. cit.* no 466; R. Perrot, *La mise en demeure* dans *Répertoire de droit civil*, sous la direction de E. Vergé, G. Ripert, Paris, Jurisprudence générale Dalloz 1953, Vol. 63 p. 469 no 19. One must note the dissenting opinion of Mazeaud, Mazeaud and Tunc, *op. cit.* no 2275 foot-note 3. "La disposition ne vise pas les cas où l'exécution de l'obligation au bout d'un certain temps devient seulement plus onéreuse". This opinion also appears to be that of Marie-Jeanne Pierrard in *La mise en demeure et les dommages-intérêts compensatoires,* 1945 Semaine juridique no 466: "Passé ce délai (in which obligations could be executed), l'exécution devient, sinon matériellement, du moins juridiquement impossible, en ce sens qu'elle ne présente plus *aucune* utilité pour le créancier".

80 Demogue, *op. cit.* no 247.

French jurisprudence adopted this larger approach both in cases in which the execution of the obligation was less useful for the creditor[81], as well as in situations rendering the obligation more onerous for said creditor[82].

In Quebec, the only case which appears to discuss this aspect is that of *Brousseau v. Bénard*[83], in which Mr. Justice Archambault states:

> "There is another consideration which may, perhaps be applicable to this case; article 1068 provides that the debtor is also in default when a thing, which he has obliged himself to give or to do, can only be given or done within a time which he has allowed to elapse. Commentators of the corresponding article of the Code Napoléon give as an instance of this, the case of a man who undertakes to furnish certain articles for. . . exhibition at a fair, the date of which has been fixed, and has not furnished them until the fair is over. In this case, it has been held that the defendant was in default without any special act on the plaintiff's part. The question arises whether, as in this case, where it appears that the intention of the parties was that this cutting of ten acres should be done each year, in order to facilitate the clearing of the land for agricultural purposes, the mere failure to do the cutting and removing of the logs, within a delay which would enable the farmer to clear the land that year, did not furnish a case where the thing could only be done within the delay which the debtor had allowed to elapse. It is true that the thing could be done the next year; but so also the goods in the case above mentioned could be exhibited at the fair which might take place the next year. It seems to me that, if the contract had clearly stipulated that its object was that the ten acres which were to be cut each year were so to be cut and the logs hauled away in time to allow the cultivation of the land that year, this case would certainly fall under article 1068. The contract is not specific as to the object of the plaintiff in making it, but it does refer to the clearing up of the land; – it does oblige the defendant to follow the clearings of the plaintiff, if a demand is made for that purpose. I think it does indicate that there was an intention in the mind of both parties that the logs were being cut so as to enable the plaintiff to clear

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81 e.g. Civ. 18 oct. 1927; 1928.1.22, in which merchandise to be sold during the Christmas rush was not delivered on time by the debtor. Req. 12 juin 1903, D.P. 1903.1.413: One party agreed to publish a magazine for another in consideration of a bulletin service and other important advantages. Failure by the latter to furnish same reduced the efficacy of the publishing venture.

82 c.f. Req. 12 mars 1878; S. 1878.1.293. In this matter the Banque franco-égyptienne was to guarantee the credit of Jullian-Suzan in order to permit the latter to purchase a quantity of sugar. The bank kept delaying final approval of the transaction, thus causing the other financial backers of the operation to become restive. As a result, they made the terms more onerous for J-S. Under these conditions he could not go through with the deal. Thus, the Bank, by delaying matters, caused default to be incurred automatically, since the situation of the creditor became more onerous by their stalling.
Another leading case is that of *Bouchet c. Seigneau* (Paris 25 mars 1930; G.P. 1930.1. 871) which was decided along the same lines as the Banque franco-égyptienne matter. In this case, Bouchet, a lawyer, was asked to prepare a deed of sale for the purchase of a commercial enterprise. Seigneau requested Bouchet to register the deed immediately since a new tax law on transfers of property was about to be passed. Bouchet neglected to do so, thus forcing Seigneau to pay taxes on the sale and rendering the latter's situation more onerous.

83 *Loc. cit.* (1912) 43 S.C. 165.

> up the land; that that was an interest which the plaintiff had in the contract and one of the considerations of the sale which he made of the logs"[84].

The uncertainty of the situation above described was readily admitted by the judge who nevertheless maintained that article 1068 C.C. could apply. In my opinion, said article 1068 C.C. does not have any application under these circumstances, since execution of the obligation was always possible even though this tardiness may have inconvenienced the creditor. Due to the fact that the rule *dies non interpellat pro homine* requires an express putting in default; exceptions to this rule may be applied only in cases which adhere to the letter of article 1068 C.C.

To pass on to another aspect of this question, the Civil Code mentions not only that execution must be impossible, but must also be impossible "within a certain time" which the debtor has allowed to expire. In effect, one must distinguish between the term for execution established by the parties and the period of time during which execution could materially have been completed:

> "Cette disposition ne se rapporte pas, comme on pourrait le croire à première lecture, à l'hypothèse où le contrat a fixé un délai au débiteur pour s'exécuter; elle ne vise pas, en effet, le débiteur qui devait s'exécuter dans un certain temps, mais le débiteur qui ne pouvait s'exécuter que dans un certain temps. Elle envisage par là les espèces où, après un certain délai, l'exécution est devenue matériellement impossible"[85].

Certain authors[86] have implied that in order to determine this, one must scrutinize not only the material facts, but above all the intentional elements of the parties involved. A certain jurisprudence has also retained the importance of the intentions of the parties involved.

In the French case of *Féry c. Dame Damia*[87], Féry engaged Damia to put on three shows in his theater. Under the terms of the agreement, Damia promised to notify Féry of her arrival at Pau at least fourteen days before the opening night of her engagement. To ensure this, a penal clause was provided. Since this notice was not given, the Cour de Cassation held that this was a matter in which article 1146 *in fine* C.civ.fr. would apply[88].

In spite of these opinions, I prefer that of Pierrard which makes a clear distinction between the intentional element and the material facts:

> "La restriction au principe de la nécessité d'une mise en demeure ne concerne pas les obligations qui devaient d'après la volonté des parties, s'accomplir dans un certain laps de temps, autrement dit, les obligations à terme. L'arrivée du

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84 *ibid.* p. 169.

85 Mazeaud, Mazeaud and Tunc, *op. cit.* no. 2275.

86 cf. L. Baudouin, *op., cit.* p. 566; Mignault, *op. cit.* p. 412.

87 Civ. 25 avril 1936; S. 1936.1.256.

88 See also Req. 16 fév. 1921; D.P. 1222.1.102.

terme, dans bien des cas, ne rend pas impossible l'exécution de l'obligation, elle n'équivaut pas à une inexécution définitive"[89].

The *Féry c. Dame Damia* case is an excellent example of the confusion which may arise if too much emphasis is placed on the intention of the parties to the detriment of the nature of the debtor's obligation. The Cour de Cassation held Damia in default, not because she was absent for the shows in question, but rather due to the fact that she failed to give the stipulated fourteen day notice of her arrival to Féry. I feel that even if she arrived later than agreed upon, (but in time to put on her act), execution of her obligation was always possible and article 1146 *in fine* C.civ.fr. would not have applied. Had she arrived after the dates scheduled for the shows themselves, then this would have been an entirely different matter. Therefore I maintain that for Dame Damia to have been in default by her failure to give the notice mentioned in the contracts, the parties would have had to expressly stipulate that said default would be automatic, and without the intervention of any *interpellation* (art. 1139 c.civ.fr.).

Thus, to resume my opinion on this aspect of article 1068 C.C., I believe that in certain cases, the intention of the parties may have a great influence on the decision whether article 1068 C.C. will apply or not to a given situation. For example, I sell my car to X who states that he wishes to use it on his honeymoon, which will take place at a specified time. If I do not deliver in time for said use, I am in default *de jure*. However, if I sell my car to X with delivery stipulated for a certain date, by the mere fact that I do not deliver until after this date does not constitute a state of default[90]. Nevertheless, save in exceptional cases, the determination of the possibility of execution should be a question of fact, determined *per se* without recourse to an analysis of the intention of the parties. The *Beaudry v. Tate* case[91] is an excellent illustration of this. Because Beaudry desired that his boat be refloated within a delay of fifteen days, Tate was not in default by sole fact of non-execution. The default was incurred because ice had destroyed the boat before Tate completed execution of his obligation.

Up to the present, the examples provided have illustrated the application of article 1068 C.C. with regards to contracts of instantaneous execution (*contrats instantanés*)[92]. However, one may safely affirm that this article also applies to contracts of successive execution (*contrats à exécution successive*) such as

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89 *loc. cit.* no 466.

90 cf. Mazeaud, Mazeaud and Tunc, *op. cit.* no 2281.

91 *Op. cit.*

92 For additional examples, one may consult: *Oligny v. Brault,* (1895) 8 S.C. 506; Req. 28 jan. 1874, D.P. 1874.1.387; Civ. 7 juil. 1909, S. 1910.1.371; Seine 1 mars 1954, G.P. 1954, 2e sem. 103; Civ. 14 mars 1962, J.C.P. 1962.IV.61 (Sommaire).

agreements to furnish electricity[93] or water[94], or other situations in which the prestation of the debtor is of a continuous nature[95].

The basic question in France was not to determine whether the debtor was in default *de jure* to execute his obligation, but rather to determine if, in a continuous obligation, the failure to provide an uninterrupted execution constituted a delay (*retard*) in executing or a case of non-execution. Since French jurists today are unanimous in affirming that a putting in default is not necessary prior to a claim for compensatory damages[96], the debate as to the existence of a state of default is irrelevant until the nature of the damages has been determined. In Quebec, on the contrary, we will discover that the putting in default is necessary in order to claim both compensatory and moratory damages.

However, we may retain as highly pertinent, French doctrine and jurisprudence which finally arrived at the conclusion that in contracts of successive execution, any interruptions in the smooth sequence of execution constituted cases of non-execution and not merely delays in execution. The reasoning invoked may be resumed as follows:

> "C'est qu'en effet, l'obligation du bailleur étant successive, il lui appartient d'assurer chaque jour, chaque heure, chaque minute, une jouissance paisible pour le preneur, de telle sorte que, si cette obligation n'a pas été remplie dans le passé, il y a bien inexécution définitive et non pas retard dans l'exécution"[97].

If this is the case (and I agree it is), then we have situations in which the debtor is in default *de jure* under article 1068 C.C. Let us take the example of the supplier of electricity. If power is interrupted at my enterprise the 1st of June 1971, and is re-established the 2nd, the electrical company could not make up for the time lost by furnishing double the amount of electricity on the 3rd. As each moment went by, the debtor was "guilty" of not executing his obligation.

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93 e.g. *Dame Langevin v. Perrault,* (1891) 35 L.C.J. 121. Even though this case was decided on the grounds that no putting in default was necessary since the debtor admitted that he did not execute his obligation, said debtor would nevertheless have been in default under article 1068 C.C.; Seine 28 avril 1931; G.P. 1931, 2e sem. 75.

94 e.g. *La Compagnie d'Aqueduc de la Jeune Lorette v. Dame Turner, op. cit.* (1921) 33 K.B. 1; The Cour de Cassation decided the contrary in the *arrêt:* Civ. 9 nov. 1914, D.P. 1916.1.268. However, this judgment is isolated and discredited. *Vide* Pierrard, *loc. cit.* no 32 states: "Cette solution est tout à fait inexacte, car la fourniture d'eau suppose de la part de la compagnie des prestations successives de telle sorte que si, dans le passé, cette fourniture n'a pas été faite, il y a bel et bien une inexécution définitive".

95 For instance, the obligation to furnish a person with monthly work to the equivalent of 3000 fr. (Req. 29 nov. 1882.D.P.1883.1.376); the obligation to keep vehicles in a good state of repair (Req. 30 jan. 1911.D.P. 1912.1.48); the obligation to pay the premiums of a life insurance policy given to guarantee a loan, (Req. 18 jan. 1922, S.1922.1.222); the obligation of an employer to furnish meals to his employee, (Soc. 17 déc. 1943, S.1944.1.137); the agreement by a publisher to keep a writer's works in circulation, (Paris, 7 nov. 1951, D.1951.759).

96 e.g. One may consult Pierrard's article *loc. cit.* 1945 Semaine Juridique no 466. This aspect is discussed in detail later. (pp. 58 *et seq.*).

97 Meurisse *loc. cit.* no 31.

The notion of non-execution in matters of contracts of successive execution has been developed in France, mainly in the area of lease and hire[98]. At first, the French courts held[99] that damages caused to the lessee by the neglect of the lessor to make repairs were compensatory in nature, and as such, did not require a prior putting in default[100]. Nevertheless, this rendered the situation of the lessor more precarious since he gave up the enjoyment of his property to another person and therefore had less occasion to realize when repairs were necessary[101]. Jurisprudence arrived at a compromise situation which respected the logic of the arguments invoked for dispensing with the *mise en demeure* while permitting, nevertheless, that the lessor be treated in a more equitable manner. In effect, today, the lessor cannot be held liable for damages caused by a lack of repairs to the premises leased, unless he has been advised, in some manner, of the need for said repairs. This informal notice, however, cannot be considered a *mise en demeure*[102].

In the Province of Quebec, the whole question of lease and hire is approached in an entirely different manner. One has to distinguish whether the party suffering injury is the tenant or a third person. If the third person is victim, no putting in default is necessary, because the fault of the landlord is delictual rather than contractual in nature[103].

If the injured party is the lessee himself, the preponderance of Quebec jurisprudence favors that the lessor should have been put in default to repair before damages may be claimed due to the lack of repair[104]. Thus, we may conclude that both in France and in Quebec, the general feeling is that the

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98 Perrot, *loc. cit.* no 24.

99 Except in certain exceptional cases such as the much discussed matter of *Juif c. Philippe,* Civ. 11 jan. 1892, S. 1892.1.117 (note Planiol). For additional comments on this case, one may consult Beaudry-Lacantinerie, *op. cit.* no. 470).

100 For instance Nîmes, 4 juin 1934, D.H.1934.547; Toulouse, 23 oct. 1934, D.P. 1935.249; Civ. 28 jan. 1936, G.P. 1936, Ie sem. 507; Riom. 25 mars 1937, G.P. 1937.1.887; Req. 3 avril 1939, G.P. 1939, 2e sem. 92.

101 Mazeaud, Mazeaud and Tunc, *op. cit.* no 2275.

102 Civ. 5 jan. 1938, D.H. 1938.97 which states: "Attendu que la demande en dommages-intérêts, formée contre le bailleur tenu des grosses réparations, pour inexécution de ses obligations, n'est pas, en principe, subordonnée à la mise en demeure prévue par l'art. 1146 c.civ., qu'il en est ainsi notamment en cas d'accident survenu au locataire par suite du mauvais état de la chose louée, à moins qu'il n'eût négligé d'aviser *sous une forme quelconque,* son propriétaire, de la nécessité des réparations qui s'imposaient et dont lui seul, par suite des circonstances était à même de constater l'urgence". Civ. 10 oct. 1940, S.1941.1.11; Civ. 18 jan. 1943, G.P.1943. 1.153. Contra: Aix-en-Provence 4 fév. 1952, G.P. 1952, Ie sem. 312.

103 *Dame Lamontagne v. La Société de Placement de Montréal,* (1923) 30 L.R. n.s.18; *Dame Collin v. Vadenais ès qual.,* (1927) 44 K.B. 89; *Dame Brazeau et al. v. Dame Mourier et al,* (1934) 72 S.C. 503; *Belbin v. Dame Tarte et al.,* (1961) S.C. 234; *Dame Beauregard v. St.Armand,* (1962) S.C. 436; F. Snow, *Landlord and Tenant,* 3rd ed. by L. Carroll, Montreal, Southam Press Ltd., 1934, p. 162.

104 Snow *ibid* pp. 163-164; *Shimanski v. Higgins,* (1898) 13 S.C.348; *Rae v. Phelan et uxor,* (1898) 13 S.C.491; *Lady Hingston v. Bénard,* (1916) 25 K.B. 512, (1918) 56 S.C.R. 17 (the Supreme Court did not discuss this aspect of matter); *Saba v.*

lessor must be advised that the property leased need repairs. Quebec is more formal in this respect since we are required to give a full *mise en demeure* whereas in France, an informal notice will do.

I believe that in said matters, article 1068 C.C. should apply due to the fact that we are dealing with contracts of successive execution[105]. However, I will not insist upon this point, not only because this remains basically a debate for the courts to settle, but also due to the fact that the legislative aspect of lease and hire does not fall within the scope of this paper.

**B – Knowledge of debtor –**

As another condition necessary for article 1068 C.C. to receive application, the debtor must have known that after a given moment, execution of his obligation will no longer be materially possible. If the nature of the agreement[106] or the circumstances of the case are not sufficient to indicate to the debtor that his obligation may be fulfilled only during a certain time, express mention should be made in the contract in order to avoid an equivocal situation. Of course the knowledge of the debtor is a question of fact left to the appreciation of the judge[107].

Larombière explains why the debtor should have knowledge of the situation in which he is entering:

> "La mise en demeure suppose en effet la mauvaise foi, c'est-à-dire la connaissance acquise des besoins du créancier et du dommage que peut causer le retard. Comment le débiteur sera-t-il donc responsable de son défaut d'exactitude, alors qu'on ne lui en a pas fait connaître la nécessité, et qu'il a cru de bonne foi s'obliger dans des conditions ordinaires, où sa mise en demeure ne peut résulter que d'une interpellation régulière faite?"[108].

Since there does not appear to be any controversy over this aspect, we may pass on to the third condition.

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*Duchow,* (1917) 54 S.C.53; *Desloover v. Mansfield,* (1918) L.R.n.s.155; *Thaddee Brisson Ltée v. Desbiens,* (1924) 37 K.B. 539; *Marchand v. Letual et al.,* (1927) 33 L.R. n.s. 85; *Nudelman v. Hack,* (1932) 70 S.C. 452; *Dame Koznets v.Dame Labbé,* (1933) 71 S.C. 561; *Bernard v. Cymbalista,* (1955) S.C. 434; *Bertalon v. Huels,* (1968) Q.B. 715. Contra: *Trude et uxor v. Meldrum et al.,* (1902) 8 R. de J. 410.

105 In the case of *Lesage v. Renaud,* (1926) 33 L.R.n.s.350, the Circuit Court would appear to have touched this approach but later contradicted it when Mr. Justice Archambault stated: "Il y a faute de sa part, et le défaut de mise en demeure ne lui supplée par une fin de non-recevoir à l'action. Son obligation était de conserver la chose dans l'état où il l'avait reçue afin de la vendre en cet état; l'ayant vendue endommagée, il est en demeure parce que la chose qu'il devait faire, devait être faite dans un temps qu'il a laissé écouler. (1608 c.c.) (sic). Son obligation à réparer le dommage naît de sa faute et il n'y a pas de mise en demeure nécessaire". See also *Mindlin v. Cohen et al;* (1960) S.C. 114.

106 *Oligny v. Brault, loc. cit.* (1895) 8 S.C. 506.

107 Faribault, *op. cit.* no 419; Langelier *op. cit.* p. 517; Demogue, *op. cit.* no 248; Duranton, *op. cit.* no 466; Demolombe, *op. cit.* no 522; Civ. 31 juil. 1946, S.1947.1.5.

108 Larombière, *op. cit.* p. 479. For a good example of the application of the rule that the debtor must be aware of the situation in which he is entering one may consult Civ. 31 juil. 1946 S. 1947.1.5.

**C – The debt must be *portable* –**

The same distinctions made before, during the examination of *la demeure* and commercial matters also apply here. Art. 1068 C.C. applies to both obligations to do as well as to obligations to give. However, in the latter case, default will not take place by sole effect of law unless the debt is *portable.* If the debt was, on the other hand *quérable,* the debtor would not be in default unless the creditor presented himself for payment at the debtor's domicile[109].

**4) Contravention of an obligation "not to do" –**

The debtor is in default by sole effect of law by his violation of an obligation not to do. In effect, article 1070 C.C. (based on article 1145 C.N.[110] provides as follows:

> "Damages are not due for the inexecution of an obligation until the debtor is in default under some one of the provisions contained in the articles of the preceding section; except the obligation be not to do, when he who contravenes it is liable for damages by the fact of the contravention alone".

One cannot debate the reasoning involved which dispenses with the *mise en demeure* under these circumstances. As a rule, the putting in default is a means provided for the creditor to indicate to his debtor that the former desires that his obligations be fulfilled without further delay. However, in the case of an obligation not to do, not only is the inaction of the debtor tolerated, (as in the case of positive obligations), before the state of default is incurred, his inaction is mandatory under pain of damages[111] Mazeaud, Mazeaud and Tunc resume the situation as follows:

> "C'est alors que par un fait actif que le débiteur viole son obligation; il ne se contente pas, comme le débiteur d'une obligation de faire qui ne s'exécute pas, de rester dans l'inaction, ce qui peut être la conséquence d'un oubli; il agit; il va à l'encontre de l'engagement qu'il avait contracté; il n'ignore pas qu'il cause un préjudice à son co-contractant. A quoi servirait de l'avertir par une mise en demeure?"[112].

