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## COMMENTS

### DISTURBANCE OF THE LESSEE'S POSSESSION IN LOUISIANA

All duties of the lessor, which are implied in every contract of lease unless expressly stipulated to the contrary,<sup>1</sup> flow from his general obligation to procure for the lessee enjoyment of the thing leased throughout the term of the lease.<sup>2</sup> One of the continuing obligations listed under Article 2692 of the Louisiana Civil Code<sup>3</sup> is to maintain the lessee in peaceable possession of the leased premises. The purpose of this Comment is to examine the various ways in which the lessee may be disturbed in his possession, and the remedies available for such disturbances.

#### DISTURBANCES BY THE LESSOR

The lessor's obligation is twofold. He must not only protect the lessee from disturbances by certain third persons, but he must refrain himself from disturbing the lessee.<sup>4</sup> Possession of the leased premises is exclusively the right of the lessee until voluntarily surrendered or terminated by final judgment.<sup>5</sup> With the exception in Article 2700, which deals with the need for urgent repairs, the lessor who enters the premises without consent is liable as a trespasser.<sup>6</sup> It is immaterial that the tenant is not occupying the premises at the time, assuming of course, that the contract is not one which specifically obligates him to do so. As long as he is paying rent, he may choose to occupy, or

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1. LA. CIV. CODE arts. 2684, 2692, 2732-2733; *Continental Bank & Trust Co. v. Times Pub. Co.*, 142 La. 209, 76 So. 612 (1917); *Tate v. Fakouri*, 118 So.2d 464 (La. App. 1st Cir. 1960); *Mosher v. Burglass*, 170 So. 416 (La. App. Or. Cir. 1936).

2. PLANIOL, *CIVIL LAW TREATISE* no. 1675 (La. St. L. Inst. transl. 1959).

3. LA. CIV. CODE art. 2692: "The lessor is bound from the very nature of the contract, and without any clause to that effect:

"1. To deliver the thing leased to the lessee.

"2. To maintain the thing in a condition such as to serve for the use for which it is hired.

"3. To cause the lessee to be in a peaceable possession of the thing during the continuance of the lease."

4. 6 MARCADÉ, *EXPLICATION DU CODE CIVIL* 464 (1875). See also 4 *OEUVRÉS DE POTHEIR, TRAITÉ DU CONTRAT DE LOUAGE* n° 75 (1861).

5. *Liuzza v. Simms*, 154 La. 339, 97 So. 470 (1923).

6. *Hitt v. Herndon*, 166 La. 497, 117 So. 568 (1928); *Parker v. McGlin*, 52 La. Ann. 1514, 27 So. 946 (1900); *Butler v. Jones*, 21 So.2d 181 (La. App. Or. Cir. 1945); *Walsh v. Bush*, 20 So.2d 190 (La. App. Or. Cir. 1945); *Bradford v. Mangano*, 6 So.2d 162 (La. App. 1st Cir. 1942); *Vogt v. Jannarelli*, 198 So. 421 (La. App. Or. Cir. 1940). The tenant is not limited to a claim for damages, but may have the activities of the lessor enjoined. See *Eddy v. Monaghan*, 60 So.2d 717 (La. App. Or. Cir. 1952).

leave the premises vacant,<sup>7</sup> although relief may be denied where the trespass is slight or the consequences insignificant.<sup>8</sup>

Louisiana courts have repeatedly emphasized that regardless of how certain it is that the lessee's right of possession has ended (as for example, when the lease has expired or the rent has not been paid), the lessor must resort to legal process for enforcement of his rights. The lessor who ignores legal remedies and harasses his tenants<sup>9</sup> evicts them,<sup>10</sup> or seeks personally to enforce his privilege by seizing the lessee's belongings,<sup>11</sup> renders himself liable in damages and gives the lessee an opportunity to terminate the lease. The fact that the tenant has disturbed the lessor, or is otherwise guilty of misconduct does not relax the obligation to resort to the courts in times of dispute.<sup>12</sup>

The lessor must proceed with care even when he enforces his privilege<sup>13</sup> by having the sheriff seize the lessee's property under a writ of sequestration.<sup>14</sup> Use of the writ to seize property which is immune from the privilege, such as the "tools and instruments" by which the lessee makes his living,<sup>15</sup> subjects the lessor to damages.<sup>16</sup> In the case where the lessee fails to pay the rent due, the lessor may hold him for this amount and sue to dissolve the

7. *Pelletier v. Sutter*, 121 So. 364, 365 (La. App. Or. Cir. 1929): "Even though his then tenant was not actually occupying the apartment, it was his right to occupy it, or to close it up and leave it vacant, and no one on earth had the right to enter and take possession of it for any purpose, except to make absolutely necessary repairs."

8. *Woodards v. Pick*, 149 So. 140 (La. App. Or. Cir. 1933); *Battalion Washington Artillery v. St. Charles Skating Rink Co.*, 7 Or. App. 426 (La. App. 1910). Of course, the lessee cannot complain if he has consented to the lessor's entry. See *Seguin v. Carondelet Realty Co.*, 5 Or. App. 10 (La. App. 1907).

9. *Robinson v. Bonhaye*, 195 So. 365 (La. App. Or. Cir. 1940); *Lindsey v. Zibulich*, 153 So. 341 (La. App. Or. Cir. 1934).

10. *Waller & Edmonds v. Cockfield*, 111 La. 595, 35 So. 778 (1904); *Jones v. Pereira*, 13 La. Ann. 102 (1858); *Thayer v. Littlejohn*, 1 Rob. 140 (La. 1841); *Holmes v. Di Leo*, 184 So. 356 (La. App. Or. Cir. 1938).

11. *Boniell v. Block*, 44 La. Ann. 514, 10 So. 869 (1892); *The Orleans Theatre Ins. Co. v. Lafferanderie*, 12 Rob. 472 (La. 1846); *McCarroll v. Newman*, 176 So. 140 (La. App. 1st Cir. 1937); *Lansolot v. Mihaljevich*, 125 So. 183 (La. App. Or. Cir. 1929). *But see Reed v. Walters*, 193 So. 253 (La. App. Or. Cir. 1940).

12. *Waller & Edmonds v. Cockfield*, 111 La. 595, 35 So. 778 (1904) (operated premises in a careless manner); *Barrios v. Bango*, 52 So.2d 579 (La. App. Or. Cir. 1951) (marital strife); *Vogt v. Jannarelli*, 198 So. 421 (La. App. Or. Cir. 1940) (drunken parties).

13. LA. CIV. CODE arts. 2705-2709, 3218.

14. The cases usually speak of the writ of provisional seizure for enforcing the lessor's privilege, but this was eliminated by the Code of Civil Procedure and replaced with the writ of sequestration. See LA. CODE CIV. P. arts. 3571, 3575 comment (a).

15. LA. CIV. CODE art. 2705; *First Nat'l Bank Bldg. v. Dickson & Denny*, 202 La. 970, 13 So.2d 283 (1943) (seizure of lawbooks).

