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Landlord and Tenant - Lessor's Liability to Third Persons - Defective Premises

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to adopt this view in the *Barret* case[11] where the substitution occurred after verdict. However, if the judge who attempts to instruct the jury was not present during the taking of testimony, he may well be unable adequately to state the law applicable to the facts of the case; particularly is this true in Louisiana where a transcription of the testimony is not required.

Most courts that hold a substitution of judges during the course of trial to be reversible error have emphasized the fact that a substituted judge who has had no opportunity to observe the demeanor of witnesses on the stand cannot adequately comment on the evidence to the jury.[12] This argument would have no weight in Louisiana since the trial court is precluded by law from expressing any opinion on the facts of the case.[13] The general problem presents a balance between the interest of the courts in the rights of the individual, on the one hand, and the desire for a speedy and efficient administration of the criminal law, on the other.

Although there is some authority to the contrary,[14] it is generally held that such right as a defendant may have against substitution of judges is a personal one and may be waived by him.[15] This view would probably be adopted by the Louisiana court.

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LANDLORD AND TENANT—LESSOR'S LIABILITY TO THIRD PERSONS —DEFECTIVE PREMISES—In two recent cases, the wife of a lessee and the guest of a lessee were denied recovery for injuries received as a result of defects in the premises. In both instances, the lessor was not the owner of the building, and it was *held,* that the obligations imposed by Articles 2692 and 2695[1] run in favor of the lessee only. *Duplain v. Wiltz,* 190 So. 60 (La. App. 1940); *Graff v. Marmelzadt,* 194 So. 62 (La. App. 1940).

11. State v. Barret, 151 La. 52, 91 So. 543 (1922). While this case was decided before the Code of Criminal Procedure was adopted, Louisiana has long held that error without injury does not entitle the defendant to a new trial. See State v. Kennedy, 11 La. Ann. 479 (1856); State v. Kennon, 45 La. Ann. 1192, 14 So. 187 (1893); State v. Pascal, 147 La. 634, 85 So. 621 (1920).

12. Freeman v. United States, 227 Fed. 732 (C.C.A. 2d, 1915); Commonwealth v. Claney, 113 Pa. Super. 439, 173 Atl. 840 (1934).

13. Art. 384, La. Code of Criminal Procedure.

14. Freeman v. United States, 227 Fed. 732 (C.C.A. 2d, 1915); Commonwealth v. Claney, 113 Pa. Super. 439, 173 Atl. 840 (1934).

15. People v. Henderson, 28 Cal. 466 (1865); State v. Wood, 118 Kan. 58, 233 Pac. 1029 (1925); State v. McCray, 189 Iowa 1239, 179 N.W. 627 (1920).

1. La. Civil Code of 1870.

Article 2695 of the Civil Code provides that the lessor guarantees the lessee against all vices and defects of the leased premises. Although Article 2322[2] imposes liability upon the owner for damage occasioned by its ruin, Article 2695 does not treat of the liability of the owner ex delicto, but of the indemnification due the lessee from the lessor (who may not be the owner) if any loss should result to the lessee from the defective condition of the premises.

At an early date, the Louisiana Supreme Court held that a guest of the lessee could not, under the provisions of Article 2322, recover damages for personal injuries caused by the failure of the owner to make necessary repairs.[3] This was in accord with the French authorities on the subject.[4] However, in *Cristadoro v. Von Behren's Heirs*,[5] the decision was repudiated insofar as the responsibility provided by Article 2322 is restricted to neighbors and passers-by; the owner was held liable in damages to a third person injured on the premises because of defective structure. This rule was later followed in numerous decisions.[6] In some cases[7] the court enforced the landlord's warranty to the tenant

2. Art. 2322, La. Civil Code of 1870: "The owner of a building is answerable for damages occasioned by its ruin, when this is caused by neglect to repair it, or when it is the result of a vice in its original construction."

3. McConnell v. Lemley, 48 La. Ann. 1433, 20 So. 887, 34 L.R.A. 609, 55 Am. St. Rep. 319 (1896).

4. Art. 1386, French Civil Code, is identical with Art. 2322, La. Civil Code of 1870, providing that: *"Le propriétaire d'un bâtiment est responsible du dommage causé par sa ruine, lorsqu'elle est arrivée par une suite du défaut d'entretien ou par le vice de sa construction."* 31 Demolombe, Contrats et Obligations (1882) 568, nº 659; 7 Larombière, Théorie et Pratique Des Obligations (1885) 658-659, nº 3; 20 Laurent, Principes de Droit Civil Français (1876) 696, nº 644.

