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Lease of a Movable: How the Public Policy of Louisiana Affects the Validity and Interpretation of Exculpatory Clauses

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quite adequately be handled by the judiciary. It is submitted that a further erosion of the taxpayer standing rule would allow the Court greater freedom in protecting the individual's fundamental constitutional rights without abrogating other traditional judicial limitations.

Winston R. Day

LEASE OF A MOVABLE: HOW THE PUBLIC POLICY OF LOUISIANA AFFECTS THE VALIDITY AND INTERPRETATION OF EXCULPATORY CLAUSES

Plaintiff, a tree-cutter, rented an aluminum extension ladder from the American Rent All Company of Baton Rouge, Louisiana. He signed a printed lease contract containing an exculpatory clause.[1] Plaintiff, while working, climbed to the top of the extended section of the ladder; it telescoped, causing him to fall and sustain severe injuries. *Held,* the exculpatory clause in the rental agreement between plaintiff and American Rent All Company completely relieved the lessor and its insurer from all liability. Such a stipulation is not contrary to the public policy of Louisiana. The court did not consider whether the ladder was defective or whether the plaintiff was negligent in using the ladder.[2] *Celestin v. Employers Mut. Liab. Ins. Co.,* 387 F.2d 539 (5th Cir. 1968).

The Civil Code of Louisiana contains an entire section devoted to the obligations and rights of the lessor. These obligations of the lessor are made part of every contract of lease by operation of law.[3] However, these expressed statutory obligations of the

1. Celestin v. Employers Mut. Liab. Ins. Co., 387 F.2d 539 (5th Cir. 1968): "The lessor makes no warranty of any kind on said equipment and the lessee agrees to immediately return any leased equipment which develops indication of defect or improper working condition: that the lessee agrees to use said equipment entirely at his own risk, to be liable for any damage to persons or property resulting directly or indirectly from the use thereof and the lessee further agrees to protect and save harmless the lessor, its agents, servants and employees from any and all liability resulting from the operation or use of the above rented equipment . . . "

2. *Id.* at 539-40. Under the instructions given the jury in the trial court, the general verdict rendered for the defendant did not disclose whether the jury found (1) that the exculpatory clause completely absolved the defendant, (2) that the ladder was defective, or (3) that the plantiff used it negligently.

3. LA. CIV. CODE arts. 2692-2699. Article 2695 states: "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."

lessor may be waived in the lease contract by an unequivocal manifestation by the lessee that such is his intent, if this agreement does not derogate from good morals or violate public policy.[4] If such a contract renounced the lessor's obligation of guaranteeing the lessee against the vices and defects of the thing, this contract would be binding between the parties and article 2695 would not apply.[5] The broad language of article 2695 itself and the jurisprudence indicate that article 2695 would apply to leases of movables as well as immovables, when the parties make no clear stipulation to the contrary.[6]

Since Louisiana courts have never decided whether an exculpatory clause in the lease of a *movable* violates the state's public policy, the court in *Celestin* was compelled to reason by analogy from the cases involving policy in relation to leases of *immovables*. When an immovable has been leased, Louisiana courts have always upheld the validity of exculpatory clauses waiving obligations of the lessor to the lessee.[7] The jurisprudence, in adopting this view, has relied on several French commentators who all agree that, under most circumstances, a clause relieving the lessor from the guarantee imposed by article 2695 does not contravene public order.[8] They reason that to hold otherwise would violate the principle of freedom of contract.

An early case, *Klein v. Young*,[9] had held that the owner of the premises, as distinguished from the lessor, could *not* relieve himself by convention from the liability imposed by

4. *Id.* art. 11. *See* Grundmann v. Trocchiana, 125 So. 171 (La. App. Orl. Cir. 1929) ; Pecararo v. Grover, 5 La. App. 676 (Orl. Cir. 1927) ; Lewis v. Pepin, 33 La. Ann. 1417 (La. App. Orl. Cir. 1881).

5. LA. CIV. CODE arts. 11, 1901, 1945.

6. Lyons v. Jahncke Service, Inc., 125 So.2d 619 (La. App. 1st Cir. 1960). *Accord*, Blackburn v. Chenet, 42 So.2d 288 (La. App. Orl. Cir. 1949). *But cf.* Willis v. Schuster, 28 So.2d 518 (La. App. 2d Cir. 1946). *See generally* Note, 21 TUL L. REV. 696 (1947).

