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Notice to Vacate Leased Premises

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Comments

NOTICE TO VACATE LEASED PREMISES

LOUISIANA ACT 200 OF 1936:[1]

> When any person having leased any house, store, or other buildings, or landed estate, for a term of one or more years, or by the month or otherwise, either verbally or otherwise, shall be desirous of obtaining possession of the said leased premises upon the termination of the lease, either by limitation or by non-payment of the rent when due, or any other breach of the said lease, he shall demand and require in writing his tenant to remove from and leave the same, allowing him five calendar days from the day such notice is delivered.
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> And if the owner or his agent shall be desirious of obtaining the possession of the said leased premises for any other reason or cause, such as, for the purpose of leasing the said premises to another tenant or otherwise, he shall give to the tenant a notice in writing to vacate, ten days before the expiration of the month, if the same be a monthly lease, or thirty days before the expiration of the said lease, if the said lease be in writing, and for a term of one or more years or otherwise, other than by the month.

This comment is primarily concerned with the requirement of giving notice to vacate upon the termination of a contract of lease. It is apparent that a distinction is drawn between the notice necessary to oust the tenant upon termination of the lease by limitation or because of a breach by the lessee, and that necessary upon termination because of an expiration of the term. Only five days' notice calculated "from the day such notice is delivered" is required in the former, whereas from ten to thirty days' "before the expiration of the . . . lease" is stipulated in the latter. This seems a justifiable differentiation because the basis for termination of the lease contemplated in the first paragraph of the Act is either a violation of the contractual terms by the lessee or the occurrence of a contingency which would entitle the lessor to immediate possession but for the positive directions of the statute.

1. Dart's Stats. (1939) § 6597. La. Act 284 of 1855 was the first of the series of legislative measures which culminates in La. Act 200 of 1936 [Dart's Stats. (1939) § 6597]. It became Section 2155 of the Revised Statutes of 1870, which has since been amended by La. Act 96 of 1888; La. Act 23 of 1894; La. Act 52 of 1900; La. Act 313 of 1908; La. Act 49 of 1918; La. Act 55 of 1926; and La. Act 200 of 1936.

In the second paragraph, on the other hand, no violation on the part of the tenant is contemplated, and longer notice is stipulated in his favor.

Although the notice required of the lessor under Act 200 of 1936 must be in writing, it need not be made in any special manner or at any particular place; the important requisite is that the lessee actually receive the notice.[2] However, the mere publication of an advertisement offering property for rent does not constitute formal notice to vacate.[3]

Notice Upon Limitation or Breach

The first paragraph of the Act, which has appeared on our statute books in substantially its present form since 1855,[4] deals with three causes of termination of lease in which notice to vacate is required: (1) limitation; (2) nonpayment of the rent when due; and (3) "any other breach."

As to the first of these causes, the word "limitation" has never been interpreted by the courts. In the Act of 1855, the legislature may have intended it to be synonomous with "expiration," no notice in such an event having originally been provided. But the second paragraph, dealing specifically with notice upon the expiration of the term of the lease, was added in 1908;[5] and both provisions have been continued in the numerous amendments since that date.[6] Since an act should be interpreted in such a way as to give effect to every portion thereof,[7] it would seem that a different interpretation should be found for "limitation," in order to avoid a serious conflict within the Act itself: It suggests itself in the light of the common law *conditional limitation.*

Primarily the term limitation implies the termination of the lease by the happening of a contingency stipulated in the contract, independent of the will of the lessor or of any breach by the lessee, "as when land is granted to a man so long as he is

2. Brunet v. Schulman Bros., 177 So. 847 (La. App. 1938). The assignee of a lessor may remove the lessee by summary process. Walker v. Vanwinkle, 8 Mart. (N.S.) 560 (La. 1830); Norman v. Woods, 8 La. App. 184 (1928). The landlord must show that the relationship of landlord and tenant exists. Dyer v. Wilson, 190 So. 851 (La. App. 1939).