5. 119 La. 1025, 44 So. 852, 17 L.R.A. (N.S.) 1161 (1907). The reason for the Louisiana Supreme Court reaching a contrary result from McConnell v. Lemley, 48 La. Ann. 1433, 20 So. 887, 34 L.R.A. 609, 55 Am. St. Rep. 319 (1896), is that Article 670 of the Louisiana Civil Code does not appear in the French Civil Code, and as this article applies to neighbors and passers-by, Article 2322 would be mere surplusage if given the same meaning as Article 1386 of the Code Napoléon.

6. Wise v. Lavigne, 138 La. 218, 70 So. 103 (1915); Boutte v. New Orleans Terminal Co., 139 La. 945, 72 So. 513 (1916); Allain v. Frigola, 140 La. 982, 74 So. 404 (1917); Badie v. Columbia Brewing Co., 142 La. 853, 77 So. 768 (1918); Ciaccio v. Carbajal, 145 La. 869, 83 So. 73 (1919); Thomson v. Cooke, 147 La. 922, 86 So. 332 (1920); Breen v. Walters, 150 La. 578, 91 So. 50 (1922); Davis v. Hochfelder, 153 La. 183, 95 So. 598 (1923); Shelton v. Masur, 157 La. 621, 102 So. 813 (1925); Pierre v. Levy, 3 La. App. 769 (1926); Lasoyne v. Zenoria Lumber Co., 163 La. 185, 111 So. 670 (1927).

7. Schoppel v. Daly, 112 La. 201, 36 So. 322 (1904); Boutte v. New Orleans Terminal Co., 139 La. 945, 72 So. 513 (1916); Ciaccio v. Carbajal, 145 La. 869, 83 So. 73 (1919); Thomson v. Cooke, 147 La. 922, 86 So. 332 (1920); Breen v. Walters, 150 La. 518, 91 So. 50 (1922); Shelton v. Masur, 157 La. 621, 102 So. 813 (1925).

under Articles 2693 and 2695 for the benefit of third persons. In *Morris v. Hava*,[8] although the wife of the lessee was not permitted to recover under the above Articles, her action was maintained against the owner and lessor by virtue of Article 2315.[9]

The owner's ignorance of the unsafe condition of his building does not relieve him of the duty imposed by law to maintain his property in a condition of safety to others,[10] nor is he any less responsible for injuries to persons simply because the lessee, by virtue of Article 2694,[11] could repair the structure and deduct the expenses from the rent.[12] However, where it is obligatory on the lessee to make the incidental repairs according to Article 2716,[13] the lessor is not liable to persons injured by reason of the lessee's breach of duty.[14]

Where the landlord by contract shifted the responsibility of repairing the building to the tenant, he was not liable to the tenant for injuries sustained by reason of defects in the structure;[15] but in *Klein v. Young*,[16] the Supreme Court held that a lessor could not absolve himself from responsibility to third persons by covenanting with the lessee that the latter shall see to the safety of the building. Insofar as the point decided is concerned, this decision has been rendered ineffective by the passage of Act 174 of 1932.[17] This Act provides that where there is such a con-

8. 180 So. 216 (La. App. 1938).

9. Art. 2315, La. Civil Code of 1870: "Every act whatever of man that causes damages to another, obliges him by whose fault it happened to repair it. . . ."

10. Tucker v. Illinois Central R.R., 42 La. Ann. 114, 7 So. 124 (1890); Allain v. Frigola, 140 La. 982, 74 So. 404 (1917); Atkins v. Bush, 141 La. 180, 74 So. 897, L.R.A. 1917E 809 (1917); Badie v. Columbia Brewing Co., 142 La. 853, 77 So. 768 (1918); Thomson v. Cooke, 147 La. 922, 86 So. 332 (1920).

11. La. Civil Code of 1870.

12. Art. 2694, La. Civil Code of 1870. Boutte v. New Orleans Terminal Co., 139 La. 945, 72 So. 513 (1916); Ciaccio v. Carbajal, 145 La. 869, 83 So. 73 (1919); Shelton v. Masur, 157 La. 621, 102 So. 813 (1925). See Badie v. Columbia Brewing Co., 142 La. 853, 860, 77 So. 768, 770 (1918).

13. La. Civil Code of 1870.

14. Brodtman v. Finerty, 116 La. 1103, 41 So. 329 (1906); Harris v. Tennis, 149 La. 295, 88 So. 912 (1921); Yates v. Tessier, 5 La. App. 214 (1926); Tesoro v. Abate, 173 So. 196 (La. App. 1937).

