SUPREME COURT OF LOUISIANA

No. 95-C-3058

SHIRLEY HARTMANN, Wife of/and RICHARD P. CARRIERE

versus

BANK OF LOUISIANA IN NEW ORLEANS

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, FIFTH CIRCUIT, PARISH OF JEFFERSON

ON REHEARING

KIMBALL, Justice.[*]

ISSUE

We granted the writ in this case to determine the respective rights and obligations of a lessor and the purchaser at a Sheriff's sale of the lessee's mortgaged "leasehold estate" and the improvements located thereon. Because we find the original lessee in mortgaging his "leasehold estate" mortgaged only his right of occupancy, use and enjoyment under the lease, as opposed to his entire interest in the lease, we hold that the purchaser owes no rent to the lessors under the lease. Furthermore, we find the lessors' claim for unjust enrichment is without merit (1) because there was justification under the law and under contract for the enrichment which inured to the benefit of the purchaser of the "leasehold estate" at the Sheriff's sale, and (2) because the lessors had available to them another remedy at law. Finally, because the "step in the shoes" provision in favor of the mortgagee in the lease is a separate, optional remedy for the mortgagee in the event of the lessee's default on the lease and the mortgagee herein elected to foreclose on the mortgaged collateral instead of availing itself of the "step in the shoes" provision, we hold the bank's use of the premises as a restaurant after acquiring the premises at the Sheriff's sale did not constitute a "step[ing] in[to] the shoes" of the lessee by the mortgagee under the lease. Instead, the bank's actions in operating the premises as a restaurant after acquiring the premises at the Sheriff's sale is a proper exercise of its right of occupancy, use and enjoyment under the lease. We therefore reverse the judgment of the court of appeal and dismiss plaintiffs'/lessors' case.

FACTS AND PROCEDURAL HISTORY

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[*] Marcus, J., not on panel. See Rule IV, Part 2, Section 3.

On April 23, 1982, plaintiffs/lessors, Richard P. Carriere and his wife, Shirley Hartmann, (hereinafter "Carrieres") owners of a commercially zoned tract of land located at 2712 N. Arnoult Road in Metairie, Louisiana, entered into a five-year ground lease with Frank Occhipinti, Inc. (hereinafter "Occhipinti"). The lease between the Carrieres and Occhipinti specifically contemplated the development of a restaurant by Occhipinti on the Carriere's land. To this end, in addition to provisions concerning lease payments, liability for taxes, and insurance requirements, provisions concerning the construction of improvements on the land by the lessee and the lessee's ownership thereof,[1] the lease contained an option in favor of the lessee to renew the lease for two consecutive five-year terms, the reversion of any improvements constructed by the lessee on the leased premises to the lessor upon termination of the lease,[2]

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[1] The lease, in pertinent part, contained the following provisions regarding the lessee's construction and ownership of improvements on the leased land:

> 2. CONSTRUCTION OF IMPROVEMENTS: LESSEE anticipates constructing at its sole cost and expense, improvements to include a building, driveways and parking area (herein referred to as "Improvements") in accordance with the Plans and Specifications annexed hereto....
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> * * *
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> 8. RIGHT TO MAKE ALTERATIONS, TITLE TO AND REMOVAL OF IMPROVEMENTS: LESSEE may make or permit any Subleasee (sic) to make alterations, additions and improvements to the demised premises from time to time and all of such alterations, additions and improvements, including those which may be constructed by LESSEE in accordance with Paragraph 2 hereof, shall be and remain the property of the LESSEE or Sublessee, as the case may be, at all times during the term of this Lease and any extensions or renewals thereof....