3. Tuemler v. Latter & Blum, Inc., 188 So. 172 (La. App. 1939). Despite the clear application of Act 200 of 1936, the court failed to apply it, discussing only Article 2686, La. Civil Code of 1870. For a more detailed discussion of the similarities of the two, see text, infra, pp. 166-167.

4. La. Act 284 of 1855.

5. La. Act 313 of 1908.

6. See note 1, supra.

7. Jackson State Nat. Bank v. Merchants' Bank & Trust Co., 177 La. 975, 149 So. 539 (1933), and authorities therein cited.

parson of Dale, or so long as he continues unmarried, or the like."[8] Frequently, however, the occurrence of the objective condition merely gives the lessor an option to cancel, without a similar privilege in the lessee. The sending of the notice to vacate as a prerequisite to a summary proceeding to recover possession of the leased premises is an exercise of the option granted the lessor.

> "A development of the primary form of limitation, in which the happening of the future contingency is controlled neither by the landlord nor the tenant, is one in which such future happening provided as a possibility in the lease is set in motion by the landlord. This is probably the most frequent type of conditional limitation, and is well illustrated by the clause which furnishes the landlord the right to terminate the lease on a number of days' notice in the event of a bona fide sale of the property . . . or by express reservation without any reason given . . . ."[9]

Examples of both these types of limitations are contained in the Civil Code,[10] with specific provisions for notice. In the case of reservation of the right to possession in the event of sale, Article 2739[11] provides ten days' notice[12] as to all except predial leases, which are granted a full year's notice; and Article 2734[13] provides (by reference to Article 2696[14]) ten days' notice when the lessor wishes to exercise the unconditional right to possession which he has reserved. Since these provisions are for specific situations, they may possibly be interpreted as not being superseded by the more general provisions of Act 200 of 1936; but it would seem more reasonable, if the interpretation of "limitation" suggested above is accepted, to consider these notice articles replaced by the Act.[15] In this event the notice required would be five days

8. Burnee Corp. v. Uneeda Pure Orange Drink Co., 132 Misc. 435, 230 N. Y. Supp. 239, 248 (1928).

9. Burnee Corp. v. Uneeda Pure Orange Drink Co., 132 Misc. 435, 230 N.Y. Supp. 239, 249 (1928).

10. Art. 2735 (lessor's stipulation of right to resume possession in event of sale of property) and Art. 2732 (reservation by lessor of right to dissolve the lease for the purpose of occupying the premises himself), La. Civil Code of 1870. Cf. Arts. 1744 and 1761, French Civil Code.

11. La. Civil Code of 1870.

12. By reference to Art. 2686, La. Civil Code of 1870.

13. La. Civil Code of 1870.

14. La. Civil Code of 1870.

15. Another solution would be to adopt the narrower definition of *conditional limitation* (see text, supra, p. 162). This would exclude both of these reservations and consequently leave Articles 2734 and 2739 unaffected by the provisions of Act 200 of 1936.

in all instances—a very material reduction from the year provided for predial leases by Article 2739.

The non-payment of rent clause of the Act is much more clearly defined. Article 2712[16] provides that "The lessee may be expelled from the property if he fails to pay the rent when it becomes due," and, as was said in a recent case, "The non-payment of rent 'when due' is a peremptory cause for the dissolution of the lease and the restoration of possession of the leased property to the lessor."[17]

Since the failure to pay money due under a contract is a passive violation, an additional duty is imposed upon the lessor to put the obligor in default before he can obtain a dissolution of the lease in case of non-payment.[18] This demand need not be made on the exact day the rent is due,[19] as is necessary under certain circumstances at common law.[20]

The remaining instance in which only five days' notice is required, under the first paragraph of Act 200 of 1936, is that of "any other breach of the said lease." This has been construed to include a non-compliance with affirmative acts required of the lessee in the contract;[21] but there has been very little litigation