16. LA. CODE CIV. P. art. 3506. See also *Hollingsworth v. Atkins*, 46 La. Ann. 515, 15 So. 77 (1894); *Fleetwood v. Dwight*, 8 La. Ann. 481 (1852).

lease and evict the lessee.<sup>17</sup> If there is an acceleration clause, the lessor may obtain judgment for the total rent due for the remainder of the term, but under this course, the lease continues in force, including the lessor's obligation to maintain the lessee in peaceable possession.<sup>18</sup> If the sheriff, under these circumstances, locks the premises and stores therein the property seized so that the lessee is effectively deprived of the use of the thing leased, there is an eviction, and the lease is terminated,<sup>19</sup> notwithstanding that the lessee may have vacated.<sup>20</sup> As a general rule, the lessor cannot obtain both possession of the premises and the unmatured rent;<sup>21</sup> however, this result may eventually prevail where a lessor with judgment for future rent proceeds against the lessee's right of occupancy in satisfaction of the debt.<sup>22</sup>

The landlord must be equally careful when seizing the effects of a subtenant to satisfy the rent due from the principal tenant. Under Article 2706, the lessor's privilege on the subtenant's property is limited to the rent owed by the subtenant at the time of the seizure.<sup>23</sup> The lessor must refrain from seizing the property of a sublessee who owes no rent, and from seizing property in excess of the amount owed.<sup>24</sup> Of course, the sublessee can claim no right of possession as against the lessor after the principal tenant has been legally evicted. The sublessee's rights

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17. LA. CIV. CODE art. 2712: "The lessee may be expelled from the property if he fails to pay the rent when it becomes due."

18. *Henry Rose Mercantile & Mfg. Co. v. Stearns*, 154 La. 946, 98 So. 429 (1923). The lessor can also get judgment for future rent when the lessee abandons the premises. See *Reynolds v. Swain*, 13 La. 193 (1839).

19. *Henry Rose Mercantile & Mfg. Co. v. Stearns*, 154 La. 946, 98 So. 429 (1923); *Maggio v. Price*, 1 So.2d 404 (La. App. 1st Cir. 1941); *Pirkle & Williams, Inc. v. Shreveport Jitney Jungle, Inc.*, 140 So. 837 (La. App. 2d Cir. 1932). However, if the lessee is deprived of only a small portion of the thing because of the action of the sheriff, he will not be allowed to claim an eviction. See *Kinchen v. Arnold*, 60 So. 2d 114 (La. App. 1st Cir. 1952); cf. *Morgan v. Agricultural Enterprises, Inc.*, 127 So.2d 335 (La. App. 2d Cir. 1961).

20. *Maggio v. Price*, 1 So.2d 404 (La. App. 1st Cir. 1941); *Pirkle & Williams, Inc. v. Shreveport Jitney Jungle, Inc.*, 140 So. 837 (La. App. 2d Cir. 1932).

21. *Sigur v. Lloyd*, 1 La. Ann. 421 (1846); *Jacobs v. Kagan*, 14 So.2d 278 (La. App. Orl. Cir. 1943). But see *Wall v. Green*, 228 La. 59, 81 So.2d 769 (1955), which is discussed in *The Work of the Louisiana Supreme Court for the 1954-1955 Term—Particular Contracts*, 16 LA. L. REV. 211, 250 (1956).

22. See text at note 143 *infra*.

23. LA. CIV. CODE art. 2706; *Tulane Improvement Co. v. Green Photo Supply Co.*, 124 La. 619, 50 So. 601 (1909).

24. *Malmore v. Martinez*, 144 La. 95, 80 So. 212 (1918); *Arent v. Bone*, 23 La. Ann. 387 (1871); *Williams v. Hill, Harris & Co.*, 190 So. 157 (La. App. 2d Cir. 1939).

can be no greater than those of the principal lessee, to whom he must look for any recourse.<sup>25</sup>

In cases of eviction, the fact that the lessor uses the machinery of the law to remove the tenant is not an automatic defense if the ejected tenant had a legal right to remain on the premises. In such a case, the tenant may obtain damages in a suit against the lessor for malicious prosecution,<sup>26</sup> if it can be shown that the lessor acted maliciously and without probable cause.<sup>27</sup> If the ejectment suit is unsuccessful at the trial level and the tenant is not actually evicted, the lessor is likely to be found to have acted in good faith.<sup>28</sup> The sheriff himself, in carrying out the court's order to clear the premises, may be liable to the lessee for departing from the procedures prescribed for evicting a tenant.<sup>29</sup>

A special statute<sup>30</sup> renders the lessor who prevents a farm tenant from making a crop<sup>31</sup> liable for the market value of an average crop that could have been produced on the same or similar land, if the lessee meets the burden of proving such value. The landlord is entitled to deduct expenses incurred in producing the crop,<sup>32</sup> and recovery will be limited to one year, rather than for all the years remaining under the lease.<sup>33</sup> It has been held that the statute is penal in nature and applies only

25. *Audubon Hotel Co. v. Braunning*, 120 La. 1089, 46 So. 33 (1908); *Scott v. Kalip*, 197 So. 205 (La. App. 2d Cir. 1940); *Miles v. Kilgore*, 191 So. 556 (La. App. 2d Cir. 1939).

26. *Mangelle & Co. v. Abadie*, 48 La. Ann. 669, 19 So. 670 (1896); *Deslonde v. O'Hearn*, 39 La. Ann. 14, 1 So. 286 (1887); *Block v. Bonnet*, 28 La. Ann. 540 (1876).

27. *Graffagnini v. Shnaider*, 164 La. 1108, 115 So. 287 (1927).

28. *Id.*; *Hartz v. Stauffer*, 163 La. 382, 111 So. 794 (1927); *cf. Wolf v. Cussia*, 144 La. 336, 80 So. 581 (1919).

29. *Perres v. Munsch & Arnoudin*, 6 La. App. 770 (Orl. Cir. 1927). See LA. CODE CIV. P. art. 4733. The Code of Civil procedure provides for eviction as follows: When a lessee's right of occupancy has ceased, he is entitled to written notice to vacate, and must be allowed at least five days to do so. *Id.* art. 4701. If the notice is not complied with, the lessee can be cited to show cause why he should not deliver possession. *Id.* art. 4731. If the court finds the lessor is entitled to relief, or if the lessee fails to appear at trial, the court shall render a judgment of eviction which, if not complied with within twenty-four hours, shall be followed by a warrant commanding the sheriff to deliver possession of the premises to the lessor. *Id.* arts. 4732-4733. The sheriff shall clear the premises in the presence of two witnesses. *Id.* art. 4734. See also LA. CIV. CODE arts. 2713-2714.

30. LA. R.S. 9:3203 (1950).

31. See, *e.g.*, *Young v. Gay*, 41 La. Ann. 758, 6 So. 608 (1899); *Pleasant v. Anderson*, 36 So.2d 731 (La. App. 2d Cir. 1948).

32. *Fontenot v. Benoit*, 128 So.2d 815 (La. App. 3d Cir. 1961). The tenant recovers nothing if he fails to prove crop value or if the crop could not have been profitably harvested. See *Moore v. Lelong*, 226 La. 962, 77 So.2d 729 (1955); *Fontana v. Benson*, 157 So.2d 251 (La. App. 2d Cir. 1963).

33. *Fontenot v. Benoit*, 128 So.2d 815 (La. App. 3d Cir. 1961).

where the lessor has through fault interfered with the lessee. Thus, if the lessee is evicted upon sale of the premises, his remedy is found under Articles 2735 and 2737.<sup>34</sup>

The lessor can do nothing which diminishes the usefulness or agreeableness of the premises let.<sup>35</sup> Article 2698 forbids the lessor to make alterations in the thing leased during the term of the lease. To unilaterally alter the thing is to modify the contract, which is the law between the parties, and cannot be revoked except by mutual consent.<sup>36</sup> For violation of this prohibition, the lessee can claim cancellation of the lease,<sup>37</sup> or damages,<sup>38</sup> notwithstanding that the alterations are beneficial to the lessee.<sup>39</sup> The lessee is entitled to damages *ex delicto*, including recovery for the tort intangibles of distress, inconvenience, humiliation, *etc.*,<sup>40</sup> even though the lessor's liability arises through violation of contract.<sup>41</sup> The lessee cannot complain if he has consented, either expressly or impliedly to the alterations,<sup>42</sup> or if the lessor acts in accordance with provisions in the lease.<sup>43</sup> But the lessor must not abuse such consent by acting beyond the contemplation of the parties; any such lease provision will be strictly construed.<sup>44</sup> The lessor who remodels the premises for his next tenant cannot defend on the basis of a lease permitting "necessary" repairs.<sup>45</sup> Similarly, the fact that the repairs are urgent, or that the lessee has consented does not relieve the lessor of

34. King v. King, 185 So.2d 893 (La. App. 3d Cir. 1966).

35. 2 PLANIOL, CIVIL LAW TREATISE n° 1680 (La. St. L. Inst. transl. 1959).

