

# Leases - Sale of Lease Distinguished from Sale of Right of Occupancy

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court will have notice of the law which would be applied in the transferor court on an important issue, thereby minimizing the difficulties inherent in the former's determination and application of the law and policy of the state of the transferor court.<sup>35</sup>

This discussion of considerations involved in a transfer under section 1404(a) is particularly important in Louisiana because of its civil law tradition. It is not difficult to suppose a case in which interpretation or construction of civilian institutions would be crucial to parties litigating here. There is little likelihood that judges sitting in federal courts in common law jurisdictions will have the same expertise as a Louisiana judge in civil law generally, or Louisiana civil law in particular. This is a factor that may militate against transfer to a district court sitting in a common law jurisdiction. If transfer is ultimately granted, it may be advisable for the federal district court sitting in Louisiana to insure the clarity of the applicable law by either a transfer conditioned upon stipulation of the parties, or a pronouncement on the applicable law of Louisiana.

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#### LEASES — SALE OF LEASE DISTINGUISHED FROM SALE OF RIGHT OF OCCUPANCY

Plaintiff and defendant entered a lease agreement containing an acceleration clause. Upon nonpayment of rent by defendant, plaintiff obtained judgment for rent past due and rent for the unexpired term of the lease. The judgment recognized plaintiff lessor's privilege on defendant's movables situated on the leased premises. National Cash Register intervened, asserting a vendor's privilege and chattel mortgage on several cash registers which had been placed on the leased premises prior to recordation of the chattel mortgage. By virtue of a writ of fieri facias, both the right of occupancy and defendant's movables,

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35. The feasibility of such a pronouncement will depend upon the stage of the proceedings in the transferor court. If the proceeding is in the preliminary pleading stage, it may be difficult or impossible for the court to isolate issues of law which may be determinative of the case. This dilemma would appear to be a factor which militates against transfer. See *Chenoweth v. Atchison, T. & S.F. R.R.*, 229 F. Supp. 540 (D. Colo. 1964), where the transferee court transferred the action back to the transferor court, as the original transfer was premature in view of the complex issues of law which could most expeditiously be isolated and decided by the transferor court at a later stage in proceedings there.

including the cash registers, were seized and sold to satisfy plaintiff's judgment. The right of occupancy was adjudicated to plaintiff before the cash registers were sold. Intervenor contended that plaintiff's purchase of the "lease" before adjudication of the seized movables extinguished the lease by confusion, resulting in loss of plaintiff's privilege on the unsold movables. *Held*, purchase of the right of occupancy by the lessor extinguished the lease; however, since the lessor's privilege is security for the obligation to pay rent and since the obligation to pay rent became merged into the judgment, the lessor's privilege became security for payment of the judgment and thus was not extinguished. *Morrison v. Faulk*, 158 So. 2d 837 (La. App. 4th Cir. 1963).

To secure payment of rent the Civil Code provides the lessor with a privilege and right of pledge on the lessee's movables found on the leased premises.<sup>1</sup> The courts have uniformly held that the lessor's privilege attaches as soon as the movables are placed on the leased property.<sup>2</sup> Article 3263 of the Civil Code ranks the lessor's privilege superior to a vendor's privilege on movables remaining in the possession of the vendee.<sup>3</sup> Similarly, the lessor's privilege primes a chattel mortgagee's claim if the mortgaged property is placed on the leased premises before recordation of the mortgage.<sup>4</sup> However, if the chattel mortgage

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1. LA. CIVIL CODE art. 2705 (1870): "The lessor has, for the payment of his rent, and other obligations of the lease, a right of pledge on the movable effects of the lessee, which are found on the property leased." See *id.* arts. 3217-3219.

2. See, *e.g.*, *Youree v. Limerick*, 157 La. 39, 101 So. 864 (1924); *Universal C.I.T. Credit Corp. v. Parker*, 117 So. 2d 660 (La. App. 2d Cir. 1960).

3. LA. CIVIL CODE art. 3263 (1870): "The privilege of the vendor on movables sold by him which are still in the possession of the vendee, yields to that of the owner of the house or farm which they serve to furnish or supply, for his rents."

4. See LA. R.S. 9:5353-5354 (Supp. 1964). 9:5354 provides: "Every such mortgage shall be effective as against third persons from the time of filing in the proper offices, and the filing shall be notice to all parties of the existence of the mortgage, which shall be superior in rank to any privilege or preference arising *subsequently thereto*." (Emphasis added.)