16. La. Civil Code of 1870.

17. Gaar v. Prudhomme, 181 So. 604, 606 (La. App. 1938). Accord: Jackson v. Muse, 190 So. 162 (La. App. 1939).

But a lease cannot be terminated by reason of non-payment of the rent when due, if the lessee was merely awaiting the arrival of the collector who customarily called for collection of rent notes, although the latter were contractually made payable at a stipulated bank: Gottlieb v. Schloss, 5 La. App. 379 (1927); and if a lessor, month after month, has, without objection or protest, accepted the rental a few days after it was due, he cannot, without previous notice to his tenant, claim a forfeiture of the lease: Bacas v. Mandot, 3 Orl. App. 324 (1906), quoted with approval in Standard Brewing Co. v. Anderson, 121 La. 935, 941, 46 So. 926, 928 (1908). Cf. Saxton v. Para Rubber Co. of Louisiana, 166 La. 308, 117 So. 235 (1928), in which the lessor notified the tenant that in the future payment would be required promptly on the date specified in the contract, and *at the office of the lessor*. No place of payment was set forth in the lease, so under Article 2157 payment would be made at the place of business of the lessee. It was held that the notification was ineffective without the acquiescence of the lessee, since it changed the provisions of the contract.

18. Arts. 1912, 1914, La. Civil Code of 1870. See Ricou v. Hart, 47 La. Ann. 1370, 1372, 17 So. 878, 879 (1895); Bacas v. Mandot, 3 Orl. App. 324, 327 (1906).

19. Hyde v. Palmer and Southmayd, 12 La. 359 (1838).

20. "At common law . . . a demand for the rent on the day on which it is due, at a certain time of such day, and upon the premises, is necessary in order that the landlord may enforce an express condition of forfeiture for nonpayment. None of the statutes in regard to summary proceedings assert the necessity of any such formal demand, though . . . sometimes they provide for a demand for the rent as a part of a notice to quit. . . ." 2 Tiffany, A Treatise on the Law of Landlord and Tenant (1912) 1757-1758, § 274(3).

21. Southside Plantation Co. v. Fabacher, 12 Orl. App. 418 (1915) (failure to maintain a barbed wire fence around the leased premises).

on the meaning of this phrase. It must apply exclusively to breaches by the lessee, since the notice to vacate provided by the Act is only that of the lessor, and a party cannot take advantage of his own breach to annul a lease.[22] Apparently the clause is sufficiently broad to include dissolution of the lease in the event the lessee "makes another use of the thing than that for which it was intended," *or* damage results from an abuse of the enjoyment of the premises,[23] so that five days' notice would be required before the landlord could exercise his right to summary proceedings after dissolution on that ground.

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22. See Sigur v. Lloyd, 2 La. Ann. 421, 422 (1846).

23. Art. 2711, La. Civil Code of 1870: "If the lessee makes another use of the thing than that for which it was intended, *and* if any loss is thereby sustained by the lessor, the latter may obtain the dissolution of the lease. . . ." (Italics supplied.) It has been held that putting to another use *and* damage to the lessor are both necessary in order to obtain a dissolution under this article. New Orleans & C. R. Co. v. Darms, 39 La. Ann. 766, 2 So. 230 (1887).

The English versions of this portion of the article in the Civil Codes of 1808 (p. 377, 8.3.27) and 1825 (Art. 2681) were identical with that of 1870; but the French text, which is controlling in the event of a difference between the French and English versions [Davis v. Houren, 6 Rob. 255 (La. 1843); Phelps v. Reinach, 38 La. Ann. 547 (1886); Straus v. New Orleans, 166 La. 1035, 118 So. 125 (1928); Sample v. Whitaker, 172 La. 722, 135 So. 38 (1931)] was taken verbatim from the projet of the Code Napoleon (Book III, Title 13, Art. 38), and uses "or" instead of the "and" italicized above: *"Si le preneur emploie la chose louée à un autre usage que celui auquel elle a été destinée, ou dont il puisse résulter un dommage pour le bailleur, celui-ci peut demander la resiliation du bail."* Translation: "If the lessee makes another use of the thing than that for which it was intended, *or* if any loss is thereby sustained by the lessor, the latter may obtain the dissolution of the lease." (Italics supplied.)