36. 25 LAURENT, PRINCIPES nos 143, 146 (4th ed. 1887).

37. Saputa v. Catanese, 182 So.2d 826 (La. App. 4th Cir. 1966); Pelletier v. Sutter, 121 So. 364 (La. App. Or. Cir. 1929).

38. Wood v. Monteleone, 118 La. 1005, 43 So. 657 (1907); Bradford v. Mangano, 6 So.2d 162 (La. App. 1st Cir. 1942); Rivarde v. Hebert, 2 So.2d 478 (La. App. Or. Cir. 1941).

39. Wood v. Monteleone, 118 La. 1005, 43 So. 657 (1907); Pelletier v. Sutter, 121 So. 364 (La. App. Or. Cir. 1929). *But see* Rainy v. Pietri, 180 So. 459 (La. App. Or. Cir. 1938).

40. Bradford v. Mangano, 6 So.2d 162 (La. App. 1st Cir. 1942); Rivarde v. Hebert, 2 So.2d 478 (La. App. Or. Cir. 1941).

41. Wood v. Monteleone, 118 La. 1005, 43 So. 657 (1907). This is advantageous to the lessee who is relieved of the burden of proving damages according to the code articles on the violation of conventional obligations. The quantum of tort damages is left to the discretion of judge and jury. But the lessee still has his contract action if he fails to bring a tort suit within the one-year limitation. See *Illinois Cen. R.R. v. New Orleans Terminal Co.*, 14 Or. App. 310 (La. App. 1917).

42. Helmas v. Paillet, 126 La. 497, 52 So. 676 (1910); Cross v. Breland, 185 So. 542 (La. App. Or. Cir. 1939); Rainy v. Pietri, 180 So. 459 (La. App. Or. Cir. 1938); Delaune v. Bellina, 177 So. 841 (La. App. Or. Cir. 1938); Ghisalberty v. Lagarde, 146 So. 763 (La. App. Or. Cir. 1933).

43. Succession of Marx v. Schornstein, 169 So. 93 (La. App. Or. Cir. 1936); LA. CIV. CODE art. 2684.

44. Capital City Auto Co. v. Folsie, 155 La. 761, 99 So. 590 (1924).

45. Saputa v. Catanese, 182 So.2d 826 (La. App. 4th Cir. 1966); Jacobs v. Kagan, 14 So.2d 278 (La. App. Or. Cir. 1943).

liability for negligence in the making of repairs, even when the negligence is that of an independent contractor.<sup>46</sup>

The lessee is entitled to dissolution of the lease when he is constructively evicted by a lessor who deprives him of essential services.<sup>47</sup> However, recovery may be denied if the deprivation of services causes only minor inconvenience,<sup>48</sup> or if the lessor is in no way responsible.<sup>49</sup>

The foregoing discussion has not exhausted the ways in which the lessor may interfere with the lessee's possession. Other instances, occurring less frequently in the jurisprudence, include leasing the property to another during the term of the lease,<sup>50</sup> denying access to the leased premises,<sup>51</sup> dedicating the premises for a public purpose,<sup>52</sup> and withholding possession altogether.<sup>53</sup> In the latter case, the lease can be extended by decree so as to begin on the date when the lessee is permitted to take possession.<sup>54</sup>

#### CHANGE OF OWNERSHIP

Article 2733 provides that the purchaser of leased property cannot evict the lessee for the duration of the term.<sup>55</sup> It should be noted that this principle is qualified by the public records doctrine,<sup>56</sup> and therefore, is an accurate statement of the law

46. *Smith v. The Female Orphan Asylum*, 1 La. 547 (1830) (removal of icehouse roof during summer); *West Bros. v. Pierson*, 2 So.2d 71 (La. App. 2d Cir. 1941); *Clark v. Engelhardt*, 120 So. 498 (La. App. Or. Cir. 1928).

47. LA. CIV. CODE art. 2729; *Fontenot v. Boniot*, 128 So.2d 815 (La. App. 3d Cir. 1961) (removed pump needed for rice irrigation); *LaCour v. Myer*, 98 So.2d 308 (La. App. 1st Cir. 1957) (cut off water supply); *Vogt v. Jannarelli*, 198 So. 421 (La. App. Or. Cir. 1940) (cut off lights, water, and gas); *Florsheim v. Penn*, 137 So. 749 (La. App. 2d Cir. 1931) (deprived farm tenant of water).

48. *United Shoe Stores Co. v. Burt*, 142 So. 370 (La. App. 2d Cir. 1932). The tenant was not entitled to vacate the premises because of lessor's failure to furnish elevator service where the floor leased was only nine feet from the ground. This case has another interesting aspect. An additional reason for denying relief to the lessee was that the lessor's refusal was a passive breach of the contract, and the lessee had not placed him in default. The decision also indicated, in dictum, that the same breach would have been *active* had it rendered the premises unsuitable.

49. *Scudder v. Paulding*, 4 Rob. 428 (La. 1843) (gas company withheld gas).

50. *Grace v. Haas*, 20 La. Ann. 73 (1868); *Tate v. Fakouri*, 118 So.2d 464 (La. App. 1st Cir. 1960).

51. *New Orleans City R.R. v. McCloskey*, 35 La. Ann. 784 (1883).

52. *McWilliams v. Harper*, 177 La. 728, 149 So. 437 (1933).

53. *Bennet v. Weinberger*, 160 La. 1001, 107 So. 780 (1926).

54. *Williams v. James*, 188 La. 884, 178 So. 384 (1938). This was first recognized on behalf of mineral lessees. See, e.g., *Gulf Refining Co. v. Hayne*, 148 La. 340, 86 So. 891 (1920).

55. LA. CIV. CODE art. 2733.

56. *Id.* arts. 2264, 2266. Article 2733 can be traced to Article 2704 of the Code of 1825, Article 44 of the Code of 1808, and Article 1743 of the Code Napoleon, but Articles 2264 and 2266 of the Revised Civil Code have no counter-

only when the lease is recorded. Both mineral and surface lessees are included among those who are protected by and entitled to rely upon the public records.<sup>57</sup> For example, a lessee who enters property already under lease to another is not liable as a trespasser if the public records do not indicate the pre-existing lease,<sup>58</sup> nor can a lessor who wrongfully seizes the property of a sublessee defend on the basis of an unrecorded lease which prohibits subleasing since the provision is not binding on the sublessee.<sup>59</sup>

The lessee who holds under a recorded lease is protected in his possession when the property is sold to another during the term of the lease.<sup>60</sup> The recorded lease is a real obligation upon the land which accompanies it into the hands of a new owner,<sup>61</sup> who is entitled to the rent subsequently accruing,<sup>62</sup> and like the previous owner, liable to the lessee if he evicts him.<sup>63</sup> However, where the vendee becomes a coproprietor of an undivided tract burdened with a recorded lease, title to the land will pass free of the lease when the property is subsequently partitioned by licitation.<sup>64</sup> Even if the lease is recorded, the new owner is not bound

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parts (in the sense that they deal with the public records) in the codes prior to 1870. See 3 LA. LEGAL ARCHIVES, COMPILED EDITIONS OF THE CIVIL CODES OF LOUISIANA 1236 (1940).