[2] The lease contained, in pertinent part, the following provisions concerning reversion of any improvements constructed by the lessee to the lessor upon termination of the lease:

> 5. LESSEE'S COVENANTS: The LESSEE covenants and agrees that during the term of this Lease and for such further time as the LESSEE, or any person claiming under it, shall hold the demised premises or any part thereof;
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> * * *
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> (G) Upon termination of this Lease, either by lapse of time or otherwise, to surrender, yield and deliver up the demised premises in such condition as it shall then be, subject to the provisions of paragraph 8 hereof....
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> * * *
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> 8. RIGHT TO MAKE ALTERATIONS, TITLE TO AND REMOVAL OF IMPROVEMENTS:

the right of the lessee to mortgage the leasehold estate,[3] an option in favor of the lessor to sell the land to the lessee, an option in favor of the lessee to purchase the land from the lessor, and liability of assignees and/or successors of the lease.[4]

After entering into the lease, Occhipinti obtained financing for the construction of his restaurant from Gulf Federal Savings and Loan Association (hereinafter "Gulf Federal") by pledging both his "leasehold estate" and the improvements which would be built with the loan proceeds on the leased land. However, before Gulf Federal would actually commit to such financing, it demanded amendments to the lease to

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> ...Upon termination of the Lease, for any reasons whatsoever, LESSEE shall return to LESSOR, without cost to LESSOR, the leased ground with such improvements or structures that may have been erected thereon during the term of this Lease, by LESSEE and to convey and vest in LESSOR, title to such buildings, improvements or structures, free and clear of any liens, rights, title, interest, claim or demand whatsoever and to deliver to LESSOR such instrument of title or Deed which LESSOR may reasonably require conveying to LESSOR and vesting in LESSOR, title to such improvements, buildings or structures.

[3] The lease, in pertinent part, contained the following provisions concerning mortgaging of the leasehold estate by the lessee:

> 10. MORTGAGING OF LEASEHOLD ESTATE: In the event that LESSEE shall mortgage its leasehold estate and the mortgagee or holders of the indebtedness secured by the leasehold mortgage shall notify the LESSOR in the manner hereinafter provided for the giving of notice of the execution of such mortgage and name and place for service of notice upon such mortgagee or holder of indebtedness, or holders of indebtedness from time to time.
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> (B) Such mortgagee or holder of indebtedness shall have the privilege of performing any of LESSEE's covenants hereunder or of curing any default by LESSEE hereunder or of exercising any election, option or privilege conferred upon LESSEE by the terms of this Lease.
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> * * *
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> (E) No liability for the payment of the rental or the performance of any of LESSEE's covenants and agreements hereunder shall attach to or be imposed upon any mortgagee or holder of any indebtedness secured by any mortgagee upon the leasehold estate, all such liability being hereby expressly waived by LESSOR.

[4] The lease, in pertinent part, contained the following provision concerning successors and assigns of the lease:

> 26. BINDING ON SUCCESSORS OR ASSIGNS: The terms, conditions and covenants of this Lease shall be binding upon and shall inure to the benefit of each of the parties hereto, their heirs, personal representatives, successors, or assigns, and shall run with the land....

insure its position as mortgagee would be protected. The lease was therefore amended on January 10, 1983[5] to add Gulf Federal in its capacity as "LENDER" as an intervenor in the lease, stating "[t]he parties are desirous of amending said GROUND LEASE in order to induce LENDER to finance the project and its improvements by making a loan to the LESSEE." The amendment to the lease also added the lender as an additional insured for purposes of both liability and destruction of the premises and improvements, and also added, *inter alia*, provisions concerning the lender's ability to exercise the lessee's rights under the lease and limitations upon the lender's obligations under the lease,[6] the lender's ability to exercise the lessee's option to purchase the land, subordination of any mortgage by the lessor of the land to the mortgage of the leasehold estate, and the continued existence of the lender's mortgage until satisfied regardless of termination of the lease or a change in ownership of any improvements constructed by the

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[5] The lease was also amended on March 1, 1983 to correct a typographical error in the January 10, 1983 amendment to lease.