The interpretation of the corresponding article of the Code Napoleon (Art. 1729) has caused a definite split among the French commentators; all but two agreeing that *ou* should be interpreted disjunctively rather than conjunctively, so as to require either a different use or damage to the lessor, or both. ". . . *et on s'étonne que M. Duranton (XVII, 99) et M. Duvergier (I, 400) aient cru nécessaire de remplacer cette disjonctive ou par la copulative et, pour ne voir ici qu'une seule idée.*" 6 Marcadé, Explication Théorique et Pratique du Code Civil (1875) 480. Translation: ". . . and it is surprising that M. Duranton (XVII, 99) and M. Duvergier (I, 400) had thought it necessary to replace the disjunctive or [*ou*] by the conjunctive and [*et*], so as to contemplate here only a single thought."

The position of the majority of the commentators is adequately presented by Huc: *"Il n'est pas nécessaire, pour l'application de ce texte, qu'il y ait à la fois changement de destination, et dommage causé pour abus de jouissance. Le bailleur pourra demander la résiliation dans chacun des deux cas, et à plus forte raison si les deux cas se réalisent."* 10 Huc, Commentaire Théorique et Pratique du Code Civil (1897) 421, nº 311. Translation: "It is not necessary, for the application of this provision [Art. 1729], that there be at one and the same time a change of destination and damage caused by the abuse of the enjoyment. The lessor will be able to demand the resolution in each of the two cases, and all the more so if the two happen together." Accord: 20 Baudry-Lacantinerie et Wahl, Traité Théorique et Pratique de Droit Civil, du Contrat de Louage I (1906) 439-446, nº 772-778; 25 Laurent, Principes de Droit Civil Français (1877) 285-287, nº 263; 6 Marcadé, op. cit. supra, at 479-481; 10 Planiol et Ripert, Traité Pratique de Droit Civil Français (1932) 706-708, nº 568; 9 Troplong, Le Droit Civil (1859) 397-398, nº 300. Contra: 17

NOTICE UPON EXPIRATION OF TERM

The second paragraph of the Act, which first appeared in 1908,[24] provides the notice which must be given in the event of termination of the lease because of the expiration of the term of the lease.[25]

The language of this paragraph seems very broad, but upon analysis it is apparent that only two general types of leases are covered: (1) monthly leases, either oral or written, which are terminable upon giving written notice "ten days before the expiration of the month"; and (2) *written* leases "for a term of one or more years or otherwise, other than by the month," which require thirty days' notice before the expiration of the lease.[26] Not covered by the Act are oral leases, other than by the month; and consequently there is no provision for the giving of notice upon the expiration of such a lease. (And, of course, there is no provision for summary proceedings.) Apparently "for a term of one or more years or otherwise, other than by the month" would include written leases for a shorter period than a month, for which the thirty days' notice would seem utterly inconsistent. However, since such short-term contracts of lease are almost invariably oral, no real injustice is done by this broadness of terminology.

Notice to vacate urban leases without a fixed duration, which are "considered to have been made by the month,"[27] is doubly

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Duranton, Cours de Droit Français (1834) 74, nº 99, note 2. *"Le texte dit: ou dont il puisse résulter un dommage pour le bailleur; mais il faut évidemment la conjonctive et dont il puisse . . . car si c'est suivant la destination de la chose que le preneur en use, il n'y a pas à examiner s'il en résulte ou non un dommage pour le bailleur. Ce dommage n'est même pas supposable."* Translation: "The text says: or if any loss is thereby sustained by the lessor; but it is evident that the conjunctive *and* should be used . . . because if one uses the thing in accordance with the purpose for which it was intended, there is no need to determine whether or not a loss is sustained by the lessor. This loss is not even supposable."

Thus, through a mistranslation of our Code, Louisiana reached a result opposite to the position taken by the majority of the French commentators. It is hoped that *New Orleans & C. R. Co. v. Darms* will not be followed in the future.

24. La. Act 313 of 1908.

25. The phrase "any other reason or cause" appearing in the second paragraph of the Act does not seem to refer to the lessor's reason for breaking the lease in the *direct* sense but to the *distant* reason for which he wishes to secure possession of the property. The example is given "such as, for the purpose of leasing the said premises to another tenant or otherwise. . . ."