15. Grundman v. Trocchiani, 13 La. App. 277, 125 So. 171 (1929); 127 So. 748 (La. App. 1930).

16. 163 La. 59, 111 So. 495 (1927).

17. La. Act 174 of 1932, § 1 [Dart's Stats. (1939) §§ 6595-6596]: "The owners of buildings or premises which have been leased under a contract whereby the tenant or occupant assumes responsibility for the condition of the premises shall not be liable in damages for injury caused by any vice or defect therein to any tenant or occupant, nor to any one in the building or on the premises by license of the tenant or occupant, unless the owner knew of such vice or defect, or should within reason have known thereof, or had

tract between the *owner* and the lessee, the *owner* shall not be liable to the lessee or to third persons injured on the premises unless the owner had reason to know or should have known of the defects in the building. This act shifts to the tenant or the third person the responsibility of proving that the owner knew of the defect in the premises where the tenant contracts to keep the structure in repair.[18]

Since the decision in *Klein v. Young*,[19] the courts of appeal have held conflicting views regarding the applicability of Articles 2693-2695 to cases in which third persons were injured as a result of defects in the premises.[20] In *Duplain v. Wiltz*,[21] one of the principal cases, the court based its decision on the dictum in *Klein v. Young*[22] to the effect that Articles 670 and 2322 render the owner liable to visitors and licensees for harm caused by defects in the premises, but that a third person cannot rely on the provisions of Articles 2693-2695 as a basis for recovery against the landlord since this warranty of the lessor runs in favor of the lessee only. However, *Klein v. Young*[23] stands only for the proposition that an owner cannot contract with the lessee to absolve himself from liability to third persons injured on his property. A

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received notice of such vice or defect and failed to remedy same within a reasonable time thereafter.

"The term 'by license of the tenant or occupant' as used in the above section has reference to those who derive their right or license to be on the premises from said tenant or occupant, such as subtenants, roomers, servants, guests, customers, employees, members of the family, and others of a similar status."

This Act was held constitutional in Paul v. Nolen, 166 So. 509 (La. App. 1936), no writ to the Supreme Court being applied for.

18. McFlynn v. Crescent Realty Co., 160 So. 454 (La. App. 1935) (writ of error refused on May 27, 1935).

19. 163 La. 59, 111 So. 495 (1927).

20. Health v. Suburban Building, 163 So. 546, 549 (La. App. 1935); Tesoro v. Abate, 173 So. 196, 201 (La. App. 1937). Contra: language in Potter v. Soody Building Co., 144 So. 183 (La. App. 1932).

21. 194 So. 60 (La. App. 1940).

22. 163 La. 59, 111 So. 495 (1927). Also it was unnecessary to rely on Articles 2693 and 2695 in the cases of *Heath v. Suburban Building* and *Tesoro v. Abate*, cited in *Duplain v. Wiltz*. In Heath v. Suburban Building, 163 So. 546 (La. App. 1935), it was held that the defendant owner had no legal right to go on the property until he had accepted title, and accordingly, was not liable to the plaintiff, suing for condition of the premises, adjudicated to defendant at sheriff's sale prior to plaintiff's injury. Noted in (1936) 11 Tulane L. Rev. 139. Tesoro v. Abate, 173 So. 196 (La. App. 1937) (writ of certiorari refused on May 24, 1937). It was held that the obligation of the tenant under Art. 2716, La. Civil Code of 1870, was to make repairs to the door knob and therefore the injured plaintiff had no right of action against the landlord. See note 14, supra.

23. 163 La. 59, 111 So. 495 (1927).

third person was thereby permitted to recover against the owner where the tenant under similar conditions could not.[24]

It is an established doctrine in Louisiana that a person may lease property of which he is not owner.[25] Where the lessor is also the owner, there should be no difficulty in applying the provisions of Articles 670 and 2322, thereby allowing persons accidentally injured by defects in leased premises to recover against the owner.[26] The inference from Act 174 of 1932[27] is that the legislature deemed the *owner* to be liable to third persons. However, where the lessor is not the owner (as in the two principal cases) there can be no recovery against the lessor unless the provisions of Articles 2693 and 2695 are extended to include third persons lawfully on the premises and injured by reason of defective condition of the building. The rule might admit of one exception: where there is a contract between the owner and the lessor to the effect that the lessor is to assume the responsibility of repairing the premises. In such an event the lessor would be liable if Act 174 of 1932[28] is interpreted to mean that any one who covenants to repair the leased structure is to be liable to any person injured because of vices or defects in the building. However, the Act does not specifically so provide, and the terms owner and lessee are used throughout its provisions.