7. Grundmann v. Trocchiana, 125 So. 171 (La. App. Orl. Cir. 1929) ; Pecararo v. Grover, 5 La. App. 676 (Orl. Cir. 1927) ; Lewis v. Pepin, 33 La. Ann. 1417 (La. App. Orl. Cir. 1881) ; *cf.* Klein v. Young, 163 La. 59, 111 So. 495 (1926) ; Clay v. Parsons, 144 La. 985, 81 So. 597 (1919) ; Torres v. Starke, 132 La. 1045, 62 So. 137 (1913) ; Pierce v. Hedden, 105 La. 294, 29 So. 734 (1901) ; Phillips v. Mitthoff, 108 So.2d 669 (La. App. Orl. Cir. 1959).

8. Pierce v. Hedden, 105 La. 294, 29 So. 734 (1901) ; Pecararo v. Grover, 5 La. App. 676, 677-78 (Orl. Cir. 1927), citing 1 BAUDRY-LACANTINERIE ET WAHL, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL DU CONTRAT DE LOUAGE nº 440 (3d ed. 1906) ; 3 DUVERGIER, DROIT CIVIL DE L'ÉCHANGE ET DU LOUAGE nº 345 (3d ed. 1859) ; 30 DALLOZ, JURISPRUDENCE GENERAL, REPERTOIRE DE LEGISLATION DE DOCTRINE ET DE JURISPRUDENCE nº 196 (1st ed. 1853) ; 1 GUILLOUARD, TRAITÉ DU CONTRAT DE LOUAGE nº 121 (3d ed. 1891) ; 4 OEUVRES DE POTHIER, TRAITÉ DU CONTRAT DE LOUAGE nº 114 (2d ed. 1861) ; 1 TROPLONG, LE DROIT CIVIL DE L'ÉCHANGE ET DU LOUAGE nº 198 (3d ed. 1859).

9. 163 La. 59, 111 So. 495 (1926) (owner held liable to lessee's roomer) ; Gardiner v. Desalles, 126 So. 739 (La. App. Orl. Cir. 1930). *But cf.* Taul v. Graffato, 13 Orl. App. 338 (La. App. 1916) (owner not liable to lessee's mother-in-law).

articles 670 and 2322 to third persons. This jurisprudence was overruled by the enactment of Act 174 of 1932,[10] which was reenacted in virtually the same language as LA. R.S. 9:3221 (1950).[11] The court in the *Celestin* case stated that the legislative overruling of *Klein v. Young* by the enactment of R.S. 9:3221 clearly indicated that a clause in a contract involving either movables or immovables by which the lessee assumed responsibility for the condition of the thing leased does not contravene the public policy of Louisiana, even though such clause had the effect of relieving the owner of the responsibility imposed upon him by the Civil Code in favor of third persons.

The *Celestin* case, however, dealt with the relationship between a lessor and lessee rather than that between an owner and a third person. Even prior to the holding in *Klein v. Young,* a lessor was permitted to contract with his lessee for an assumption by the latter of responsibility for the condition of the premises.[12] Such an assumption had the effect of relieving the lessor of his code responsibility to indemnify the lessee against any loss arising from defects in the thing leased. But this jurisprudence did not deal with the question of whether a lessor who knew of a defect could shield himself by such a clause against a lessee who was not informed of its existence nor did it deal with the question of whether a lessor could absolve himself of responsibility from his own negligence. It appears merely to have given him an avenue of escape with respect to defects of which he was ignorant or both he and the lessee were informed.

10. La. Acts 1932, No. 174, §§ 1, 2: "Section 1. Be it enacted by the Legislature of Louisiana, That 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 anyone 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 received notice of such vice or defect and failed to remedy same within a reasonable time thereafter."

"Section 2. That 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."

11. LA. R.S. 9:3221 (1950): "The owner of premises leased under a contract whereby the lessee assumes responsibility for their condition is not liable for injury 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."

12. Lewis v. Pepin, 33 La. Ann. 1417 (La. App. Orl. Cir. 1881); *cf.* Clay v. Parsons, 144 La. 985, 81 So. 597 (1919); Torres v. Starke, 132 La. 1045, 62 So. 137 (1913).

