

Louisiana Law Review

Volume 20 | Number 1
December 1959

Responsibility of Landlord and Tenant for Damages from Defects in Leased Premises

Ben R. Miller Jr.

Repository Citation

Ben R. Miller Jr., *Responsibility of Landlord and Tenant for Damages from Defects in Leased Premises*, 20 La. L. Rev. (1959)
Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol20/iss1/17>

This Comment is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

LOUISIANA LAW REVIEW

LOUISIANA STATE UNIVERSITY LAW SCHOOL

BATON ROUGE 3, LOUISIANA

Subscription per year \$5.00 (Foreign \$5.50)

Single copy \$1.25

VOLUME XX

DECEMBER, 1959

NUMBER 1

STUDENT BOARD

Sidney D. Fazio, *Editor-in-Chief*
J. C. Parkerson, *Managing Editor*
Ben R. Miller, Jr., *Associate Editor*
Joseph W. Milner, *Associate Editor*
Charley Quienalty, *Associate Editor*
David W. Robertson, *Associate Editor*
Hugh T. Ward, *Associate Editor*
William M. Nolen, *Summer Associate Editor*

Merwin M. Brandon, Jr.
Hillary J. Crain
Sam J. Friedman
George C. Herget, Jr.

C. A. King, II
Ben W. Lightfoot
Charles Lindsay
M. Aubrey McCleary, Jr.

Peyton Moore
William S. Moss, Jr.
Gordon A. Pugh
Leslie J. Schiff

FACULTY ADVISORY BOARD

Dale E. Bennett
Harriet S. Daggett
Joseph Dainow
Melvin G. Dakin

Milton M. Harrison
Paul M. Hebert
Henry G. McMahan
Wex S. Malone

Robert A. Pascal
J. Denson Smith
Donald H. Wollett
A. N. Yiannopoulos

George W. Pugh, *Faculty Editor*

Beverly D. Walker, *Editorial Assistant*

COMMENTS

Responsibility of Landlord and Tenant for Damages from Defects in Leased Premises

Certain obligations to maintain the property and to be accountable for any damages resulting from a failure to do so are imposed by the Louisiana Civil Code upon owners, lessors, and tenants of leased premises. The purpose of this comment is to *survey* these responsibilities and to *examine* in detail the effect of R.S. 9:3221 upon these obligations.¹

1. This Comment will exclude discussion of the liability of proprietors of places open to the public and also of the duty owed to business and social guests. See Note, 26 TUL. L. REV. 103 (1952).

LANDLORD'S AND TENANT'S RESPONSIBILITY IN DAMAGES

Landlord's Responsibility to Tenant

The primary duties owed by the lessor to his tenant are to deliver the thing leased, to maintain the lessee in peaceful possession, and to indemnify the lessee for losses resulting from vices and defects in the thing leased.² The latter obligation, contained in Article 2695 of the Civil Code,³ imports into every contract of lease the lessor's duty to maintain the thing leased in good condition.⁴ The usual situation envisioned by this article is that in which the person or the property of the lessee is injured through a vice or defect in leased premises. The lessor is held strictly accountable for any such injury.⁵ Lack of knowledge of the defect is no defense to the lessor's liability in such cases.⁶

Since Article 2695 is under the general heading "Of Leases" in the Civil Code and is located in a section which defines the obligations of the lessor to the lessee, it would seem that the article was intended to benefit only a lessee who sues his lessor. In addition, the language of the article seems to limit its scope to "lessor" and "lessee." Nevertheless, the Louisiana courts during one period held that a third person lawfully on the premises stood in the shoes of the lessee in invoking the provisions of this article, apparently on the basis that the lease contemplated third persons would come onto the premises.⁷ It appears, however, that the courts have returned to the apparent meaning of the article and now hold that it operates only in favor of the lessee.⁸

2. LA. CIVIL CODE arts. 2692-2704 (1870).

3. *Id.* art. 2695: "The lessor guarantees the lessee against all the vices and defects of the thing, which may prevent its being used even in case it should appear he knew nothing of the existence of such vices and defects, at the time the lease was made, and even if they have arisen since, provided they do not arise from the fault of the lessee; and if any loss should result to the lessee from the vices and defects, the lessor shall be bound to indemnify him for the same."

4. For detailed studies of this responsibility, see Comments, 7 LOUISIANA LAW REVIEW 406 (1947), 16 TUL. L. REV. 448 (1942), 4 TUL. L. REV. 611 (1930); Note, 2 LOUISIANA LAW REVIEW 744 (1940).

5. See *Green v. Southern Furniture Co.*, 94 So.2d 508, 510 (La. App. 1957); *Byrd v. Spiro*, 170 So. 384, 385 (La. App. 1936) ("The law of Louisiana is rigid and harsh on the owner").

6. *Barnes v. Beirne*, 38 La. Ann. 280 (1886); *Morbry v. Frazier*, 4 So.2d 556 (La. App. 1941); *Thompson v. Morgan*, 140 So. 291 (La. App. 1932).

7. *Thompson v. Cooke*, 147 La. 922, 86 So. 332 (1920); *Willis v. Cahn*, 164 So. 452 (La. App. 1935); *Potter v. Soady Building Co.*, 144 So. 183 (La. App. 1932).

8. *Girouard v. Agate*, 44 So.2d 388 (La. App. 1950); *Graff v. Marmelzadt*, 194 So. 62 (La. App. 1940); *Duplain v. Wiltz*, 194 So. 60 (1940); *Teroso v.*

Certain rules have been developed by the courts in determining what is a "vice or defect" within the meaning of Article 2695. The vice must be substantial and likely to cause injury to a reasonably prudent person.⁹ The defect which caused the injury must have been in the thing leased.¹⁰ Evidence as to local building codes¹¹ as well as proper building practices¹² is admissible to test the existence of a defect under Article 2695.

