

Louisiana Law Review

Volume 21 | Number 3
April 1961

Leases by Non-Owners

Robert B. Butler

Repository Citation

Robert B. Butler, *Leases by Non-Owners*, 21 La. L. Rev. (1961)
Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol21/iss3/5>

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 kayla.reed@law.lsu.edu.

LOUISIANA LAW REVIEW

LOUISIANA STATE UNIVERSITY LAW SCHOOL

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

Single copy \$1.25

VOLUME XXI

APRIL, 1961

NUMBER 3

STUDENT BOARD

Ben R. Miller, Jr., *Editor-in-Chief*
David W. Robertson, *Managing Editor*
Hillary J. Crain, *Associate Editor*
Sam J. Friedman, *Associate Editor*
George C. Herget, Jr., *Associate Editor*
Gerald L. Walter, Jr., *Associate Editor*

Edward C. Abell, Jr.	James L. Dennis	Gerald LeVan
Bernard E. Boudreaux, Jr.	James A. George	Jerry W. Millican
Merwin M. Brandon, Jr.	Robert A. Hawthorne, Jr.	J. Peyton Moore
Robert B. Butler, III	Walter I. Lanier, Jr.	Martin Smith, Jr.
John S. Campbell, Jr.		George M. Snellings III

FACULTY ADVISORY BOARD

Dale E. Bennett	Milton M. Harrison	Robert A. Pascal
Frank S. Craig, Jr.	Paul M. Hebert	Alvin B. Rubin
Harriet S. Daggett	Carlos E. Lazarus	J. Denson Smith
Joseph Dainow	Henry G. McMahon	Donald H. Wollett
Melvin G. Dakin	Wex S. Malone	A. N. Yiannopoulos

George W. Pugh, *Faculty Editor*

Beverly D. Walker, *Editorial Assistant*

COMMENTS

Leases by Non-Owners

The lease of a thing is a contract by which one party, the lessor, undertakes to convey to another, the lessee, the enjoyment of a thing during a certain period in return for a fixed price.¹ The lessor is personally bound to furnish the lessee with the enjoyment of the property during the lease term, and if the lessee is disturbed in his possession of the property he has recourse against the lessor. Thus a lease is basically a personal contract under which the lessee receives an obligation of the lessor to do.² Followed to its logical conclusion, the notion that

1. LA. CIVIL CODE art. 2674 (1870).

2. 2 PLANIOL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) no. 1707 (1959): "The right of the lessee resulting from the obligation contracted towards him by the lessor is purely personal: it is a credit, the lessor is bound towards him by an obligation to do. The

a lease is a personal contract would support the theory that a person may lease property even though he has no connection with it whatsoever. The lessee, having received the lessor's obligation to maintain him in peaceful possession, would be entitled to no more. On the other hand, even though a lessor does not undertake to convey title, he does undertake to convey corporeal possession. Consequently, it might be thought that, at least in certain cases, he should be required to have a right to that corporeal possession good against the true owner. This Comment will consider some problems that arise in connection with the rights of a lessee where the lessor has no right of possession valid against the owner.

Articles 2681 and 2682

Article 2681 provides: "He who possesses a thing belonging to another, may let it to a third person, but he cannot let it for any other use than that to which it is usually applied." At first glance it might appear that this article allows any possessor to let property, even though he might not have a right to corporeal possession good against the true owner.³ However, it would seem that the possessor contemplated in Article 2681 is not an actual owner or one who possesses as owner with no right against the owner, but is one who has a right to possession good against the true owner. In the first place, a lease deals with corporeal possession and there is no good reason for saying that the possessor mentioned in the article is necessarily one who possesses as owner. Secondly, the last clause of Article 2681, which provides "but he cannot let it for any other use than that to which it is usually applied," indicates that not only is the possessor a corporeal possessor, but he is one possessing under the right of the true owner. A precarious possessor cannot lease property for a use to which he does not have the right to put it in such a way as to bind the true owner, and the prohibition against the possessor letting the

lessee does not acquire any real rights on the thing comparable to those of the usufructuary and enforceable against everyone."