[6] The amendment to the lease, in pertinent part, added the following provisions concerning the lender's right to exercise the rights of the lessee under the lease and limits upon the liability of the lender under the lease:

> 5. LESSOR and LESSEE agree that the LENDER shall be permitted, at its option, to "stand in the shoes" of the LESSEE and to exercise, on behalf of the LESSEE or itself, all options and rights, and to fulfill all duties and requirements, and to pay any obligations, charges or expense encumbered upon LESSEE to pay. However, the exercising of these rights and meeting these obligations shall not be mandatory on the part of LENDER but shall be optional.
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> 15. Article 19 is amended as follows:
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> The parties agree, however, that any leasehold mortgage to LENDER shall require the LESSEE pledge and mortgage all rights and title it may have to the premises and to its leasehold interest and allow said LENDER to exercise all of LESSEE's rights, to stand in LESSEE's place, and to take over from LESSEE in the event of either a default on said indebtedness or if in the opinion of LESSEE it must act to protect its interests in the leasehold. Nothing contained in this article or in any other part of the lease shall operate to prevent the LENDER from so exercising its right to protect its security interests in the premises.
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> * * *
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> 19. The parties hereby agree to all of the above as witnesses (sic) by their signatures below and acknowledge that Gulf Federal Savings and Loan Association of Jefferson Parish, the LENDER herein appears only to enforce its rights and said LENDER shall have no obligation under this lease except as set out and limited above.

lessee.[7]

After the above amendments to the lease were instituted, Gulf Federal issued the proceeds of the loan to Occhipinti and he thereafter constructed a building and parking lot on the leased premises and began operating the facility as a restaurant. In 1987 Occhipinti refinanced the loan from Gulf Federal with Bank of the South ("BOS"). As part of this refinancing, an additional amendment to the lease was made on June 26, 1987 to substitute BOS as the lender and to provide the lessee with an additional option to extend the lease for another five-year term beyond the two five-year options to extend which had been granted in the original lease. This "buyout" of Gulf Federal as the lender by BOS also explicitly incorporated all of the terms and conditions of the original lease and the prior amendments thereto. Therefore, while Occhipinti was, at the time of the refinancing, still in the last year of the original five-year term of the lease, he now had three successive options to extend the lease through October of 2002. By virtue of a subsequent merger between BOS and the Bank of Louisiana in New Orleans ("BOL"), BOL became the holder of the collateral mortgage and note given by Occhipinti and the successor in interest to BOS' position as lender under the lease.[8]

In 1988, Occhipinti filed for Chapter 11 bankruptcy, which was thereafter converted to a Chapter 7 bankruptcy proceeding on March 28, 1989. In January, 1989, Occhipinti ceased making rental payments due under the ground lease and also failed to pay the 1988 property taxes on either the land or the improvements, as required by the lease. Occhipinti also ceased making mortgage payments to BOL. In May, 1989, the trustee administering the Occhipinti bankruptcy estate rejected the ground lease and dismissed from the bankruptcy proceedings the leasehold improvements as assets of value to the bankruptcy estate. As a result of Occhipinti's failure to make the lease payments or pay the property taxes, the Carrieres issued a notice of default to Occhipinti on June 12, 1989, and, when the default was not

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[7] The amendment to the lease, in pertinent part, added the following provision concerning continuation of the lender's mortgage:

> 8. Article 8 is hereby amended to include the following sentence: "Except that the said improvements shall remain subject to the LENDER's mortgage until said mortgage is fully paid."

[8] In refinancing the loan with the Bank of the South, Occhipinti had borrowed $1,200,000.00. The loan was secured by a collateral mortgage on Occhipinti's leasehold estate on the Carriere's land, and included all of the buildings and improvements located thereon.

timely cured under the terms of the lease, a notice to vacate the premises on July 7, 1989. Copies of both of these notices were sent to BOL in accordance with the terms of the lease. Thereafter, on July 19, 1989, the Carrieres filed suit to terminate the lease and evict Occhipinti from the premises. Less than a week later, on July 25, 1989, BOL filed suit for executory process, foreclosing on the Occhipinti note and collateral mortgage. At a Sheriff's sale on September 20, 1989, BOL purchased the mortgaged property, *i.e.*, the "leasehold estate" and the improvements. The Carrieres then amended their suit for eviction to add BOL as a defendant, demanding the lease be declared terminated and the premises vacated.