Both French and Quebec jurisprudence contain many straightforward applications of this article[113]. However a nuance has been introduced which protracted in a certain measure the effect of this provision. The gist of the matter may be stated as follows: In obligations to do *(obligations de faire)*

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109 cf. C. Aubry, C. Rau, *Cours de droit civil français,* 6e éd., par Bartin E., Paris, Editions Techiniques S.A., 1938, vol. 4, p. 139; Laurent, *op. cit.* no. 238.

110 First Codifiers report, *op. cit.* p. 18.

111 cf. Demolombe *op. cit.* no 541; Azard, *op. cit.* no 114; Laurent *op. cit.* no. 240.

112 *op. cit.* no. 2274.

113 cf. *Leduc v. Lafrance,* (1910) 17 L.R. n.s. 333. In this case, the debtor promised not to block access to a store-room, while building an extension to an edifice. Douai, 7 déc. 1881, D.P. 1882.2.112: A person had a right of habitation which would cease if she left the house for more than a month. Req. 23 juin 1930, S. 1930.1.344: The lessee of an "estaminet" belonging to a brewery, engaged to serve only the products of the lessor and promised not to change the destination of the premises.

may be found implicit obligations not to do[114]. For instance, if I am engaged to plant a field with wheat, I am thereby bound not to plant any other type of crop. Thus if instead I plant corn, I am in default by the fact that my gesture violates this implicit obligation not to do[115].

Said reasoning may be carried to extreme lengths and we could plausibly arrive at the following conclusion: If I contract an obligation to do; for instance to build a house, I also implicitly contract obligations not to do, such as to not build a barn, to not build the house with defective materials and even to not abstain from building the house. If this were true, a putting in default would never be needed because each debtor who did not fulfill his obligations would have violated an obligation not to do i.e. not to fail fulfilling his obligations.

Where may we establish a line of demarcation? I believe the solution lies in the comportment of the debtor, who may remain either passive and not make any effort to execute his obligation, or else he may do something which is in contradiction with what he is bound to do. For example, I am engaged to build a barn. If I do not attempt to fulfill this contract, but rather prefer to remain passive, I am not in default under article 1070 C.C., because my intentions are not clear. By my inaction, I am not executing, but nor am I refusing to execute. My attitude towards the contract will not be legally established until after a *mise en demeure.* On the other hand, If I not only, not build the barn but build a house instead, my attitude is clear – By my gesture, I am saying in effect, "not only will I not build your barn, I have even done the contrary and built a house".

Thus, to resume, the debtor in a passive state will have to be put in default whereas the debtor who poses an overt act which is in contradiction with his obligations is in default *de jure* under article 1070 C.C.[116].

This solution appears to be in conformity with the jurisprudence[117]. In *Countebourre c. l'Etat,* the Cour de Cassation affirmed:

> ". . . Le simple retard apporté par le débiteur à l'exécution d'une obligation de faire ne le rend, en général, passible de dommages-intérêts, que lorsqu'il a été mis en demeure, mais que sa responsabilité est immédiatement engagée par tout fait offensif accompli par lui en contradiction de l'obligation qu'il a

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114 Perrot, *loc. cit.* no. 15: "Il est à noter du reste que la jurisprudence cherche à étendre la portée de l'article 1145 du code civil en découvrant, à travers les obligations de faire, des obligations corrélatives de ne pas faire la chose contraire".

115 Larombière, *op. cit.* p. 518.

116 As Demogue states (op. cit. no 246): "La doctrine applique de même l'art. 1145 si on fait de manière irrévocable autre chose que ce qui est dû. Cette disposition s'applique aussi lorsque le débiteur exécute autrement qu'il ne le devait".

117 For example in *Cie Générale Transatlantique c. Goddard* (Req. 18 fév. 1874, D.P. 1874.1.309), Goddard bought a specified lot of coal from the company. However, the latter, in order to benefit from a rise in prices, sold part of the lot. Before the Cour de Cassation, the company invoked lack of a prior putting in default. It was decided that the company was in default due to ". . . certains agissements auxquels s'est livré la demanderesse au mépris de ses engagements. . ."

> contractée; que l'obligation de faire une chose emporte, en effet, virtuellement l'obligation de ne pas faire la chose contraire. . ."[118].

The Quebec Court of Appeal in the fairly recent case of *Masson v. Andrews* also accepted this line of argument. The facts may be resumed as follows: Masson leased a restaurant to Andrews. Later, Masson desired to make renovations in his building but the only way the builders could have access to the upper floors was by way of the ground-floor restaurant. Andrews was willing to put up with the inconvenience, but only for a limited time which Masson said would be sufficient for his needs. However, conditions got so bad after the time agreed upon for the repairs, that Andrews sued in resiliation of lease and damages. The Superior Court maintained his action. In appeal, Masson invoked the lack of a *mise en demeure* prior to the claim for damages. In the judgment confirming the Superior Court, Mr. Justice Bissonnette stated:

> "En second lieu, comme la jouissance des lieux est une obligation stipulée en faveur du locataire, le bailleur ne peut en priver ce dernier. D'où il suit qu'il a l'obligation de ne faire aucune chose qui trouble cette jouissance. Or, comme l'exposé très logiquement le juge de première instance, la mise en demeure n'est pas nécessaire dans le cas d'obligation de ne pas faire (art. 1070 c.c.)"[119].

## B — Conventional putting in default:

Although the Civil Code has adopted the rule *dies non interpellat pro homine,* it nevertheless allows the parties to a contract to derogate from this principle and stipulate the contrary[120]. Article 1067 C.C. provides in part as follows:

> "The debtor may be put in default either by the terms of the contract, when it contains a stipulation that the mere lapse of the time for performing it shall have the effect, . . .[121]

The conditions necessary for the debtor to be in default by sole effect of a convention may be resumed as follows:

1) The parties must have stipulated that the debtor would be in default upon his failure to fulfill his obligations, and;

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118 Civ. 2 mars 1875, S.1875.1.292. However, this case decided that no putting in default was necessary because this was a delictual matter.

119 (1945) L.R. n.s.40 at p. 56. Another example is the matter of *Coursol v. Rapid Tool and Machine Co.,* (1923) 29 L.R. n.s.409, in which it was decided that a putting in default was not necessary in the case of the violation of a legal obligation (not to disturb the owner of the legitimate possession of his property). See also *Daigneau v. Lévesque;* (1886) 30 L.C.J. 188 (Appeal Court).

120 In which case Beaudry-Lacantinerie and Barde state (*op. cit.* no 1001) "Le débiteur se trouve interpellé par anticipation: il est averti que le créancier tient essentiellement à l'exécution immédiate de l'obligation aussitôt que le terme sera échu; il n'a qu'à se tenir sur ses gardes".

121 Despite the great similarity between this article and its counterpart of the *Code civil français* (article 1139), the wording of the latter would seem to require a more explicit derogation from *le droit commun:* "Le débiteur est constitué en demeure. . . par l'effet de la convention, lorsqu'elle porte que, sans qu'il soit besoin d'acte et par la seule échéance du terme, le débiteur sera en demeure".

2) The debt should be stipulated *portable.* In this latter case, certain distinctions will have to be made because even if the debt is not portable, default is still incurred without the intervention of an interpellatory *mise en demeure.* Nevertheless, under these circumstances, the creditor will have a prior formality to perform. We shall examine these conditions in greater detail further on.

**1) Stipulation of the parties** – In France, the authors are in agreement that the wording of the stipulation dispensing with the *mise en demeure* need not be identical to the provisions of the *Code civil français* (art. 1139). Toullier's hesitations[122] gave way to the clear affirmation that:

> "Il n'est pas indispensable, pour mettre le débiteur en demeure par la seule échéance du terme, de se servir littéralement des termes de la loi et de dire en conséquence: sans qu'il soit besoin d'acte et par la seule échéance du terme. Il est satisfait aux prescriptions de la loi par l'emploi d'expressions équipollents, les termes de l'article 1139 n'ayant rien d'exclusif ni sacramentel"[123].

In determining whether, under the circumstances, equipollent terms have been employed, the French courts as a rule[124], have demonstrated very liberal attitudes towards creditors. For instance, the courts have held that by tacit agreement, the parties dispensed with the formal requirement of a *mise en demeure,* when the time for execution of the obligation was strictly fixed in advance[125], or when merchandise was stipulated *"livrable de suite"*[126].

The fact that a penal clause was provided for also implied a conventional putting in default[127], since, as Laurent stated, this indicated the interest of the creditor that the obligation be fulfilled on the date designated by the parties[128].

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122 Toullier (*op. cit.* no 249) opines as follows: "Mais est-il nécessaire de cumuler ces deux phrases incidentes? Ne suffit-il pas qu'il soit exprimé que le débiteur sera constitué en demeure par la seule échéance du terme? Faut-il indispensablement ajouter 'sans qu'il soit besoin d'acte'? . . . Dire que la seule échéance du terme constitue le débiteur en demeure, c'est dire suffisamment qu'il n'est pas besoin d'acte". Later he states however: "Il serait. . . très imprudent de ne pas ajouter la clause 'sans qu'il soit besoin d'acte ou d'interpellation' d'autant plus que nous avons contracté en France, l'habitude vicieuse de cumuler dans les actes une foule de mots inutiles, dans la crainte de laisser échapper le mot propre. . .".

123 Larombière *op. cit.* p. 477. See also Demolombe, *op. cit.* no 519, Laurent *op. cit.* no. 237.

124 Civ. 15 nov. 1852, D.P. 1852.1.305; Req. 16 fév. 1921, D.P. 1922.1.102; Cons. d'état, 10 nov. 1926, G.P. 1927 (1) 342; Req. 29 juil. 1929, S. 1930.1.214; Soc. 3 juil. 1953, D. 1954.615.

125 Rennes 10 déc. 1875, S. 1876.2.268; Paris 16 juin 1952, D. 1953.8 (sommaire).

126 Paris, 12 nov. 1924 D.H. 1924.705; Req. 21 juin 1933, D.H. 1933.412.

127 Req. 18 fév. 1856, D.P. 1856.1.260 (In this case the parties stipulated that the penalty would be incurred *de plein droit);* Soc. 3 juillet 1953.D.1954.615.

128 Laurent *op. cit.* no 237: "Or, stipuler une amende en cas de retard, c'est bien marquer que l'on a intérêt. . . This argument is put forward in the following cases: Req. 29 juillet 1929, S.1930.1.214 and *Brousseau v. Bénard, loc. cit.* (1912) 43 S.C. 165 at p. 170.

Thus, one may say that in France, the attitude of the courts has become more severe towards debtors[129].

In the Province of Quebec, the authors[130] were naturally influenced by the ideas discussed in French doctrine, and have manifested general agreement on four basic principles surrounding the conventional *mise en demeure:*

Firstly, the parties must have expressly provided that default would be incurred by the debtor as soon as the latter's obligation became executory. Thus, contrary to what was decided by the courts in France, the mere stipulation of a term would not be sufficient to constitute the debtor in default[131]. I believe that attempts to plead cases of tacit agreements implying conventional putting in default should not be viewed sympathetically since the Civil Code has enumerated a limited number of situations in which it is presumed that the parties have tacitly set aside the express putting in default;[132] *exceptiones sunt strictissimae interpretationis.* As Azard wrote:

> "Raisonner différemment conduirait à ressusciter partiellement dans le droit québecois l'ancienne règle du droit romain 'dies interpellat pro homine' laquelle a certainement été écartée dans les deux codes québecois et français"[133].

There are several cases in which the courts were called upon to judge whether, given the circumstances, the parties have conventionally dispensed with the necessity of a formal putting in default. Needless to say, the Quebec tribunals have manifested ambivalent attitudes in approaching this question.

Among the cases accepting a generous interpretation of the agreement is that of *Brousseau v. Bénard,* in which Mr. Justice Archibald of the Court of Review explains his view of default:

> "Now, the theory of default is this: - that the delay given for the performance of a contract is a delay on behalf of the debtor of the contract, and it is not presumed that the creditor has an interest in the performance of the contract within the delay, unless he expressly says so. Thus, in a case where a penalty is attached to the non-performance of the contract within the delay stipulated, there is no necessity of putting in default because the creditor has already sufficiently declared his interest in the performance within the delay"[134].

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129 Demogue *op. cit.* no 251.

130 cf. Langelier *op. cit.* p. 513; Mignault *op. cit.* p. 411; Faribault *op. cit.* no. 398; Beaudouin *op. cit.* p. 564.

131 Langelier *ibid;* Faribault *ibid.*

132 e.g. Commercial matters in which the time for performance is fixed (art. 1069 C.C.), and things which could have only been given or done during a time which the debtor has allowed to expire (art. 1068 C.C.).

133 Azard *op. cit.* no 114. Another argument rests on the fact that in case of doubt, the contract must be interpreted in favor of the debtor (art. 1019 C.C.),

134 *loc. cit.* (1912) 43 S.C. 168 at p. 170. In this case, besides stating that the debtor was in default due to the reasons invoked here, he also held said debtor in default because this was a commercial matter as well as something which could not have been done during a time which he allowed to expire.

This reasoning is not acceptable for two reasons: Firstly, a penal clause is nothing more than a secondary agreement fixing in advance the damages which may be claimed in case of the non-fulfillment of an obligation[135]. This does not necessarily mean that a creditor who neglects to stipulate a penal clause in a contract has any less desire that his obligations be fulfilled. Secondly, it would appear to me that each person who enters into legal engagements has, at least initially, an interest in the accomplishment of the obligations contracted. It is just as possible for a creditor who clothes his obligations with penal clauses, to lose interest in the prompt execution of his *créances,* as it is for any other creditor who did not embellish his agreements with said accessory clauses, to insist upon prompt execution.

In the case of *Dame Dumontet v. Lauzon et al,* the contract in question, stipulating a monthly rent of fifty dollars as consideration for the alienation of immoveable, also contained the following clause:

> "... Et il est de plus convenu entre les parties que dans le cas où le présent acquéreur ne verserait pas au vendeur ou à son épouse, la rente susmentionnée... le vendeur ou son épouse, auront droit de reprendre le présent immeuble et ce, sans qu'il soit besoin d'avoir recours à la justice..."[136].

Mr. Justice Surveyer interpreted this clause as being a conventional putting in default. This is debatable from a double point of view. To begin with, the clause dispenses only with the obligation of going before the courts in order to put the clause in effect; not with the necessity of putting the debtor in default. Another point which must be raised is the fact that even if one believes that there was a conventional putting in default, this did not discharge the creditor from the obligation of presenting himself to his debtor to receive payment. In examining this case, I saw no indication that the debt was *portable.*

In *Lachance v. Drolet*[137], Magistrate Girouard decided that when a lease provided that the rent was payable strictly in advance on the first of each month at the domicile of the lessor, this constituted a conventional *mise en demeure.* However, the absolutism of this affirmation is compromised when he subsequently states:

> "Considérant de plus que, subséquemment, le demandeur s'était adressé à la Régie des loyers, et il demandait la révocation de la prolongation du bail, vu que le locataire était en retard de trois semaines dans le paiement de son loyer;
> Considérant que cette procédure constituait une demande de paiement[138].

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135 cf. Aubry-Rau, *op. cit.* no 309 p. 173; arts. 1131 *et seq.* C.C.

136 (1933) 39 R. de J. 126 at p. 128.

137 (1956) S.C. 248.

138 *ibid* p. 249

A similar situation is encountered in the matter of *Levy v. Sperdakos*[139] in which the lease stipulated that any default by the lessee would entitle the lessor to demand cancellation. The aspect of this judgment to which one must object is stated in the following *considérant:*

> "Considering that, according to the lease and as confirmed by letter from the defendant, the rent was payable at the domicile of the lessor and consequently, no *mise en demeure* was required prior to the institution of plaintiff's action"[140].

Mr. Justice Batshaw based this affirmation on the case of *Reinhardt v. Turcotte*[141]; but in this affair, it was held that the mere fact that the rent was *portable* and payable in advance, was not sufficient in itself to conclude that no putting in default was required. Also in this case, the creditor had given an interpellatory putting in default just before the obligation fall due. Therefore, I believe that the reasoning invoked in the *Levy* case[142] incorrectly applies the *Reinhardt* precedent[143], which militates in favour of the strict approach in examining situations which appear to dispense with a *mise en demeure.*

The more conservative approach in interpreting conventions purporting to dispense with the interpellatory putting in default is exemplified by several cases. For instance, in *Labelle v. Dame Chapleau*[144], the Court of Review stated:

> "Considérant que bien qu'il soit stipulé dans l'acte de vente allégué dans la déclaration qu'à défaut par le défendeur d'exécuter les obligations par lui prises relativement au paiement des taxes et cotisations ainsi qu'au paiement de la rente viagère y mentionnée, il serait lors de telle défaillance déchu de plein droit de la faculté de réméré, il n'est pas stipulé que le seul écoulement du temps constituerait le débiteur en demeure; et que, dans ces circonstances, le défendeur ne pouvait être constitué en défaut que par une demande par écrit, laquelle n'a jamais eu lieu"[145].

This attitude was also reflected in the case of *Goyette v. Ménard*[146] which discussed whether an election of domicile at the creditor's implied a dispensation with the requirement of giving a formal putting in default.

In reversing the Superior Court judgment, Sir Mathias Tellier of the Court of Appeal felt that:

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139 (1959) S.C. 89.

140 *ibid* p. 90.

141 (1956) Q.B. 241.

142 *loc. cit.* One may also consult *Mayer v. Pelletier* [(1960) S.C. 455] which employed the same reasoning but arrived at a different conclusion since the creditor had tolerated tardiness in payment and had thus lost the benefit of the clause dispensing with the putting in default.

143 *loc. cit.*

144 *loc. cit.* (1908) 14 L.R. n.s. 469.

145 *ibid* p. 472. See also L. Baudouin, *op. cit.* p. 565 foot-note 11.

146 (1933) 56 K.B. 534.

> "Le contrat originaire ne me paraît contenir aucune stipulation particulière à ce sujet. . . On n'y trouve nulle part la stipulation que le seul écoulement du temps aura l'effet de constituer les débiteurs en demeure"[147].

After quoting the clause providing for an election of domicile, Sir Mathias continued:

> "Cette clause signifie sans doute que le créancier entendait toucher son paiement chez-lui. Mais signifie-t-elle aussi que ses débiteurs voulaient le dispenser de toute mise en demeure? Je ne le crois pas, quoique ce soit là l'avis de Laurent. . ."[148].

I believe that these cases in which the courts have held that the formal *mise en demeure* may not be dispensed with unless expressly provided, reflect accurately, the goal which the legislator had in mind when he permitted the parties to derogate from the general rule concerning default.

Before going on to the second of the four principles mentioned above, there is one additional comment which must be made: In all cases in which it is provided that the debtor will be in default automatically, the creditor must utilize these stipulations rigorously if he wishes to retain their advantages. Once default is incurred under the terms of the agreement, if the creditor fails to exploit the openings afforded him within a reasonable delay, he will lose the benefit of said stipulation and will thereafter be required to give an interpellatory putting in default before exercising his recourses[149]. This aspect will be examining in detail later.

One may give as a second principle that even though the stipulation of conventional default must be express, there are no formal expressions which need be employed. Nevertheless, the will of the parties must be clearly discernible.

> "Comme dans toutes les autres conventions, aucune expression particulière n'est nécessaire pour cela: tout ce qu'il faut pour que l'expiration du délai entraîne la mise en demeure du débiteur, c'est que telle ait été l'intention

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147 *ibid* p. 539.

148 *ibid* p. 39. One may also consult the opinion of Mr. Justice Rivard whose notes stated: (at p. 541), "Dans notre droit, le seul laps de temps ne constitue pas le débiteur en demeure; pour que l'écoulement du temps ait cet effet, il faut une stipulation expresse, claire, non équivoque (1067 c.c.). Cette stipulation ne se trouve pas dans l'acte de prêt".

149 e.g. *Shaposnick et al v. Workman et al,* (1947) L.R. 385 (Appeal Court); *Marie v. Crédit Mauricien Inc. et Martin* (1956) Q.B. 693; *Mayer v. Pelletier* (1960) S.C. 455. (In this case the Court also appears to feel that rent payable in advance would indicate that the parties have dispensed with a *mise en demeure*. While not agreeing with the premise, I find that it is logical to state that by habitually accepting payments after they are due would require an interpellatory *mise en demeure* before an action in expulsion may be taken); *Chartrand v. Desrochers et al,* (1962) S.C. 465; *Caplan et al v. Montreal City and District Realty Co.* (1917) 52 S.C. 435 (Court of Review).

certaine des parties. Peu importe en quels termes elles ont manifesté cette intention"[150].