The lessor has a number of defenses at his disposal under appropriate circumstances to relieve himself of liability.¹³ In addition to denying the existence of a defect, he can assert there was no accident or resulting injury,¹⁴ plead that the defect was not the proximate cause of the injury,¹⁵ and deny the existence of a landlord-tenant relationship.¹⁶ The lessor may affirmatively assert that plaintiff was contributorily negligent.¹⁷ As another defensive measure to the strict liability of Article 2695, landlords once used Article 2694, which gives the tenant the right to make repairs and deduct the cost thereof from the rent. In earlier decisions it was said the failure of the tenant to take the initiative in repairing the premises was a defense available to the lessor.¹⁸ However, this defense now appears renounced by the courts apparently on the grounds that the right given to the lessee to make the repairs does not impose a duty to do so.¹⁹

Agate, 173 So. 196 (La. App. 1937); Heath v. Suburban Building & Loan Ass'n, 163 So. 546 (La. App. 1935). See Note, 2 LOUISIANA LAW REVIEW 748 (1940).

9. Chaix v. Viau, 15 So.2d 662 (La. App. 1943).

10. Dauterive v. Pan-American Life Ins. Co., 24 So.2d 211 (La. App. 1945); Cheatham v. Bohrer, 17 So.2d 492 (La. App. 1944) (defective attic not intended to be leased).

11. Ellsworth v. Tedesco, 235 La. 679, 105 So.2d 264 (1958); Golden v. Katz, 11 So.2d 412 (La. App. 1943).

12. Gaida v. Hourgettes, 67 So.2d 737 (La. App. 1953).

13. For defenses available to the landlord's insurer under Act 174 of 1932, see Comment, 21 TUL. L. REV. 596 (1947).

14. Curet v. Hiern, 95 So.2d 699 (La. App. 1957); Moses v. Metropolitan Casualty Co., 78 So.2d 9 (La. App. 1955); Landry v. Le Bleu, 172 So. 19 (La. App. 1937); Winfield v. Levitan, 170 So. 373 (La. App. 1936).

15. Ellsworth v. Tedesco, 235 La. 679, 105 So.2d 264 (1958); Lasyone v. Zenoria Lumber Co., 163 La. 185, 111 So. 670 (1927); Denneker v. Pecoraro, 64 So.2d 510 (La. App. 1953); Burch v. Mathson, 26 So.2d 230 (La. App. 1946); Landry v. Le Bleu, 172 So. 19 (La. App. 1937).

16. Salter v. Zoder, 216 La. 769, 44 So.2d 862 (1950); Warren v. Metropolitan Life Ins. Co., 190 So. 855 (La. App. 1939); Blackwell v. Guiffria, 187 So. 341 (La. App. 1939); Thomas v. Harman, 170 So. 365 (La. App. 1936); Smith v. Lucas, 159 So. 429 (La. App. 1935).

17. Parker v. Kreber, 153 La. 191, 95 So. 601 (1923); Bianchi v. Del Valle, 117 La. 587, 42 So. 148 (1906); Prudhomme v. Berry, 69 So.2d 620 (La. App. 1953); Johnson v. Lucy Realty & Development Co., 187 So. 325 (La. App. 1939).

18. Bianchi v. Del Valle, 117 La. 587, 42 So. 148 (1906); Welham v. Lingham, 28 La. Ann. 903 (1876); Diggs v. Maury, 23 La. Ann. 59 (1871); Westemeier v. Street, 21 La. Ann. 714 (1869).

19. White v. Juge, 176 La. 1045, 147 So. 72 (1933); Landry v. Monteleone,

Tenant's Responsibility Under Article 2716

Article 2716 contains a listing of certain minor repairs and provides that they must be made at the "expense of the tenant." The responsibility for the listed repairs is placed on the tenant because they are in the nature of maintenance required by the normal use of the premises. When the injury complained of results from one of the described defects, the tenant has no action against the lessor.²⁰ Although this article does not expressly preclude action by third persons against the owner for injuries resulting from defects mentioned therein, the courts have interpreted it as limiting the third person's remedy solely to an action against the lessee.²¹ The theory is that since the owner is not in possession, he should not be charged with neglect to perform an act which the law requires another to perform.

Owner's Responsibility to Third Persons

Article 2322 provides that the owner of a building is answerable for the damage occasioned by its ruin, when this is caused by neglect to repair it, or when it is the result of a vice or defect in its original construction.²² Although the language of the article does not preclude recovery by tenants, it has been customary for only third persons injured by defects in the premises to make use of this provision.²³ Another code provision dealing with the owner's liability is Article 670, which provides that everyone is bound to keep his building in repair, so that neither

150 La. 546, 90 So. 919 (1922); *Boutte v. New Orleans Terminal Co.*, 139 La. 945, 72 So. 513 (1916).

20. *Lowe v. Home Owners' Loan Corp.*, 199 La. 672, 6 So.2d 726 (1942); *Harris v. Tennis*, 149 La. 295, 88 So. 912 (1921); *Moore v. Aughey*, 142 La. 1042, 78 So. 110 (1918); *Vignes v. Barbarra*, 5 So.2d 656 (La. App. 1942); *Farve v. Danna*, 181 So. 823 (La. App. 1938). However, where the lessor delivers the premises to the tenant in bad condition, he has breached his obligation contained in Article 2693 to deliver the premises in good condition. Thus in this situation it would seem that a lessee, injured by a defect encompassed in Article 2716 could recover against the lessor, and a third person would have an action under Article 2322 against the owner. See *Cornelio v. Viola*, 161 So. 196 (La. App. 1935). See also *Lowe v. Home Owners' Loan Corp.*, 119 La. 672, 6 So.2d 726 (1942) (court considered whether minor defect arose before or during lease).

21. *Lowe v. Home Owners' Loan Corp.*, 199 La. 672, 6 So.2d 726 (1942); *Harris v. Tennis*, 149 La. 295, 88 So. 912 (1921); *Moore v. Aughey*, 142 La. 1042, 78 So. 110 (1918); *Vignes v. Barbarra*, 5 So.2d 656 (La. App. 1942); *Farve v. Danna*, 181 So. 823 (La. App. 1938).

22. A federal court in applying Article 2322 to a home owner concluded that the Louisiana courts have distinguished between a home owner and an owner who leases premises, and held that as to a home owner, the injury to the third person must result from ruin or falling down of the premises. See *Southern Farm Bureau Casualty Insurance Co. v. McKenzie*, 252 F.2d 195 (5th Cir. 1958).