57. LA. R.S. 9:2722 (1950): "Third persons or third parties so protected by and entitled to rely upon the registry laws of Louisiana... are hereby re-defined to be and to include any... lessee in any surface lease or leases or as lessee in any oil, gas or mineral lease." See also *id.* 9:2721. Chicago Mill & Lumber Co. v. Ayer Timber Co., 131 So.2d 635 (La. App. 2d Cir. 1961); Jackson v. Golson, 91 So.2d 394 (La. App. 2d Cir. 1956).

58. Tate v. Fakouri, 118 So.2d 464 (La. App. 1st Cir. 1959).

59. Arent v. Bone, 23 La. Ann. 387 (1871); Murray v. LeBlanc, 6 Orl. App. 387 (La. App. Orl. Cir. 1909).

60. Coyle v. Geoghegan, 187 La. 308, 174 So. 366 (1937); Carmouche v. Jung, 157 La. 441, 102 So. 518 (1924); Ernest A. Carrere's Sons v. Levy, 191 So. 747 (La. App. Orl. Cir. 1939).

61. LA. CIV. CODE arts. 2015, 2733; Spence v. Lucas, 138 La. 763, 70 So. 796 (1915). See also Yiannopoulos, *Real Rights in Louisiana and Comparative Law: Part II*, 23 LA. L. REV. 518, 533 (1963).

62. LA. CIV. CODE arts. 1903, 2461, 2490; Carmouche v. Jung, 157 La. 441, 102 So. 518 (1924); Lesseigne v. Cedar Grove Realty Co., 150 La. 641, 91 So. 136 (1921). This may not be true, however, if the former owner has transferred the right to collect rentals to another, and the new owner acquires the property with knowledge of this fact. See Coyle v. Geoghegan, 187 La. 308, 174 So. 366 (1937).

63. Hinrichs v. Tulane Educational Fund, 49 La. Ann. 1029, 22 So. 96 (1897); Lewis v. Klotz, 39 La. Ann. 259, 1 So. 539 (1887).

64. Spence v. Lucas, 138 La. 763, 773, 70 So. 796, 799 (1915): "The rule is settled that acts entered into by one of the coproprietors of an undivided object are subordinate to the result of a partition. And when the property leased is sold to effect the partition, the title will pass free of the lease." It should be emphasized that not all the co-owners joined in the lease. Nor is the lessee entitled to the value of his lease out of the proceeds of the sale. LA. CIV. CODE art. 1338, which provides that the mortgages, liens, and privileges existing against the coproprietors are transferred to the proceeds when there is a partition by licitation, does not provide for leases. See also *id.* art. 3185.



by personal obligations assumed by his vendor in the lease agreement.<sup>65</sup> For example, a stipulation by the lessor-vendor that he will not allow his property to be used for purposes competitive to those for which the property is leased does not prevent his vendee from starting a competitive business.<sup>66</sup>

When the lease is unrecorded, the holder thereof has no rights against a subsequent owner who has not expressly assumed the lease obligations of his vendor.<sup>67</sup> The lessee who is evicted by the purchaser must look to his lessor for damages.<sup>68</sup> If the new owner leaves the lessee undisturbed, then there can be no complaint against the lessor since the lessee still enjoys peaceable possession.<sup>69</sup>

Article 2731 states that the heirs of a lessor are bound by the lease contract after the lessor's death.<sup>70</sup> However, the lessor's obligation to warrant peaceable possession does not survive as an obligation of his succession if the lessor was only a usufructuary since, under Article 2730, a lease granted by a usufructuary ceases at expiration of the usufruct.<sup>71</sup> Unless the heirs have ratified the lease,<sup>72</sup> they may terminate it upon the usufructuary's death, subject to indemnifying the lessee only if the lessor had not made known his status as usufructuary.<sup>73</sup> In the reverse situation, where a lease granted by the owner remains unexpired at commencement of the usufruct, the usufructuary is bound if the lease is recorded. In the absence of recordation, it has been suggested that a usufructuary is a "third person" entitled to rely upon the registry laws to escape the lease only where he succeeds by particular title.<sup>74</sup> If the usufructuary succeeds by

65. *Calhoun v. Gulf Refining Co.*, 235 La. 494, 104 So.2d 547 (1958); *Williams v. Arkansas Louisiana Gas Co.*, 193 So.2d 78 (La. App. 2d Cir. 1966); *Ernest A. Carrere's Sons v. Levy*, 191 So. 747 (La. App. Or. Cir. 1939).

66. *Leonard v. Lavigne*, 245 La. 1003, 162 So.2d 341 (1964); *Hebert v. Dupaty*, 42 La. Ann. 343, 7 So. 580 (1890).

67. See LA. CIV. CODE art. 2019; *Brown v. Matthews*, 3 La. Ann. 198 (1848); *Vaughn v. Kemp*, 4 La. App. 682 (2d Cir. 1926). An unrecorded lease is similarly unavailing to a sublessee when the principal lessee assigns the lease to another. See *Grammatas v. Peveto*, 12 So.2d 14 (La. App. 1st Cir. 1943).

68. *Pacific Express Co. v. Haven*, 41 La. Ann. 811, 6 So. 650 (1889); *King v. King*, 185 So.2d 893 (La. App. 3d Cir. 1966). See LA. CIV. CODE art. 2696.

69. *Mathews v. Priest*, 165 So. 535 (La. App. 2d Cir. 1936). See note 98 *infra*.

70. LA. CIV. CODE art. 2731; *Dyer v. Wilson*, 190 So. 851 (La. App. 2d Cir. 1939); *Cheney v. Haley*, 142 So. 312 (La. App. 2d Cir. 1932).

71. See also LA. CIV. CODE art. 555.

72. *Aucoin v. Greenwood*, 199 La. 764, 7 So.2d 50 (1942).

73. LA. CIV. CODE art. 2730; *Sparks v. Dan Cohen Co.*, 187 La. 830, 175 So. 590 (1937).

74. *Yiannopoulos, Rights of the Usufructuary; Louisiana and Comparative Law*, 27 LA. L. REV. 668, 719 (1967); LA. CIV. CODE art. 3556 (28).

universal title to all the rights and obligations of the deceased, he should be bound even by unrecorded leases.<sup>75</sup>

#### DISTURBANCES BY THOSE CLAIMING A RIGHT TO THE PREMISES

Unlike the naked owner of property who must merely allow the usufructuary to enjoy the property, the lessor is bound to procure, for the lessee, enjoyment of the thing leased.<sup>76</sup> The French characterize the disturbances which third persons may cause as disturbances of fact or disturbances of right,<sup>77</sup> a distinction embodied in Articles 2703 and 2704 of our Code.<sup>78</sup> The disturbance of right, also described as the judicial disturbance,<sup>79</sup> exists where the third party claims to own all or part of the thing leased, or demands that the lessee submit to the exercise of some right or servitude which the third party claims to have over the property.<sup>80</sup> The lessor must defend the lessee against those who claim a right to the thing leased,<sup>81</sup> even though the lessor may not be the owner of the thing.<sup>82</sup> While the Code does not require ownership as a prerequisite to a valid lease,<sup>83</sup> it does provide that a non-owner lessor must warrant enjoyment of the property against the true owner.<sup>84</sup> If the lessee is cited as a defendant in an action against him by a third person, he must, in order to preserve his recourse against his lessor, formally call the latter in warranty as required by Article 2704.<sup>85</sup> The law imposes this obligation on the lessee because the disturbance of right threatens the lessor more than the lessee in that it implies

75. *Id.*

76. 6 MARCADÉ, EXPLICATION DU CODE CIVIL 464 (1875).