Thirdly, in case of doubt as to whether the convention of the parties has provided for automatic default, this doubt must be resolved in favor of the debtor, who will be entitled to an interpellatory *mise en demeure.* This general rule contained in article 1019 C.C. does not require additional comment[151].

Finally, as a rule, there is nothing contrary to public order and good morals in a stipulation dispensing with the necessity of a formal putting in default[151]. The notable exception to this rule is provided by the addition to the Civil Code of article 1040e which provides:

> "The provisions of this section (requiring a notice of sixty days in certain cases) shall apply notwithstanding any agreement to the contrary. Any renunciation of the notice prescribed above is of no effect".

**2) The debt should be *portable*** — In the introduction to this chapter, mention was made of a second condition required in order to conventionally derogate from the rule *dies non interpellat pro homine.* In effect, the parties must have stipulated that in the case of an obligation to give, the debt must be *portable*[153]. If the parties omitted to provide for this aspect of the question and in fact have stipulated that the debtor would be in default automatically, the validity of the conventional dispensation would not be affected. Nevertheless the creditor would have to present himself at the debtor's domicile[154] in order to receive payment before said stipulation could become effective[155]. Thus, the creditor would not have to address a formal *mise en demeure* but would still be inconvenienced by the necessity of having to seek out the debtor in order to receive payment[156]. As a result, it would be practically useless to stipulate that

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150 Langelier *op. cit.* This is also advanced by Mignault *op. cit.* Faribault *op. cit.* and L. Baudouin *op. cit.*

151 Mignault *ibid;* Faribault *ibid.*

152 Mignault *ibid;* Langelier *op. cit.*

153 Laurent, *op. cit.* no 238.

154 Art. 1152 C.C. *Smardon v. Lefebvre* (1884) 8 L.N. 330.

155 A. Colin, H. Capitant. *Traité de droit civil* refondu par L. Julliot de la Morandière, Paris, Librairie Dalloz, 1959 vol. 2, no 844; *The Royal Guardians and Clarke et al.* (1914) 49 S.C.R. 229; In the case of *Gagnon v. Lemay* [(1918) 56 S.C.R.365] Mr. Justice Anglin stated the contrary in the following *obiter:* "What then is the purpose and effect of inserting the terms 'ipso facto' and 'sans mise en demeure?' In my opinion the latter term is merely designated to dispense with the necessity for demanding payment at the debtor's domicile".

156 Demogue (*op. cit.* no 251) wrote: "Si la mise en demeure est inutile d'après la convention et que, par une modification, la dette qui était portable devienne quérable, la mise en demeure redevient nécessaire". (This was also held in Orléans, 23 mars 1861, D.P. 1861.2.78 and in Paris 15 fév. 1870, D.P. 1870.2.163). This opinion cannot be accepted because the putting in default itself must not be confused with the "mechanical" aspects of payment.
cf. Duranton *op. cit.* no 442.
*Labelle v. Dame Chapleau* (1908) 14 L.R. n.s. 469 Soc. 15 juin 1951, D.1951.669 (especially notable is the critique by R. Savatier).

the debtor will be in default *ipso facto,* unless the creditor is also liberated from ihe obligation of going to the debtor.

One may conclude by adding that the mere fact that a debt is portable does not automatically entail a dispensing with a formal mise en demeure[157]. In *Quebec County Realty v. Tcharos,* Mr. Justice Dorion stated:

> "La demanderesse devait mettre les défendeurs en demeure pour pouvoir réclamer les intérêts moratoires, car la mise en demeure est exigée, sans distinction pour les dettes portables comme pour les dettes quérables"[158].

## C – The State of Default *Ipso Facto*

Up to this point, all the exceptions to the rule *dies non interpellat pro homine* have originated from express provisions of law which provide for their existence. Nevertheless, there are many circumstances and situations on the subject of which the law has maintained a complete silence; but in which it would be highly illogical to demand a *mise en demeure* from the creditor. We shall examine briefly these situations which cause a state of default to be incurred *ipso facto* by the debtor.

### 1) Delictual and quasi-delictual matters –

Both French and Quebec doctrine and jurisprudence are unanimous in stating that in delictual and quasi-delictual matters, no putting in default is necessary prior to a claim for reparations[159].

In doctrine, three basic arguments were raised supporting this fact: Firstly, in the *Code civil français,* the provisions concerning default are found under title three (dealing with contracts) of the third book of said code; whereas articles 1382 et seq. of the French code (dealing with delicts and quasi-delicts are situated under title four[160].

Secondly, from a logical point of view, it would be useless to require a *mise en demeure* from the victim of a delict since his right to damages arises only from the date of the harm resulting from the damageable gesture. Before this happening, no direct obligations exist between the persons involved, even though there lies on everyone, a general obligation not to injure his fellow-man's person or property. To decide otherwise would force each person to give puttings in

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157 Carbonnier (*op. cit.* p. 289) maintains the contrary.

158 (1915) 48 S.C. 540 at p. 542.

159 Mazeaud, Mazeaud and Tunc, *op. cit.* no 2296. A. Brun, *Rapports et domaines des responsabilités contractuelles et délictuelles,* Paris, Librairie du Recueil Sirey, 1931, no 27; G. Marty, P. Raynaud, *Droit Civil,* Paris, Sirey, 1962, vol. 2, no 657; Larombière *op. cit.* p. 521; Beaudry-Lacantinerie *op. cit.* no 473; Demogue, *op. cit.* no 250; Faribault, *op. cit.* no 414; Demolombe *op. cit.* no 545.

160 Mazeaud. Mazeaud and Tunc, *ibid;* Meurisse, *loc. cit.* no 12; Pierrard *loc. cit.* item A. This argument would have less force in Quebec because the titles are not divided in the same manner.

default to everyone else, warning them to not cause injury or damage, under pain of all legal recourses[161].

The third argument is derived from article 1070 C.C. (art. 1145 C.civ.fr.) which covers violations of obligations not to do. As previously mentioned, everyone is bound not to injure his neighbour or his neighbour's property. By the mere fact of damage being caused and liability being determined, the author of the violation is in default due to his having contravened an obligation not to do[162].

In France, the jurisprudence confirmed these opinions without much debate. The general tenor of these cases is exemplified by the case of *De Monterol c. Commune de Plauzat* in which the Cour de Cassation stated:

> "Mais que si l'art. 1146 C.N. exige une mise en demeure pour rendre passible de dommages-intérêts les débiteurs en retard d'accomplir leurs obligations conventionnelles, cette disposition n'est point applicable dans le cas où il s'agit, comme dans l'espèce, de la responsabilité plus rigoureuse de faits, négligences ou imprudences constituant des quasi-délits que l'on est toujours en demeure de prévenir"[163];

In the Province of Quebec, it would not be inaccurate to state that our courts have also indicated unanimity on the principle that in delictual matters, no putting in default is needed[164].

Therefore, the greatest difficulty one may expect in studying this aspect is not whether a putting in default will be necessary, but rather whether we are dealing with a case involving delictual or conventional responsability. As Prof. Crépeau has indicated in his book dealing with the civil liability of doctors and hospitals, this distinction is still a topic of much debate [165].

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161 Pierrard *ibid;* Marty-Raynaud, *op. cit.* no 657.

162 Meurisse *loc. cit.* no 13; Marty-Raynaud *ibid.*

163 Civ. 30 nov. 1858, D.P. 1859.1.20; see also Req. 8 mai 1832, Rec. Gén. 1837.1.398; Civ. 30 jan. 1826; Rec. Gén. 1825-27.1.270; Civ. 2 mars 1875; S. 1875.1.292; Seine 4 fév. 1931, D.H. 1931.188; Req. 3 mars 1937, S. 1937.1.165; Crim. 17 fév. 1938, D.H.1938.244.

164 e.g. *Sénécal v. The Grand Trunk Railway Co.;* (1915) 48 S.C. 496 (Court of Review). The Quebec Courts insisted upon this aspect in matters of lease and hire: *cf. Dame Collin v. Vadenais ès qual. loc. cit.* (1927) 44 K.B. 89; *Dame Brazeau et al v. Dame Mourier et al, loc. cit.* (1934) 72 S.C. 503; *Belbin v. Dame Tarte, loc. cit.* (1961) S.C. 234; *Dame Beauregard v. St-Amand, loc. cit.* (1962) S.C. 436.

165 P.-A. Crépeau, *La responsabilité civile du médecin et de l'établissement hospitalier,* Montreal, Wilson et Lafleur Ltée, 1956, p. 67. In the following French cases, the court opted for delictual responsability even though the circumstances could lend themselves to conventional liability also: Req. 31 mai 1865, D.P. 1866.1.26; Req. 4 fév. 1868, D.P. 1868.1.271. (cf. Demogue *op. cit.* no 253); Req. 25 fév. 1930, D.H. 1930.211 (critique Mazeaud, Mazeaud and Tunc *op. cit.* no 2296 foot-note 2). In the Quebec case of *Lambert v. Comeau, loc. cit.*(1920) 59 S.C. 425, the Superior Court held that this was a delictual matter whereas the Court of Review opted for contractual liability.

**2) Refusal of the debtor to execute –**

Since the goal of a putting in default is to notify the debtor that the creditor desires the fulfillment of his obligation without further delay, this measure is no longer useful when the debtor takes the initiative by stating that he will not execute. Notwithstanding the opinion of Planiol, which maintained the necessity of a putting in default in spite of this refusal[166], both the Quebec[167] and the French courts[168] have been emphatic in their support of the idea hereinabove described.

Nevertheless, this aspect of *la demeure* must be approached with extreme caution in certain circumstances which give rise to the exception of *non adimpleti contractus.* In effect, the refusal by one of the parties to a synallagmatic contract to execute his obligation until his debtor has first done his part, will not necessarily place the said abstaining party in a state of default[169].

**3) The debtor acknowledges that he is in default –**

The debtor who admits that he has not fulfilled his obligations and who understands that by doing so, he is in a state of default, dispenses his creditor from the necessity of sending an interpellatory *mise en demeure*[170].

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166 *op. cit.* no 227: "Refus volontaire – Dans cette première hypothèse, à la différence des deux autres, rien n'empêche le débiteur de s'acquitter: l'exécution serait encore possible, s'il le voulait, mais il s'y refuse. L'inexécution se confond alors avec le retard, elle n'est qu'un retard prolongé. On comprend donc la nécessité d'une mise en demeure, qui servira à prouver que le retard n'a pas été toléré par le créancier". The contrary was held by Colin and Capitant, *op. cit.* no 843 and by Pierrard, *loc. cit.* para. 3-c.

167 These cases may be cited without comment: *Fuller v. Moreau* (1889) M.L.R. 5 S.C. 121; *Arcand et al v. Hamelin* (1899) 2 P.R. 437 (Superior Court); *Work v. Clancey,* (1904) 25 S.C. 199 (Court of Review); *Melody v. Michaud et al* (1906) 31 S.C.1 (The Court of Review held the contrary but was reversed by the Court of Appeal) (1907) 17 K.B. 25; *Blais v. Dame Delorme et vir.* (1917) 52 S.C. 530 (Court of Review); *Lacroix v. Morency* (1923) 35 K.B. 189; *Dubois v. Ferland* (1926) L.R.n.s. 24 (Superior Court); *Limoges v. L'Ecuyer* (1932) 38 R. de J. 88 (Superior Court), (1932) 52 K.B. 400; *Zaccardelli v. Hébert* (1955) S.C. 478; *Deauville Estates Ltd. v. Dame Tabah,* (1964) K.B. 53.

168 Req. 28 fév. 1865, D.P. 1865.1.420; Req. 4 jan. 1927, D.H. 1927.65; Req. 2 juil. 1929; D.H. 1929.413; Marseille 22 mai 1931, D.H. 1932.7 (summary). This solution was not arrived at in Colmar 8 mai 1845, D. 1846.2.219; which fact was criticized by Laurent (*op. cit.* no 252).

169 Professor L. Baudouin, in examining this aspect states (*op. cit.* p. 565): "En principe, dans ces contrats (synallagmatiques) l'exécution des obligations par une des parties sert de cause à l'exécution des obligations de l'autre; en sorte que l'on peut se demander si la mise en demeure est nécessaire dès qu'une des parties ne s'exécute pas. La tendance générale de la jurisprudence est de considérer que le fait pour l'une des parties au contrat de n'avoir pas exécuté son obligation ne constitue pas *ipso facto* sa mise en demeure. La mise en demeure est nécessaire de la part de l'autre partie au contrat et celle-ci doit (et un certain rigorisme s'affirme ici) prouver qu'elle est en mesure de procéder elle-même à l'exécution de sa propre obligation et d'offrir cette exécution". See also Marty-Raynaud, *op. cit.* no. 293; Mazeaud, Mazeaud, Mazeaud, *op. cit.* no 1124 *et seq.*

170 Demogue, *op. cit.*, no. 236; Faribault, *op. cit.* no 409.

At first, the French authors were quite strict as regards the content and nature of the admission[171]; however today, it is generally admitted that in making the admission, the only requirements are that the debtor must realize the damageable effects of his default, and the consequences this will have in rendering him civilly liable[172]. Quebec jurisprudence does not appear to be overly strict in appreciating whether the debtor put himself in default. For example, in the case of *Bagg v. Baxter,* the Court of Review stated:

> "Considérant qu'il appert de la propre déposition du défendeur. . . que ledit défendeur s'est lui-même constitué en demeure par rapport à la dette réclamée par l'action, par ses dires, ses aveux, et ses promesses, et qu'il a ainsi rendu inutile et sans objet toute autre mise en demeure de la part de ses créanciers; qu'il est de principe que lorsque le débiteur se constitue de lui-même en demeure, la demeure est acquise au créancier"[173].

Nevertheless, the Court of Review, in the case of *Paiement v. Dubois*[174], followed the lead of the authors[175] and refused to hold that the debtor had placed himself in default by soliciting an extension of delay. In this matter, Dubois, whose hypothecary loan was falling due, had his notary ask for additional time for payment, the day before expiration of the term previously granted. Paiement refused and the next day, without bothering to put the debtor in default, took action. Upon receipt of the action, Dubois tendered and deposited the amount due without costs. The evidence at the trial also indicated that even if Paiement had presented himself for payment, the debtor would not have been able to pay. In reversing the Superior Court, Mr. Justice Archibald stated:

> "The defendant's request for a few days' delay cannot stand in the place of the demand of payment upon the due date of the debt. The money was payable at the defandant's domicile. The defendant would not be put *en demeure,* except by a demand there. No demand was made. (. . .) The fact of a request for delay on the previous day could not have the effect of putting the defendant in default on the following day, nor was the fact that the defendant did not have in his house, the money to pay the debt on the day when it was due sufficient to liberate the plaintiff from the obligation to make the demand. . .[176].

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171 cf. Larombière *op. cit.* p. 486 no 20: ". . . Par sa reconnaissance, le débiteur doit, pour être efficacement et réellement constitué en demeure, se tenir pour bien et dûment interpellé pour mis en demeure, en propres termes ou expressions équivalentes". See also Demolombe *op. cit.* no 530.

172 Demogue (*op. cit.* no 236) states that the most important aspect of the admission is that the debtor knowingly accepts the consequences of default. Laurent (*op. cit.* no 234) writes: "La condition essentielle est que le débiteur sache que le créancier éprouve un dommage par le retard qu'il met à exécuter son obligation. . ."

173 (1896) 11 S.C. 71 at p. 72. The judgment reported does not describe the details of the case. However, one may consult: *Dame Langevin v. Perrault,* [ (1891) 35 L.C.J. 121 (Superior Court) ] in which the debtor who contracted to furnish electricity admitted interruptions of said electricity; and *Perkins Electric v. Abran* [ (1926) 42 K.B. 162 ] which held that the debtor of a certain object put himself in default by intervening to contest a petition in revendication.

174 (1911) 39 S.C. 507.

175 e.g. Demolombe, *op. cit.;* Larombière, *op. cit*; Faribault, *op. cit.*

176 *Loc. cit.* pp. 508 - 509.

As regards the form of this acknowledgement, most writers feel that no particular formalities are strictly required for the validity of the admission[177]. The general feeling is that the only limiting factors should be the rules of evidence[178].

**4) Execution of the obligation is impossible through the fault of the debtor –**

Since the putting in default has as goal to notify the debtor that the fulfillment of his obligations is desired, this measure loses its *raison d'être* when execution of the obligation is no longer possible, either in spite of, or due to the acts of the debtor. In the former case, the impossibility to execute a synallagmatic contract due to *force majeure,* puts an end to the correlative obligation; *res perit debitori*[179]; whereas in the latter case, should execution become impossible due to the fault of the debtor, his civil liability will be engaged without the necessity of an express putting in default[180].

Beaudry-Lacantinerie and Barde base the validity of the principle presently discussed, on art. 1145 C.N.:

> "Dans toute obligation, le débiteur s'engage tacitement à ne rien faire qui rende impossible l'exécution de l'obligation; si donc il contrevient à cette obligation, les dommages et intérêts seront dus de plein droit"[181].

At first glance, one would be inclined to feel that cases of impossibility are covered by article 1068 C.C. (i.e. something which could only be given or done in a time which the debtor has allowed to expire). However, the basic difference between the present hypothesis and said article 1068 C.C. is the fact that with the former, the fault of the debtor is a result of a gesture or act rendering an obligation otherwise executable, impossible to execute; whereas in the latter case, the debtor knew that execution would be possible only during a certain time which be allowed to expire. Thus, the fault of the debtor originates in his

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177 Demolombe *op. cit.*

178 Except for the opinion of Laurent, *(op. cit.)* Duranton (*op. cit.* no 441) and Toullier (*op. cit.* no 253) who maintain that the admission must necessarily be in writing since the putting in default itself must be made by *sommation* or equivalent act (art. 1139 C.civ.fr.). However, this is an isolated opinion; since the majority of writers opt for any form of acknowledgement which will be acceptable in evidence: cf. Demolombe *ibid*; Larombière *op. cit.*; Demogue *op. cit.*; *Bernard v. Guay*, (1936) 40 P.R. 139 (dealing with the rule of evidence requiring proof in writing of a *mise en demeure* unless the other party has made an *aveu* of same).

179 H. Mazeaud, L. Mazeaud, J. Mazeaud; *Leçons de droit civil,* 2e éd., Paris, Editions Montchrestien, 1962, vol. 2, no 1110. Even in the case of a unilateral engagement, impossibility of executing extinguishes it (art. 1138C.C.). In each case, no recourse in damages is possible.

180 Mazeaud, Mazeaud and Tunc, *op. cit.* no 2279;
Colin and Capitant *op. cit.* no 843.

181 *op. cit.* no 472.

neglect to act. Nevertheless, these distinctions are purely academic since in both cases, the debtor is in default and liable for damages[182].

In the French case of *Roulin c. The Molassine Company Limited*[183], it was held that by rendering the execution of his obligation impossible, the debtor had placed himself in default. In effect Roulin had sold a quantity of biscuits to two different persons, and tried to get himself released from the first sale by falsely claiming that the French government prohibited exportation of said goods. Since delivery was made to the second purchaser, execution of the first sale thereby became impossible.

The Quebec courts also had numerous occasions to take position on this question, especially in matters of sale. For instance in *Versailles v. Paquin*[184], Mr. Justice Trenholme stated:

> ". . . Where a party sues for damages, we have held and will hold now, that it is not necessary for that party to make tender of the deed where the other party refused to carry out the contract or where it is impossible for him to carry out the contract. . ."[185].

This case involved an option to purchase granted by Versailles to Paquin. When the latter notified the former of his decision to buy, Versailles had already sold the property in question to a third person. A similar situation is encountered in *Munro v. Dufresne*[186] except that here, the Court of Appeal decided that a *mise en demeure* with tender of the sale price was necessary within the delay for the option. I cannot agree with this judgment, on the grounds that Munro had made execution impossible and therefore only damages could be claimed. As a result, what would be the use of a putting in default with tender of a deed and the price of the sale? An additional objection could be the fact that the Court felt that a simple acceptance of the offer to sell within the delay granted was not sufficient. In so deciding, the Court neglected to take into account the consensual nature of the contract of sale.

**5) The debtor and the creditor both want to terminate the contract —** Since the putting in default indicates the creditor's desire that the obligation be fulfilled; the putting in default is of no utility if both parties desire to

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182 The case of *Muzard c. Riscles* (Soc. 26 juin 1959, D.1959.529) is an excellent illustration of the difficulty which exists in making these distinctions. It is interesting to note that the French courts have decided that in cases in which execution is impossible without the fault of the debtor, and in the absence of *cas fortuit*, and *force majeure*, the debtor need not be placed in default: Req. 19 juil. 1843, S. 1844.1.236 (sale of a postmaster's *brevet* which is *hors commerce*) and Amiens 14 mai 1895, D.P. 1898.2.42 (sales of shares which must be approved by the *société* In this case, the *société* refused to sanction the transfer of said shares).