On January 8, 1990, the district court rendered judgment in favor of the Carrieres, declaring the lease terminated and ordering BOL to vacate the premises. BOL appealed the judgment, claiming that as it was now the owner of the improvements constructed on the Carriere's land by Occhipinti by virtue of its purchase of the improvements at the Sheriff's sale, it could not be evicted from its own property. The court of appeal agreed and, finding the lease to still be in effect, reversed the judgment of the trial court:

> We hold that, as to the Bank of Louisiana, the Carrieres were not entitled to terminate the lease and evict it. However, with regard to Bank of Louisiana's argument that rejection of the lease by the trustee in bankruptcy had the effect of terminating the lease and, with it, the Carrieres' rights, we hold that the lease agreement continues in effect until it is terminated or expires....
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> We expressly do not rule on the ownership of the property. Disputes as to ownership of property must be adjudicated in an ordinary proceeding and not in a summary eviction proceeding. [Citation omitted]. Nor do we rule on Bank of Louisiana's mortgage rights, as evidence pertaining to that issue is not in the record. In addition, neither the right of the Carrieres to rental payments, if any, nor the right of Bank of Louisiana, if any, to exercise the option to extend the lease is before us. These are issues which must be resolved in other proceedings.

Carriere v. Frank A. Occhipinti, Inc., 570 So.2d 43, 46 (La. App. 5th Cir. 1990). Though the Carrieres thereafter filed a writ application in this court, their application was denied. *Carriere v. Occhipinti*, 575 So.2d 392 (La. 1991).

The Carrieres filed the instant suit on March 7, 1991, seeking rental payments and the payment of property taxes by BOL from the date of the foreclosure sale at which BOL had purchased Occhipinti's "leasehold estate" and the improvements. However, on BOL's motion, the trial court granted BOL summary judgment and dismissed the Carrieres' suit. On appeal by the Carrieres, the court of appeal vacated the judgment of the trial court and remanded for trial on the merits. *Carriere v. Bank of*

Louisiana, 602 So.2d 155 (La. App. 5th Cir. 1992).

After a trial on the merits, the trial court entered judgment in favor of the Carrieres in the amount of $398,032.05, representing rents and property taxes from the date of BOL's purchase of the "leasehold estate" and improvements at the Sheriff's sale, and attorney fees in the amount of $55,000.00. BOL appealed the judgment of the trial court and, on appeal, the court of appeal concluded "that the bank, by purchasing the lease and the building, and by operating the property as a restaurant, exercised its option to 'step into the shoes' of the lessee" and therefore became bound as the lessee and could "no longer take advantage of those articles in the lease governing the rights of the lender." *Carriere v. Bank of Louisiana In New Orleans*, 95-212, p.13 (La. App. 5th Cir. 9/26/95), 662 So.2d 491, 497. The court of appeal therefore affirmed the trial court award of damages for rents and property taxes. However, because BOL had not had an opportunity to contest the reasonableness of the attorney fees evidence, the court of appeal vacated that portion of the trial court award and remanded the matter to the trial court for consideration of the reasonableness of the attorney fees award. *Id.* at p.13, 497-98. On application by BOL, we granted the writ to consider the correctness of the court of appeal's decision. *Shirley Hartmann, Wife of/and Richard P. Carriere v. Bank of Louisiana in New Orleans*, 95-3058 (La. 5/10/96), 676 So.2d 99.

Thereafter, this court rendered an opinion affirming the judgment of the court of appeal. *Shirley Hartmann, Wife of/and Richard P. Carriere v. Bank of Louisiana in New Orleans*, 95-3058 (La. 12/13/96), 684 So.2d 907. Upon application by BOL, we granted the instant rehearing to reexamine our initial resolution of this matter. *Shirley Hartmann, Wife of/and Richard P. Carriere*, 95-3058 (La. 3/07/97), ___ So.2d ___.