26. This would include the "lease of a predial estate when the time has not been specified," which is "presumed to be for one year," under Article 2687.

27. Art. 2685, La. Civil Code of 1870.

provided: by the Act, and by Article 2686.[28] No confusion is caused by this duplication, because the same period of notice, ten days, is required by each.[29] At any rate Article 2686 is not entirely superseded by the Act, for the Article requires that notice be given by *either* party desiring to end the lease;[30] Act 200 of 1936 applies only to the lessor. Article 2686 presents the only requirement imposed upon the lessee concerning the giving of notice to vacate; and although it stipulates that "notice in writing" must be given, it has been held that the actual abandonment of the property by the tenant without the landlord's consent, but with his full knowledge,[31] is the equivalent of such notice.[32] But since the notice must be given at least ten days before the expiration of the month which has begun to run, a lessee who vacates at the *end* of the month is liable for the following month's rent.[33]

The provision for ten days' notice provided in Article 2686 and Act 200 of 1936 (besides applying to leases the duration of which has not been specified by the parties, that is, "by the

28. Art. 2686, La. Civil Code of 1870: ". . . If no time for its duration has been agreed on, the party desiring to put an end to it must give notice in writing to the other, at least ten days before the expiration of the month, which has begun to run." Cf. McCarroll v. Newman, 176 So. 140, 142 (La. App. 1937): "The notice provided for under Article 2686 of the Civil Code is one required to legally determine the termination of a contract of lease if the contract itself does not stipulate the time of its duration. That notice has nothing to do with ejectment of a stubborn tenant who refuses to vacate the premises after termination of the contract or upon breach of its terms. Proceedings incidental to regaining possession of a leased premises under such circumstances are fully provided for under . . . Act 200 of 1936. . . ."

Prior to Act 284 of 1855, Article 2656 of the Code of 1825 set forth the only requirement for notice to vacate and Article 2683 of the Code of 1825 provided for summary proceedings to eject after notice was given. These two articles were carried forward to the Code of 1870 as Articles 2686 and 2713. All amendments to the 1855 Act, the parent of Act 200 of 1936, have provided for summary proceedings, rendering the present Article 2713 obsolete.

29. Leonard v. Klein, 2 Orl. App. 85 (1905); Ballay v. Columbia Brewing Co., 4 Orl. App. 365 (1907); United Life & Accident Ins. Co. v. Scallan, 174 So. 674 (La. App. 1937); Brunet v. Schulman Bros., 177 So. 847 (La. App. 1938).

See Parsons v. Iron Warehouse, Inc., 10 Orl. App. 228 (1913), where it was held that a notice to "vacate the premises as soon as possible" was not a sufficient notice to put an end to a monthly lease since Article 2686 contemplates that the written notice should fix with certainty the date of its termination.

30. See note 28, supra.

31. If the landlord was absent at the time the tenant vacated, the lease continues until the end of the month which had begun to run when the landlord returned and found his property abandoned. Waples v. New Orleans, 28 La. Ann. 688 (1876).

32. Lafayette Realty Co. v. Travia, 11 Orl. App. 275 (1914).

33. Lafayette Realty Co. v. Travia, 11 Orl. App. 275 (1914).

month"[34]) is also applicable to tacitly reconducted leases of urban property,[35] which have been held to be by the month.[36]

The failure of the lessor of a predial lease to give his tenant notice as prescribed in Act 200 of 1936 does not mean that the landlord will be forced to submit to a tacit reconduction of the lease if the lessee wishes to stay upon the premises beyond the term of the lease. Concerning Article 2688,[37] the Supreme Court said in the case of *Ashton Realty Co. v. Prowell.*[38]

> "The meaning of that article is simply this: That, if both parties to the lease remain silent and inactive for the space of one month after the expiration of the lease, they shall both be presumed to have acquiesced in, and tacitly consented to, a renewal of the lease for another year. It has no application whatever when either party has clearly announced his intention *not to renew* the lease on the same terms or for a full

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34. Art. 2685, La. Civil Code of 1870. By implication it does not apply to predial leases in which no duration has been specified and which are "presumed to be for one year" (Article 2687) because the notice is directed to be given "at least ten days before the expiration of the *month,* which has begun to run" (Article 2686). (Italics supplied.)