183 Req. 14 jan. 1925, S. 1925.1.364; see also Req. 28 jan. 1874, D.P. 1874.1.387.

184 (1914) 23 K.B. 432.

185 *ibid* p. 434. See also *Cyr v. Lecours*, (1914) 47 S.C. 86.

186 (1876) M.L.R. 4 Q.B. 176.

resolve or resiliate the contract[187]. French jurisprudence has furnished many examples of this on several occasions. For instance, in the case of *Mathon et al c. Decottignies et al.* the *Cour de Cassation* decided:

> ". . . En général, aucune condamnation ne peut être prononcée sans que le débiteur ait été mis en demeure de remplir son obligation; que toutefois, l'évènement de certains faits dispense le créancier de l'accomplissement de cette formalité. . .
>
> Mais attendu que le débat . . . ne comportait pas la nécessité d'une mise en demeure, laquelle suppose, de la part de l'une des parties, la volonté d'exécuter la convention; que cette formalité devient sans objet lorsque, comme dans l'espèce, la résiliation est demandée de part et d'autre. . .[188].

Although the Quebec courts[189] do not appear to have had occasion to pronounce themselves upon this aspect of default, it is reasonable to believe that their decisions would be in general agreement with the French jurisprudence.

**6) The putting in default is impossible —**

If the creditor, due to certain circumstances, is placed in a situation in which the presenting of a *mise en demeure* to the debtor is impossible, damages will be due without the intervention of such a gesture, as soon as they are incurred[190]. This is an application of the adage: *"A l'impossible nul n'est tenu"*. Demogue gives as examples of cases in which the putting in default is impossible:

> ". . . Le débiteur étant absent, ou mort et ses héritiers inconnus, ou si le créancier par la faute du débiteur ignore sa créance. Il y aura alors demeure de plein droit"[191].

In the Province of Quebec, the courts also affirmed on many occasions that in matters of lease and hire, the lessee may leave the premises and seek resiliation of the lease without prior *mise en demeure* whenever the conditions are so bad that said premises are rendered uninhabitable. Mr. Justice de Lorimier described the nature of this situation when he wrote:

> ". . . Pour qu'il y ait urgence, il n'est pas nécessaire et ne doit pas être nécessaire que la maladie ait atteint la famille ou qu'il y ait eu des membres de la famille de décédés; il suffit qu'il y ait péril sérieux"[192].

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187 Josserand, *op. cit.* no 621.

188 Civ. 24 juil. 1928, S. 1928.1.367. One may also examine Civ. 14 jan. 1862, D. 1862.1.91; Req. 25 jan. 1875, D.P. 1875.1.270; Civ. 15 nov. 1887, D. 1888.1.120; Req. 7 déc. 1926, S. 1927.1.106; Req. 15 avril 1929, S. 1929.1.231.

189 Nor Quebec doctrine for that matter.

190 Mazeaud, Mazeaud and Tunc, *op. cit.* no 2297. Although the case was decided on another point, this was affirmed in *Haeck c. Heiligstein,* (Colmar, 3 nov. 1936, D.H. 1937.75).

191 *op. cit.* no 248.

192 *Nadeau v. Gratton,* (1929) 67 S.C. 63. See also *Tylee v. Donegani,* (1871) 3 L.R. 441 (Court of Review); *Marchand v. Letual et al* (1927) 33 L.R. n.s. 85; *Dame Boudreau et vir v. Marcotte;* (1926) R. de J. 398 (Superior Court). In the case *Dame McCrory et al v. Robidoux et al* [ (1930) 68 S.C. 370 at p. 374 ] Mr. Justice Archam-

Even though each situation has to be interpreted in light of the relevant circumstances, it is only reasonable to dispense the creditor with the putting in default whenever said mise en demeure is impossible to give.

**7) The debtor has executed his obligation in an imperfect manner** *(malfaçon)* –

In the Province of Quebec, there has developed a line of jurisprudence holding that in case of *malfaçon*[193], no *mise en demeure* is necessary before an action in damages may be brought[194]. This whole development originated with the judgments in *Vermette v. Parent*[195] and *Dame Gagnon v. Maheux et al*[196], decided by the Court of Appeal.

In the *Vermette* case, the facts may be resumed as follows: Parent contracted to build a commercial oven for Vermette, in consideration of the sum of $1297.00; of which $500.00 was payable thirty days after completion of the work and acceptance of same by the creditor. After Parent claimed that the work was finished, Vermette attempted, but could not get said oven to function. Confronted with this, Parent admitted that he did not know how to remedy the defect. Thus, a specialist was hired and succeeded in getting the machine to function. Subsequently, Parent brought action to be paid his remuneration, to which Vermette not only pleaded that the sum was not due because he did not accept the completed object, but also brought a cross-demand to be reimbursed the sum expended to hire the expert; the whole with damages. The Superior Court rejected both the principal action as well as the cross-demand, invoking in the latter case that no prior putting in default was given. Appeal was brought only upon the cross-demand on the grounds that no *mise en demeure* was necessary. In his notes Mr. Justice Carroll insisted upon the opinions of Larombière and Planiol[197]. Planiol wrote in part as follows:

> "Inexécution due à une faute – En ce cas, il est certain malgré la généralité des termes de l'art. 1146, que la mise en demeure n'est plus nécessaire. Mais pourquoi? C'est qu'il y a ici un autre principe qui intervient, une autre cause génératrice d'obligation, la faute du débiteur. La faute suffit à engendrer l'obliga-

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bault resumed the exception to the rule concerning default as follows: "La Cour en vient à la conclusion décisive qu'à moins d'urgence et de nécessité extrême mettant en danger la vie du locataire et de sa famille, celle-ci ne peut s'exempter de la mise en demeure exigée par la loi".

193 This term is more accurate and concise than the English phrase "badly done work" or "bungled work".

194 e.g. *Hôpital Laval Ltée v. Roberge,* (1942) S.C. 166; *Miller v. Picard,* (1949) S.C. 233; *Baron v. St.Louis,* (1959) Q.B. 437, (summary); *Duelz v. Kajandi,* (1960) S.C. 89; *Acme Restaurant Equipment Co v. Coziol,* (1962) Q.B. 1; *Georges V Auto Body v. Pagé et al,* (1966) P.R. 127 (Superior Court).

195 (1910) 20 K.B. 156.

196 (1912) 24 K.B. 129.

197 In this case, the references to these authors are incorrect. In the case of Larombière, the reference should read "Oblig. T. 1. p. 522 no 2" instead of "T.2. p.5 no 2"; and for Planiol "T.2 p. 82 no 227" instead of "T.2 p. 75".

> tion de payer une indemnité; la mise en demeure, qui se ferait nécessairement d'après la faute commise, c'est-à-dire après la naissance de l'obligation qui en dérive pour le débiteur, serait une formalité sans utilité et sans but. La loi elle-même le suppose dans l'art. 1145, où elle prévoit la contravention à une obligation de ne pas faire. . ."[198].

Mr. Justice Carroll concluded as follows:

> "Nous basant sur l'opinion récente de Planiol (Tome 2 p. 75) (sic) savoir: que la question de la mise en demeure dépend de la nature du fait qui a empêché l'exécution, *nous disons que Parent se déclarant incapable de terminer son contrat, une mise en demeure était, dans ce cas absolument inutile*"[199].

Thus we may ask ourselves the question: Was Parent in default because he violated an obligation not to do, or was he in default because he admitted his fault in not being able to execute the contract due to a lack of technical skill?

In the case of *Dame Gagnon v. Maheux et al,*[200] the Court of Appeal appears to have answered the above question. The circumstances in this matter are fairly similar to the Vermette case: Maheux was hired by Dame Gagnon to make extensive repairs to her house. After the work was completed, he sued the owner in order to be paid; to which action she pleaded that the work was badly executed. Dame Gagnon also brought a cross-demand for damages. The Appeal Court confirmed the Superior Court judgment rejecting both actions.

In his notes, Mr. Justice Cross quoted Larombière:

> "Si donc l'exécution de l'obligation au lieu d'être simplement retardée, avait été imparfaite, nulle ou mauvaise, des dommages et intérêts seraient dus au créancier pour son inaccomplissement, sans mise en demeure préalable"[201].

Although it is not reproduced in the notes of the judgment, the following sentence of Larombière continues immediately after the above quotation and merits examination:

> "La mise en demeure est alors sans intérêt et sans application possible, puisqu'il s'agit, non plus de protester contre un retard dans l'exécution mais d'obtenir la réparation d'un fait accompli, et constitutif en lui-même d'une infraction positive à la loi du contrat"[202].

The judge then stated after citing Larombière:

> "When a builder goes so far as to take suit to recover the balance of the price of his work as such, I take it that that is an assertion on his part that his work has been completed and that there is nothing more to be done to it, and in

198 Planiol *ibid.*

199 *Vermette v. Parent, loc. cit.* p. 163.

200 *loc. cit.*

201 *ibid* p. 132. Note however that the reference to Larombière is incorrect and should read "vol 2 p. 523" instead of "vol. 2. p. 161".

202 Larombière *op. cit.*

> that situation, I would say that he is, there and then, responsible in damages for his wrongly executed work"[203].

Thus we may affirm that these two cases are applications of article 1070 C.C. dealing with obligations not to do. In effect, by badly executing their work, the deeds of these debtors were in contradiction with the obligations they had incurred; and these gestures violating the contract dispensed the creditors with the necessity of an interpellatory putting in default.

If such is the case, one may ask, why weren't these observations made in that part of this paper dealing with obligations not to do? In fact one could assert that this is a facet of the whole question of obligations not to do. However, jurisprudence has evolved to such a degree, that now, it is an accepted principle that in all cases of *malfaçon,* default exists *ipso facto*[204], and I believe that as such, one may classify matters of this nature under a separate heading.

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203 *Dame Gagnon v. Maheux*, loc. cit.

204 cf. cases cited under foot-note 192.

# 2 - The Mechanism of Default

In the first part of this paper, our main preoccupation was with the nature and the development of the rule *dies non interpellat pro homine,* as well as the exceptions to the rule. If one were faced with a problem involving default, it would be logical to determine first whether an interpellatory putting in default was required or not; and then proceed to send it, if necessary. This is the general idea behind the manner in which we shall approach the second part of said monograph. Having examined the rule requiring an express putting in default and its exceptions, the emphasis will carry on the manner in which this interpellatory putting in default must be made, the effects or default, and ways in which a person may be relieved from a state of default. Finally, this second part will conclude with recommendations concerning future legislation.

## 1 – THE INTERPELLATORY PUTTING IN DEFAULT

Unless the law provides otherwise, the creditor who desires the execution of his obligation must assume an active role and expressly put his debtor in default. This chapter will concentrate on the "mechanical" aspects of the interpellatory *mise en demeure,* including its form and the conditions for its validity. We will also determine at exactly what moment a state of default is acquired.

### A – The form of the interpellatory putting in default –

Since the Quebec rules were borrowed for the most part from the *Code Napoléon*[205], it would not be without interest to examine the French doctrine and jurisprudence before turning to our own law.

Article 1139 of the *Code civil français* provides that:

> "Le débiteur est constitué en demeure . . . par une sommation ou par autre acte équivalent"[206].

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205 First Codifiers' Report *op. cit.* p. 18.

206 The original article of the *Code Napoléon* (identical to the text cited) at the time of its adoption, modified the usages in force prior to the codification, which required an *"interpellation judiciaire"*. (cf. R. Pothier, *Oeuvres de Pothier,* 2e éd., edited by

According to Laurent, one may define *la sommation* as:

> "L'acte par lequel le créancier interpelle le débiteur de donner, de faire ou de ne pas faire quelque chose; cet acte doit être notifié par un officier public ayant caractère pour ces sortes d'actes"[207].

French law is not explicit as to what would constitute "equivalent acts" in matters of putting in default; however, the authors generally agree that the *commandement*[208], a *citation en conciliation* followed by a judicial demand within the month[209], a seizure[210], an *assignation* before the courts or other procedure introductive of a suit[211], as well as a *contrainte administrative*[212] may be considered as sufficient[213]. One rule of thumb employed in order to judge the sufficiency of a gesture as a *mise en demeure,* is whether or not said act is interruptive of prescription[214]. Since, the *sommation* itself is not sufficient to constitute an interruption; *a fortiori* those measures that do may be considered at least equivalent to the *sommation* (if not more forceful) as a means of putting in default[215].

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M. Bugnet, Paris, Cosse et Marchal, Henri Plon, 1861, vol. 2, no 144). Vestiges of this strict approach still remain today (e.g. art. 1479 C. civ. fr.); but the biggest modification was that of article 1153, which, prior to the *loi du 7 avril 1900,* required an action in order to be able to claim interest on sums due, (Mazeaud, Mazeaud, Tunc, *op. cit.* no 2287; Aubry, Rau, *op. cit.* no 308, p. 40).

207 Laurent, *op. cit.* no 234, Toullier's definition (*op. cit.* no 252) is quite similar. Marty-Raynaud define the *sommation* as "un acte signifié par huissier de justice, invitant formellement le débiteur à exécuter". (*op. cit.* no 656). For a description of the content of a *sommation*, one may consult Larombière (*op. cit.* p. 481).

208 Marty-Raynaud define the *commandement* as: "Une invitation à payer plus énergique encore que la sommation; il suppose un titre exécutoire et constitue normalement le préliminaire d'une saisie". *(ibid).*

209 Civ. 6 jui. 1908, S. 1909.1.350; Req. 4 juil. 1928, S. 1928.1.319.

210 Civ. 7 fév. 1933, G.P. 1933 Ie sem. 801.

211 Douai, 24 mai 1847, S. 1848.2.189 (cross-demand); Douai, 31 jan. 1853, D.P. 1853.2.241; Nancy, 17 mars 1859, D.P. 1859.2.168; Civ. 29 août 1860, D.P. 1860.1. 428; Amiens, 8 fév. 1862, S. 1862.2.110 (This action, although brought before an incompetent Court, still availed as a putting in default); Req. 18 avril 1877, D.P. 1877.1.395; Req. 17 jan. 1893, D.P. 1893.1.537 (a claim in bankruptcy was considered the equivalent of a demand in justice); Civ. 16 juin 1903, D.P. 1903.1.407; Civ. 28 mars 1904, D.P. 1904.1.315; Req. 10 jan. 1910, S. 1912.1.158; Cons. d'état, 10 jan. 1913, S.1918 – 19.3.28 (demand brought before an incompetent Court deemed sufficient as a *mise en demeure*); Req. 10 mai 1922, S. 1922.1.66 *(Bulletin des sommaires);* Req. 15 mai 1923, S. 1924.1.123; Civ. 9 mai 1928, D.P. 1929.1.125; (incompetent Court); Civ. 14 oct. 1931, D.P. 1932.153; Civ. 3 juin 1953, J.C.P. 1953.4.109; Civ. 30 nov. 1953, J.C.P. 1954.4.6.

212 Crim. 7 nov. 1930, G.P. 1930.2.733.

213 cf. Larombière, *op. cit.* pp. 482-484; Beaudry-Lacantinerie, Barde, *op. cit.* no 427; Demogue, *op. cit.* no 235; Josserand *op. cit.* no 618; Demolombe, *op. cit.* no 527.

214 Beaudry-Lacantinerie, Barde *ibid;* Demolombe *ibid.*

215 The French courts have accepted as equivalent to a *sommation,* a protest lodged with the French consul who later had same served upon the debtor (Req. 2 déc. 1879, D.P. 1880.1.266); an *ordre de reversement* (Req. 27 juil. 1936, D.H. 1936.475); a *citation en référé* (Req. 25 mai 1892, S. 1894.1.259); as well as a notice sent by an administrative authority. (Civ. 25 avril 1893, D.P. 1893.1.350; Civ. 29 mai 1933, D.H. 1933.412; Req. 27 juil. 1936, D.H. 1936.475).

Although the terms of article 1139 C.civ.fr. appear quite formal as to the manner in which putting in default may be made, both doctrine and jurisprudence admit that there are two cases in which derogations from the rule may be viewed favorably: Firstly, the provisions of said article 1139 are not of public order; therefore an express convention as to what will be the form of a putting in default is valid[216]. In this manner, it would be feasible for the parties to stipulate, for example, that the debtor will be in default upon receipt of a notice by registered letter. The second exception to the rule results from the usages in commercial matters, which generally permit the *mise en demeure* to be made by registered letter or even by ordinary post[217].

Nevertheless, a great divergence between the viewpoint of the authors and that of the courts is encountered in discussions involving the form of the *mise en demeure* in civil matters: On the one hand, the courts maintain that since appreciation of the sufficiency of a document as a putting in default is a *"pouvoir souverain des juges du fond"*[218], a fair amount of latitude in said power of appreciation would lead to a broader interpretation of art. 1139 C.civ.fr. Thus, the courts have held on numerous occasions that a letter, either registered or ordinary, constituted, under the circumstances, a sufficiently formal document equivalent to a *sommation*[219]. These liberal tendencies were criticized in doctrine as being contrary to a formal provision of law[220].

In the Province of Quebec, the Codifiers felt that the rule of article 1139 C.N. was too formalistic, and thus recommended more flexible legislation:

> "Of the articles on the subject of default, 87 and 88 are based upon the articles 1139 and 1146 of the French Code, but the article 87 (art. 1067 c.c.)

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216 cf. Carbonnier *op. cit.* no 159; Marty-Raynaud, *op. cit.* no 656; Larombière, *op. cit.* p. 482; Colin, Capitant, *op. cit.* no 839.

217 e.g. Paris, 24 fév. 1857, D.P. 1857.2.134; Paris, 5 fév. 1874, D.P. 1877.2.11; Req. 1 août 1898, D.P. 1900.1.551; Req. 4 déc. 1900, D.P. 1901.1.518; Req. 13 jan. 1909, G.P. 1909.1.457; Soc. 13 mars 1958, D. 1958.110 (sommaire).

218 Req. 25 août 1911, D. 1912.1.225. In this case it was decided that a *"constatation contradictoire et remise du devis"* sufficed as a putting in default. See also Req. 16 mai 1882, D.P. 1883.1.175.

219 e.g. Ordinary letters were held sufficient in Req. 5 déc. 1883, D.P. 1884.1.130 and in Civ. 17 nov. 1947, G.P. 1948, le sem. 76 (index). Contra: Req. 6 fév. 1933, S. 1933. 1.126. A registered letter was judged acceptable in Trib. de Paix de Bagnères-de-Bigarre, 23 avril 1906, D.P. 1906.5.69; Req. 5 août 1929, S. 1930.1.212; Civ. 9 juil. 1945, D.P. 1946.1.52.

220 cf. Ripert, Boulanger, *op. cit.* no 1489; Colin, Capitant, *op. cit.* no 839; Marty-Raynaud, *op. cit.* no 656; Carbonnier, *op. cit.* p. 288; Planiol-Ripert, *op. cit.* no. 772. Demogue (*op. cit.* no 235 p. 258) mentions this conflict between doctrine and jurisprudence, but goes on to say at p. 261: "Ceci semble éclairer la portée des termes du Code: acte équivalent. Au lieu de les analyser grammaticalement, il faut les comprendre psychologiquement. Il y a mise en demeure si on manifeste une volonté aussi énergique que par une sommation et cela peut résulter d'une lettre en matière civile, d'un ensemble de faits éloquents. Quant à la mise en demeure verbale, elle sera en principe admissible même en matière civile, mais il ne pourra être rapporté de preuve que conformément aux articles 1347 et suiv. Civ."
It would be quite safe to affirm that a verbal putting in default is not sufficient since the French Code requires *"un acte équivalent"* (Demolombe *op. cit.* no 525).

> also declares that a party may be put in default by a simple demand. This goes beyond the *sommation ou autre acte équivalent* of the article 1139, and also exceeds the rule of the ancient law by which a judicial demand was necessary"[221].

The result of the codifiers' recommendations was the following:

> "The debtor may be put in default . . . by the commencement of a suit or a demand which must be in writing unless the contract itself is verbal"[222].

Consequently, our legislation adroitly avoided the French conflict involving the equivalent of the *sommation* and stumbled into another which we shall be examining shortly.

**(i) A demand in writing** – The rule concerning interpellatory putting in default simply requires a demand in writing which clearly indicates to the debtor that the creditor wants the fulfillment of his obligations.

With regards to the rule, the only question which appears to have been raised was whether a lawyer's letter could constitute a valid putting in default[223]. Quebec jurisprudence, contrary to what Faribault would lead us to believe[224], has never placed in doubt the validity of this type of letter, since it conforms to the requirements of art.1067 C.C.; the lawyer being simply the mandatary of the creditor[225]. In each case which decided that the debtor was not sufficiently placed in default, no reproach was ever made as to the form of the *mise en demeure* itself. What the judges found lacking was the fact that when the debt was *quérable*, the letter could not suffice without an actual demand for payment at the debtor's domicile[226].