LAW

In Louisiana, a lease is a synallagmatic contract by which one party ("lessor") binds himself to grant to the other party ("lessee") the enjoyment of a thing during a certain time, for a certain stipulated price which the other party binds himself to pay. La. C.C. arts. 2669, 2674; *Potter v. First Federal S. & L.*, 615 So.2d 318, 323 (La. 1993). The lessor's and lessee's duties *ex contractu* are set forth in the parties' contract of lease; in Title IX of the Civil Code, *Of Lease*, art. 2669 et seq.; and in Title III of the Civil

Code, *Obligations in General*, art. 1756 et seq. *Potter, supra* at 323. The Civil Code, however, while defining and governing the relationship of the parties to a lease, still leaves the parties free to contractually agree to alter or deviate from all but the most fundamental provisions of the Code which govern their lease relationship:

> However, the codal articles and statutes defining the rights and obligations of lessors and lessees are not prohibitory laws which are unalterable by contractual agreement, but are simply intended to regulate the relationship between the lessor and lessee when there is no contractual stipulation imposed in the lease.
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> * * *
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> Our jurisprudence is that the usual warranties and obligations imposed under the codal articles and statutes dealing with lease may be waived or otherwise provided for by contractual agreement of the parties as long as such waiver or renunciation does not affect the rights of others and is not contrary to the public good.

Tassin v. Slidell Mini-Storage, Inc., 396 So.2d 1261, 1264 (La. 1981); *see also T.D. Bickham Corp. v. Hebert*, 432 So.2d 228 (La. 1983)(upholding lessee's subordination of statutory right to maintain lease on premises after sale of land by lessor). In other words, the lease contract itself is the law between the parties; it defines their respective rights and obligations so long as the agreement does not affect the rights of others and is not contrary to the public good. La. C.C. art. 1983; *Frey v. Amoco Production Co.*, 603 So.2d 166, 172 (La. 1992); *Tassin*, 396 So.2d at 1264.

Along these lines, it has also been long established in Louisiana that the right of occupancy, use and enjoyment possessed by a lessee by virtue of a lease may be severed from the lessee's obligation to pay rents under the lease. *See, e.g., Ranson v. Voiron,* 176 La. 78, 146 So. 681 (1933); *Walker v. Dohan*, 39 La. Ann. 743, 2 So. 381 (1887); *Hollier v. Boustany*, 180 So.2d 591 (La. App. 3rd Cir. 1965), *writ denied*, 182 So.2d 662 (La. 1966); *Morrison v. Faulk*, 158 So.2d 837 (La. App. 4th Cir. 1963), *writ denied*, 160 So.2d 229 (La. 1964).

Finally, where the parties to a lease intend to agree that one of the parties shall subordinate one or more of his codal rights to the rights or interests of the other party, such subordination must be specific and unambiguous. *T.D. Bickham*, 432 So.2d at 230.

Though the right to possess, occupy or use the land of another may exist by virtue of agreement or by operation of law, it is axiomatic that one possessing, occupying or using the land of another must have

a *legal right* of one type or the other to such possession, occupation or use. *See* Title II of the Civil Code, *Ownership,* art. 477 et seq. In this regard, though the Civil Code explicitly provides that buildings and other constructions permanently attached to the ground may belong to a person other than the owner of the ground, *see* La. C.C. arts. 491 and 493, the Code further provides that when such an owner no longer has the *right* to keep them on the land of another he must, upon written demand of the owner of the ground, remove them within 90 days after such written demand. La. C.C. art. 493. If the owner of such buildings or other constructions fails to timely remove them, the owner of the ground acquires ownership of such buildings or other constructions with no obligation to compensate the former owner. *Id.*

Applying the above precepts, a lessee who has availed himself of his statutory right[9] to mortgage his interests in his lease may mortgage either: (1) his entire lease, which includes all of the lessee's rights, duties and obligations under the lease, including the obligation to pay rents; or (2) only his right of occupancy, use and enjoyment under the lease. If the lessee mortgages his entire lease, defaults on the mortgage, and the mortgagee forecloses, the purchaser at the Sheriff's sale becomes the owner of the lease, *i.e.*, the lessee, and acquires all of the lessee's rights, duties and obligations under the lease, including the obligation to pay rent. As such, absent a specific and unambiguous subordination by the lessor, he acquires the original lessee's obligation to pay rents and he also acquires, in addition to the original lessee's right of

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[9] La. C.C. art. 3286, in pertinent part, provides:

> The only things susceptible of mortgage are:
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> * * *
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> (4) The lessee's rights in a lease of an immovable with his rights in the buildings and other constructions on the immovable.