The lessor's privilege attaches as soon as movables are placed on the leased premises. Consequently, when the mortgage is recorded prior to placing the mortgaged movables on the leased premises, R.S. 9:5354 applies ranking the chattel mortgage ahead of the lessor's privilege. On the other hand, the courts have applied R.S. 9:5354 conversely: if the mortgaged movables are placed on the leased premises before recordation of the mortgage, the lessor's privilege will prime the chattel mortgage. See, *e.g.*, *Smith v. Bratsos*, 202 La. 493, 12 So. 2d 245 (1942); *Union Bldg. Corp. v. Burmeister*, 186 La. 1027, 173 So. 752 (1937); *White v. Hammond Stage Lines*, 180 La. 962, 158 So. 353 (1934); *Comegys v. Shreveport Kandy Kitchen*, 162 La. 103, 110 So. 104 (1926); *Youree v. Limerick*, 157 La. 39, 101 So. 864 (1924); *Universal C.I.T. Credit Corp. v. Parker*, 117 So. 2d 660 (La. App. 2d Cir. 1960).

is recorded before the movables are placed on the leased premises, the chattel mortgagee will prevail.<sup>5</sup>

According to the jurisprudence, a lease is composed of two main parts: the right to enjoy the leased premises (the right of occupancy); and the obligation to pay rent.<sup>6</sup> Furthermore, the courts have held that the right of occupancy can be severed from the obligation to pay rent.<sup>7</sup> Thus the sale of the right of occupancy merely conveys the right of enjoyment without the obligation to pay rent,<sup>8</sup> whereas the sale of a lease transfers the obligation to pay rent as well as the right to enjoy the leased premises.<sup>9</sup> Finally, the jurisprudence supports the proposition that the purchase of the lease by the lessor operates to extinguish the lease by confusion since the correlative rights and duties are united in a single person, the lessor.<sup>10</sup>

5. See note 4 *supra*. An interesting problem arises if the mortgage is recorded before the beginning of the term of the lease but after the lease agreement has been signed. The courts have allowed the chattel mortgagee to prevail. See *In re Ruston Creamery*, 190 La. 681, 182 So. 715 (1938); *Hardie v. Wright*, 125 So. 312 (La. App. Or. Cir. 1929).

6. In *Walker v. Dohan*, 39 La. Ann. 743, 744, 2 So. 381, 382 (1887), the court stated: "The contract embodies, in itself, reciprocal rights and obligations — the right of enjoyment and the obligation of paying rent."

7. *Ranson v. Voiron*, 176 La. 718, 146 So. 681 (1933); *Villavaso v. Creditors*, 48 La. Ann. 946, 20 So. 167 (1896); *Schwartz v. Saiter*, 40 La. Ann. 264, 4 So. 77 (1888); *Walker v. Dohan*, 39 La. Ann. 743, 2 So. 381 (1887); *Lehman v. Dreyfus*, 37 La. Ann. 587 (1885); *Brinton v. Datas*, 17 La. Ann. 174 (1865); *D'Aquin v. Armant*, 14 La. Ann. 217 (1859); *Bartels & Dana v. Creditors*, 11 La. Ann. 433 (1856) (dissent); *Succession of Howard*, 2 Orl. App. 163 (La. App. Or. Cir. 1905).

8. See note 7 *supra*. The dissent in *Bartels* has often been quoted when the need arose to distinguish between the sale of a lease and the sale of the right of occupancy: "There are two ways of selling the unexpired term of a lease; one by selling it for a premium, subject to the payment of rent to the landlord, the other by selling or assigning the right of occupation without the assumption of the rent." *Bartels & Dana v. Creditors*, 11 La. Ann. 433, 437 (1856).

9. See note 7 *supra*. Additionally, neither the lease nor the right of occupancy is subject to the lessor's privilege since neither is classified as a movable. See *Henry Rose Mercantile & Mfg. Co. v. Stearns*, 154 La. 946, 98 So. 429 (1923); *Brunner Mercantile Co. v. Rodgin*, 130 La. 358, 57 So. 1004 (1912). An interesting problem arises when the right of occupancy is seized by a third person and not by the lessor. In *Loyacano v. Villere & Burglass*, 6 La. App. 37 (Orl. Cir. 1927), the lessor obtained a judgment for the full term of the lease and seized movables on the leased premises to satisfy his judgment. Subsequently, the lessor attempted to cancel the lease after the right of occupancy had been seized by a general creditor. The court denied the lessor's claim since the right of occupancy had been seized by a third person recognizing that the right of occupancy was subject to seizure by any general creditor under a writ of fieri facias. In *Loyacano*, the lessor had the opportunity to seize and purchase the right of occupancy, which would terminate the lease. However, his inaction allowed a third person to seize the right of occupancy, thereby preventing the lessor from doing so.