35. Art. 2689, La. Civil Code of 1870: "If the tenant either of a house or of a room should continue in possession for a week after his lease has expired, without any opposition being made thereto by the lessor, the lease shall be presumed to have been continued, and he cannot be compelled to deliver up the house or room without receiving the legal notice or warning directed by article 2686."

36. Murrell v. Lion, 30 La. Ann. 255 (1878). But the tacit reconduction of predial leases is for a year. Art. 2688, La. Civil Code of 1870. For a discussion of tacit reconduction see Comment (1938) 1 LOUISIANA LAW REVIEW 439.

37. La. Civil Code of 1870: "If, after the lease of a predial estate has expired, the farmer should still continue to possess the same during one month *without any step having been taken, either by the lessor or by the new lessee,* to cause him to deliver up the possession of the estate, the former lease shall continue subject to the same clauses and conditions which it contained; but it shall continue only for the year next following the expiration of the lease." (Italics supplied.)

When the required possession is had and reconduction does take place, it is only for one year at a time, regardless of the length of the original lease. Dyer v. Wilson, 190 So. 851, 853 (La. App. 1939).

38. 165 La. 328, 331, 115 So. 579, 581 (1928). In this case the lessor of a plantation under a written lease for a term of three years did not give the lessee notice as required under the Act, but upon the expiration of the lease the lessee notified him that he did not wish to renew the lease. The lessee then remained in possession under an agreement that he should vacate upon ten days' written notice from the lessor. It was held that a tacit reconduction had not taken place under Article 2688 and summary proceedings would lie against the lessee after ten days' notice. But apparently the court considered this "agreement" an oral lease with reservation of the right to take possession of the land at any time (Article 2734), upon the giving of the notice prescribed in the contract.

In Federal Land Bank of New Orleans v. Sanders, 167 So. 140 (La. App. 1936), the lessor, by reason of affirmative acts, was estopped from dispossessing the tenant upon the termination of a predial lease despite the fact that the parties contracted against tacit reconduction under Article 2688.

year, for the purpose of the law is not to *force* a contract upon parties unwilling to contract, but merely to establish a rule of evidence, or presumption, as to their intention in the premises."

CONCLUSION

Despite the importance of these provisions in the life of the average man, there has been very little appellate litigation on leases and notice to vacate, probably because the amount involved is ordinarily too small to make an appeal worthwhile. Clarification by the higher courts is, therefore, not likely to be forthcoming. The legislature, however, could do much to alleviate the confusion: (1) by conclusively defining the word "limitation" in Act 200 of 1936 as a common law "conditional limitation,"[39] and amending Articles 2734 and 2739 to resolve the resulting conflict between them and the Act; or (2) by deleting the word if it was inadvertently continued after the reason for its inclusion was lost, thus obviating the apparent inconsistency within the Act itself.

As discussed herein, the conditional limitation theory appears to supply the more logical interpretation of the statute as a whole, but deletion of the word "limitation" from the text of the Act would seem the preferable solution when the legislature approaches the problem. In such an event, the reservations by the lessor would still be covered by the specific codal provisions, and all requirements of notice to vacate would be reconciled.

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USUFRUCTUARY'S RIGHT TO THE PROCEEDS OF OIL AND GAS WELLS IN LOUISIANA

LOUISIANA CIVIL CODE OF 1870:

ART. 552. The usufructuary has a right to the enjoyment and proceeds of mines and quarries in the land subject to the usufruct, if they were actually worked before the commencement of the usufruct; but he has no right to mines and quarries not opened.[1]

In the development of the oil and gas law of Louisiana, the courts have been forced to apply, to the situations which arise, articles of the Civil Code which never contemplated the nature

39. See text, supra, pp. 162-163.
1. La. Civil Code of 1870.