23. See Comment, 7 LOUISIANA LAW REVIEW 406, 412 (1947).

their fall, nor that of any part of the materials composing them, may injure the neighbors or passers-by.²⁴

From the language of these two articles, it appears that they place obligations exclusively upon owners and not upon a lessor who is not also an owner.²⁵ As mentioned heretofore, Article 2695 has been interpreted as applying only between the parties to a lease contract.²⁶ It therefore appears that a lessor, who is not the owner, but instead a sub-lessor, has no obligation to third persons.²⁷

Lessee's Assumption of Responsibility Prior to 1932

Article 2695 has always imposed a heavy burden upon the lessor of premises, requiring him to keep the premises in repair. However, the lessor may shift some of this burden to his lessee by means of a lease stipulation.²⁸ Even though there is no express provision in the Civil Code for such an agreement, this has been possible because traditionally parties to a contract have been able to "renounce what the law has established in their favor, when the renunciation does not affect the rights of others, and is not contrary to the public good."²⁹ Consequently, the parties to a lease have the right, as have the parties to a sale, to broaden or restrict their respective rights and obligations. French writers commenting upon an article in the French Code, identical to Article 2695 of the Louisiana Code, agree that it is permissible for the lessor to stipulate that no warranty is made for vices or defects in the leased premises.³⁰ Therefore, by a

24. It should be noticed that this provision, like the one in Article 2322, governs the owners of all buildings and not just owners of leased premises.

25. It seems to be a well-established doctrine in Louisiana that a person may lease to others property which he does not own. LA. CIVIL CODE art. 2681 (1870). See *Stinson v. Marston*, 185 La. 365, 169 So. 436 (1936); *Town of Morgan City v. Dalton*, 112 La. 9, 36 So. 208 (1904); *Tippet v. Jett*, 10 La. 359 (1836).

26. See note 8 *supra*.

27. This rule is subject to the exception of the lessor's own negligence, for which he, like every other person, is liable under LA. CIVIL CODE art. 2315 (1870).

28. *Clay v. Parsons*, 144 La. 985, 987, 81 So. 597 (1919) ("the obligation thus imposed by law upon the landlord may be dispensed with, not only by a lessee as a condition of his contract of lease, but by any one desiring to occupy the house and willing to assume the risk"); *Torres v. Starke*, 132 La. 1045, 62 So. 137 (1913); *Pecararo v. Grover*, 5 La. App. 676 (1927).

29. LA. CIVIL CODE art. 11 (1870).

30. "The lessor does not warrant the vices which he has excepted from the warranty by an express clause of the contract." 30 DALLOZ REP. 320, S. 196. "It is permitted to stipulate that the lessor shall not warrant the vices of the thing leased in general, or of a special vice in particular." 3 DUVERGIER 328, S. 345. "Very often parties insert in the lease clauses having for their object to restrict the obligation of warranty of the lessor; these clauses, be it understood, should receive their execution, and the lessor shall not be held for any warranty

stipulation in the contract of lease, the lessor has been able to dispense with the warranty against defects or restrict it in any manner mutually agreeable to him and the tenant.³¹

Prior to 1932 where such an assumption of responsibility by the lessee was agreed upon, the tenant was contractually barred from recovering from a lessor.³² A different situation was presented where third persons were involved. While the owner's liability to the tenant could be avoided by the tenant's assumption of responsibility for all defects, such a provision could not affect the rights of third parties.³³ Thus, *Klein v. Young*³⁴ held that when a landlord was sued by a person other than the lessee, the assumption of responsibility by the lessee was not a defense.

LESSEE'S ASSUMPTION OF RESPONSIBILITY UNDER ACT 174 OF 1932

Generally

R.S. 9:3221³⁵ (formerly Act 174 of 1932): "The owner of premises leased under a contract whereby the lessee assumes responsibility for their condition is not liable for injury

for the vice or for the vices of which he is formally exonerated." 1 GUILLONARD 137, S. 121.

31. *Clay v. Parsons*, 144 La. 985, 81 So. 597 (1919); *Torres v. Starke*, 132 La. 1045, 62 So. 137 (1913); *Pecararo v. Grover*, 5 La. App. 676 (1927).

32. See note 31 *supra*.

33. *Klein v. Young*, 163 La. 59, 111 So. 495 (1926); *Badie v. Columbia Brewing Co.*, 142 La. 853, 860, 77 So. 768, 770 (1918) ("the owner of a building cannot, by any contract or agreement with the lessee, tenant, or subtenant, absolve himself of responsibility to others for injuries resulting from a failure to maintain the leased premises in safe condition"); *Gardiner v. De Salles*, 126 So. 739 (La. App. 1930); *Hero v. Hankins*, 247 Fed. 664 (5th Cir. 1917); *Frank v. Suthon*, 159 Fed. 174 (E.D. La. 1908).

34. 163 La. 59, 111 So. 495 (1926). See also note 33 *supra*.

35. Act 174 of 1932 has been raised in the following cases which were disposed of on other grounds: *White v. Juge*, 176 La. 1045, 147 So. 72 (1933); *Golden v. Katz*, 11 So.2d 412 (La. App. 1943); *Ford v. Spiro*, 5 So.2d 385 (La. App. 1942); *Redd v. Sokoloski*, 2 So.2d 266 (La. App. 1941); *Lowe v. Home Owners' Loan Corp.*, 1 So.2d 362 (La. App. 1941); *Creel v. Dorsey*, 159 So. 608 (La. App. 1935).