Although the rule requiring a written demand is simple as to its application the greatest difficulties are encountered when studying the exceptions to said rule:

**a) The verbal putting in default** – As article 1067 C.C. states, the "demand. . . must be in writing unless the contract is verbal". The question

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221 *op. cit.* p. 18.

222 art. 1067 C.C.

223 Faribault, *op. cit.* no 407.

224 *ibid.*

225 art. 1732 C.C., *Clarke v. Dorion et al*, (1917) 58 S.C. 174.

226 cf. *Smardon v. Lefebvre*, (1884) 8 L.N. 330 (Superior Court); *Lay v. Cantin*, (1903) 23 S.C. 405 (Circuit Court); *Dame Dufresne v. Antonacci et al*, (1918) 53 S.C. 36 (Court of Review). In the case of *Guimont v. Léonard*, [ (1885) 8 L.N. 171 (Circuit Court) ] it was decided that a lawyer's letter sufficed even though the debt was *quérable*. In *Dubé v. Cousineau* [ (1940) 46 R. de J. 470 ] the Superior Court held that the *mise en demeure* by the lawyer was not sufficient because the creditor did not follow it up with a judicial demand. This was held to indicate that said creditor did not have serious intentions. Finally in *Bellavance v. Lacroix et al* [ (1927) 35 L.R. n.s. 48 (Superior Court) ] it was decided that a simple letter by the creditor was insufficient since the debt was *quérable* and no demand for payment at the debtor's was made.

which immediately arises is whether this rule must be strictly observed, or is the form of the putting in default subject only to the rules of evidence? In other words does article 1067 C.C. permit the creditor to give testimonial evidence of a putting in default to his debtor under a verbal contract involving a value of more than fifty dollars? One could present the problem in another manner and ask if a verbal *mise en demeure* would be acceptable in a civil matter involving a written contract in which the amount in question is less than fifty dollars.

Quebec doctrine has manifested three different schools of thought: The first opinion, advanced by Mignault (later confirmed by Prof. Azard)[227], may be summarized by stating that he envisioned the stipulation of art. 1067 C.C. as a *règle de fond* having absolutely no connection with the rules of evidence. As he wrote:

> "Il ne s'agit pas ici des règles de la preuve. (. . .) S'ensuit-il que lorsque le contrat est verbal, on pourra prouver par témoins, la mise en demeure, sans égard au chiffre de l'obligation?
> L'affirmation me paraît s'imposer ici. Décider le contraire serait exiger, ce me semble, une demande par écrit, contrairement à la disposition de l'article 1067"[228].

A second opinion is that of Faribault who accepted Mignault's affirmations as such, but felt that the provisions of article 1233 C.C. could not be disregarded[229]. Therefore Faribault would not allow evidence by testimony of a *mise en demeure* where the amount involved exceeded fifty dollars, even though the contract itself was verbal[230]. This solution is not acceptable for the reason indicated by Prof. Azard:

> "Si l'on admet – ce que l'on doit logiquement être porté à croire – que l'exigence d'un écrit en cette matière ne se justifie guère, il est préférable d'adhérer à l'opinion de Mignault: Sur ce point particulier elle ne va plus contre la lettre du texte; bien au contraire; et en matière, L. Faribault rajoute aux exigences de la loi"[231].

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227 *op. cit.* pp. 132 - 133.

228 *op. cit.* p. 411 note A. Mignault also made a distinction between a *mise en demeure* and a demand for payment. In the latter case, he admitted that proof of said demand could be made by testimony, *(ibid.* p. 413). cf. *Bagg v. Baxter,* (1896) 11 S.C. 71 (Court of Review); *Donohue v. De la Bigne,* (1896) 2 R. de J. 132 (Circuit Court). Langelier (*op. cit.* p. 515) appears to hold the same position as Mignault. However he simply affirms the rule without making any distinction.

229 Faribault, *op. cit.* no. 401.

230 If we proceed by analogy, it would not be permitted to prove a verbal putting in default in the case of a written contract involving less than fifty dollars, since this would be in direct contradiction with article 1067 C.C.

231 *op. cit.* p. 133.

The third opinion, as advanced by Prof. L. Baudouin and based upon the cases of *Bélanger v. Paxton*[232] and *Décary v. Lafleur*[233], maintains that the form of the putting in default is only a question of evidence:

> "La forme de la mise en demeure importe peu en réalité car elle n'a ni pour effet ni pour but de priver l'une des parties de son droit, elle ne porte aucune atteinte aux droits des intéressés, elle est simplement la manifestation d'une volonté, celle du créancier qui veut avoir une certitude sur l'exécution ou l'inexécution définitive. Si le débiteur s'estime suffisamment mis en demeure par une mise en demeure verbale, rien ne s'oppose à la validité de celle-ci. La mise en demeure n'est pas un mode de preuve de l'existence même de l'obligation mais seulement une condition de son exécution ou de son inexécution; elle s'apparente davantage à une règle de procédure qu'à une règle de fond"[234].

The Quebec Courts manifested a general lack of agreement in this dispute. In fact, three types of reactions were noted: A first group of judgments simply affirmed the rule that when a contract is in writing, so must be the putting in default; and then proceeded to apply this rule in an absolute manner[235]. The second group raised the question whether proof by testimony would be acceptable, and then decided against it[236]. The third also raised this question but decided that as a rule, the form of the mise en demeure was subject only to the

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232 (1886) 14 L.R. 526 (Court of Review).

233 (1890) 14 L.N. 314 (Magistrate's Court). Prof. Baudouin also cites the *Dame Dufresne v. Antonacci et al* case (*op. cit.*) in support of his affirmation; but the Court of Review decided the contrary. However, the dissenting opinion of Mr. Justice Martineau supports his views.

234 *op. cit.* p. 564. This also appears to be the attitude of Nadeau and Ducharme when they write: "Il (art. 1233 c.c.) s'applique aussi aux actes unilatéraux, tels des avis de congé, des mises en demeure, des renonciations etc., puisqu'on peut les constater par écrit". A. Nadeau, L. Ducharme, *Traité de droit civil du Québec,* Montréal, Wilson et Lafleur Ltée, 1965, vol. 9, no 443; *Shorter v. Beauport Realties (1969) Inc.* (1969) S.C. 363 at p. 374. See also the opinion of Montgomery J. in *Zaor v. Fontaine Auto Parts Inc.* (1969) Q.B. 708 at p. 710): "It might have been preferable for plaintiff to put defendant in default by registered letter. By relying on telephone calls, it ran the risk that the proof might be found insufficient, but the trial judge accepted Ratté's testimony, and I see no reason to intervene".
In his recent book on obligations, Professor J.L. Baudouin likewise militates in favour of this point of view (*op. cit.* no. 538, p. 282).

235 e.g. *Molleurs v. Favreau* (1865) 1 L.C.L.J. 28 (Court of Review); *Chapman and Larin,* (1879) 4 S.C.R. 349; *Dame Marcille v. Dame Mathieu* (1883) 7 L.N. 55 (Superior Court); *Johnson v. Brunelle* (1886) 14 L.R. 219 (Superior Court); *Lacroix v. Fauteux* (1891) 7 M.L.R. 40 (Queen's Bench); *Fitzpatrick v. Darling et al* (1896) 9 S.C. 247; *Rae v. Phelan et uxor* (1898) 13 S.C. 491 (Court of Review); *Lafrance v. Larochelle* (1905) 27 S.C. 153 (Court of Review); *Fournier et al v. Ville de Victoriaville* (1918) 28 K.B. 216; *Pateno v. Abdellah* (1919) 26 L.R. n.s. 179 (Court of Review); *Batt v. Lamarre* (1923) 29 L.R. n.s. 474 (Superior Court); *Nudelman v. Hack* (1932) 70 S.C. 452.

236 e.g. *Pelletier v. Boyce,* (1902) 21 S.C. 513.
(In this case, Mr. Justice Andrews argument seems to be that even though a written lease continued by tacit renewal requires a written putting in default, he found the verbal proof of a *mise en demeure* insufficient in this matter).
*Bernard v. Guay,* (1936) 40 P.R. 139 (Superior Court);
*Dame Koznets v. Dame Labbé* (1933) 71 S.C. 561;
*Dame McCrory et al v. Robidoux et al* (1930) 68 S.C. 370;
*Dame Dufresne v. Antonacci et al, loc. cit.* (1918) 53 S.C. 36 (Court of Review).

rules of evidence[237]. Therefore, as one may easily discover, this whole matter is far from settled.

Although it would be preferable that the form of the putting in default be subject only to the rules of evidence, the rather explicit nature of the provisions of art. 1067 C.C. would indicate that the most valid approach to the subject is that of Mignault. Nevertheless, this ambiguity shall have to be resolved by legislation.

**b) The notice of sixty days** – The second exception to the general rule is the provisions of article 1040a *et seq.* dealing with the notice of sixty days in certain matters. Since this subject does not come within the ambit of this paper, we shall not discuss said aspect any further.

**(ii) Commencement of a suit** – Actions brought before the Courts, which otherwise respect the basic requirements of *la demeure,* constitute valid puttings in default[238], since these procedures are more formal than the simple "demand in writing" of art. 1067 C.C.[239].

However, the immediate utilization of a suit in this manner, instead of the usual preceeding extra-judicial demand, presents many disadvantages. To begin with, the debtor, upon receiving the action may admit the pretentions of the plaintiff and tender immediate execution of his obligation; in which case the Court will certainly condemn plaintiff to assume all costs[240]. Another problem

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237 *Bélanger v. Paxton, loc. cit.* (1886) 14 L.R. 526, (Court of Review);
*Décary v. Lafleur, loc. cit.* (1890) 14 L.R. 314 (Magistrate's Court);
*Desloover v. Mansfield,* (1918) 25 L.R. n.s. 155 (Court of Review);
*Dame Roy v. Breton,* (1960) S.C. 279.
*Nadeau and Ducharme (op. cit.* no 443 foot-note 16B) criticized this judgment because it supposedly stated that the putting in default could always be proved by witnesses. In actual fact, Mr. Justice Edge decided, (at p. 281) ". . . *Que la demande de paiement* au domicile du débiteur peut toujours se prouver par témoins, alors même que le montant en jeu excède $50.00".

238 cf. *Gagnon et Cloutier,* (1872) 3 Rev. Crit. 50 (Queen's Bench): *McGuigan v. The Greenfield Land and Construction Co.,* (1921) 28 L.R. n.s. 88 (Court of Review); *Asbestos Corporation v. Dame Dumas,* (1924) 36 K.B. 277; *Dame Paré v. Dame Millett,* (1927) 30 P.R. 143 (Superior Court); *Nadeau v. Gratton,* (1929) 67 S.C. 63; *Labrecque v. Pigeon,* (1953) K.B. 574 (confirmed by the Supreme Court 1st Nov. 1954); *Dame Carpentier v. Carpentier et al,* (1964) S.C. 311; *Cummings v. Imperial Tobacco Co.,* (1969) P.R. 167.

239 This is clearly illustrated in the case of *Gagnon v. Séguin,* [ (1952) K.B. 528 ] in which the plaintiff brought an action to be paid the gift stipulated in her marriage contract. The first action was dismissed on an exception to the form. By a second action, plaintiff asked for interest on the said sum from the date of the first action; which conclusion was received by the Court of Appeal, since the first action constituted a sufficient demand in writing.

240 e.g. This occurred in the following cases:
*Guénard v. Guay,* (1853) 4 R.J.R.Q. 58 (Circuit Court);
*Hearle and Date,* (1861) 9 R.J.R.Q. 425 (Court of Appeal);
*Chanteloup et vir v. Fulton,* (1899) 16 S.C. 387 (Court of Review);
*Diamond Shoe; Turcotte et al v. Coté,* (1936) 74 S.C. 264;
*Royal Typewriter Co. Ltd. v. Arpin* (1940) 78 S.C. 13;
*Lebel and Les Commissaires d'écoles pour la municipalité de Montmorency* (1954)

is the fact that the service of an action would not be sufficient as a demand for payment in the case of a *quérable* debt. Therefore, upon receipt of said procedure, the debtor could, in the present circumstances, as in the hypothesis mentioned above, tender and deposit the amount due and avoid a condemnation for costs[241].

Nevertheless, in certain cases, it would be undoubtedly more expedient to proceed immediately by action instead of by a prior demand in writing. The most striking example is that of a claim about to be prescribed. Since a judicial demand has the advantage of both interrupting prescription and constituting a putting in default, the creditor wishing to preserve his *créance* would have to run the risk of being condemned for costs.

## B – The conditions required for a valid putting in default –

Since there has been very little written on this aspect of default, none of the authors offer a comprehensive synthesis of the rules involved; preferring instead to dwell temporarily on one or more of the required elements. However, most of these elements may be grouped under one of the following headings: By whom and to whom should the putting in default be given; what should the putting in default state; when should it be given, and finally, where should it be made[243].

**(i) By whom and to whom should the putting in default be given** – The *mise en demeure* must be made by the creditor himself or by his mandatary[244]. In the latter case, the representative of the creditor must clearly establish his authority to receive payment (in the case of an obligation to give), otherwise the debtor would be justified in refusing to act[245]. Likewise, the *mise en demeure*

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Q.B. 824, (1955) S.C.R. 298. See also Azard *op. cit.* p. 136; Mignault *op. cit.* p. 411, and Faribault *op. cit.* no 400. It should also be noted that under art. 477 C.C.P., the court has a certain latitude in the awarding of costs.

241 e.g. *Armstrong v. Damien,* (1889) 12 L.N. 146 (Magistrate's Court).

242 For example, in *Mercier v. Mercier,* [(1892) 2 S.C. 479 ] an exception to the form was held to constitute a putting in default to name a curator to an insane person. See also, *Laberge v. Brosseau,* (1899) 16 S.C. 430 (a *demande d'abandonnement); Bissonnette v. La Cie de Finance Laval Ltée et al,* (1963) Q.B. 391, (1963) S.C.R. 616, (a *requête en rétrocession).*

243 With all due respects to professional journalists. The final question, "why give a putting in default" will be treated under a subsequent heading dealing with the effects of *la demeure.*

244 cf. Faribault *op. cit.* no 408. In many cases, the mandatary will be either a notary (e.g. *Langlois v. Charpentier,* (1914) 20 L.R. n.s. 169 (Superior Court); *Christin dit St-Amour v. Morin,* (1888) M.L.R. 4 S.C. 469) or a lawyer, (see cases cited under foot-notes 225 and 226). See also Demogue *op. cit.* no 237.

245 e.g. Civ. 28 juin 1836, Rec. Gen. 1836.1.690; *Rochette v. Lauzon* (1921) 32 L.R. n.s. 480 (Superior Court); *Bellavance v. Lacroix et al,* (1927) 35 L.R. n.s. 48 (Superior Court); Faribault *(ibid)* justifiably takes issue with the judgment of Mr. Justice Casault in *Marcotte v. Falardeau* [(1880) 6 Q.L.R. 296 (Circuit Court) ].

must be addressed to the debtor, his mandatary or other representative having authority to pay or execute the obligation[246].

**(ii) What should be included in the putting in default** – Since the goal of the putting in default is to indicate that the creditor will not tolerate any further delay, it is natural that the emphasis of this type of procedure should carry on this desire that the obligation be executed[247]. Generally speaking, one may state that there is basic unanimity amongst the French and Quebec tribunals in that they require essentially, that the clear and categorical desire for execution[248] on the part of the creditor be manifested to the debtor, notwithstanding the actual language employed[249].

The Quebec courts however, appear to be somewhat more exacting than their French counterparts, in that the former require that the *mise en demeure* indicate to the debtor, the probable consequences his failure to fulfill his duty will have on his patrimony[250].

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246 Demogue, *op. cit.* no 237. A question which could be raised involves the capacity required to give or receive a putting in default. It has been stated that as a rule: "La mise en demeure pour être valable, doit être faite à une personne capable de payer par une personne capable de recevoir". cf. *Dufresne et al v. Denis et al,* (1929) 32 P.R. 227; Duranton *op. cit.* nos 441, 445. However, Demogue feels that (*op. cit.* no 237): "La mise en demeure ayant un caractère conservatoire, un incapable comme un mineur émancipé peut l'adresser". Nevertheless, I feel that while an incapable person should be entitled to protect himself, the debtor should also be entitled to the protection of a valid discharge upon execution of his obligation. Since art. 1146 C.C. provides that: "Payment is not valid if made to a creditor who is incapable by law of receiving it, unless the debtor proves that the thing paid has turned to the benefit of such a creditor"; it would appear that a creditor desirous of fulfilling his obligation but who is presented with a creditor whose capacity is affected by some restrictions, will have to take the precautions necessary in order to ensure that payment is made to a person having quality to act for said creditor. For instance, in the case of a mental patient, payment could be made to the Public Curator (*Public Curatorship Act,* R.S.Q. 1964, ch. 314, art. 6). In the case of a minor, the debtor could provoke the nomination of a tutor (art. 250 C.C.). If the situation is reversed, and the debtor is incapable, the creditor would have to give the putting in default to his legal representative, (Req. 17 jan. 1893, D.P. 1893.1.537). In the case of a bankrupt, one must give the putting in default to the trustee (*Dufresne et al v. Denis et al.* loc. cit.).

247 If in the case of a sum of money or other quantity of things which the debtor is obliged to give, the putting in default mentions a greater quantity than that which is due, the *mise en demeure* will avail for the correct quantity. (cf. Demogue *op. cit.* p. 255; Paris 18 mars 1929, D.H. 1929.258). If the putting in default is far less than the amount due, said *demeure* is valid only for said lesser amount (Demogue *ibid*). It is not necessary that the capital of a claim be liquidated, only that it be exigible, (Civ. 2 déc. 1929, G.P. 1930, Ie sem. 45).

248 Req. 1 août 1898, D.P. 1900.1.551; Req. 13 jan. 1909, G.P. 1909.1.457; Marseille 12 jan. 1938, D.H. 1938.191.

249 cf. Req. 5 août 1929, S. 1930.1.212. In this case the creditor sent a registered letter, "où en termes courtois mais très clairs, elle annonçait des sanctions pour le cas où le retard se prolongerait".

250 e.g. In *Renaud v. Walker* [ (1868) 13 L.C.J. 180 ], the Superior Court held that the creditor was bound to notify the debtor of the damages that would result from the latter's negligence; in *Dame McCrory v. Robidoux et al* [ (1930) 68 S.C. 370 ] it was decided that the putting in default should have advised the lessor that if the trouble to the lessee's enjoyment did not cease, said lessee would introduce procedures to have the lease resiliated. In the case of a lease with promise of sale, Mr. Justice Archambault decided that a letter in question, in order to avail as a putting in default,

This question of the content of the *mise en demeure* is one of the danger areas encountered when employing procedures introductive of a suit as a means of putting in default. Of course, one cannot reproach this type of measure as lacking in firmness, or for not revealing the eventual consequences of the default, since the creditor in his quality of plaintiff or petitioner, indicates the final result solicited in his conclusions. Nevertheless, an action or other similar procedure often misses the mark since it presupposes non-execution or delay in execution and simply concludes with the sanctions conventionally or legally established for the non-fulfillment of said obligations. Otherwise stated, this type of proceeding is often insufficient as a putting in default since it fails to tell the debtor to execute: "Une poursuite ne peut tenir lieu de mise en demeure que pour ce qu'en est l'objet"[251]. The courts have had many opportunities to pronounce themselves on this aspect, and for the most part, have decided along the lines discussed[252].