10. See *Villavaso v. Creditors*, 48 La. Ann. 946, 20 So. 167 (1896); *Bartels & Dana v. Creditors*, 11 La. Ann. 433 (1856). However, when a third person purchases the lease, he obligates himself to pay the purchase price of the lease to the lessee and rent to the lessor. See *Schwartz v. Saiter*, 40 La. Ann. 264, 4

In the instant case, National Cash Register introduced a novel argument in support of its claim. First, intervenor contended that the entire lease was purchased by the lessor, thereby extinguishing the lease by confusion.<sup>11</sup> Second, intervenor asserted that since the lessor's privilege arises out of the lease, extinguishment of the lease operates to extinguish the lessor's privilege. Intervenor concluded that plaintiff's purchase of the lease before adjudication of the cash registers terminated the lease at the moment of sale, causing the loss of plaintiff lessor's privilege on the unsold cash registers and thus the proceeds from the sale of the cash registers could not be applied to plaintiff's judgment.

In rejecting intervenor's first contention, the court reasoned that the judgment for rent for the unexpired term of the lease replaced, or was substituted for, the obligation to pay rent. In other words, although the lessee retained the obligation to satisfy the judgment, the obligation to pay rent had been satisfied by procurement of the judgment for rent for the full term of the lease. Accordingly, the lessor could not have purchased the lease, since the right of occupancy was the only element of the lease remaining after the obligation to pay rent had been satisfied. Nevertheless, extinguishment of the lease was still possible for the right of occupancy remained in the patrimony of the lessee subject to seizure and sale. Consequently, plaintiff's purchase of the right of occupancy extinguished the lease but not by uniting the qualities of debtor and creditor in the lessor as intervenor contended. Had the lease been purchased by the plaintiff, he would have assumed the obligation to pay rent which would have been an anomalous result, since plaintiff had previously obtained a judgment for the whole of the rent.<sup>12</sup>

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So. 77 (1888) ; *Lehman v. Dreyfus*, 37 La. Ann. 587 (1885) ; *Brinton v. Datas*, 17 La. Ann. 174 (1865) ; *D'Aquin v. Armant*, 14 La. Ann. 217 (1859).

11. LA. CIVIL CODE art. 2217 (1870) : "When the qualities of debtor and creditor are united in the same person, there arises a confusion of right, which extinguishes the obligation." Intervenor was contending that the obligation to pay rent was purchased as well as the right of occupancy which resulted in confusion of the lease.

12. However, such a result occurred in *Bartels & Dana v. Creditors*, 11 La. Ann. 433 (1856). The lessor obtained a judgment for the unexpired term of the lease and then proceeded to purchase the unexpired term at the sheriff's sale. The court held that the lease was extinguished by confusion and the lessor had assumed the obligation to pay rent for the unexpired term of the lease. Thus the lessor's judgment was reduced by the amount of rent for the unexpired term of the lease plus the purchase price that the lessor paid for the unexpired term. The decision produced a strong dissent which pointed out that it was much more plausible that the lessor had purchased the right of occupancy and not the lease. The dissenting

More significantly, the court recognized the apparent impropriety of adopting the intervenor's second contention. The court declared that since the lessor's privilege was security for payment of the rent and since the obligation to pay rent was replaced by the obligation to pay the judgment, the lessor's privilege became security for payment of the judgment. Had the court adopted intervenor's argument, the lessor would be prohibited from asserting his privilege after extinguishment of the lease. For example, assume that the lessor sued for past due rent and cancellation of the lease. Applying intervenor's argument, after the lessor had obtained the judgment for past due rent and cancellation of the lease, the lessee's movables which were sequestered previously, or seized under a writ of fieri facias, could not be sold to satisfy the judgment since the lessor's privilege was extinguished with the cancellation of the lease. Such a result is unquestionably inconsistent with the purpose of the lessor's privilege as security for the obligation to pay rent.<sup>13</sup>

Undoubtedly, the result reached in the instant case was sound. However, it is questionable whether the formalistic approach utilized by the court was necessary for a disposition of the case. An alternative approach would have been to emphasize that the purpose of the lessor's privilege is to secure payment of rent, whether the obligation to pay manifests itself as rent or has taken the form of a judgment.

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judge declared that the lessor had certainly not intended to pay a substantial premium for the purpose of reducing the debt owed him by the lessee.

13. A similar factual situation was found in *Ranson v. Voiron*, 176 La. 718, 146 So. 681 (1933), the only difference being that the movables seized under the lessor's privilege were sold before the lessor purchased the right of occupancy. In *Ranson* the court declared that the lease was terminated by confusion. However, the court continued: "[T]he cancellation, in such a case, does not have the retroactive effect of destroying the lessor's lien on movable property which has been seized and sold by the sheriff and bought by the lessor in part satisfaction of his claim for rent." *Id.* at 722, 146 So. at 682. Such language indicates that the *Ranson* court may have reached a different result had the right of occupancy been sold prior to adjudication of the movables. The court in the instant case recognized this possibility and correctly rejected it.