Act 174 of 1932, incorporated as LA. R.S. 9:3221 (1950), has been considered in the following cases: *Kordek v. Fidelity & Casualty Co.*, 119 F. Supp. 18 (W.D. La. 1954); *Phillips v. Mitthoff*, 108 So.2d 669 (La. App. 1959); *Green v. Southern Furniture Co.*, 94 So.2d 508 (La. App. 1957); *French v. Mathews*, 78 So.2d 197 (La. App. 1955); *Poss v. Brown*, 73 So.2d 661 (La. App. 1954); *Thompson v. Suprema*, 65 So.2d 801 (La. App. 1953); *Girouard v. Agate*, 44 So.2d 388 (La. App. 1950); *Thiel v. Kern*, 34 So.2d 296 (La. App. 1948); *Terrenova v. Feldner*, 28 So.2d 287 (La. App. 1946); *Mitchal v. Armstrong*, 13 So.2d 506 (La. App. 1943); *Roppolo v. Pick*, 4 So.2d 839 (La. App. 1941); *Santee v. Pick*, 199 So. 141 (La. App. 1940); *Atkinson v. Stern*, 175 So. 126 (La. App. 1937); *Hoffman v. Zimmer*, 175 So. 115 (La. App. 1937); *Thompson v. Donald*, 169 So. 242 (La. App. 1936); *Paul v. Nolan*, 168 So. 509 (La. App. 1936); *McFlynn v. Crescent Realty Corp.*, 160 So. 454 (La. App. 1935).

caused by any defect therein to the lessee or anyone on the premises who derives his right to be thereon from the lessee, unless the owner knew or should have known of the defect or had received notice thereof and failed to remedy it within a reasonable time."

The law changed in 1932 with the adoption of this statute which bars, with certain exceptions, the third person's recovery from the owner for injuries on leased property when the tenant has assumed responsibility. It seems that the policy of this act was to lessen the owner's burden. In *Paul v. Nolen*³⁶ the statute was held constitutional against the contention that it deprived the injured person of his property rights without due process of law.

An owner taking advantage of this contractual shield must plead, as an affirmative defense to a suit by a tenant or third person, that the contract comes under R.S. 9:3221.³⁷ It would seem that the assumption, to fit under the act as a defense to the owner, must be express; however, that does not preclude an oral agreement shifting responsibility.³⁸

In deciding what language is necessary in the contract for the lessee to assume responsibility under the 1932 act, it seems that the courts would be bound to give effect to the intention of the parties as they must for contracts generally.³⁹ In practice the stipulations seem fairly uniform and usually contain variations of the following two clauses:

Repairs and Maintenance—No repairs shall be due lessee by lessor except to the roof and such as may be rendered necessary by fire or other casualty, not occasioned by lessee's fault or negligence.

36. 166 So. 509 (La. App. 1936).

37. *Thiel v. Kern*, 34 So.2d 296 (La. App. 1948); *Roppolo v. Pick*, 4 So.2d 839 (La. App. 1941); *Hoffman v. Zimmer*, 175 So. 115 (La. App. 1937).

38. An oral agreement shifting responsibility should be binding for the reason that a completed verbal agreement of lease is a contract; it needs only the concurrence of thing, price, and consent. See *Knapp v. Guerin*, 144 La. 754, 81 So. 302 (1919); *Laroussini v. Werlein*, 52 La. Ann. 424, 427, 27 So. 89, 90 (1899) ("a verbal contract of lease, complete in itself, independent of any writing, and unaccompanied by an intention to have the same reduced to writing as perfecting it, is an enforceable contract"). *Accord*, *Roppolo v. Pick*, 4 So.2d 839 (La. App. 1941) (oral assumption recognized as possible); *Atkinson v. Stern*, 175 So. 126 (La. App. 1937) (oral assumption upheld).

39. LA. CIVIL CODE art. 1945 (1870): ". . . That courts are bound to give legal effect to all such contracts according to the true intent of all the parties. . . ."

Liability for Damages—Lessor shall not be liable for any damage to person or property sustained by lessee or any other person, and any such liability is assumed by lessee.⁴⁰

An interesting problem is presented if a stipulation of assumption is printed on the reverse side of a rent receipt which is handed the tenant upon paying his rent.⁴¹ Since the stipulation is not contained in the lease agreement which is claimed to be modified, for the restrictions to be effective a special contract would have to be found.⁴² When a rent receipt or any ticket is given in exchange for personal property the presumption is that the receipt acknowledges only a change in possession or payment, and does not create a special contract according to the fine print on the reverse side.⁴³ If the court determines that the stipulation in the lease is an assumption of responsibility, still other questions must be answered. One concerns what would be a vice or defect within the contemplation of R.S. 9:3221. Since the basic purpose of the statute seems to be to effect a revision of only the landlord's duty to third persons, it would appear that the meaning of "defect" was not changed by the act. The fact that no specific examples of a "defect" are given and the fact that there are no qualifying or explanatory words are further evidence that no change was contemplated by the legislature. The existence of a vice or defect and of an injury are questions of fact.⁴⁴ The same is true when the issue is whether the vice was the cause of plaintiff's injury. Plaintiff has to prove by a "preponderance of the evidence" and with "legal certainty" these requisite facts.⁴⁵ Since plaintiff's family and guests are generally

40. Phillips v. Mitthoff, 108 So.2d 669 (La. App. 1959); Atkinson v. Stern, 175 So. 126 (La. App. 1937); Paul v. Nolen, 166 So. 509 (La. App. 1936); McFlynn v. Crescent Realty Corp., 160 So. 454 (La. App. 1935). In the following cases the courts concluded, without printing the agreement, that the language of the contract did not contain an assumption of responsibility: Girouard v. Agate, 44 So.2d 388 (La. App. 1950); Hoffman v. Zimmer, 175 So. 115 (La. App. 1937); Thompson v. Donald, 169 So. 242 (La. App. 1936).

41. This issue was considered in the following cases and in no case was such a stipulation in the rent receipt held to be an effective assumption of responsibility by the tenant: Ford v. Spiro, 5 So.2d 385 (La. App. 1942); Roppolo v. Pick, 4 So.2d 839 (La. App. 1941); Santee v. Pick, 199 So. 141 (La. App. 1940).

42. Roppolo v. Pick, 4 So.2d 839 (La. App. 1941). See Marine Ins. Co. v. Rehm, 177 So. 79 (La. App. 1937) (dealing with a ticket given when car was parked).

43. See Marine Ins. Co. v. Rehm, 177 So. 79 (La. App. 1937).

44. Abrams v. Mann, 179 So. 620 (La. App. 1938); Gulley v. Vatter, 174 So. 289 (La. App. 1937); Lewis v. Wedemeyer, 174 So. 116 (La. App. 1937); Winfield v. Levitan, 170 So. 373 (La. App. 1936).