77. 25 LAURENT, PRINCIPES nos 160, 161, 164 (4th ed. 1887).

78. LA. CIV. CODE art. 2703: "The lessor is not bound to guarantee the lessee against disturbances caused by persons not claiming any right to the premises; but in that case the lessee has a right of action for damages sustained against the person occasioning such disturbance."

*Id.* art. 2704: "If the persons by whom those acts of disturbance have been committed, pretend to have a right to the thing leased, or if the lessee is cited to appear before a court of justice to answer to the complaint of the person thus claiming the whole or a part of the thing leased, or claiming some servitude on the same, he shall call the lessor in warranty, and shall be dismissed from the suit if he wishes it, by naming the person under whose rights he possesses."

79. 4 OEUVRES DE POTHIER, TRAITÉ DU CONTRAT DE LOUAGE n° 82 (1861).

80. *Id.*

81. LA. CIV. CODE art. 2704.

82. *Id.* art. 2682: "He who lets out the property of another, warrants the enjoyment of it against the claim of the owner."

83. *Id.* art. 2681.

84. *Id.* art. 2682.

85. *Id.* art. 2704; *Carmouche v. Jung*, 157 La. 441, 102 So. 518 (1925); *Rojas & Conner v. Seeger*, 122 La. 218, 47 So. 532 (1908); *Fox v. McKee*, 31 La. Ann. 67 (1879); *Fasterling v. George*, 127 So. 448 (La. App. Orl. Cir. 1930). The lessee must call his lessor in warranty and not his lessor's vendor. *See Young v. Chamberlin*, 14 La. Ann. 687 (1859).

the lessor is not the owner of the thing.<sup>86</sup> In the words of Planiol, the lessee who defends the suit himself "does so at his own risk and peril."<sup>87</sup> Of course, relief cannot be denied for failure to call in warranty if the lessee was not made defendant in any action.<sup>88</sup> The predial lessee is not entitled to bring the petitory or possessory action,<sup>89</sup> but the mineral lessee is "the owner of a real right,"<sup>90</sup> and has standing to bring these actions.<sup>91</sup>

The lessee is relieved of the obligation to pay future rent from the time he was disturbed by those claiming ownership of the property.<sup>92</sup> If the lessee is evicted by the owner, the lessor is answerable, under Article 2696,<sup>93</sup> for the damages sustained by the eviction. Since the articles on lease do not specify the measure of damages, they are determined by the article dealing with damages generally, which limit liability to damages reasonably within the contemplation of the parties at the time of contracting.<sup>94</sup> In *Martel v. Hunt*,<sup>95</sup> the lessee was denied drilling expenses because it was not contemplated that the individual lessor would be responsible for such large costs, while such expenses were recoverable in *Slack v. Riggs*,<sup>96</sup> where the lessors were two large corporations. The lessee may be denied damages altogether when he was aware at the time of contracting of the danger of eviction.<sup>97</sup>

86. 25 LAURENT, PRINCIPES n° 164 (4th ed. 1887).

87. 2 PLANIOL, CIVIL LAW TREATISE n° 1683 (La. St. L. Inst. transl. 1959). In *Fasterling v. George*, 127 So. 448 (La. App. Or. Cir. 1930), the court did not allow diminution of rent for failure to call lessor in warranty although the lessor had full knowledge of the claim because she had appeared in the proceedings as a witness.

88. *Pairque v. Lake Eugenie Land Development, Inc.*, 124 So. 612 (La. App. Or. Cir. 1929).

89. See LA. CODE CIV. P. arts. 3651, 3656; *Leightsey v. Welch*, 158 La. 1024, 105 So. 51 (1925).

90. LA. CODE CIV. P. art. 3664.

91. See LA. CODE CIV. P. art. 3664; LA. R.S. 9:1105 (1950); *Allison v. Wideman*, 210 La. 314, 26 So.2d 826 (1946). See also Yiannopoulos, *Real Rights in Louisiana and Comparative Law: Part I*, 23 LA. L. REV. 161, 201 (1963).

92. *Rulf v. Von Schoeler*, 52 So.2d 82 (La. App. Or. Cir. 1951); *Board of Levee Com'rs for Orleans Levee Dist. v. Dalton*, 139 So. 487 (La. App. 1st Cir. 1932).

93. LA. CIV. CODE art. 2696: "If the lessee be evicted, the lessor is answerable for the damage and loss which he sustained by the interruption of the lease."

94. LA. CIV. CODE arts. 1930, 1933, 1934; *Martel v. Hunt*, 195 La. 701, 197 So. 402 (1940).

95. 195 La. 701, 197 So. 402 (1940).

96. 177 La. 222, 148 So. 32 (1933).

97. *Wood v. Fabrigas*, 105 La. 1, 29 So. 367 (1900); *Rulf v. Von Schoeler*, 52 So.2d 82 (La. App. Or. Cir. 1951). One of the factors influencing the court in *Martel* to deny recovery of drilling expenses was that the lessee had made its own title check rather than rely on the lessor's warranty of title, whereas in *Slack*, the lessee had relied on such warranty. *Query*: Why should the fact that the lease contains a no warranty of title clause affect damages? It is not necessary that the lessor own the property leased, and warranty of title, unlike warranty of

While Louisiana courts have repeatedly held that a lessee in peaceable possession cannot avoid his lease obligations by contesting his lessor's title,<sup>98</sup> it has not yet been clearly determined whether a lessee is disturbed when a valid right to possession of the property exists in a third person who has taken no steps to interfere with the lessee. Although the French commentators are divided, it has been suggested that the lessee should be considered as disturbed in his possession when knowledge of the outstanding claim prevents use of the premises for the purpose leased.<sup>99</sup>

#### DISTURBANCES BY THOSE CLAIMING NO RIGHT TO THE PREMISES

Under Article 2703, the lessor is not responsible for what the French term disturbances of fact,<sup>100</sup> *i.e.*, disturbances caused by trespassers or others claiming no right to the premises. Instead, the lessee is given his own right of action.<sup>101</sup> The fact that those causing the disturbances are unknown or insolvent

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peaceable possession is not imposed on the lessor by the Code. If the lessee is disturbed under such circumstances, the lessor has failed to fulfill his obligation of providing peaceable possession, and should, under Article 2696, be liable for damages. On the other hand, the lessee who is aware of the danger of eviction may be said to accept the risk, and, therefore, damages for eviction are not within the contemplation of the parties at the time of contracting. *See* 4 OEUVRES DE POTHIER, TRAITÉ DU CONTRAT DE LOUAGE n° 84 (1961).

98. *Sientes v. Odier & Co.*, 17 La. Ann. 153, 154 (1865): "It is perfectly immaterial to the lessee what was the lessor's right or title to the thing leased. The lessee got, under his contract, all that he could have acquired from the true owner, quiet and peaceable possession, which was guaranteed to him by his lessor." *See also* *Thomas v. Jackson*, 158 La. 1019, 105 So. 49 (1925); *Campbell v. Hart*, 118 La. 871, 43 So. 533 (1907); *Harvin v. Blackman*, 112 La. 24, 36 So. 213 (1904); *Hanson v. Allen*, 37 La. Ann. 732 (1885); *Burgess v. Hogan*, 175 So.2d 924 (La. App. 2d Cir. 1965); *Magnolia Petroleum Co. v. Carter*, 2 So.2d 680 (La. App. 2d Cir. 1941); *Mathews v. Priest*, 165 So. 535 (La. App. 2d Cir. 1936); *Federal Land Bank of New Orleans v. Spencer*, 160 So. 175 (La. App. 2d Cir. 1935). It makes no difference that the lessee may be the owner himself. *See* *Ideal Savings & Homestead Ass'n v. Gould*, 163 La. 442, 112 So. 40 (1927); *Town of Morgan City v. Dalton*, 112 La. 9, 36 So. 208 (1904). Of course, the lessee can question title once he is disturbed. *See* *Pairque v. Lake Eugenie Land Development, Inc.*, 124 So. 612 (La. App. Orl. Cir. 1929).