3. The problem of what situations are covered by Article 2681 has not received careful attention in the cases. Article 2681 has been applied somewhat indiscriminately in cases dealing with those who possess as owner and those who possess through the owner. Thus it has been used in cases involving leases by lessees, administrators, and possessors as owner. *Weil v. Segura*, 178 La. 421, 151 So. 639 (1933) (lessor sold property during lease); *Knapp v. Guerin*, 144 La. 754, 81 So. 302 (1919) (lease by lessee); *Succession of Sparrow*, 42 La. Ann. 500, 7 So. 611 (1890) (lease by administrator); *Succession of Myrick*, 38 La. Ann. 611 (1886) (lease by administrator); *Paulding v. Dowell*, 2 La. 452 (1831) (lessor possessed as owner); *Mathews v. Priest*, 165 So. 535 (La. App. 1936) (lessor sold property during lease).

property for a use other than its usual use suggests that this is what the codifiers had in mind. If the article is interpreted to authorize leasing by those who possess the property of another as owner, it becomes hard to find a reason for this last clause. Presumably the clause gives someone the privilege of avoiding the lease if the property is leased for such a use. But whom? The true owner would already have the privilege of disregarding any lease made by the possessor, so it seems doubtful that the clause was intended for his benefit. If the privilege was accorded the lessee, we must ask why it was given to him in the case where the property is put to such a use when it was denied him in other cases. There seems no good answer to this. It might be said that the unusual use would expose him to an action in damages by the true owner while a customary one would not, but this seems rather tenuous.

Read in the suggested light, Article 2681 constitutes a definite recognition that a person who has the right to possession against the owner can lease the property to another. However, such a right is limited by the right of the owner to insist that it not be let for a use other than that to which it is usually applied. If the owner objects that the possessor has let the thing for such a use, then the lessee's recourse is against the lessor on his warranty of enjoyment "against the claim of the owner" under Article 2682.⁴ From this point of view, since the Code does not specifically deal with the relationship between a lessee and a lessor when the latter has no right to possession against the true owner, the rights of such a lessee should be determined by the general principles of lease and contract.

Absence of a Right to Possession as a Disturbance

Since a lease is basically a personal contract by virtue of which the lessor guarantees to the lessee the peaceable enjoyment of the premises,⁵ a lessee should be in no position to complain as long as his enjoyment is not disturbed. If, for example, the period of the lease has expired and there has been no disturbance, the lessee should not be entitled to recover from the lessor the rent he has paid even though the lessor may have had no right to possession of the property.⁶ By the same token, he should have no

4. LA. CIVIL CODE art. 2682 (1870) : "He who lets out the property of another, warrants the enjoyment of it against the claim of the owner."

5. 2 PLANIOL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) no. 1707 (1959).

6. *Sientes v. Odier*, 17 La. Ann. 153 (1865) (lessee who discovered, after the

valid defense against an action for unpaid rent by the lessor.⁷ However, the lessee's enjoyment may be disturbed,⁸ and problems arise as to what constitutes a "disturbance" and the recourse available to the lessee if he is disturbed.

A lessor is not bound to protect the lessee against disturbances by third persons claiming no right to the property.⁹ However, he warrants the lessee against the non-tortious acts of those claiming a right.¹⁰ When the acts of such persons hinder the lessee in his use of the property he has suffered a disturbance in fact and should then be entitled to a reduction of the rent commensurate with the disturbance,¹¹ and to damages caused by it.¹² If a suit is filed against the lessee asserting a right to the property, the lessee may call the lessor in warranty and be dismissed from the suit.¹³ If the action against the lessor is successful, it results in a judgment of eviction from all or a part of the property and the lessee is entitled to have the rent reduced proportionately and to recover damages.¹⁴

A difficult problem arises when a valid right to possession of the property exists in a third person but there has been no physical interference with the lessee's possession. The question then presented is whether the lessee may count himself disturbed. At this point it might be helpful to consider the writings of some of the French commentators on the subject of a lease by one who has no right to possession. Broadly speaking there were two

expiration of the lease, that his lessor had no right to the property was not entitled to recover rent paid under the lease).

7. *Paulding v. Dowell*, 2 La. 452 (1831) (lack of title in lessor held no defense to suit for rent after the expiration of the lease).

8. One of the obligations of the lessor is to maintain the lessee in peaceful possession. LA. CIVIL CODE art. 2692 (1870).

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

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

11. This follows simply from the fact that rent is the lessee's payment for enjoyment; to the extent that he does not have the enjoyment, he should not have to pay for it.

12. This follows from the fact that if the lessee is disturbed, the lessor has breached his obligation to supply the peaceful possession, and so should respond in damages as in the breach of any other obligation.