45. Ellsworth v. Tedesco, 235 La. 679, 105 So.2d 264 (1958); Moses v. Metropolitan Cas. Ins. Co., 78 So.2d 9 (La. App. 1955); Baudot v. Abundance Realty

the only eye witnesses to the accident, the courts are compelled to rely upon plaintiff's witnesses for this information. As a consequence, evidence tendered by plaintiff is scrutinized with the utmost care to avoid a miscarriage of justice.⁴⁶

Another question for determination is whether plaintiff received the injury complained of while "on the premises" as required by R.S. 9:3221. A tenant has the right to enjoy and use the principal thing leased as well as its accessories, such as a common courtyard, an approach to leased premises, or a common stairway.⁴⁷ Such accessories when in the control of the owner do not come within a lessee's assumption of responsibility for defects in the premises.⁴⁸ A tenant or third person, therefore, can maintain an action against the owner for damages flowing from an injury caused by a defect in an accessory to the property leased notwithstanding the lessee's contractual assumption of responsibility.⁴⁹ Another issue concerning the phrase "on the premises" was raised in *Green v. Southern Furniture Co.*⁵⁰ In that case plaintiff was injured by a defect in the building while he was on a public sidewalk adjacent to the leased premises. The court held that the injury occurred off of the premises and thus was not within the scope of the statute.

Prior to 1932, the lessee's spouse was not bound by the contractual assumption and was permitted to sue the owner.⁵¹ This

Corp., 157 So. 297 (La. App. 1934); *Boudro v. United States Fidelity & Guaranty Co.*, 145 So. 294 (La. App. 1933).

46. *Wallace v. Meyer*, 4 So.2d 784 (La. App. 1941); *Bussey v. Trew*, 2 So.2d 495 (La. App. 1941).

47. See *Estes v. Aetna Casualty & Surety Co.*, 157 So. 395 (La. App. 1934) (court found duty on owner of leased premises to maintain a common courtyard in good condition). See also 20 *CONTRAT DE LOUAGE* 229: "The tenant, having the right to use not only the principal thing, but also the accessories, his enjoyment must be guaranteed of the latter as well as of the principal thing."

48. *Bates v. Blitz*, 205 La. 536, 17 So.2d 816 (1944) (platform built by lessor over mud to apartments held the responsibility of the lessor); *Glain v. Sparandeo*, 119 La. 339, 44 So. 120 (1906) (where tenant was lowering dresser from balcony which broke and precipitated him to ground, court said the lessor is bound for the safety of the necessary approaches and exits to and from the apartments which he lets); *Estes v. Aetna Casualty & Surety Co.*, 157 So. 395 (La. App. 1934).

49. *Poss v. Brown*, 73 So.2d 661 (La. App. 1954) (plaintiff sustained water damage from a common sewer and sued another lessee who had assumed responsibility, held, the common sewer was likened to common stairways for which responsibility does not pass); *Thiel v. Kern*, 34 So.2d 296 (La. App. 1948) (where lessee injured by defect in common stairway, owner urged a contract of assumption in defense, and recovery allowed).

50. 94 So.2d 508 (La. App. 1957).

51. *Bianchi v. Del Valle*, 117 La. 587, 42 So. 148 (1906); *Dubois v. Ferrand*, 8 La. Ann. 373 (1853); *Heath v. Suburban Building & Loan Ass'n*, 163 So. 546 (La. App. 1935). *Contra*, *Crawford v. Magnolia*, 4 So.2d 48 (La. App. 1941) (wherein it was said the wife had an interest in the contract as the beneficiary

resulted from the court's finding no privity of contract between a lessee and his spouse. However, since the wife derives her right to be on the premises from the lessee, it would appear that the 1932 act precludes suit by her against the owner where there is a contractual assumption.

Where there is a contractual assumption, R.S. 9:3221 relieves the owner of responsibility "unless [he] . . . knew or should have known of the defect or had received notice thereof and failed to remedy it within a reasonable time." Many contracts of lease which include an assumption provide that the lessor will not be responsible for any vices and defects "except in the case of positive neglect or failure to take action toward the remedying of such defects . . . after having received *written notice*."⁵² [Emphasis added.] The courts, in deciding whether a written notice requirement of a lease contract is binding, have reasoned that since this is not a requirement of the act, it is sufficient that the landlord merely knew or should have known of the defect and failed to remedy it within a reasonable time.⁵³ This reasoning would be sound as far as third parties are concerned; however, as between the parties to the contract, it seems that the lessee could renounce what the law has established for his benefit in favor of a more stringent requirement of written notice of vices and defects.

Under the ancient civil law, the owner of leased premises was presumed to know of obvious and latent defects.⁵⁴ However, *knew* as mentioned in the act is not given this meaning. Knowledge of defects is held not to be imputed to the owner; instead he must have actual knowledge.⁵⁵ Knowledge has been found where the owner was shown old and discolored plaster,⁵⁶ or given

of a stipulation pour autrui). Criticized in Comment, 16 TUL. L. REV. 448, 452 (1942).

52. *Thompson v. Suprena*, 65 So.2d 801, 802 (La. App. 1953). See *Torres v. Starke*, 132 La. 1045, 62 So. 137 (1913); *French v. Mathews*, 78 So.2d 107 (La. App. 1955); *Mitchal v. Armstrong*, 13 So.2d 506 (La. App. 1943); *Pecararo v. Grover*, 5 La. App. 676 (1927); *Hero v. Hankins*, 247 Fed. 664 (5th Cir. 1917).

53. *French v. Mathews*, 78 So.2d 197 (La. App. 1955); *Thompson v. Suprena*, 65 So.2d 801 (La. App. 1953); *Mitchal v. Armstrong*, 13 So.2d 506 (La. App. 1943).

54. See *Barnes v. Beirne*, 38 La. Ann. 280 (1886); *Morbry v. Frazier*, 4 So.2d 556 (La. App. 1941); *Thompson v. Morgan*, 140 So. 291 (La. App. 1932).

55. *Green v. Southern Furniture Co.*, 94 So.2d 508, 516 (La. App. 1957) ("this argument overlooks that such imputed knowledge may be used to justify strict liability of the owner for injuries caused through defects in the leased premises, but it is inapplicable where the tenant has assumed such liability").