99. *See* Comments, 39 TUL. L. REV. 798, 828 (1965), 21 LA. L. REV. 606, 610 (1961), which discuss the problem fully and collect French authorities. The case in Louisiana coming closest to the problem is *Board of Levee Comm'rs for Orleans Levee Dist. v. Dalton*, 139 So. 487 (La. App. 1st Cir. 1932), but the court was influenced in its decision to relieve the lessor of his rent obligation by the fact that he had been threatened with arrest by the true owner.

100. LA CIV. CODE art. 2703. *See* text at note 77 *supra*.

101. *Esmele v. Violet Trapping Co.*, 187 La. 728, 175 So. 471 (1937); *DeMoss v. Police Jury of Bossier Parish*, 167 La. 83, 119 So. 700 (1928); *Reynolds v. Egan*, 123 La. 294, 48 So. 940 (1909); *State v. King*, 46 La. Ann. 78, 14 So. 423 (1894); *Pargoud v. Tourne*, 13 La. Ann. 292 (1858); *Gulf Coal & Coke Co. v. Bingaman*, 6 La. App. 107 (Orl. Cir. 1927); *Shell Oil Co. v. S.S. Tynemouth*, 211 F. Supp. 908 (E.D. La. 1962). However, the mineral lessee is not entitled to sue for geophysical trespass even though this right has been accorded the owner. *See* *Tinsley v. Seismic Exploration Inc.*, 239 La. 23, 117 So.2d 897 (1960).

does not operate to give any recourse against the lessor.<sup>102</sup> According to the French, the lessee alone must defend against such disturbances because they result from his negligence in not taking better care of the thing leased, or from activity directed against him personally,<sup>103</sup> as distinguished from claims of right to the thing leased which ultimately concern the lessor.<sup>104</sup> The disturbances for which the lessee has his own action include not only intentional acts, but also negligent acts which result in injury to the leased premises.<sup>105</sup> The fact that the property is under lease does not deprive the lessor of his own action against trespassers since the possession of the lessee is that of the lessor,<sup>106</sup> but the lessor who recovers on his own behalf may have to account to the lessee.<sup>107</sup>

It has been held that where the tenant is disturbed by the adjoining proprietor who is exercising his rights with respect to a party wall,<sup>108</sup> the tenant is entitled to a reduction of rent, but, under certain circumstances, may be denied damages or dissolution of the lease.<sup>109</sup> This is because the adjoining owner is exercising his rights and is making no claim to the thing leased, that there is no vice or defect in the thing leased, and no fault on the part of the lessor.<sup>110</sup> But Article 2699,<sup>111</sup> which allows annulment of the lease without requiring fault on the part of the lessor, has been cited to support a decision allowing dissolution.<sup>112</sup> The approach of an early case was to analogize the party wall situation to the case of necessary repairs under Article 2700 and to judge the remedy according the seriousness of the

102. 25 LAURENT, PRINCIPES nos 160, 161 (4th ed. 1887). *But see* 4 OEUVRES DE POTHIER, TRAITÉ DU CONTRAT DE LOUAGE n° 81 (1861).

103. 25 LAURENT, PRINCIPES nos 160, 161 (4th ed. 1887); 1 BAUDRY-LACANTINERIE ET WAHL, TRAITÉ DE DROIT CIVIL—DU CONTRAT DE LOUAGE n° 520 (1906).

104. *See* text at note 86 *supra*.

105. *Shell Oil Co. v. S.S. Tynemouth*, 211 F. Supp. 908 (E.D. La. 1962).

106. LA. CIV. CODE art. 3433; *Sandlin v. Coyle*, 143 La. 121, 78 So. 261 (1918); *Bright v. Bell*, 113 La. 1073, 37 So. 976 (1905).

107. *See Jefferson Lake Sulphur Co. v. State*, 213 La. 1, 34 So.2d 331 (1947), where the lessee was entitled to 7/8 of the recovery obtained by the lessor on its own behalf against a trespasser who had mined salt lying beneath land leased to the sulphur company.

108. LA. CIV. CODE arts. 681-682. *See* Comment, 23 LA. L. REV. 458, 466 (1963).

109. *Stevens Co. v. Board of Adm'rs of Tulane Educational Fund*, 136 La. 1013, 68 So. 109 (1915); *Dorville v. Amat*, 6 La. Ann. 566 (1851).

110. *Id.*

111. LA. CIV. CODE art. 2699. "If, without any fault of the lessor, the thing cease to be fit for the purpose for which it was leased, or if the use be much impeded, as if a neighbor, by raising his walls shall intercept the light of a house leased, the lessee may, according to circumstances, obtain the annulment of the lease, but has no claim for indemnity."

112. *Coleman v. Haight*, 14 La. Ann. 564 (1859).

disturbance.<sup>113</sup> In *Reynolds v. Egan*,<sup>114</sup> a non-party wall case, the court allowed cancellation where excavation of adjoining property rendered the leased premises uninhabitable. The suggestion in *Reynolds* was that the lessee has a remedy of cancellation against the lessor when there is no remedy against the adjoining owner.<sup>115</sup> The Code clearly contemplates that the lease is at an end when the thing is no longer fit for the purpose leased.<sup>116</sup> If the lawful activity of the adjoining owner causes this result, then Article 2699, which does not require that the activity be illegal or that the lessor be at fault, should entitle the lessee to dissolution of the lease.<sup>117</sup>

#### DISTURBANCES BY CO-LESSEES

The guaranty of the lessor is applicable when the enjoyment of the lessee is interfered with by the acts of another lessee of the same immovable.<sup>118</sup> This was established in *Keenan v. Flannigan*<sup>119</sup> where the lessee of an apartment found it necessary to vacate due to the continuous revelry of the lessees in the apartment below. It was held that the word "premises" in Article 2703 is not restricted to the premises leased to the person disturbed; therefore, the lessor was responsible for the disturbance. According to the court, Article 2703 means "that a lessor is not bound to warrant his lessee against a disturbance caused by a person who does not claim, under covenant with the lessor, a right to be in a position to carry on the disturbance."<sup>120</sup>

This language should not be taken to imply that one who *does* have a covenant with the lessor is in a "position" or has any kind of right which entitles him to disturb other tenants, but rather that a disturbance by a co-lessee is a disturbance by one claiming a *right* upon a portion of the thing leased. This, it

113. LA. CIV. CODE art. 2700; *Dorville v. Amat*, 6 La. Ann. 566 (1851).

114. 123 La. 294, 48 So. 940 (1909).

115. *Id.* at 317, 48 So. at 948: "The . . . [adjoining owner] either acted in strict accord with its rights, or it has passed outside the limits of its rights and subjected itself to actions of damages for tort. If the latter be the case, plaintiff has no action against the defendant [lessor] under article 2703.

"If the former be the case, while the plaintiff might be entitled to relief of some kind at the hands of her lessor, it would not go to the extent of holding her liable to an action for damages. . . . She would be limited either to a claim for reduction of rent or to demand a cancellation of the lease. . . ."

116. LA. CIV. CODE arts. 2697, 2699, 2728.

117. See note 111 *supra*.

118. 5 AUBRY ET RAU, DROIT CIVIL FRANÇAIS n° 366 (6th ed. 1946), as translated in J. SMITH, LOUISIANA AND COMPARATIVE MATERIALS ON SALES AND LEASES (2d ed. 1963) (a casebook prepared for the students of Louisiana State University Law School).