If the holding in the *Celestin* case is merely that exculpatory clauses which relieve the lessor of liability arising from leases of movables do not offend the public policy of the state, it is probably correct. But if the holding extends to cases where the lessor knows of the defects and the lessee does not or to cases where the lessor, but not the lessee, is guilty of negligence, serious questions are presented. The decision in the principal case failed to disclose whether the lessor actually knew or should have known of the defects, or whether he was negligent in failing to discover that the ladder did have defects before he leased it. If the lessor actually knew of the defects and failed to reveal them, it would appear that the consent of the lessee may have been vitiated by fraud.[13] Although no Louisiana cases have considered this question, and found such fraud, several French commentators do specifically state that a lessor will not be permitted to perpetrate fraud upon a lessee through an absolving lease stipulation when the lessor actually knows of the defects in the object leased.[14] An analogy may be drawn between the contract of lease and the contract of sale. In the first place, a renunciation of warranty made by the buyer is not obligatory where there has been fraud on the part of the seller.[15] In addition, the seller who knows of a vice in the thing he sells and omits to declare it is answerable to the buyer in damages.[16] In all cases where information which would have destroyed the existing error has been withheld by the other party to the contract, it comes under the heading of fraud and invalidates the contract.[17]

A further question presented is whether or not a lessor can contract away his negligence. The *Celestin* case touched on this issue in dealing with the case of *Sandel & Lastrapes v. City of Shreveport,* in which the court stated that "it is contrary to public policy to allow a contractee to stipulate exemption from negligent acts which cause injury."[18] The court in *Celestin* attacked this statement by saying the court in *Sandel & Lastrapes* did not support the statement by authority. No other Louisiana

13. LA. CIV. CODE arts. 11, 1819, 1847(5), 1881.

14. 5 AUBRY ET RAU, DROIT CIVIL FRANCAIS no 336 (6th ed. 1946) ; 1 BAUDRY-LACANTINERIE ET WAHL, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL DU CONTRAT DE LOUAGE no 440 (3d ed. 1906) ; OEUVRES DE POTHIER, TRAITÉ DE CONTRAT DE LOUAGE no 114 (2d ed. 1861).

15. LA. CIV. CODE art. 2548; Roby Motors Co. v. Price, 173 So. 793 (La. App. 2d Cir. 1937). *See generally* Note, 14 LOYOLA L. REV. 447 (1968).

16. LA. CIV. CODE 2545.

17. *Id.* art. 1832.

18. Sandel & Lastrapes v. City of Shreveport, 129 So.2d 620, 624 (La. App. 2d Cir. 1961).

cases have been found which applied the principle of *Sandel & Lastrapes*. French jurists, relying on French jurisprudence, indicate that it is well-settled French law that although the victim may release his tortfeasor by convention from liability after the tort has been committed, the tortfeasor cannot absolve himself of responsibility before the actual happening of the tort.[19] The view expressed in *Sandel & Lastrapes* is consistent with this position. It is submitted that public policy should not allow a lessor to relieve himself of liability from his negligence when the liability has not yet arisen and the lessee is unaware of the full consequences which might result. Of course, where the lessee is made aware of the defect, any loss to him that results from it may be attributed to his own want of care rather than the negligence of the lessor, but, if a latent defect which should have been known to the lessor causes the loss, it is by no means clear that an exculpatory clause should protect the latter. Policy should be strict in this area in order to protect the public at large from defective objects. An effective means of protecting third persons from injury caused by the defective object would be to place all liability caused by the lessor's negligence on the lessor himself, regardless of any contractual provisions.

Although the wording of R.S. 9:3221 leaves much to be desired, it does suggest that an owner cannot relieve himself of responsibility toward his lessee with respect to defects of which the owner knew or should have known. It is doubtful that this view would apply in a case where the defect occurs during the term of the lease and the lessee has assumed responsibility for repairing it, but it may very well apply where the defect exists at the time of executing the lease contract and its existence should have been known to the owner.[20]

Even though R.S. 9:3221 applies only to leases of immovables, the principle of protecting the lessee from the lessor's fraud and negligence, whether the lessor is the owner or not, has as much, if not greater application in leases of movables.[21] It is suggested, therefore, that the lessor's obligations to the lessee

19. 2 COLIN ET CAPITANT, COURS ÉLÉMENTAIRE DE DROIT CIVIL FRANCAIS nº 320 (10th ed. 1953); 6 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS nº 401 (2d ed. 1952).

20. Phillips v. Mitthoff, 108 So.2d 669 (La. App. Orl. Cir. 1959).

21. There are many situations where the bargaining power and the knowledge of lessee about the object leased is disproportionately less than that of the lessor when a movable is leased as distinguished from the situation where an immovable is leased. The typical case is where an individual customer rents a car, a power tool, a television, or some other similar object.

may be waived in the lease of a movable or immovable, except where public policy would be offended by the lessor attempting to contract away his fraud or his negligence before it has occurred.

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