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should have threatened the lessee with expulsion or resiliation of the lease or forfeiture of his right of purchase in case of non payment of the rent, (cf. *Labonté v. Laliberté* [ (1943) 81 S.C. 394 ]. The Court of Appeal affirmed in *Dame Desmarteau v. Desmarteau,* [ (1951) K.B. 264 ] that the putting in default should have indicated that in the event there was no settlement of the debt, a *"pacte commissoire"* would be invoked. In *Léo Perrault Ltée v. Tessier* [ (1958) Q.B. 420, confirmed by the Supreme Court the 19th of Nov. 1958 ], Mr. Justice Bissonnette wrote (at p. 424: "Cette mise en demeure devra indiquer ce qu'est ou ce que sera la source ou la cause de ces dommages". Nevertheless, this obligation of informing the debtor must not be carried to an extreme, as in the case of *Ferland v. Bergeron* [ (1956) P.R. 87 ], in which the facts may be summarized as follows: Ferland felt that the separation fence between his property and that of his neighbour was not sufficiently maintained and had Bergeron, the rural inspector, force the neighbour to make repairs (under the authority of art. 202 Municipal Code), which the latter did. However, Ferland was not satisfied with the inspector's opinion that the repairs made were sufficient, and put the said inspector in default to exact further repairs, under threat of a writ of mandamus. Mr. Justice Desmarais rejected Ferland's pretentions since the mise en demeure was not explicit enough: (*ibid* p. 92) "Considérant que le sens de la lettre pièce P-1 adressée à l'intimé est ambigu, imprécis et incertain, que ladite lettre ne fait aucune mention, comme le dit l'art. 202, que le requérant 'demande' la construction, la réparation ou des travaux d'entretien de la clôture de ligne, mais déclare, ce qui ne peut avoir la même signification, que l'intimé est 'requis de voir' à cette réparation et à ces travaux d'entretien". Nevertheless, one must agree with the final result since the evidence would appear to reveal that the works were completed properly. *Contra: Shorter v. Beauport Realties (1964) Inc.* (1969) S.C. 363. On p. 374, Mr. Justice Bélanger writes: "La mise en demeure n'est pas non plus un avis de ce que le créancier a l'intention de faire et ce dernier n'a pas à exposer quels sont les recours à sa disposition, lequel il entend exercer et quelle ligne de conduite il tiendra. Enfin, c'est du contrat que l'obligation tire son existence et non pas de la mise en demeure, cette dernière servant plutôt à déterminer le moment à compter duquel le débiteur de l'obligation se rend passible de paiements additionnels à l'obligation proprement dite, tels que dommages-intérêts et dépens si son défaut persiste".

251 cf. Mr. Justice Létourneau's dissenting opinion in the case of *Asselin v. Ste-Marie, loc. cit.* (1937) 65 K.B. 39 at p. 49.

252 e.g. Civ. 30 nov. 1953, J.C.P. 1954.IV.6; *Wisintainer v. Jasmin et al,* (1921) 60 S.C. 343 (Court of Review) (The dissenting opinion of Mr. Justice de Lorimier examines this question); *Dame Boudreau et vir v. Marcotte* (1926) 32 R. de J. 398 (Superior Court); *Beauchamp v. Bissonnette,* (1927) 33 L.R. n.s. 211 (Superior Court); *Dame Prairie v. Prairie,* (1961) Q.B. 23; *Chartrand v. Desrochers et al* (1962) S.C. 465. *Contra:* Civ. 2 juil. 1883, D.P. 1884.1.302.

The most efficacious manner in which to overcome this "weakness" inherent in the commencement of a suit also serving as a putting in default is to have alternative conclusions – either the debtor execute his obligations or resolution, resiliation or revocation (or any other conclusion, as the case may be) will become effective[253]. However, problems of this nature will be encountered to a lesser extent in matters of immoveable property since the provisions of articles 1040A *et seq.* formally require a prior notice of sixty days.

There is one additional comment which must be made before passing on to the next sub-section, even though it does not directly involve the actual content of the putting in default: In cases which admit of it, not only does the creditor have to indicate to his debtor that he wants the latter to execute, said creditor must also have done all that he was required to do at the time of putting said debtor in default. In other words, the creditor must have accomplished all that was necessary to protect himself from a plea of *non adimpleti contractus*[253A]. A striking example of the consequences involved may be found in the case of *Léo Perreault Ltée v. Tessier*[254], in which Tessier promised to sell a quantity of lumber to Perrault Ltée. After having commenced delivery, the vendor notified the purchaser that his supply of wood was running short and that he would soon cease to deliver the balance. The purchaser, wishing to protect its eventual recourse in damages, stopped paying for the wood delivered to date but continued nevertheless to receive other deliveries. Consequently, the vendor brought an action in resiliation of sale and the purchaser, after sending a *mise en demeure,* brought a cross-demand for damages. The Court of Appeal confirmed the Superior Court judgment maintaining the principal action and dismissing the the cross-demand. As Mr. Justice Bissonnette stated:

> "Quand elle tentera de protester, le 24 novembre, cette mise en demeure se révélera fallacieuse et insuffisante parce que, pour être efficace, elle aurait dû être appuyée d'un paiement formel de la livraison des cinq derniers wagons ou, tout au moins, d'une offre de paiement"[255].

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253 e.g. In *Dame Boudreau et vir v. Marcitte (ibid),* Marcotte brought a cross-demand to have lease resiliated due to his being troubled in his enjoyment. He lost said action because the lessor was not in default to put an end to the troubles. Therefore, to avail as a sufficient putting in default, Marcotte should have asked the court to order lessor to put an end to the troubles within a certain delay or else the lease would be resiliated. As regards the *Beauchamp v. Bissonnette* case *(ibid),* plaintiff brought an action in giving in payment without giving a prior *mise en demeure* for payment of the hypothec. (note that the conventional putting in default was held to have been waived by plaintiff). Thus the action should have asked for payment in default of which the giving in payment clause would become effective. See also *Chartrand v. Desrochers et al (ibid)* which is quite similar. Another example is *Dame Prairie v. Prairie (ibid)* in which plaintiff sought damages to compensate an obligation to "loger, nourrir, vêtir etc." without having put defendant in default to furnish same.

253A J.L. Baudouin, *op. cit.* no. 540, p. 283.

254 *loc. cit.* (1958) Q.B. 420 (confirmed by the Supreme Court).

255 *ibid* p. 424. In practice, the most numerous examples of the other formalities involved in a sufficient putting in default are found in cases of actions *en passation de titre:* However these formalities will vary somewhat, depending on whether the plaintiff is vendor or purchaser, cf. *Poirier v. Archambault,* [ (1912) 1 D.L.R. 358

**(iii) When should the putting in default be made** – As a rule, the putting in default may be given as soon as the obligation falls due[256]. If it is sent after a lapse of time since the debt was exigible, the creditor merely has indicated that up to that time, the passive attitude of his debtor has not caused any harm but from that point on, no further delays will be tolerated, under pain of all possible damages.

Demogue has raised the question in doctrine whether a putting in default could be validly given before the date upon which the debt fell due. He was of the opinion that this was possible[257].

Happily, our Court of Appeal has had the occasion to express an opinion on this question in the case of *Reinhardt v. Turcotte*[258]. This matter involved a contract of lease and hire in which the lessor gave a putting in default to the lessee four days before the rent was due on the first of the month. Mr. Justice Pratte wrote:

> "Il est vrai que cet avis a été donné avant l'échéance du terme, mais cela n'importe pas dans l'espèce. En effet, l'avis a été reçu si peu de temps avant le premier juin qu'il ne serait pas raisonnable de présumer que le créancier a pu changer d'idée dans l'intervalle"[259].

One must agree with the position taken since, as Demogue indicated, the putting in default is a clear warning that no latitude as to the time for execution would be allowed the debtor. Thus if he was notified before the obligation was due, the debtor would be amply advised of what was expected of him. I also find it fortunate that Mr. Justice Pratte saw fit to qualify his opinion to a certain extent: This "early" putting in default was held valid because the short period of time between the moment it was given and the moment the debt was due would lead one to believe that the creditor had not changed his mind in the interval. In effect, since the creditor cannot immediately have recourse to contentious proceedings until the debt is due, it would be difficult to appreciate his determination to exact complete, regular and immediate execution of his claim. How could one prove that the creditor remained steadfast in his attitude towards the

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(Superior Court); (1914) 23 K.B. 495; (1915) 51 S.C.R. 637]; *Langlois v. Charpentier,* (1914) 20 L.R. n.s. 169 (Superior Court); *Trudel v. Marquette,* (1915) 24 K.B. 279; *Chercuitte v. Cummings,* (1916) 51 S.C. 63 (Court of Review); *Archambault v. Deslandes,* (1928) 66 S.C. 346. Subject to the risk of being guilty of grossly oversimplifying a fairly complex subject, one could say that generally, the vendor-plaintiff would have to tender a signed project of deed of sale along with the titles establishing his right to the property; whereas the purchaser-plaintiff would tender a signed project of deed along with the sale price.

256 Demogue *op. cit.* no 238; Pau, 17 juil. 1902, S. 1902.2.216.

257 *ibid:* "Mais selon nous elle est possible avant l'arrivée du terme et de la condition. Car c'est surtout, d'après la jurisprudence, un acte par lequel le créancier manifeste qu'il ne veut supporter aucun retard. Il peut le faire avant terme. De façon générale, si un acte peut se faire incontestablement après une date qui le justifie, il peut aussi se faire avant, si à cette époque, il a sa raison d'être".

258 *loc. cit.* (1956) Q.B. 241.

259 *ibid* p. 243.

debtor while awaiting the due date of his *créance?* Therefore, as Mr. Justice Pratte stated, it would be unlikely that any basic change in intentions has taken place a short interval before the debt was exigible. On the other hand, if the putting in default was given after the time for execution had arrived, the court would be able to judge the seriousness of the creditor's intentions by the manner in which he prosecuted the fulfillment of his obligations.

**(iv) Where should the putting in default be given** – The basic requirement is that the debtor have knowledge of the putting in default[260]. Usually, this would imply that said *mise en demeure* was given at the debtor's domicile, if not to said debtor in person at any other place[261].

As mentioned many times in this paper, the simple notification of a putting in default is not sufficient in the case of the obligation to give, unless the debt was *portable.* Thus to put the debtor in default effectively, not only should notice be given but also the creditor must present himself in order to receive payment at the place where the obligation is executable[262]. Since this aspect has already been examined earlier, no further comment is necessary.

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260 Marseille 12 jan. 1938, D.H. 1938.191; Req. 1 mai 1929, D.H. 1929.297. (In the latter case, the registered letter sent never arrived to the debtor). Civ. 15 déc. 1948, D. 1949.1.105 (The notice was sent to the last domicile of Jewish refugees who had abandoned same during the war). In *Guilbeault v. C.P.R. Co.,* [ (1890) 21 L.R. n.s. 215 ] the Superior Court held that verbal notices given to subordinate employees was not sufficient to put the company in default. One may ask the question whether the notice was held insufficient because it was verbal, or because it was given to an ordinary employee, or both?

261 cf. Faribault, *op. cit.* no 406 p. 355. In matters of elected domiciles, the Court of Appeal appears hesitant to affirm that notification made at said elected domicile is sufficient notice to the debtor. The facts of the case of *Desmarteau v. Desmarteau (loc. cit.)* may be resumed as follows: Dame Desmarteau was the hypothecary creditor of Desmarteau, who was domiciled in the State of Illinois. In the deed, there was an election of domicile made at the Prothonotary for the District of Montreal's office; thus, the action en dation en paiement was served there and judgment was obtained by default. However, Desmarteau, upon receiving news of these happenings, immediately brought an opposition to judgment, and tendered all that was due. Mr. Justice Gagné (along with the other members of the Court of Appeal) felt that (at p. 269): "C'est donc l'action qui constituait cette mise en demeure, mais le défendeur n'en a pas eu connaissance. Dès qu'il a été mis au courant, il a, dans le plus court délai possible, produit son opposition à jugement et offert tout ce qui était dû. Le jugement qui a maintenu cette opposition, déclaré valables les offres faites et consignées, et révoqué le jugement qui avait déclaré la demanderesse propriétaire, me paraît absolument bien fondé".

262 Art. 1152 C.C., see also C. Zachariae, *Cours de droit civil français,* edited by C. Aubry and C. Rau, Strasbourg, F. Lagier éditeur, 1839, vol. 2, p. 316; Demogue, *op. cit.* no 235, p. 261; Demolombe, *op. cit.* no 542; Faribault *op. cit.* no 406. As example of the application of this rule, one may cite the following cases (the majority of which have been mentioned before): Civ. 28 juin 1836, Rec. Gen. 1836.1.690; Paris, 15 fév. 1870, D.P. 1870.2.163; Req. 30 déc. 1919, D. 1920.1.50 (summary); Civ. 15 déc. 1925, S. 1925.1.342; *Lay v. Cantin,* (1903) 23 S.C. 405 (Circuit Court); *Paiement v. Dubois,* (1911) 39 S.C. 507 (Court of Review); *Trester v. Desève,* (1917) 27 K.B. 237; *Dame Dufresne v. Antonacci et al,* (1918) 53 S.C. 36 (Court of Review); *Wilson et Lafleur Ltée v. Gendron et al,* (1925) 32 L.R. n.s. 250 (Superior Court); *Dame Larose v. Barrette,* (1926) 64 S.C. 200; *Bellavance v. Lacroix et al,* (1927) 35 L.R. n.s. 48 (Superior Court).

## C – When is a state of default acquired?

When the creditor has duly placed his debtor in default, will said debtor immediately be exposed to a recourse in damages and will he, at the instant he is notified of his default, assume the risks of the thing which he is bound to deliver?

In French doctrine[263], many opinions were expressed ranging from a strict to a lenient approach to the situation of the debtor. As the leading exponent of the "hard-line", Larombière felt:

> "La mise en demeure est immédiatement acquise au créancier. Il ne s'agit pas d'accorder au débiteur, à partir de la sommation, ce qu'on appelle un délai moral, généralement de vingt-quatre heures. Tant pis pour lui si, averti par la convention, il ne s'est pas mis en mesure de payer exactement à l'échéance. (. . .) Une mise en demeure est incompatible avec la concession du moindre délai, parce que le débiteur qui a terme n'est pas en retard, et, en ce sens, ne doit rien"[264].

A contrary opinion was held by Demolombe and Duranton, who maintained that a certain period after notification received must be granted to the debtor in order to permit him to accomplish that which is required of him[265]. Thus, during this *"délai moral"* before the expiration of which, the obligation cannot be executed, the debtor will not be en demeure. It would appear that the actual length of this *"délai moral"* could vary according to the circumstances and the obligation to be fulfilled[266].

Demogue advances a third point of view which must be described at best as a compromise between the two radically opposing positions just described[267]. While agreeing that as a rule, default should not be incurred by the debtor who immediately proceeds to execute when so requested, he would hesitate granting this benefit to debtors of obligations which, by their nature, cannot be fulfilled within a short time:

> "Toutefois nous croyons que s'il s'agit d'un long travail, il doit en être autrement et que la mise en demeure a un effet immédiat. Si un entrepreneur doit livrer un bâtiment pour le 1er juin, il ne suffit pas qu'il le commence aussitôt la mise en demeure. L'effet de la mise en demeure commencerait donc plus ou moins tard suivant l'intention probable des parties[268].

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263 In Quebec, our authors did not discuss this aspect.

264 *op. cit.* p. 487 no 21. Faribault would appear to share this view when he writes (*op. cit.* no 413): "La demeure est acquise au créancier dès l'instant où elle est faite. . .".

265 cf. Demolombe, *op. cit.* no 531; Duranton, *op. cit.* no 443.

266 For instance, the delay required to build a house would be much longer than the time needed to deliver a horse.

267 *op. cit.* no 240.

268 *ibid.*

The courts have manifested very clearly their acceptance of the Duranton-Demolombe approach to the question, although the Quebec courts were seized more often with disputes of this nature than were those of France. In effect, our courts decided that the debtor should be granted a "reasonable delay" to execute[269]. As for the determination of this "reasonable delay", Mr. Justice Brossard wrote:

> "Notre loi ne stipulant pas de délai déterminé, la suffisance du délai devient une question de fait dépendant, dans chaque cas, des circonstances et laissée à l'appréciation du juge"[270].

The orientation of the courts in this domain must be viewed favorably since it coincides with the nature of *la demeure.* As has been previously mentioned (perhaps too often), the putting in default is the indication to the debtor that he must execute his obligation immediately. Therefore, the debtor who diligently undertakes to fulfill his share of the bargain must not be penalized and viewed in the same manner as another person who refuses or neglects to show any inclination towards execution.

**2 — The effects of Default —**

There are three basic areas in which the putting in default plays a key role: In the claim for damages resulting from non-execution or tardy execution of an obligation; in the transfer of the risk of the thing (*"risque de la chose"*) from the creditor to the debtor; and finally, we shall determine whether the putting in default is necessary before resolution of a contract may be obtained.

**A- The claim for damages** — In France, notwithstanding the apparently unambiguous provisions of articles 1146 C.civ.fr.[271], a rather vociferous debate has arisen not only in doctrine but also in jurisprudence concerning the necessity of the *mise en demeure* before a claim for damages will lie. The factor initiating these difficulties involved the distinction between moratory and compensatory

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269 cf. *Prévost and Brien dit Desrochers,* (1866) 2 L.C.L.J. 82 (Court of Appeal); *Beaudry and Curé et Marguilliers etc. de Notre-Dame,* (1880) 3 L.N. 218 (Court of Appeal); *Law v. Frothingham et al,* (1881) 1 Q.B.R. 352; *La Cie de Chemin de Fer "Québec Central" v. Létourneau,* (1885) 14 L.R. 324; *Crevier et al v. The Ont. and Que. Railway Co.,* (1888) M.L.R. 4 S.C. 428; *Speller v. Greenshields* (1912) 18 L.R. n.s. 427 (Court of Review); *Ferrari v. Bastien,* (1913) 20 R. de J. 521 (Court of Review); *Dansereau v. Boissy et al* (1955) S.C. 385; *Alarie v. Crédit Mauricien Inc. et al,* (1956) Q.B. 693; *Bertalen v. Huels,* (1968) Q.B. 715. In France, the courts appeared to require a delay which would depend on the nature of the obligation and the actual time which could be required for its execution: cf. Bordeaux, 17 déc. 1895, D.P. 1897.2.507; Paris 13 mai 1924, D.H. 1924.419; Req. 29 nov. 1932, D.H. 1933.20.

270 cf. *Chartrand v. Desrochers et al, loc. cit.* [ (1962) S.C. 463 at p. 477 ]. The judge also alluded to the fact that quite often, the delays for appearance were held sufficient by the courts. It should be noted also that in certain cases, the courts decided that the creditor could explicitly establish a delay in the putting in default. cf. *Beaudry and Curé et Marguilliers etc. de Notre-Dame, loc. cit.; Simmons v. Gravel* (1884) 10 L.N. 396 (Circuit Court); *Dame Tarte v. Sarrazin* (1933) 54 K.B. 99.

271 "Les dommages et intérêts ne sont dus que lorsque le débiteur est en demeure de remplir son obligation. . ."

damages[272]. Unlike moratory damages for which it is geneially agreed, a *mise en demeure* is required[273], opinions are divided as to whether a putting in default must be made in order to obtain compensatory damages.

Of the authors maintaining that the putting in default is not necessary in order to claim the latter[274], Marie-Jeanne Pierrard presented the most lucid argument:

> "D'après la théorie classique à laquelle nous nous rallions – celle de la responsabilité à base de faute – l'existence de la responsabilité civile suppose réunies trois conditions: une faute, un préjudice et un lien de causalité entre la faute et le préjudice, celui-ci étant causé par celle-là. Or, en cas d'inexécution par la débiteur de ses obligations, où est la faute commise par ce débiteur? La faute, disent MM. H. et L. Mazeaud, est une erreur de conduite, erreur de conduite telle qu'elle n'aurait pas été commise par une personne avisée placée dans les mêmes circonstances externes que l'auteur du dommage. Qu'aurait fait, lors de l'échéance une personne avisée tenue d'une obligation? Elle aurait exécuté son obligation. Celui qui n'exécute pas commet une erreur de conduite, une faute; il est, par le seul fait de l'inexécution, responsable du préjudice qu'il cause à son créancier"[275].

Pierrard then concluded that the putting in default, while essential for moratory damages, has no effect on the attribution of compensatory damages. She also maintained that her opinion conformed to the intentions of the Codifiers of the Napoleonic Code[276].

Oddly enough, the French writers, who felt that a putting in default was necessary for compensatory damages[277], would find the general line of argument

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272 For a definition of these types of damages, one may consult Demolombe (*op. cit.* no 567): "Les premiers (dommages-intérêts compensatoires) ont pour but de réparer, de compenser le dommage que l'inexécution de l'obligation cause au créancier; et ils doivent avoir, en effet, généralement pour résultat de mettre, par équivalent, dans le même état que si l'obligation avait été exécutée . . . .
Quant aux intérêts moratoires, ils ont pour but, ainsi que leur dénomination même l'indique, de réparer le dommage que le créancier a éprouvé, par suite du retard dans l'exécution de l'obligation".

273 e.g. Cons. d'état, 4 août 1870, D.P. 1872.3.23; Req. 11 juil. 1889, D.P. 1890.1.415; Civ. 28 avril 1891, S. 1891.1.216; Cons. d'état, 8 août 1896, D.P. 1898.3.10; Cons. d'Indo-Chine, 29 avril 1910, D.P. 1912.2.71; Civ. 28 oct. 1918, S. 1918-19.1.89 (note Hugueney).

274 e.g. Beudant, *op. cit.* no 256; Demolombe, *op. cit.* no 570; Aubry and Rau, *op. cit.* no 445, p. 498; Mazeaud, Mazeaud and Tunc, *op. cit.* no 2276; Laurent *op. cit.* no 242; Zachariae, *op. cit.* p. 316.

275 *loc. cit.* 1945 Semaine juridique no 466 no 1.