56. *Mitchal v. Armstrong*, 13 So.2d 506 (La. App. 1943) (owner when shown the stains and discolored plaster had not the right to believe they were harmless).

an oral complaint.⁵⁷ In any situation it is a question of fact to be resolved upon the evidence presented.⁵⁸

A question of fact also arises as to whether the owner "should have known" of the defect.⁵⁹ The source statute provided that the tenant is bound under his assumption unless the owner "should *within reason* have known" of the defect (emphasis added).⁶⁰ Thus it would seem that the owner, where actual knowledge is lacking, must have some reason for knowing of the defect.⁶¹ The act seems to place on the tenant the burden of proving that the owner knew or should have known of the defect.⁶²

If the owner knew or should have known of the defect complained of, he must, within a reasonable time, repair the defect.⁶³ What is a reasonable time in this context appears to be a question of fact to be resolved by applying the rule of reasonable conduct. In one situation a time lapse of a month and a half between knowledge of the defect and the accident was unreasonable.⁶⁴ If the owner makes repairs within a reasonable time, but does so negligently, an assumption of responsibility by the lessee would seem to be no bar to an action by an injured party against the owner for damages resulting from his negligent undertaking.

The owner, when sued by a tenant or third party, has several defenses available which have been set forth heretofore.⁶⁵ The owner may also plead the contractual assumption as a bar, but as mentioned before he must prove with legal certainty that the lease contained such an assumption of responsibility by the lessee.⁶⁶

57. *French v. Mathews*, 78 So.2d 197 (La. App. 1955) (need no notification in writing; oral complaint was sufficient to give notice to owner).

58. *McFlynn v. Crescent Realty Corp.*, 160 So. 454 (La. App. 1935).

59. *Kordek v. Fidelity & Cas. Co.*, 119 F. Supp. 18 (W.D. La. 1954) (where plaintiff's daughter hit in eye with rock hurled from mowing machine on insured's property, held that insured knew or should have know of defect).

60. La. Acts 1932, No. 174, § 1. The phrase "within reason" was omitted when the statute was incorporated into LA. R.S. 9:3221 (1950).

61. See *Atkinson v. Stern*, 175 So. 126 (La. App. 1937) (where owner thought room unlivable, but was persuaded to lease, there was no reason that owner should have known of defect).

62. *McFlynn v. Crescent Realty Corp.*, 160 So. 454 (La. App. 1935). See *Phillips v. Mitthoff*, 108 So.2d 669 (La. App. 1959).

63. LA. R.S. 9:3221 (1950).

64. *Mitchal v. Armstrong*, 13 So.2d 506 (La. App. 1943).

65. See notes 14-17 *supra*. It would also seem the owner could use the defense of *vis major* and contributory negligence for the same reasons that the tenant would seem to be able to use these as defenses.

66. *Roppolo v. Pick*, 4 So.2d 839 (La. App. 1941) (failed to prove a rent receipt was an assumption of responsibility); *Hoffman v. Zimmer*, 175 So. 115

Another possibility at the disposal of an owner is third party practice — the former call in warranty. While not a defense, it may afford him redress from his tenant for damages which the court might assess. In *Green v. Southern Furniture Co.*,⁶⁷ a building was leased by the owner under a contract whereby the lessee assumed responsibility for all defects therein. Plaintiffs, who were passers-by, were injured when a defective canopy fell to the sidewalk. The court held that the contractual assumption was no defense to the owner, since plaintiffs were not "on the premises" as required by the act. In *Terrenova v. Felder*,⁶⁸ a lease containing an assumption was executed prior to 1932 and the court said the tenant could not be held directly responsible. However, in both of these cases while direct suit was not permitted against the tenant on his assumption, the owner was allowed to call the tenant in warranty.⁶⁹ In these situations, because of the assumption, the lessee was ultimately responsible to the landlord for breach of his obligation. Yet, for the technical reasons given above, the owner could not urge the assumption as a defense to suit by the third party. In such a case an owner condemned to pay damages to a third person can maintain an action against the lessee or call the lessee in warranty for reimbursement of the damages sustained.⁷⁰

Effect of Lessee's Assumption on Third Persons

The basic reason for adoption of R.S. 9:3221 seems to have been a legislative renunciation of the result of *Klein v. Young*,⁷¹ and other cases⁷² which allowed a third person injured as a result of defects in leased premises to maintain successfully an action against the owner notwithstanding the fact that the tenant had assumed all responsibility for vices in the property. It appears that the act was designed to lessen the owner's burden

(La. App. 1937) (failed to prove the assumption with legal certainty).

67. 94 So.2d 508 (La. App. 1957).

68. 28 So.2d 287 (La. App. 1946).

69. *Green v. Southern Furniture Co.*, 94 So.2d 508 (La. App. 1957); *Terrenova v. Feldner*, 28 So.2d 287 (La. App. 1946).

70. See note 69 *supra*. Another situation, yet to be adjudicated, could arise if the lessee only assumed the owner's obligation to make repairs and *did not* assume the owner's responsibility in damages. If a third person was injured by a defect arising because of the tenant's failure to repair, no action would lie directly against the tenant. When the owner is thus sued by the third person, it seems, however, that the owner would be able to call the lessee in warranty to answer for the breach of his obligation.

71. 163 La. 59, 111 So. 495 (1926).

72. *Badie v. Columbia Brewing Co.*, 142 La. 853, 77 So. 768 (1918); *Gardiner v. De Salles*, 126 So. 739 (La. App. 1930); *Hero v. Hankins*, 247 Fed. 664 (5th Cir. 1917); *Frank v. Suthon*, 159 Fed. 174 (E.D. La. 1908).

rather than to increase his responsibilities. Thus it would seem any change the act has effected pertains only to third persons, and eliminates recovery from the owner when the tenant has assumed responsibility with the exception of the notice provisions. Although it is apparent the drafters of the act desired to lessen the owner's burden, they apparently did not desire to go to extremes; thus they provided that the owner could be held liable to third persons if he knew or should have known of the defect.