13. *Id.* art. 2704.

14. 2 PLANIOL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) no. 1683 (1959).

views on the subject among the writers examined. Some believed that the lessee in such a lease should have rights analogous to those of a vendee in the sale of the thing of another.¹⁵ Accordingly, upon discovery that another had a right to the possession of the property the lessee would be allowed to annul the lease and recover damages from his lessor. Others maintained that the lease of the thing of another should be valid because a lease is a personal contract creating only an obligation to do in the lessor.¹⁶ Even if there were an outstanding right to possession in a third person, the lessee should not be allowed to annul the lease, because there is always a possibility that the lessor would be able to furnish the possession. As an exception to this rule, they thought that a lessee who had contracted in good faith and who had leased the property for the purpose of establishing on it some important work or business¹⁷ should generally be allowed to have the lease dissolved.¹⁸ In such a case it was said that the parties must have understood that the lessee would not have peaceful enjoyment if he had to fear an eviction.

Neither of these views has been adopted or rejected by the Louisiana jurisprudence. The case which comes closest to finding a disturbance in such a situation is one which held that a trapper threatened with arrest by a third party claimant was entitled to count himself evicted.¹⁹ Though the language of the court²⁰ indicates that the mere existence of the claim may have

15. 25 LAURENT, PRINCIPES n° 56 (4th ed. 1887). Though the authors do not take this view, a discussion of it may be found in BAUDRY-LACANTINERIE ET WAHL, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL, DU CONTRAT DE LOUAGE nos 125, 126, 127 (1906). Baudry-Lacantinerie et Wahl cites I DUVERGIER, n° 82, and 4 CHAMPIONNIÈRE ET RIGAUD, n° 3097 as taking the view that such a lease is invalid.

16. BAUDRY-LACANTINERIE ET WAHL, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL, DU CONTRAT DE LOUAGE nos 125, 126, 127 (1906); 7 DEMANTE, COURS ANALYTIQUE DE CODE CIVIL n° 159, bis. II (1887); GUILLOUARD, TRAITÉ DU CONTRAT DE LOUAGE nos 52, 53 (3d ed. 1891).

17. Exactly what would be taken to constitute an important work or business so as to fall within this exception is not certain. Apparently this rule would give considerable flexibility to the judge in deciding whether or not the lease should be set aside.

18. Baudry-Lacantinerie et Wahl mentioned this exception, but did not favor it. The other authors cited in note 16 *supra* advocated this exception. Some writers, such as Guillouard, allowed another exception. When prior to the granting of the lease the lessor had put himself in the possession of another's property and the use to which it was being put operated to waste or despoil it, they allowed the good faith lessee to have the lease annulled. This was based on the idea that no one should be forced to participate in a fraud.

19. Board of Levee Commissioners for Orleans Levee District v. Dalton, 19 La. App. 490, 139 So. 487 (1932).

20. "In this case, the defendants' possession was disturbed by Alpha's claim, by his threats to institute suit and of arresting any one sent on the property by defendant." *Id.* at 492, 139 So. at 488.

weighed somewhat in justifying the trapper's refusal to take possession, the determinative factor was probably the threat of arrest. No case was discovered that dealt expressly with the question of whether an outstanding claim might amount to a disturbance. However there have been cases where the lessee in physical possession has sought to avoid his lease obligations and the courts have stated that one in peaceful possession cannot contest his lessor's title,²¹ thus the courts seem to be proceeding on the idea that such a lessee is in peaceful possession even if his lessor has no right to possession.

It seems that the courts could go farther than they have done in a finding of disturbance. In many cases it is plain that knowledge of an outstanding right would impede the lessee in his physical use of the property. Then, too, it is doubtful that the parties to most leases contemplate that the lessee is obligated to remain on the property and pay rent even if he discovers that a third person has a right to possess the property. Whether a finding of disturbance should be limited to cases of the nature of the French exception previously mentioned is difficult to say. It would seem to this writer that whenever the purpose for which the property was leased indicates that the lessee would not have contracted if he had known that his lessor had no right, the outstanding right should amount to a disturbance. Of course, if the lessee was aware of the absence of a right of possession at the time of the lease, he should have no complaint.