276 *(ibid)*: "Cette opinion est d'ailleurs conforme aux travaux préparatoires du Code civil. Il est traditionnel, en cette matière de rappeler cette déclaration de Bigot de Préamenu: 'Les dommages-intérêts peuvent être dus non seulement à raison de l'inexécution, mais encore à raison du simple retard. Il faut, *dans ce dernier cas,* que le débiteur soit en demeure'. N'est-ce pas dire nettement que la mise en demeure est nécessaire pour faire courir les dommages-intérêts moratoires et eux seulement".

277 cf. Carbonnier *op. cit.* p. 270; Meurisse, *op. cit.* no 37; Larombière *op. cit.* p. 522, no 3; Ripert and Boulanger, *op. cit.* no 1492; Marty and Raynaud, *op. cit.* no 513; Planiol and Ripert, *op. cit.* no 828; Demogue *op. cit.* no 242; Josserand *op. cit.* no 621; Beaudry-Lacantinerie *op. cit.* no 472; Brun, *op. cit.* no 28.

raised by Pierrard quite acceptable up to a certain point. They would agree that a putting in default is not a general condition required to give rise to compensatory damages; and that damages of this nature originate with the fault *(faute)* of the debtor. They would even agree that this fault of the debtor would arise from his failure to execute. However, as they quite accurately point out, in obligations the execution of which is still possible, the debtor cannot be at fault for not executing until he has been placed in default[278]. In all other cases, the debtor is automatically in default either by sole effect of law or *ipso facto.* As Perrot wrote:

> ". . . La question n'est pas de savoir si une mise en demeure préalable est nécessaire lorsque le créancier réclame des dommages-intérêts compensatoires, mais simplement si la faute du débiteur consiste dans un simple retard fautif, justifiant une mise en demeure, ou si, au contraire, le créancier invoque un préjudice d'ores et déjà réalisé, auquel cas la mise en demeure est inutile"[279].

The French courts reflected this dispute encountered in doctrine, with the result that their jurisprudence has not clearly opted for one viewpoint over the other. Nevertheless, except in matters of lease and hire, the general tendency would appear to require the putting in default in order to establish the fact of non-fulfillment of the obligation[280].

As for the Province of Quebec; notwithstanding the fact that the provisions of our Code are nearly identical to those of the *Code Napoléon* involving damages[281], this dispute has never been seriously raised. Faribault succinctly

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278 cf. Carbonnier *ibid:* "La mise en demeure n'est pas une condition générale du droit aux dommages-intérêts compensatoires. Mais, dans la mesure où ce droit dépend de la constatation d'une faute, la formalité pourra être nécessaire, parce que, en son absence, l'attitude du débiteur n'apparaîtrait plus comme fautive". See also Meurisse *ibid:* Planiol and Ripert *ibid,* Planiol, *op. cit.* no 227. Laurent's opinion (*op. cit.* no 253) would be viewed as a compromise between the two points of view expressed: "Sans doute l'inexécution et la faute du débiteur doivent être constatées; mais ceci est une question de preuve, et la preuve de la faute reste soumise aux règles générales qui régissent la preuve; exiger les formes solennelles de la mise en demeure, comme le fait la cour de cassation, c'est admettre une exception aux règles générales de la preuve sans qu'il y ait un texte".

279 *loc. cit.* no 13.

280 In questions involving lease and hire, the courts require notifications of some sort but not necessarily a formal putting in default: e.g. Civ. 5 jan. 1938, D.H. 1938.97; Civ. 10 oct. 1940, S. 1941.1.11; Civ. 18 jan. 1943, G.P. 1943.1.153; Aix-en-Provence, 4 fév. 1952, G.P. 1952. Ie sem. 312. The courts decided that the putting in default was necessary only for moratory damages in the following cases: Civ. 15 déc. 1880, D.P. 1881.1.37; Civ. 3 déc. 1930, S. 1931.1.101; Riom 25 mars 1937, G.P. 1937.1. 887; Req. 5 déc. 1944, G.P. 1945, Ie sem. 31; Civ. (sec. com.) 13 juil. 1953, S. 1954.1.43. It was held that a putting in default was necessary in order to claim both kinds of damages in the following: Douai 24 mai 1847, S. 1848.2.189; Civ. 11 jan. 1892, S. 1892.1.117 (note Planiol); Req. 28 oct. 1903, D.P. 1904.1.14; Civ. 7 juil. 1909, S. 1910.1.371; Civ. 9 nov. 1914, D.P. 1916.1.268; Civ. 13 avril 1923, S. 1926.1.17 (note Hébert); Montpellier 18 nov. 1926, D.P. 1926.2.160; Soc.17 déc. 1943, S. 1944.1.137; Civ. 31 juil. 1946, S. 1947.1.5.

281 cf. First Codifiers' Report *op. cit.* p. 18: "This section, intitled 'Of damages resulting from the inexecution of obligations' contains articles numbered from 90 to 98, which, with some changes of expression and difference of arrangement, embody the rules contained in the articles of the French code, numbered from 1145 to 1154, and declare the existing law".

resumed the Quebec position when he wrote:

> "En France, la mise en demeure du débiteur ne paraît être exigée que lorsqu'il s'agit de dommages moratoires, et non pas lorsqu'il est question de dommages compensatoires.
> On considère que ceux-ci sont encourus par le simple fait de la contravention du débiteur. Cette doctrine ne peut être admise dans notre droit, l'art. 1070 posant une règle générale qui ne souffre pas d'exception. Cette règle doit donc être appliquée chaque fois que des dommages sont réclamés comme conséquence de l'inexécution d'une obligation de donner ou de faire, que ces dommages résultent de cette inexécution elle-même ou du retard apporté à son éxécution"[282].

Except for a few isolated judgments to the contrary, the courts of the Province have always held that a putting in default is necessary in order to claim damages, either moratory or compensatory[283]. This approach must be viewed with favor because until it is established that an obligation, still possible to execute will not be executed, the damages will be moratory in nature. The likeliest means of determining the intentions of the debtor is either by his admission that he refused to execute, or by his inaction after having received a *mise en demeure,* in which case a claim will lie for damages of a compensatory nature. Thus, one may say that in both cases, a putting in default is required.

**B- The risk of the thing** – The second effect of default in both French and Quebec Civil Law is to displace the risk of the thing *(risque de la chose)* from the creditor to the debtor[284].

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282 *op. cit.* no 432. L. Baudouin states (*op. cit.* p. 566): "La mise en demeure déclenche l'appareil sanctionneur; à raison du retard dans l'exécution, ou de l'inexécution". Mignault (*op. cit.* p. 415) and Langelier (*op. cit.* p. 519) do not make any distinctions.

283 e.g. *Dame Marcile v. Dame Mathieu,* (1883) 7 L.N. 55 (Superior Court); *Charbonneau v. Duval et al,* (1885) 13 L.R. 309 (Circuit Court); *Courville v. Leduc,* (1886) 30 L.C.J. 316 (Court of Appeal); *Johnson v. Brunelle,* (1886) 14 L.R. 219 (Superior Court); *Holland et vir v. Dame de Gaspé,* (1891) M.L.R. 7 S.C. 440 (Court of Review); *Lavoie v. Terriault* (1891) 14 L.N. 26 (Circuit Court); *Benson v. Vallière es qual. et al,* (1894) 6 S.C. 245; *Schimanski v. Higgins,* (1898) 13 S.C. 348 (Court of Review); *Rae v. Phelan et uxor,* (1898) 13 S.C. 491 (Court of Review); *Lafrance v. Larochelle* (1905) 27 S.C. 153 (Court of Review); *Cardinal v. Lalonde,* (1907) 31 S.C. 322 (Court of Review); *Vermette v. Parent,* (1910) 20 K.B. 156; *Lady Hingston v. Bénard,* (1916) 25 K.B. 512, (1918) 56 S.C.R. 17; *Saba v. Duchow,* (1917) 54 S.C. 53; *Fournier et al v. Ville de Victoriaville,* (1918) 28 K.B. 216; *Desloover v. Mansfield* (1918) 25 L.R. n.s. 155 (Court of Review); *Auger and Son Limited v. Asselin,* (1920) 58 S.C. 367; *Lambert v. Comeau,* (1920) 59 S.C. 425 (Court of Review); *Thaddée Brisson Limitée v. Desbiens,* (1924) 37 K.B. 539; *Bernard v. Cymbalista,* (1955) S.C. 434; *Léo Perrault Ltée v. Tessier,* (1958) Q.B. 420 (confirmed by the Supreme Court the 19th of Nov. 1958); *Mindlin v. Cohen et al,* (1960) S.C. 114 (Magistrate's Court); *Jodoin et al v. Dame Lavigne,* (1960) Q.B. 174; *Lavoie v. Hamelin,* (1961) S.C.30; *Bertalan v. Huels,* (1968) Q.B. 715. Contra: *Pelletier v. Boyce* (1902) 21 S.C. 513; *La Cie d'Aqueduc de la Jeune Lorette v. Dame Turner* (1921) 33 K.B. 1; *Duelz v. Kajandi,* (1960) S.C. 89.

284 cf. Art. 1302 C.civ.fr. "Lorsque le corps certain et déterminé qui était l'objet de l'obligation, vient à périr, est mis hors du commerce, ou se perd de manière qu'on en ignore absolument l'existence, l'obligation est éteinte si la chose a péri ou a été perdue sans la faute du débiteur et avant qu'il fût en demeure.
Lors même que le débiteur est en demeure, et s'il ne s'est pas chargé des cas fortuits, l'obligation est éteinte dans le cas où la chose eût également périe chez le créancier si

In both codes, the conditions of application are quite similar in that we must be dealing with a synallagmatic contract involving the obligation to give a certain object. The subsequent loss of said object must be complete and must result from *cas fortuit or force majeure*[285]. Unless the debtor is in default to deliver it, he is not at fault and should not be held liable for the destruction of the object in question, resulting from events over which he had no control. However, once a state of default is incurred, the debtor is no longer blameless and should suffer the consequences arising from his failure to act[286]. Nevertheless, the law in both France and Quebec is not too exorbitant since the debtor may be relieved of his responsability providing he establish that the object would have also perished in the hands of the creditor[287].

As Planiol wrote[288], this aspect so greatly discussed in doctrine has been very rarely pleaded before the courts. In fact only three cases involving the above mentioned principle may be found in jurisprudence[289]. Since these cases simply applied the *"théorie des risques"* in a straightforward manner, they do not require detailed analysis[290].

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elle lui eût été livrée". (See also art. 1138 C.civ.fr.) Art. 1200 C.C. "When the certain specific thing which is the object of an obligation perishes, or the delivery of it becomes from any other cause impossible, without any act of fault of the debtor, and before he is in default, the obligation is extinguished; it is also extinguished although the debtor be in default, if the thing would equally have perished in the possession of the creditor, unless in either of the above mentioned cases, the debtor has expressly bound himself for fortuitous events".

285 cf. L. Faribault, *Traité de Droit Civil du Québec,* Montréal, Wilson et Lafleur Ltée, 1959, vol. 8 bis, nos 795, 796; Demogue, *op. cit.* no 113 *et seq;* Beudant, *op. cit.* no 399 *et seq.*; Colin and Capitant, *op. cit.* no 876 *et seq.*; Marty and Raynaud, *op. cit.* no 288 *et seq.*

286 cf. Laurent states (*op. cit.* no 243): "Or, on ne peut plus dire que le débiteur est sans faute quand il est en demeure, car la demeure est aussi une faute. Si le débiteur avait livré la chose au créancier, elle n'eût point périe; si donc elle périt, on peut dire qu'elle périt par sa faute; dès lors il est responsable. See also Mignault (*op. cit.* p. 666).

287 Faribault, *op. cit.* no 799; Larombière, *op. cit.* p. 446 no 28.

288 *op. cit.* no 1348.

289 i.e. Req. 17 fév. 1879, D.P. 1880.1.346; Civ. 7 avril 1954, D. 1954.385 and *Perkins Electric Co. v. Abran,* (1926) 42 K.B. 162. This latter case is also cited in the French *Répertoires.*

290 The first French case involved the failure of a depositary of some railway bonds to return same after a demand by the depositor. The French government later ordered the sale of all such bonds. Thus, the Cour de Cassation held that the debtor was bound to indemnify the creditor for all losses resulting from such alienation.

As for the second French case, the owner of an automobile leaves it at a garage for repairs. The garage fails to make delivery after being put in default. Subsequently, the French army requisitions the car in 1944. As a result, the court held that the garagist must bear the loss.

In the Quebec case, Perkins Electric Co. sold cinema equipment to Toupin, but reserved the ownership of same until full payment. Toupin then sold the theatre to Abran but continued to exploit this enterprise as lessee. After Toupin went bankrupt, his trustee continued the business for the benefit of the creditors. However, Perkins Electric Co. revendicated the equipment sold from the trustee but Abran intervened in order to declare that he was now owner of said equipment. During these proceedings, the theatre burned and the machinery was destroyed. Mr. Justice Dorion held that Abran had placed himself in default to deliver by contesting the revendication and was therefore answerable for all losses resulting from the fire.

**C- Resolution of the contract** – Aside from the possibility of the express stipulation that in cases of non-execution by one of the parties, the contract shall be resolved in favor of the other, both the French[291] and the Quebec codes[292] allow the courts to pronounce resolution at the demand of the dissatisfied creditor even though the agreement may be silent on this point. In other words, the law provides for "tacit" resolutory conditions, in all synallagmatic contracts[293].

Before resolution may be pronounced against him, the debtor must have been at fault. Of course, the logical manner to establish this fault would be to place him in default, unless said debtor has already incurred default by sole effect of law, by convention or by the other means mentioned above[294]. This doctrine has been followed in French[295] and Quebec[296] jurisprudence with the result that it is now generally held that the putting in default is a vital prelude to the resolution of a contract.

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291 Art. 1184 C.civ.fr.: "La condition résolutoire est toujours sous-entendue dans les contrats synallagmatiques, pour le cas où l'une des deux parties ne satisfera point à son engagement.

Dans ce cas, le contrat n'est point résolu de plein droit. La partie envers laquelle l'engagement n'a point été exécuté, a le choix ou de forcer l'autre à l'exécution de la convention lorsqu'elle est possible, ou d'en demander la résolution avec dommages et intérêts. La résolution doit être demandée en justice, et il peut être accordé au défendeur un délai selon les circonstances".

292 Art. 1065 C.C.: "Every obligation renders the debtor liable in damages in case of a breach of it on his part. The creditor may, in cases which admit of it, demand also a specific performance of the obligation, and that he be authorized to execute it at the debtor's expense, or that the contract from which the obligation arises be set aside, subject to the special provisions of this code, and without prejudice, in either case, to his claim for damages.

293 cf. Baudouin, *op. cit.* p. 735; Mazeaud and Mazeaud *op. cit.* no 1088, p. 914; Faribault *op. cit.* no 350; Mignault, *op. cit.* p. 450.

294 Professor Baudouin wrote (*ibid* p. 735): "On s'accorde à reconnaître qu'on ne peut avoir la certitude de l'inexécution qu'après avoir mis le débiteur en demeure, et qu'une fois la preuve faite qu'il y a eu faute de sa part de ne pas s'exécuter soit totalement soit partiellement. Le droit à la résolution du contrat n'est ouvert en définitive que si ces deux conditions préalables se trouvent réunies".
Mazeaud and Mazeaud would also agree to this statement (*ibid* no 1100).

295 e.g. Civ. 22 avril 1846, S. 1846.1.639 (cf. critique by Laurent *op. cit.* no 253): Req. 1 déc. 1897, D.P. 1898.1.289 (note Planiol. This author confirmed the necessity of the putting in default before asking for resolution but disagreed with the manner in which the rule was applied in the case discussed); Riom 20 nov. 1907, S. 1907.2.309; Trib. de Paix de Paris (10e arr.), 24 jan. 1912, D.P. 1914.5.4; Paris, 8 déc. 1920, S. 1921.2.94; Civ. (sec. com.) 9 mai 1949, S. 1949.1.184. In the three following cases, it was held that the action in resolution itself constituted a valid putting in default; Civ. 28 mars 1904, D.P. 1904.1.315; Req. 10 mai 1922, S. 1922.1.66 (Bulletin des sommaires). Civ. 14 oct. 1931, D.H. 1932.1.153. It was decided that no putting in default was needed in Poitiers, 16 fév. 1885, D.P. 1886.2.38.

296 e.g. *Chapman and Larin,* (1879) 4 S.C.R. 349 (This case applied art. 1544 C.C.); *Cousineau et al v. Allard,* (1897) 13 S.C. 388; *Harvey Chemical Co. of Canada v. Gagnon,* (1915) 21 R. de J. 373 (Circuit Court); *Verret v. Bédard,* (1929) 35 L.R. n.s. 426 (Superior Court); *Nudelman v. Hack,* (1932) 70 S.C. 452; *Dame Grégoire v. Beaulieu,* (1945) K.B. 584; *Deauville Estates Ltd. v. Dame Tabah,* (1964) Q.B. 53. Contra: *Maranda v. Paradis,* (1905) 12 R. de J. 144 (Circuit Court); *Corporation of the Town of Grand'Mère and l'Hydraulique de Grand'Mère,* (1908) 17 K.B. 83.

**3 – How the effects of default cease –**

Since default initiates the sequence of events leading to the forced execution of the obligation *en nature* or by equivalence, it would be logical to state that as a rule, default is put aside by full payment of the debt[297]. However, it should be noted that the rights accrued to the creditor during the period of default shall still remain, unless the payment covers the whole debt and its accessories. For instance, if X places his debtor Y in default to reimburse a loan of one thousand dollars, and the latter pays only one month after having received the *mise en demeure,* said payment, in order to be complete, would also have to include legal interest on said amount for his month of default[298].

Naturally, if the creditor refuses to accept execution of his obligation, the debtor may also free himself by employing a tender (and deposit in cases which admit of it). In this manner, the debtor is freed of his own default, while placing the creditor *en demeure.* Consequently, the creditor shall reassume the risk of the thing, in the case of a certain object, and, he will no longer have interest continue to accumulate on the debt[299].

Aside from the manner indicated in the general rule, the debtor may be relieved from his default either expressly or tacitly since under *demeure,* the creditor acquires rights of a private nature, to which he may renounce[300]. If said renunciation is made expressly, then all equivocation is avoided. Nevertheless, in spite of the fact that one must tread carefully when examining tacit renunciations to default, there are many circumstances which in doctrine and in jurisprudence imply renunciation to default.

The granting of a new delay for execution without reserving the rights acquired after the putting in default would indicate the acknowledgement on the part of the debtor that no damages were suffered during the period of said default[301]. There is a situation quite similar to this which is not particularly discussed in doctrine, but which has arisen quite often in Quebec jurisprudence. It may be stated in its simplest form as follows: When the creditor fails to exploit with sufficient alacrity, the conventional default of his debtor, said creditor is deemed to have renounced to his automatic default, and must thereafter have

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297 cf. Laurent *op. cit.* no 244.

298 Of course, this affirmation could be affected by art. 1786 C.C. which provides: "An acquittance for the principal debt creates a presumption of payment of the interest unless there is a reserve of the latter". See also Laurent *ibid.*

299 cf. Laurent *ibid* no 248; Demogue *op. cit.* no 245. See also *Truchon v. Tremblay,* (1950) S.C. 194 at p. 196, in which Mr. Justice Edge wrote: "Considérant que lesdites offres telles que faites par le défendeur au demandeur constituaient celui-ci en demeure de les accepter; que lesdites offres du défendeur rendaient sans objet et anéantissaient la mise en demeure que le demandeur lui avait faite antérieurement;..."

300 Laurent *ibid* no 245.

301 *ibid;* Faribault *op. cit.* no 434; Toullier *op. cit.* no 256, Demolombe *op. cit.* no 236. e.g. *Thibeault v. Dame Lafaille et al,* (1951) S.C. 188.

recourse to the general rule requiring interpellatory *mise en demeure*[302]. It would appear that since this type of stipulation derogates from the *droit commun*, the courts prefer that it be applied strictly or else set aside in deference to the general rule of default.

A second example of tacit renunciation is the case of novation. Although some writers simply state that the extinction of the original debt by novation also extinguishes the state of default incurred involving said debt[303]; certain other authors maintain that the original claim and the damages accumulated during the state of default involving said debt constitute two separate rights for the creditor.

As Laurent resumed his argument:

> "Quand le débiteur est en demeure, le créancier a deux droits: un droit aux dommages et intérêts et un droit à l'exécution de l'obligation. S'il nove l'obligation, l'ancienne dette est à la vérité éteinte; mais le créancier en y renonçant ne renonce pas aux dommages-intérêts dus à raison de la demeure. Ce sont deux droits distincts: l'un peut s'éteindre, l'autre peut subsister. Nous ne disons pas qu'il subsistera nécessairement; cela dépend des circonstances, puisque c'est une question de fait; il se peut que les parties aient compris les dommages-intérêts dans la nouvelle obligation; dans ce cas, la demeure sera purgée; mais si la nouvelle obligation est la représentation exacte de l'ancienne, la renonciation du créancier aux dommages-intérêts n'aurait plus de cause; nous en concluons que la demeure ne serait pas purgée, alors même que le créancier n'aurait pas réservé ses droits; on n'est pas tenu de réserver ses droits pour les conserver"[304].