While R.S. 9:3221 definitely curtails a third person's action against the owner, it does not expressly say what, if anything, will be the remedy for an injured third person deprived of his action against the owner. Since the courts were apparently anxious to avoid an uncompensated injury, they have held that the statute allows a third person to proceed against the tenant when the latter has assumed responsibility.⁷³ If any support is required for this position, it could be theorized that, by virtue of the contract the third person is a beneficiary of a stipulation pour autrui.⁷⁴

When a lessee is sued by a third person as a result of the alleged contractual assumption, it seems he could plead that there was no assumption at all, or at least none as to the risk of the particular defect in question.⁷⁵ Doubtful, but not beyond the realm of possibility, is a plea of *vis major*, or that the vice or defect was caused by an act of God.⁷⁶ Another possibility, yet

73. *Terrenova v. Feldner*, 28 So.2d 287 (La. App. 1946) (tenant held responsible to third person). See also *Green v. Southern Furniture Co.*, 94 So.2d 508, 516 (La. App. 1957); *Poss v. Brown*, 73 So.2d 661 (La. App. 1954).

74. A stipulation pour autrui is a provision in a contract made between the contracting parties that will run to the benefit of a third person. The normal creditor-beneficiary situation would seem applicable, that is, where *A* promises *B* to pay *C*'s debt to *B*. Only one difference is found—the debt is not yet in existence. See LA. CIVIL CODE arts. 1890, 1902 (1870); LA. CODE OF PRACTICE art. 35 (1870). See Smith, *Third Party Beneficiaries in Louisiana, The Stipulation Pour Autrui*, 11 TUL. L. REV. 18 (1936). In *Grundmann v. Trocchiano*, 125 So. 171 (La. App. 1929), affirmed, 127 So. 748 (La. App. 1930), the court held that a contractual assumption was merely an indemnity contract which did not run in favor of third persons. It is doubted whether this case would be affirmed today in view of LA. R.S. 9:3221 (1950). See *Green v. Southern Furniture Co.*, 94 So.2d 508, 517 (La. App. 1957).

75. The effect of these allegations if sustained by the evidence would be to relegate the third person to an action against the owner on the basis of LA. CIVIL CODE arts. 2322 and 670 (1870).

76. In the following cases a plea of *vis major* was considered by the court, but ruled out as not proven: *Fazzio v. Riverside Realty Co.*, 232 La. 794, 95 So.2d 315 (1957) (tenant against lessor); *Thompson v. Commercial National Bank*, 156 La. 479, 100 So. 688 (1924) (third person against owner); *Leithman v. Vaught*, 115 La. 249, 38 So. 982 (1905) (third person against owner); *Barnes v. Beirne*,

to be decided upon in a case involving an assumption, is a claim by the lessee that the third person was contributorily negligent. This plea is available to the owner being sued by a tenant or third person lawfully on the premises,⁷⁷ but it is not specifically provided for in R.S. 9:3221. It would seem that such a defense would be equally available to the tenant. A question would arise as to whether a tenant, when sued by a third person, would be protected by the owner's knowledge of the defect. In other words, would the owner's knowledge of the defect preclude a suit against the tenant? While no case was found which raised this point, it seems that the intention of the statute was to hold the owner responsible to third persons when he knew or should have known of the defect. If this was the intent of the legislature, it would seem as a corollary the legislature must have intended to relieve the tenant of responsibility when the requisite knowledge is found.⁷⁸

Effect of Assumption as to Tenant

It would appear the incorporation into the act of the notice provisions discussed above was intended to have effect only against third persons and not the tenant. Before adoption of the act, a lessee's assumption of responsibility for leased premises barred any subsequent cause of action that he might have had against his lessor for vices and defects in the property.⁷⁹ No case was found that held the notice provisions of the statute applied to disputes between the tenant and the owner.

Sub-tenants

An interesting problem yet to be adjudicated definitively

38 La. Ann. 280 (1886) (third person against owner); Wallace v. Meyer, 4 So.2d 784 (La. App. 1941) (tenant against lessor). In Piegts v. Palombo, 5 So.2d 563 (La. App. 1942), the tenant was suing the lessor and obtained judgment which was reversed on appeal due to the finding that the damage was occasioned by a *vis major*.

Since an owner or lessor may urge a *vis major* as a defense to suit by a third person or his tenant, it certainly seems that a tenant being sued by a third person on his contractual assumption of all of the owner's responsibility may assert the same defenses that were available to the owner, including *vis major*.

77. See note 15 *supra*.

78. Even if the tenant was held protected against direct suit by a third person, it is questionable whether he would be completely free from responsibility. See Green v. Southern Furniture Co., 94 So.2d 508 (La. App. 1947); Terrenova v. Feldner, 28 So.2d 287 (La. App. 1946); and text accompanying notes 67-70 *supra*. The tenant in these cases was allowed to be called in warranty to answer for his breach of obligation to keep the premises in repair.

79. Clay v. Parsons, 144 La. 985, 81 So. 597 (1919); Torres v. Starke, 132 La. 1045, 62 So. 137 (1913); Pecararo v. Grover, 5 La. App. 676 (1927). See Taul v. Graffato, 13 Orl. App. 338 (1916).

arises when there are sub-tenants. The factual situations can be grouped in two areas: first, when there is a contract of assumption between the owner and the *sub-lessor*, and second, where no such contract exists. In the first area the owner has shielded himself from liability to the lessee and to third persons who derive their right to be on leased premises from lessee.⁸⁰ When the lessee sub-leases, the sub-tenant, explained heretofore, is a person on the premises in the right of the lessee and thus has no action against the owner because of R.S. 9:3221, except where the owner has notice of the defects.⁸¹ Where the sub-lessee is injured by a vice or defect in the premises, he may proceed against the sub-lessor only — but on either of two grounds. He may sue the sub-lessor on his assumption of responsibility under R.S. 9:3221, or proceed against him on the ground of the lessor's warranty of no defects as contained in Article 2695. Suppose, however, the guest of the sub-lessee is injured by a defect.⁸² In this case the sub-tenant's guest could not base his action for damages upon Article 2695, because that provision applies only as between the parties to the lease contract.⁸³ Nor could he sue the owner under Article 670 or 2322 because the owner has absolved himself of responsibility. Therefore, apparently the only action the guest of a sub-tenant would have is against the sub-lessor on his contract of assumption. In such a case the court must decide whether a guest of a sub-tenant is on the premises in the right of the sub-lessor, the original lessee. While a guest of a sub-tenant is not specifically mentioned in the source statute, it seems he would be included within the scope of the act.