The question remains as to whether the idea that a valid outstanding right in a third person constitutes a disturbance would fit into our jurisprudence. To answer this it is necessary to examine some of the rules which have evolved. A number of cases may be found announcing that a lessee in peaceful possession may not contest his lessor's title.²² Sometimes the court

21. *Lacaze v. Beeman*, 178 So. 660 (La. App. 1938); *Mathews v. Priest*, 165 So. 535 (La. App. 1936). Some cases have simply said that a lessee in possession may not contest his lessor's title. *Thomas v. Jackson*, 158 La. 1019, 105 So. 49 (1925); *Davidson v. Fletcher*, 130 La. 668, 58 So. 504 (1912); *Campbell v. Hart*, 118 La. 871, 43 So. 533 (1907). But it would seem the basis of decision in these cases has been the idea that such a lessee is in peaceful possession, because it has been held that a lessee whose possession is disturbed may contest his lessor's title. *Board of Levee Commissioners for Orleans Levee Dist. v. Dalton*, 139 So. 487 (La. App. 1932).

22. *Thomas v. Jackson*, 158 La. 1019, 105 So. 49 (1925); *Davidson v. Fletcher*, 130 La. 668, 58 So. 504 (1912); *Campbell v. Hart*, 118 La. 871, 43 So. 533 (1907); *Tippett v. Jett*, 10 La. 359 (1836); *Lacaze v. Beeman*, 178 So. 660 (La. App. 1938); *Mathews v. Priest*, 165 So. 535 (La. App. 1936); *Federal Land Bank v. Spencer*, 160 So. 175 (La. App. 1935). As pointed out in note 21 *supra*, though

states that he is estopped from contesting his lessor's title.²³ These cases usually involve a lessee in physical possession of the property who is attempting to avoid the payment of rent. Since a lessee is entitled only to possession, he should have no complaint that his lessor has no title to the property, provided the lessor has a right to its possession. Thus the rule might be more accurately stated: A lessee in peaceful possession cannot contest his lessor's right to possession. Put in these terms the rule simply says that so long as the lessee is receiving what he bargained for, i.e., peaceful possession, he has no complaint. This is probably all that the courts have in mind, even though they do speak in terms of title. The estoppel idea seems to go farther than simply saying that the lessee cannot complain because he obtained what he bargained for. It might well represent a conclusion that basic fair play and policy require that so long as the lessee keeps what was surrendered to him under the lease, he should not be able to withhold the rent.²⁴

There is no reason why the idea that an outstanding right to possession constitutes a disturbance should conflict with these rules. If the lessee has not been prevented from putting the premises to the use for which they were rented, it would seem that the outstanding claim has not in fact disturbed him. If, acting as the parties would have expected him to act when faced with such a claim, he refrained from putting the premises to their intended use, it would seem that he has been disturbed. In this case he should be able to sue for the dissolution of the lease, provided that he has surrendered possession. Or, he ought to be able to sue for the dissolution of the lease while in possession if he has continued to pay rent. He should not be permitted to sue for dissolution of the lease or defeat an action for rent while retaining possession of the lease and refusing to pay rent. The lessor having given possession ought to have it returned to him when the lessee refuses to pay rent. To allow the lessee to retain possession of the property and withhold the rent while a determi-

all of these cases do not mention peaceful possession, they seem to be based on the understanding that the lessee in physical possession is in peaceful possession.

23. *Thomas v. Jackson*, 158 La. 1019, 105 So. 49 (1925); *Davidson v. Fletcher*, 130 La. 668, 58 So. 504 (1912); *Morgan City v. Dalton*, 112 La. 9, 36 So. 208 (1904); *Federal Land Bank v. Spencer*, 160 So. 175 (La. App. 1935).

24. Sometimes a court says that the lessee, having recognized the lessor's right to lease, cannot question it while holding the property. There is probably more behind the rule, however, than just the idea that by taking the lease the lessee has recognized the lessor's right. To allow a lessee to withhold the rent and keep the possession while forcing the lessor to show a right to that possession would certainly open the way for lessees to take advantage of lessors.

nation of whether there has been a disturbance is made would seem to favor lessees too greatly. This result could be reached by saying that such a lessee is estopped to maintain that he has been disturbed. If the lessee remained on the property a sufficient length of time after discovering the outstanding right and without notifying the lessor, he might be held to have waived the disturbance. However, if the lessee has notified the lessor and retained possession while waiting for the lessor to guard him against the claim, no waiver should be found. Damages, where sustained, would seem to be recoverable by the lessee as in the case of any disturbance.