The Louisiana jurisprudence is of little assistance in the solution of problems arising when the lessor is not the owner of the building. By implication from the instant case where the wife was injured, her cause of action should be against the owner under Article 2322.[29] However, the lessee, husband of the injured

24. Grundman v. Trocchiani, 13 La. App. 277, 125 So. 171 (1929); 127 So. 748 (La. App. 1930).

25. Tippet v. Jett, 10 La. 359 (1836); Dennistoun v. Walton, 8 Rob. 211 (1844); Sientes v. Odier, 17 La. Ann. 153 (1865); Town of Morgan City v. Dalton, 112 La. 9, 36 So. 208 (1904); Stinson v. Marston, 185 La. 365, 169 So. 436 (1936). See Spence v. Lucas, 138 La. 763, 770, 70 So. 796, 798 (1915).

26. In the following cases, Arts. 670 and 2232, La. Civil Code of 1870, were relied on to allow recovery by a third person against the lessor and owner, without mentioning Arts. 2693 and 2695, La. Civil Code of 1870. Wise v. Lavigne, 138 La. 218, 70 So. 103 (1915); Allain v. Frigola, 140 La. 982, 74 So. 404 (1917); Badie v. Columbia Brewing Co., 142 La. 853, 77 So. 766 (1918); Breen v. Walters, 150 La. 578, 91 So. 50 (1922); Davis v. Hochfelder, 153 La. 183, 95 So. 598 (1923).

27. Dart's Stats. (1939) §§ 6595-6596.

28. La. Act 174 of 1932 [Dart's Stats. (1939) §§ 6595-6596].

29. In a recent case Bunette v. Toebelman, 195 So. 135 (La. App. 1940), decided by the same Circuit Court of Appeal after the decision in the two principal cases, the landlord was held liable in damages to the plaintiff, the tenant's paramour, who was injured by falling through defective flooring on the back porch of the leased premises. No mention was made as to whether the lessor was the owner, but by using the term "landlord," such is implied.

party, would be liable for the medical expenses incurred by his wife.[30] Is this a loss to the lessee as contemplated by Article 2695, for which the lessor must indemnify the lessee? If the lessor must reimburse the lessee for medical expenses incurred by members of his family, it follows that the lessee would have to bring suit in his own name.[31] However, if the jurisprudence is interpreted as meaning that any third person is given a right to recover against the lessor under the provisions of Article 2695, then whether the injured person was a member of the lessee's family would make no difference.[32]

Although a hardship may be inflicted by the doctrine of the present cases, the interpretation of Article 2695 as giving rise only to an ex contractu obligation between lessor and lessee appears warranted by the language of the Code. Under Article 2322, it is clear that the injured party has recourse against the owner for injuries received by reason of the defective premises. Therefore the doctrine of the principal cases should be limited to their particular facts, i.e., where the lessor is not the owner of the defective building.

J. G. C.

MEASURES OF DAMAGES—VENDOR'S BREACH OF BOND FOR DEED —FRUITS AND REVENUE OF THE LAND—Defendant refused to execute an act of sale as provided by a bond for deed contract, notwithstanding full performance by the purchaser who then sued for specific performance and damages. *Held,* that the plaintiff was entitled to specific performance and damages caused by defendant's granting a mineral lease subsequent to the time the purchaser became entitled to a conveyance under the bond for deed,

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The court did not discuss either Duplain v. Wiltz, 190 So. 60 (La. App. 1940) or *Graff v. Marmelzadt.* The decision rather went off on the grounds of sufficiency of evidence to permit the plaintiff to recover damages.

30. Overton v. Nordyke, 10 La. App. 317, 120 So. 544 (1929).

31. LaGroue v. New Orleans, 114 La. 253, 38 So. 160 (1905); Shield v. F. Johnson & Son Co., 132 La. 773, 61 So. 787, 47 L.R.A. (N.S.) 1080 (1913); Labat v. Gaerthner Realty Co., 146 So. 69 (La. App. 1933).

However, damages resulting to the wife are her separate property, recoverable by herself alone. Cartwright v. Pivesigur, 125 La. 700, 51 So. 692 (1910); Stevens v. Illinois Central R. Co., 6 La. App. 165 (1927).

32. There was dictum in *Brodtman v. Finnerty* assimilating the wife of the lessee to her husband, but this was overruled in *Ciaccio v. Carbajal.* In Brennan v. Iskevitch, 148 La. 973, 88 So. 237 (1921), the court said: "We are not informed why plaintiff should be supposed to be a lessee jointly with her husband simply because she acted as his agent in negotiating the lease and do not know of any reason why she should be so considered."