119. 157 La. 749, 103 So. 30 (1925). See also *Gayle v. Auto-Lec Stores*, 174 La. 1044, 142 So. 258 (1932). Cf. *Rojas & Conner v. Seeger*, 122 La. 218, 47 So. 532 (1908).

120. 157 La. 749, 751-52, 103 So. 31 (1925); LA. CIV. CODE art. 2703.

is submitted, is what the court meant when it referred to "a right to be in a position to carry on the disturbance." In this situation, there exists a disturbance of right for which the lessor is responsible.<sup>121</sup>

It is not every act by one tenant that disturbs another which imposes liability on the lessor. The lessor should not be responsible for a tortious act of one lessee disassociated from the rights of the parties under their lease contracts. Planiol cites as an example the case of a lessee who accidentally allows water to run into a lower apartment. In such a case, the negligent lessee cannot claim that he is using and enjoying, in conformity with his lease, the part of the premises leased to him; hence, the lessor is not responsible.<sup>122</sup> This can be compared with the lessee in *Keenan* who used his apartment for loud parties. In this latter case, it might be said the use of the premises is "associated" with the lessee's right to use and enjoy the property under the lease. In addition to the exception for tortious acts of a lessee, the lessor's responsibility is subject to the further exception that the disturbance complained of be substantial.<sup>123</sup>

#### ACTION BY PUBLIC AUTHORITIES

Article 2697 provides that the lease is terminated if the thing is taken for the purpose of public utility.<sup>124</sup> In a case of expropriation, where only the rights of the owner of the leased premises are expropriated, the purchaser takes the thing subject to the lease, including the right to future rentals. Since the lessee's possession is independent of changes in the ownership of the thing if the lease is recorded,<sup>125</sup> his rights are unaffected unless

121. See text at note 77 *supra*.

122. 2 PLANIOL, CIVIL LAW TREATISE no. 1684 (La. St. L. Inst. transl. 1959). See also *Gulf Coal & Coke Co. v. Bingaman*, 6 La. App. 107 (Orl. Cir. 1927), where it was suspected, but unproven, that one of the lessor's other tenants have removed a sign from a space rented by the plaintiff-lessee. The court noted that even if this was true, the lessor would not be liable for the tortious acts of a co-lessee.

123. *Veazey v. Rogers*, 6 So.2d 170 (La. App. Orl. Cir. 1942) (no relief for occasional blocking of driveway); *Keenan v. Legardeur*, 5 La. App. 266 (Orl. Cir. 1926) (one incident of vile language). *Dixie Homestead Ass'n v. Intravia*, 145 So. 561 (La. App. Orl. Cir. 1933) is an interesting case which held the lessor had not failed to maintain the lessee in peaceable possession by leasing to strikebreakers part of the premises housing the plaintiff-lessee's business thereby causing the union to withdraw its patronage. The strikebreakers themselves caused no disturbance, nor did the union.

124. LA. CIV. CODE art. 2697. See, e.g., *Harrison v. Myer*, 92 U.S. 111 (1876); *Zacharie v. R. Sproule & Co.*, 22 La. Ann. 325 (1870).

125. See text at note 56 *supra*.

the lease is also an object of the expropriation.<sup>126</sup> If the latter is the case, the lessee is entitled to an award for his "lease advantage." This is defined as the difference between the economic rent and the contract rent, *i.e.*, if the market value of the unexpired term of the lease is greater than the amount of rent due for the remainder of the term, the lessee is entitled to be paid the excess.<sup>127</sup> If the lessee cannot meet the burden of proving his claim "to a legal certainty," the lease advantage is zero, and the expropriator owes nothing.<sup>128</sup> The lessee is not to be compensated from the proceeds paid the owner unless the owner's rights have been determined with reference to the economic rent.<sup>129</sup> If only a portion of the leased premises are taken, the lessee is entitled to a diminution of the rent.<sup>130</sup>

The tenant can claim no relief from the lessor where the premises are rendered less useful, unaccompanied by an *actual* taking of part of the premises.<sup>131</sup> This is in contrast with the French who take the position that since the government is only exercising its rights when its activity interferes with the lessee's enjoyment, there is a disturbance of right for which the lessor

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126. *In re Morgan R.R. & S.S. Co.*, 32 La. Ann. 371 (1880); *Heirs of Merilh v. Pan American Films*, 200 So.2d 398 (La. App. 4th Cir. 1967), *writ refused*, 251 La. 71, 203 So.2d 88 (1967); *State v. Cockerham*, 182 So.2d 786 (La. App. 1st Cir. 1965), *writ refused*, 249 La. 110, 185 So.2d 219 (1966), discussed in *The Work of the Louisiana Appellate Courts for the 1965-1966 Term—Expropriation*, 27 LA. L. REV. 423, 477 (1967). In *Merilh*, after the lessor sold the premises under the threat of expropriation, the lessee moved to a new location, fearing loss of its lease. The court did not allow cancellation of the lease as of the date of moving, nor was the lessee entitled to reimbursement of the rent paid by it since that date.

127. *State v. Cockerham*, 182 So.2d 786 (La. App. 1st Cir. 1965), *writ refused*, 249 La. 110, 185 So.2d 219 (1966). Since expropriation is the exercise of a legal right, only actual damages are recoverable, and the lessee will be denied damages resulting from the inconvenience of moving or loss of business. *See State v. Levy*, 242 La. 259, 136 So.2d 35 (1962); *State v. Ferris*, 227 La. 13, 78 So.2d 493 (1955).

128. *State v. Levy*, 242 La. 259, 136 So.2d 35 (1962); *Central Louisiana Electric Co. v. Gamburg*, 200 So.2d 733 (La. App. 3d Cir. 1967).

129. *In re Morgan R.R. & S.S. Co.*, 32 La. Ann. 371 (1880); *Heirs of Merilh v. Pan American Films*, 200 So.2d 398 (La. App. 4th Cir. 1967), *writ refused*, 251 La. 71, 203 So.2d 88 (1967).

130. *Hirrichs v. City of New Orleans*, 50 La. Ann. 1214, 24 So. 224 (1898); *Foucher v. Choppin*, 17 La. Ann. 321 (1865); *David v. Beelman*, 5 La. Ann. 545 (1850).

131. In *Wellan v. Weiss*, 182 La. 1025, 162 So. 761 (1935), the court did not allow a claim for diminution of the rent under Article 2697 where enlarging a lease reduced parking space for lessee's business and reduced view of the display windows. *But see Neon Federal Co. v. Meyer Bros.*, 150 So. 410 (La. App. Or. Cir. 1933), which allowed annulment of the lessee of a sign where building to which it was attached burned, although the sign was uninjured. The *Wellan* case is discussed in Note, 10 TUL. L. REV. 475 (1936), in which the author suggests that a diminution of rent might have been granted under Article 2699.



is responsible.<sup>132</sup> For example, if the government interferes with access to the thing leased, or re-routes a road on which a business is located, the warranty of the lessor is engaged.<sup>133</sup>

When the premises are destroyed under order of condemnation, the lease is dissolved, and the lessee is entitled to damages under Articles 2695 and 2696.<sup>134</sup> Article 2697 does not prohibit recovery of damages since the "unforeseen event" contemplated therein refers to a vis major or uncontrollable force, and does not include condemnation which is destruction of the premises due to its defective condition.<sup>135</sup> Nor is the lessee barred by a lease clause exempting the lessor from liability for damages caused by defects in the property. Under a non-warranty clause, the lessee does not assume the risk of defects so radical that the premises must be destroyed as a threat to public safety.<sup>136</sup> The lessee can recover for improvements made to the property,<sup>137</sup> profits lost (if proved with sufficient certainty),<sup>138</sup> damages for worry, anxiety, and loss of professional time,<sup>139</sup> and loss of future subleases,<sup>140</sup> but not for moving expenses since they would be incurred anyway upon expiration of the term.<sup>141</sup>

#### ACTION BY CREDITORS

The lessee may be deprived of possession by his creditors. Where the lessor secures judgment for the unmatured rent, the right of occupancy remains with the lessee, and it may be seized by other creditors,<sup>142</sup> or by the lessor himself. But the lease is

132. 1 BAUDRY-LACANTINERIE ET WAHL. TRAITÉ DE DROIT CIVIL, DU CONTRAT DE LOUAGE nos 554, 556 (3d ed. 1906).