Assertion of a Right by the Lessee

Heretofore the discussion has centered around the situation where the outstanding title was in a third person. A somewhat different situation is presented where a lessee seeks to assert a title or right to possession contradictorily to his lessor. Suppose, for instance, the lessee purchases a title carrying with it a right to possession, or discovers that he has such a title or right during the lease. The fact that a man has at one time been a lessee of property does not prevent him from asserting a right against his lessor.²⁵ Nor does it seem that he is barred from acquiring, during the lease term, a right or title to the property adverse to that of his lessor. What he may not do under the jurisprudence is remain in possession and refuse to pay rent on the ground that he now possesses under some other right.²⁶ This rule has been supported on the theory that to allow him to do this would be to allow him to change the nature of his possession by his own act in contravention of the Code.²⁷ Estoppel has also been invoked

25. *Banks v. Yarborough*, 104 So.2d 283 (La. App. 1958).

26. *Federal Land Bank v. Spencer*, 160 So. 175 (La. App. 1935) (lessee who held over could not assert a lease which he had acquired from a third person as a defense to a suit for ejectment by his original lessor).

27. *Campbell v. Hart*, 118 La. 871, 43 So. 533 (1907); *Williams v. Douglas & Rooks*, 11 La. Ann. 632 (1856); *Federal Land Bank v. Spencer*, 160 So. 175 (La. App. 1935). There are several articles in the Code that indicate that such action on the part of a lessee might be prohibited. Examples are Articles 3441, 3446, 3514. Article 3514 speaks specifically of the contract of lease and provides: "One can not prescribe against his own title, in the sense, that he can not change by his own act the nature and the origin of his possession. Thus, he whose possession is founded on a contract of lease which is adduced, is considered as always possessing by the same title, and can not prescribe by any length of time." It is doubtful that this and similar articles were meant to stand for the proposition that a lessee cannot assert a title as a defense to the payment of rent while remaining in its possession. To see this it is necessary to look at the rules of prescription, which it would seem the codifiers had in mind when enacting such articles. As a general principle, only one who possesses for himself may acquire by way of acquisitive prescription. Thus a precarious possessor cannot acquire by way of

in such cases. Neither of these rules would seem to prevent a lessee who had surrendered possession of the property before the end of the lease from asserting a right to possession. The question of whether he could terminate his rent obligation for the remainder of the lease by proving such a right in himself is a troublesome one. It does not seem that the lessee should be counted as a third person, the existence of a claim in whom might be a disturbance. Thus a lessee who discovered that he had a valid right to possession or who purchased such right during the existence of the lease could not say that he was disturbed by the existence of a valid claim in himself. Such a lessee might argue that rent is only due for possession obtained under the lease and that, having shown a right to possession, his possession should henceforth be in his own right and not under the lease. However, the lessee should not be able to make performance by the lessor impossible and then claim that the failure to perform relieves him of his obligations. There would seem to be one case in which the lessee should be able to acquire a right and terminate his lease obligations by surrendering possession. This is where the existence of a valid claim in another constitutes a disturbance and the lessor, after having been given notice by the lessee, fails to take adequate steps to stop the disturbance. Here the lessee would be relieved of his rent obligation, not by the acquisition of the claim but by the lessor's failure to guard him against a disturbance.

Robert B. Butler, III

acquisitive prescription because he possesses for another. Once a man has begun to possess for another it is presumed that he continues to possess for that other. Nevertheless, the French Civil Code provides for two cases where the precarious possessor may acquire the right to prescribe. These are when the nature of his possession is changed by the acts of a third person or when he sets up an adverse claim against the owner. In both cases the precarious possessor must make it clear to the one for whom he had possessed that he now holds in his own right. Then he possesses for himself. Article 3512 indicates that the codifiers intended to make at least one of these French exceptions the law of Louisiana. It provides that "precarious possessors may prescribe when the cause of their possession is changed by the act of a third person; as if a farmer, for example, acquires from another the estate which he rented, for if he refuse afterwards to pay the rent, if he declare to the lessor that he will no longer hold the estate under him but that he chooses to enjoy it as his own, this will be a change of his possession by an external act, which shall suffice to give a beginning to the prescription." Thus it would seem that where a lessee buys the property from one other than the lessor and refuses to pay rent he then possesses for himself. This does not mean that his lessor should not be able to evict him. It only means that the proper ground for eviction is not a rule saying that the lessee cannot change the nature of his possession by his own act.