If the putting in default results from an action, said state of default will last as long as the proceedings continue[305]. Thus, if plaintiff desists from his action[306], or if defendant obtains peremption of the suit[307], the debtor will not only be relieved of the action weighing upon him but will also be freed of all its subordinate effects, including default.

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302 It must be noted that the majority of the cases cited below deal with contracts which today would fall under the provisions of articles 1040a *et seq.* However, these cases may still be used as illustrations of the affirmation: cf. *Wighton et al v. Hitch,* (1913) 44 S.C. 128 (Court of Review); *Caplan et al v. Montreal City and District Realty Co.,* (1917) 52 S.C. 435 (Court of Review); *Vallée v. Tourangeau et al,* (1922) 33 K.B. 477; *Goyette v. Ménard,* (1933) 56 K.B. 534; *Shaposnick et al v. Workman et al,* (1947) L.R. 385 (Court of Appeal); *Girard v. Girard,* (1952) Q.B. 479 (The summary of this case is quite ambiguous in that the exact stipulations are not given); *Côté et la Caisse Populaire de Montmorency-Village v. Sterblied,* (1956) Q.B. 111, (1958) S.C.R. 121; *Alarie v. Crédit Mauricien Inc. et Martin,* (1956) Q.B. 693; *Chartrand v. Desrochers et al,* (1962) S.C. 465.

303 e.g. Demogue *op. cit.* no 244; Demolombe *op. cit.* no 535; Toullier *op. cit.* no 256.

304 *op. cit.* no 245. (This opinion is also held by Faribault *op. cit.* no 434).

305 cf. Laurent *ibid* no 246; Demogue *op. cit.* no 244; Demolombe *op. cit.* no 583; Toullier *op. cit.* no 258.

306 Art. 262 C.C.P. Art. 264 C.C.P. provides in part that: "Discontinuance replaces matters in the state in which they would have been had the suit to which it applies not been commenced".

307 Arts. 265-269 C.C.P.

The situation is not as clearly defined if the default results from an extra-judicial demand. Of course, both Quebec and French Civil Law have not established any peremptory delay during which the creditor must proceed with his claim before the courts, and this naturally leads to the question as to how long an extra-judicial putting in default will maintain full effect. Two basic opinions have been advanced as solutions to this problem: On the one hand, certain writers[308] have maintained that one cannot make up for the silence of the law by proceeding by analogy. As a result, this measure, although weaker in force than a judicial demand, may subsist longer than the latter in that the extra-judicial demand may not be perempted. Larombière felt that this difference in forcefulness would explain why the state of default should last as long as the *créance*, i.e. as long as the debt is not prescribed:

> "Il nous semble au contraire que la sommation a vis-à-vis du débiteur un effet perpétuel, précisément parce qu'elle est un acte moins rigoureux et moins menaçant. Il ne faut pas oublier que la mise en demeure n'est que la constatation du retard. Or la sommation de l'huissier, le procès-verbal du notaire que nous rangeons sur la même ligne, ne font que constater ce retard. Ils n'ont de valeur que comme monument, comme preuve authentique. Eh bien! nous demanderons où est la loi qui fixe la durée d'une preuve de la constatation d'un simple fait. Le créancier pourra donc opposer la mise en demeure dûment constatée par acte de notaire ou d'huissier, aussi longtemps que durera son droit principal"[309].

On the other hand, Toullier felt that the silence of the code would simply leave greater latitude to the judge[310], who could examine the circumstances and determine whether one could interpret the inaction of the creditor as a tacit renunciation to the default. It would appear that this point of view prevails in Quebec jurisprudence[311].

With this comment, we have terminated the study of default in doctrine and in jurisprudence. The next step would be to pass from what exists in our law today, and go on to what our law should provide in this area.

## 4 — Recommendations —

The most pressing question one must answer is whether the requirement of the putting in default should or should not be maintained. Carbonnier feels that due to all the administrative delays involved in the judicial process before an executory judgment may be obtained, the *raison d'être* of art. 1139 C.civ.fr.

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308 e.g. Larombiere *op. cit.* no 19; Laurent *op. cit.* no 246; Demogue *op. cit.* no 244; Demolombe *op. cit.* no 539.

309 *ibid.*

310 *op. cit.* no 260.

311 cf. *Dubé et al v. Cousineau*, (1940) 46 R. de J. 470 (Superior Court). One may also consult the cases cited under footnote 302. Although said cases provided for conventional putting in default, they generally decided that if the creditor did not avail himself of the default immediately, the effects of the *demeure* ceased and an interpellatory putting in default would be necessary.

is dimished[312]. Mazeaud, Mazeaud and Tunc on the one hand recommend the abrogation of art. 1146 C.civ.fr., but on the other would also retain the requirement that the creditor give some type of notification to the debtor in certain circumstances[313]. Marty and Raynaud prefer to maintain *la mise en demeure* but would dispense with a demand for execution whenever the term for fulfillment of the obligation is fixed[314].

It is interesting to note that of the thirteen civil codes consulted[315], (not including France and Quebec), only one, (Soviet Russia) would exclude the necessity of the putting in default[316]. Of the remaining codes, five (i.e. Germany, Japan, Brazil, Poland and China) would require notification only in cases in which the term for execution is not certain. Thus, one may conclude that the bulk of foreign legislation (as far as this random selection is concerned) is quite similar to the law in force in the Province of Quebec[317].

However, to answer the question raised at the beginning of this chapter, the rule *dies non interpellat pro homine* should be maintained. To decide otherwise would be contrary to the general tenor of our Code since it has as one of its primary aims, the protection of the debtor[318]. I feel that for legislation dating

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312 *op. cit.* p. 293. "Pour atténué qu'il soit par l'interprétation, l'art. 1139 a l'inconvénient de mettre dans les affaires un esprit de molesse et de lenteur; la ponctualité serait-elle une qualité secondaire, et peu française? ... Entre l'échéance de la créance et la satisfaction du créancier s'interposent aujourd'hui des obstacles autrement décourageants que l'art. 1139: délais de grâce, lenteurs des procès, sursis administratifs à l'exécution des décisions de justice".

313 *op. cit.* no 2283: "Limiter son (debtor's) droit à la réparation du préjudice postérieur à une mise en demeure, c'est faire preuve d'un formalisme étroit et désuet. Le débiteur ne doit pas laisser passer le terme qu'il a accepté, sans s'en apercevoir. Il doit dès cet instant savoir qu'en n'exécutant pas, il porte préjudice à son créancier. La vie moderne est trop complexe, les conventions s'y multiplient en trop grand nombre pour qu'on puisse obliger le créancier à se pencher chaque jour sur son contrat afin de s'assurer que le terme n'est pas échu, pour qu'on puisse le contraindre à courir chez son huissier si son transporteur ne lui livre pas un colis le jour prévu. *Dies interpellat pro homine.*

Il faut donc souhaiter très vivement l'abrogation pure et simple de l'art. 1146, disposition injuste et souvent inapplicable. Certes, un avertissement du créancier au débiteur apparaît nécessaire dans certain cas: soit que le débiteur ignore qu'il méconnaît le contrat, soit qu'il ignore l'étendue du préjudice que sa négligence peut causer au créancier. . . Au surplus, lorsqu'un avertissement est nécessaire, il serait souvent légitime de lui faire produire, une fois donné dans un délai raisonnable, un effet rétroactif. . .".

314 *op. cit.* no 655 bis: "On comprend l'utilité de cette mise en demeure lorsqu'il n'y a pas de date fixée pour l'exécution; il faut alors que le créancier réclame ce qui lui est dû et avertisse le débiteur. Mais l'exigence de la mise en demeure est moins compréhensible lorsque la date de l'exécution a été brisée; il semble alors plus rationnel d'admettre que l'arrivée du terme fixé met automatiquement le débiteur en demeure".

315 i.e. Spain, Belgium, Russian Soviet Federated Socialist Republic, Germany, Ethiopia, Japan, Philippines, Louisiana, Argentina, Santa Lucia, Brazil, Poland, and China (Nationalist).

316 It would appear that Italy (art. 1223) has also done away with the putting in default - cf. Carbonnier, *op. cit.* p. 293.

317 The actual texts are reproduced in part in appendices to this paper.

318 Recent legislation such as articles 1040a *et seq.* would reinforce this idea.

over a hundred years, the provisions of our Code involving default still attain the goal sought with very respectable accuracy; therefore, no massive change in philosophy is necessary.

Nevertheless, as I have mentioned previously during the discussion of the points involved, two fundamental changes appear in order: Firstly, that no putting in default be necessary in commercial matters; and secondly, that the form of the *mise en demeure* be subject only to the rules of evidence. The reason for the first modification is to facilitate and speed-up commercial transactions; a compromise between the protection of the individual and the requirements of a society more and more involved with trade in the commercial sense. As for the second change, it would remove all ambiguity surrounding the forms of the putting in default and have them conform to our rules of evidence. This would also contribute to the cohesiveness of the Civil Code as a whole by removing an unwarranted exception to the *droit commun*. To add one additional detail, it would appear preferable to reintegrate into the chapter on default, that part of art. 1070 C.C., dealing with obligations not to do.

As a possible example of the end result, one could suggest the following:

> "**Art. 1067** –The debtor may be put in default either by the terms of the contract, when it contains a stipulation that the mere lapse of the time for performing shall have that effect; by the sole operation of law; by the contravention of an obligation not to do; by the commencement of a suit; or by a demand the form of which is subject to the rules of proof.
>
> **Art. 1068** – The debtor is also in default when the thing which he has obliged himself to give or do could only have been given or done within a certain time which he has allowed to expire.
>
> **Art. 1069** – In all contracts of a commercial nature, the debtor shall be in default as soon as his debt is exigible".

# APPENDIX

(i)

**Spanish Civil Code** (translated by Mlle Le Pelley)

"**Art. 1096 (para 3)**: Si l'obligé est mis en demeure ou s'il a promis de livrer la même chose à deux ou plusieurs personnes différentes, il sera responsable des cas fortuits jusqu'à ce qu'il effectue la livraison.

**Art. 1100**: Les personnes obligées à délivrer ou à faire une chose sont en demeure du moment où le créancier exige judiciairement ou extra-judiciairement l'accomplissement de leur obligation. Néanmoins, pour que la mise en demeure existe, il ne sera pas nécessaire d'une interpellation du créancier:

1- Quand l'obligation ou la loi le déclarent expressément;

2- Quand il résulte de la nature et des circonstances que la désignation de l'époque où l'on devait livrer la chose ou prêter le service, a été un des motifs déterminants pour établir l'obligation.
Dans les obligations réciproques, aucun des obligés ne pourra être mis en demeure du fait que l'autre n'exécute pas, ou ne se soumet pas à la complète exécution de ce qui lui incombe. Dès que l'un des obligés accomplit son obligation, la mise en demeure de l'autre commence".

(ii)

**Code Civil Belge.**

**Arts 1139, 1146 and 1302** of the Belgian Code are identical to the same numbered articles of the *Code Civil Français.*

(iii)

**Civil Code of the Russian Soviet Federated Socialist Republic.**

"**Art. 222**: A person who fails to perform an obligation or performs it in an improper manner is financially liable only if fault is present (intent or negligence), except in cases specified by law or by contract. Absence of fault is proved by the person who has breached the obligation.

**Art. 225**: A debtor who delays performance is liable to the creditor for damages sustained because of the delay and for impossibility of performance which arises accidently during the period of delay.

If the performance is no longer of interest to the creditor because of delay on the part of the debtor, the creditor may refuse to accept the performance and may demand compensation for damages. In relationships between socialist organizations, refusal to accept a delayed performance is permitted only in cases and under conditions established by law or by contract.

A debtor is not considered to be in default in performance so long as the obligation cannot be performed because of delay by the creditor (art. 227)".

**(iv)**

**German Civil Code** (translated under the direction of Me William Garcin).

"**Art. 284**: Si le débiteur ne fournit pas la prestation sur un avertissement du créancier qui intervient après l'échéance, il est constitué en demeure en vertu de cet avertissement. A celui-ci est assimilée l'introduction d'une action concernant la prestation ainsi que la notification d'un ordre de payer par voie de sommation.

Lorsque la période prévue pour la prestation est déterminée en fonction du calendrier, le débiteur se trouve constitué en demeure sans avertissement s'il ne fournit pas la prestation à l'époque fixée. Il en est de même lorsqu'une résiliation doit précéder la prestation et que la période prévue pour la prestation est fixée de telle sorte qu'elle doive se calculer d'après le calendrier, à partir de la résiliation.

**Art. 285**: Le débiteur n'est pas constitué en demeure aussi longtemps que la prestation n'a pas lieu, par suite d'une circonstance dont il n'est pas responsable.

**Art. 287**: Pendant la demeure, le débiteur répond de toute négligence. Il est également responsable de l'impossibilité de fournir la prestation survenur par cas fortuit durant son retard, à moins qu'il ne s'agisse d'un dommage qui se serait réalisé même si la prestation avait été fournie à temps"

**(v)**

**Code Civil de l'Empire d'Ethiopie**

"**Art.1772**: Le contractant qui entend se prévaloir de l'inexécution du contrat par l'autre partie doit au préalable mettre celle-ci en demeure d'exécuter ses obligations.

**Art. 1773**: (1) La mise en demeure est constituée par une sommation ou par tout autre acte manifestant la volonté du créancier d'obtenir l'exécution du contrat.

(2) Elle peut intervenir seulement lorsque l'obligation est devenue exigible.

**Art. 1774**: (1) Le créancier peut, dans la mise en demeure, indiquer au débiteur un délai passé lequel il n'acceptera plus l'exécution en nature du contrat.

(2) Ce délai doit être fixé de façon raisonnable, eu égard à la nature de l'affaire et aux circonstances.

**Art. 1775**: La mise en demeure est inutile:

(a) dans le cas des obligations de ne pas faire;

(b) dans le cas où le débiteur a assumé une obligation qui d'après le contrat ne pouvait être exécutée que dans un certain délai, et qu'il a laissé passer ce délai;

(c) lorsque le débiteur a déclaré par écrit qu'il n'exécuterait pas son obligation;

(d) lorsque la convention porte que, sans qu'il soit besoin d'acte et par la seule échéance du terme, le débiteur sera en demeure.

**Art. 1780**: Le même droit (i.e. deposit of sum due) appartient au débiteur, sans qu'une mise en demeure soit nécessaire, si la personne du créancier est inconnue ou incertaine, ou si pour quelque autre cause personnelle au créancier la prestation due ne peut être offerte au créancier.

**Art. 1798**: Les dommages et intérêts sont dûs, lors même que l'inexécution du contrat est imputable à une force majeure, si cette force majeure s'est produite quand le débiteur était en demeure".

**(vi)**

**Civil Code of Japan** (translated by J.E. de Becker)

"**Art. 412**: When there is a certain (definite) term for the performance of an obligation, the debtor is responsible for delay (is in *mora*) from the time when the term arrives.

When there is an uncertain (indefinite) term for the performance of an obligation, the debtor is responsible for delay (is in *mora*) from the time he knew of the arrival of the term.

When there is no fixed term for the performance of the obligation the debtor is responsible for delay (is in *mora*) from the time when he has received a demand for performance".

**(vii)**

**Civil Code of the Philippines**

"**Art. 1165 (para 3):** If the obligator delays, or has promised to deliver the same thing to two or more persons who do not have the same interest, he shall be responsible for any fortuitous event until he has effected the delivery.

**Art. 1169:** Those obliged to deliver or to do something incur in delay from the time the obligee judicially or extrajudicially demands from them the fulfillment of their obligation.

However, the demand by the creditor shall not be necessary in order that delay may exist:

(1) When the obligation or the law expressly so declares; or,

(2) When from the nature and the circumstances of the obligation, it appears that the designation of the time when the thing is to be delivered or the service is to be rendered was a controlling motive from the establishment of the contract; or,

(3) When demand would be useless, as when the obligor has rendered it beyond his power to perform.

In reciprocal obligations, neither party incurs in delay if the other does not comply or is not ready to comply in a proper manner with what is incumbent upon him. From the moment one of the parties fulfills his obligation, delay by the other begins".

**(viii)**

**Civil Code of Louisiana.**

"**Art. 1910:** But if a debtor of a thing is in default for not having made the delivery, it is at his risk from the time of the default.

**Art. 1911:** The debtor may be put in default in three different ways: by the term(s) of the contract, by the act of the creditor, or by the operation of law:

1) By the terms of the contract, when it specially provides that the party, failing to comply, shall be deemed to be in default by the mere act of his failure.

2) By the act of the party, when at or after the time stipulated for the performance, he demands that is shall be carried into effect, which demand may be made, either by the commencement of a suit, by a demand in writing, by a protest made by a notary public or by a verbal requisition made in the presence of two witnesses.

3) By the operation of law. This takes place in cases where the breach of the contract alone is by law declared to be equivalent to a default. The law having declared that the neglect to return a thing loaned for use, at a stipulated time, or the application of it to another use that the one

for which it was lent, puts it at the risk of the borrower; this, without any act of the tender, puts the borrower in default, and forms an example of this part of the rule.

**Art. 1912**: The effects of being put in default are not only that, in contracts to give, the thing which is the object of the stipulation is at the risk of the person in default; but in the cases hereinafter provided for it is a prerequisite to the recovery of damages and of profits and fruits, or to the rescission of the contract".

**(ix)**

**Civil Code of Argentina** (translated by F.L. Joannini)

"**Art. 543**: In order for the debtor to be in default, a judicial or extrajudicial demand must have been made by the creditor except in the following cases:

1) When it has been expressly agreed that the mere expiration of the period shall produce it.

2) When from the nature and circumstances of the obligation, it appears that the designation of the time within which the obligation was to be performed was a determinative motive on the part of the creditor".

**(x)**

**Civil Code of Santa Lucia.**

"**Art. 999**: The debtor is placed in default either by the terms of the contract, through the lapse of the time specified for its performance; or by the mere operation of law; or by the commencement of a suit, or by a demand which must be in writing except in the case of a verbal contract.

**Art. 1000**: The debtor is also in default, when the thing which he has bound himself to give or to do could only have been given or done within a time which he has allowed to expire.

**Art. 1001**: Damages are not due for non-fulfillment of an obligation until there has been default under some one of the provisions of the preceeding section. But he who does what he is bound not to do incurs by the mere doing liability to damages and is thus deemed to be in default".

**(xi)**

**Civil Code of Brazil** (translated by Joseph Wheless)

"**Art. 955**: The debtor who does not effect the payment, and the creditor who does not wish to accept it in the time, place and form agreed, are considered in default.

**Art. 960**: The non-performance of the obligation, positive and liquid, within its term, constitutes the debtor in default, by force of law.

If no period has been fixed, the default begins from the interpellation, notification or protest.

**Art. 961**: In negative obligations, the debtor is constituted in default from the day on which he does the act from which he should abstain.

**Art. 962**: In obligations arising from crime *(delicto)*, the debtor is considered in default from the time that he perpetrated it.

**Art. 963**: If there is no act *(facto)* or omission imputable to the debtor, he does not incur in default *(em mora)*".

**(xii)**

**Civil Code of Poland** (translated by Maciej Szepietowski)

"**Art. 476**: Le débiteur est en demeure s'il n'accomplit pas la prestation dans le délai et, si ce délai n'est pas fixé, lorsqu'il n'effectue pas la prestation immédiatement après avoir été sommé par le créancier. Cela ne concerne pas le cas où le retard dans l'accomplissement de la prestation est dû aux circonstances dont le débiteur n'est pas responsable.

**Art. 478**: Si la prestation a pour objet une chose certaine, le débiteur mis en demeure est responsable de la perte ou d'un endommagement de l'objet de la prestation, à moins que la perte ou l'endommagement n'eût dû se produire alors même que la prestation aurait été effectuée en temps utile".

**(xiii)**

**Civil Code of the Republic of China.**

"**Art. 229**: When the time fixed for the performance of an obligation is definite, the debtor is in default from the moment when such time expires.

When no definite time has been fixed for the performance of the obligation and when the creditor is entitled to claim performance, but the debtor does not perform the same after notice has been given by the creditor, the debtor is in default from the moment when he has been notified. Instituting an action for performance, or the service of an order for payment according to hortatory process is equivalent to a notice.

If a time for performance is fixed in the notice aforementioned, the debtor is in default from the moment when such time expires.

**Art. 230**: The debtor is not in default if the prestation has not been effected by reason of circumstances for which he is not responsible".