The second situation arises when the owner does not contract away his responsibility to the lessee, and the lessee sub-lets the premises. In this area the sub-lessee and his guest have an action against the owner under Articles 670 and 2322.⁸⁴ Suppose, how-

80. LA. R.S. 9:3221 (1950).

81. *Ibid.* In *Thompson v. Suprena*, 65 So.2d 801 (La. App. 1953), the sub-tenant's guest sued the owner and the lessor in solido. The judgment for plaintiff was affirmed on appeal and owner was held liable because she knew of the defects. The sub-lessee and his guest sued the owner in *Paul v. Nolen*, 166 So. 509 (La. App. 1936), and the court held they had no action because of the lessee's assumption of responsibility.

82. The sub-lessee's guest may not, of course, sue the owner because the latter has absolved himself of responsibility. See *Paul v. Nolen*, 166 So. 509 (La. App. 1936).

83. *Girouard v. Agate*, 44 So.2d 388 (La. App. 1950); *Graff v. Marmelzadt*, 194 So. 62 (La. App. 1940); *Duplain v. Wiltz*, 194 So. 60 (La. App. 1940); *Tesoro v. Abate*, 173 So. 196 (La. App. 1937); *Heath v. Suburban Building & Loan Ass'n*, 163 So. 546 (La. App. 1935).

84. See *Girouard v. Agate*, 44 So.2d 388 (La. App. 1950) (action brought

ever, the contract between the sub-lessor and the sub-lessee contains a clause whereby the sub-lessee assumes all responsibility for the premises. This would certainly seem to be binding as between the parties, since the sub-lessee has voluntarily contracted to relieve his lessor of the burden imposed by Article 2695.⁸⁵ As to the sub-lessee's guest, a different situation arises. The guest, it would seem, could not maintain an action against the sub-lessor for two reasons. First, the sub-lessor's only duty is dictated by Article 2695, which applies only as between the tenant and his lessor and provides no cause of action for a third person. Second, a contract of assumption to come under R.S. 9:3221 and to be effective as to third persons, must, by the language of the statute, be between the *owner* and the tenant. On the other hand, perhaps the court would apply the act by analogy and say the term "owner" used therein is only illustrative and not exclusive. In absence of this possibility the guest's only action would seem to be against the owner on the basis of Articles 670 and 2322.⁸⁶ Besides the other defenses available to the owner discussed before, in this suit he could assert that the contract of assumption between the sub-lessor and the sub-tenant inured to his benefit, i.e., that he was the beneficiary of a stipulation pour autrui. In one very old decision it was held that an assumption of responsibility between the sub-lessees *did* inure to the owner's benefit.⁸⁷

SUMMARY

Generally the owner is liable for injuries arising from defects in premises except where the tenant is responsible for damages resulting from defects which he is obligated to repair under Article 2716. The owner may, however, enlarge his obligation by agreeing to make repairs he is not statutorily obligated to make. Likewise, the tenant may enlarge his obligation by absolving the owner of responsibility to him and to third persons by a contract which will come under R.S. 9:3221. In the

against owner by heirs of deceased nightwatchman hired by sub-lessee).

85. See *Clay v. Parsons*, 144 La. 985, 81 So. 597 (1919); *Torres v. Starke*, 132 La. 1045, 62 So. 137 (1913); *Pecararo v. Grover*, 5 La. App. 676 (1927).

86. See *Lasyone v. Zenoria Lumber Co.*, 163 La. 185, 111 So. 670 (1927) (third person against owner); *Walsh v. Whitney Nat. Bank*, 4 So.2d 553 (La. App. 1941).

87. *Muntz v. Algiers & G. Ry.*, 114 La. 437, 38 So. 410 (1905) (where plaintiff sued for damages for injuries to minor child sustained when run over by defendant's street car, court permitted defendant-owner to call sub-lessee in warranty because sub-lessee's contract of assumption ran to owner's benefit).

latter case, the landlord is not relieved of all responsibility, because he is still liable for vices and defects in parts of premises not leased, in common areas, for injuries caused by his own negligence, and for injuries involving defects which he knew or should have known of.

A lessor who is not the owner of leased premises guarantees the lessee against vices in the property. The language of Article 2695 containing this warranty has been followed in limiting it to the lessee alone. This warranty to a sub-lessee, it seems, may be dispensed with by the sub-lessee assuming responsibility. However, it remains to be seen how a third person will be affected thereby.

Ben R. Miller, Jr.

Real Actions To Determine Ownership or Possession Under the Proposed Louisiana Code of Civil Procedure

Under present Louisiana law, rights of ownership and possession of immovables are asserted in four principal real actions.¹ The petitory action and the possessory action are provided for expressly in the Code of Practice;² the action of jactitation is a creature of jurisprudence;³ and the action to establish title was created by statute.⁴ Firmly embraced within this group of actions is the fundamental civilian distinction between an action to determine possession and an action to determine ownership. Which action a litigant should employ depends essentially upon whether he or the opposing litigant, or neither, is in possession of the contested immovable.

Because of the inflexibility of the present real actions and the technical manner in which the rules applicable thereto have been applied by the courts, they have been criticized as hypertechnical and unworkable.⁵ The Louisiana State Law Institute was in-

1. LA. CODE OF PRACTICE art. 4 (1870): "A real action is that which relates to claims made on immovable property, or to the immovable rights to which they are subjected. . . ."

For a comprehensive treatment of present real actions in Louisiana, see JOHNSON, LOUISIANA REAL ACTIONS (1959).

2. LA. CODE OF PRACTICE arts. 5, 43 (petitory action); 6, 46 (possessory action) (1870).

3. *Riley v. Kaempfer*, 175 So. 884, 886 (La. App. 1937): "A jactitation or slander of title action is a creature of our jurisprudence. It is not provided for in the codal or statutory laws of this state."

4. LA. R.S. 13:5062 (1950), formerly La. Acts 1908, No. 38.

5. Comment, *The "Writ" System in Real Actions*, 22 TUL. L. REV. 459 (1948).