133. 2 PLANIOL, CIVIL LAW TREATISE no. 1687 (La. St. L. Inst. transl. 1959); 6 MARCADÉ EXPLICATION DU CODE CIVIL n° 470 (1875).

134. LA. CIV. CODE arts. 2695, 2696; *Chryssoverges v. General Cigar Co.*, 163 La. 364, 111 So. 787 (1927); *Tidwell v. Meyer Bros., Ltd.*, 160 La. 778, 107 So. 571 (1926); *Knapp v. Guerin*, 144 La. 754, 81 So. 302 (1919); *Pierce v. Hedden*, 105 La. 294, 29 So. 734 (1901).

135. LA. CIV. CODE art. 2697; *Knapp v. Guerin*, 144 La. 754, 81 So. 302 (1919).

136. *Pierce v. Hedden*, 105 La. 294, 29 So. 734 (1901). The same is true if the lessee, in the lease, accepts the premises in their "present condition." See *Brunies v. Police Jury of Jefferson Parish*, 237 La. 227, 110 So.2d 732 (1959).

137. *Pierce v. Hedden*, 105 La. 294, 29 So. 734 (1901). But if they are to belong to the lessor upon expiration, the lessee recovers only an amount proportional to the unexpired term for which use of the improvements is lost. See *Knapp v. Guerin*, 144 La. 754, 81 So. 302 (1919); *McWilliams v. Harper*, 159 So. 454 (La. App. 2d Cir. 1935).

138. *Tidwell v. Meyer Bros., Ltd.*, 160 La. 778, 107 So. 571 (1926).

139. *Id.*

140. *Knapp v. Guerin*, 144 La. 754, 81 So. 302 (1919).

141. *Id.*

142. *Ranson v. Voiron*, 176 La. 718, 146 So. 681 (1933); *Burgess v. Hogan*, 175 So.2d 924 (La. App. 2d Cir. 1965). The purchaser has the right of occupancy for the term remaining without having to pay rent since the obligation to pay rent

terminated by confusion if the lessor purchases the right of occupancy after obtaining judgment for the rent.<sup>143</sup> The possessor under an unrecorded lease has no rights against a seizing creditor of the owner.<sup>144</sup> Such seizure of the leased premises, however, cancels the lease, giving the lessee the right to abandon the premises and relieving him of his rent obligation.<sup>145</sup> If the lessee prefers to stay and is allowed to do so, there is a tacit reconduction of the lease, and rent subsequently accruing is owed to the creditor, even though the lessee may have paid the entire rent in advance<sup>146</sup> or delivered negotiable notes for the entire term to another.<sup>147</sup>

When property is leased encumbered with a servitude or privilege anterior to the date of the lease, a recorded mortgage being the common example, the lessee cannot prevent exercise of the right.<sup>148</sup> If the mortgage is foreclosed, the judicial sale dissolves the lease,<sup>149</sup> and the tenant has no recourse against the mortgagee who is only exercising a legal right.<sup>150</sup>

#### CONCLUSION

The lessee has been described as the "quasi owner" of the thing leased.<sup>151</sup> He is entitled to the use and enjoyment of the premises and is guaranteed that his possession will be peaceable. He is given his own right of action against those who disturb his possession while claiming no right to the premises. The lessor is liable, like anyone else, for unauthorized entry upon the premises. If the lessee is disturbed by one claiming a right to the premises, such as the true owner, the lessor must, when called on by his tenant, defend against such disturbances. The lessor must respond in damages when he, or anyone else claiming a right to the premises, disturbs the possession of the lessee.

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merges with the judgment in favor of the landlord. See *Hollier v. Boustany*, 180 So.2d 591 (La. App. 3d Cir. 1965).

143. LA. CIV. CODE art. 2217; *Ranson v. Voiron*, 176 La. 718, 146 So. 681 (1933); *Morrison v. Faulk*, 158 So.2d 837 (La. App. 4th Cir. 1963).

144. *Flower v. Pearce*, 45 La. Ann. 853, 13 So. 150 (1893); *Dorsey & Co. v. Pritchard*, 6 La. Ann. 729 (1851).

145. *Anderson v. Comeau*, 33 La. Ann. 119 (1881); *Summers v. Clark*, 30 La. Ann. 436 (1878); *Bank of Coushatta v. Williams*, 121 So. 646 (La. App. 2d Cir. 1929).

146. *Anderson v. Comeau*, 33 La. Ann. 1119 (1881).

147. *Summers v. Clark*, 30 La. Ann. 436 (1878); *Bank of Coushatta v. Williams*, 121 So. 646 (La. App. 2d Cir. 1929).

148. *Taylor v. Mohan*, 19 La. Ann. 324 (1867).

149. *Celeste Sugar Co. v. Dunbar-Dukate Co.*, 160 La. 694, 107 So. 493 (1926); *Thompson v. Flathers*, 45 La. Ann. 120, 12 So. 245 (1893); *Barelli v. Szymanski*, 14 La. Ann. 47 (1859).

150. *Penn v. Citizens' Bank*, 32 La. Ann. 195 (1880).

151. *Esmele v. Violet Trapping Co.*, 187 La. 728, 175 So. 471 (1937).

No matter how great the fault of the lessee or how certain it is that his right of possession has ceased, Louisiana courts have consistently held that the lessor must, upon penalty of damages, resort to the machinery of the law for enforcing his rights. As for the remedies available to the lessee for interference with his possession, the Code allows diminution of rent or cancellation of the lease when the lessor is not at fault, and provides the additional remedy of damages where the lessor is in some way responsible for the disturbance.

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### JURY TRIAL IN LOUISIANA—IMPLICATIONS OF DUNCAN

Trial by jury is a familiar phrase to citizens of the United States, as it should be, since it is one of the principal guarantees of the Federal Constitution.<sup>1</sup> However, there has been considerable uncertainty as to just how far this guarantee applies, via due process, to state criminal trials. The latest effort of the United States Supreme Court to deal with this question comprises the subject matter of this Comment.

Before looking at the more recent development of the concept of trial by jury, it will be of benefit to glance at its evolution from its earliest origins. The predecessor of our modern trial by jury was the "inquisito," originated in the Ninth Century by Emperor Louis the Pious who ordered that, in all claims involving royal rights, the issues were to be determined by the sworn statements of persons within the district. This procedure was used in Normandy and it appeared in England after the Norman conquest as the inquisition. King Henry II converted the jury into an instrument for giving him information to decide disputes. In 1116, the institution known as the grand jury was formally established in the Assize of Clarendon, which provided that very comprehensive questions were to be addressed to juries. They were required to answer, among other things, questions concerning persons suspected of crimes. If a person was presented by a grand jury as suspect, he had to clear himself by one of three methods—trial by ordeal, wager of law, or trial by battle. Trial by ordeal was the one most frequently used. When

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1. U.S. CONST. art. II, § 3: "The trial of all crimes, except in cases of impeachment, shall be by jury. . . ."

*Id.* amend. VI: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial. . . ."