This provision, derived from former La. R.S. 9:5102, was added to La. C.C. art. 3286 in 1991. See Acts 1991, No. 652, §4. Former La. R.S. 9:5102, repealed by the same Act, stated:

> The lessee, sub-lessee, or assignee of a lease or sub-lease of real property may mortgage, affect, and hypothecate his interest therein, together with his interest in any buildings, constructions, and improvements upon the leased premises then or thereafter existing. Nothing in this Section shall be construed to affect, diminish, or destroy the privilege of the lessor for the payment of rent and the enforcement of other stipulations of the lease. The mortgage shall not affect third persons unless and until recorded in the manner provided by law for the recordation of conventional mortgages upon real property.

occupancy, use and enjoyment, any and all other rights which the original lessee held, such as options to extend the lease and options to purchase the land from the lessor.[10] If, on the other hand, the lessee mortgages only his right of occupancy, use and enjoyment, defaults on the mortgage, and the mortgagee forecloses, the purchaser at the Sheriff's sale becomes the owner of only the original lessee's right of occupancy, use and enjoyment under the lease, while the original lessee/mortgagor retains the obligation to pay rents. If, in this situation, the original lessee/mortgagor also defaults on his obligation to pay rents, the owner of the right of occupancy, use and enjoyment, absent a specific and unambiguous subordination in favor of such an acquirer by the lessor, may, should the lessor thereafter cause the lease to be terminated for the original lessee's non-payment of rents, lose his right to remain on the leased premises.[11] In this situation, if there are also improvements on the land which were owned by the original lessee/mortgagor that are now, by virtue of the original lessee/mortgagor's default and the subsequent foreclosure and sale, owned by the purchaser at the Sheriff's sale, the lessor will be free, in accordance with La. C.C. art. 493, to demand, in addition to the purchaser's vacation of the land, removal of such improvements within ninety

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[10] As this Court described it in *Walker v. Dohan*, 39 La. Ann. 743, 2 So. 381, 382 (1887), over 100 years ago:

> A lease is defined by the Code as "a synallagmatic contract, to which consent alone is sufficient, and by which one party gives to another the enjoyment of a thing at a fixed price." The contract embodies, in itself, reciprocal rights and obligations, - the *right* of enjoyment, and the *obligation* of paying the rent, - which, so far as governed by the contract alone, co-exist and adhere to each other. Hence it has been repeatedly decided that the sale of the *unexpired term of a lease*, without qualification, is a sale of the lease for such term, as an entirety, including its obligations as well as its rights; or, in the language of the court, that the "bid *for the lease*, in such a case, is a premium which the bidder is willing to give for the transfer of *the lease* to himself, with all its obligations, as well as all the rights thereto attached, from the moment of the adjudication." *Bartels v. Creditors*, 11 La. Ann. 433; *D'Aquin v. Armant*, 14 La.Ann. 217; *Brinton v. Datas*, 17 La. Ann. 174; *Lehman v. Dreyfus*, 37 La. Ann. 587.

[11] In *Walker v. Dohan*, 39 La. Ann. 743, 2 So. 381, 383 (1887), this court quoted the following with favor:

> What forbids the severance of a right from its correlative obligation, and the transfer of the one without the other? The lessee's right is to occupy the premises; his obligation, to pay the rent. Can he not make a sale or donation of the right, retaining himself the obligation to pay the rent? It is true that the non-fulfillment might defeat the enjoyment of his vendee of the right transferred. But the transfer and severance could be none the less possible and legal. * * * The lessor's rights are not thereby affected. 1 Hen. Dig. 803.

days.[12]

DISCUSSION

In the instant suit, the Carrieres, as landowners and lessors, maintain the prior suit between themselves and BOL resulted in a final judgment that the lease is still in effect. As such, the Carrieres argue BOL, by virtue of its actions in occupying the leased premises after acquiring the collateral mortgaged by Occhipinti at the Sheriff's sale, has exercised its right under the lease to "step in the shoes" of Occhipinti, has thereby become the lessee, and is now responsible for rents and taxes under the lease. Alternatively, the Carrieres maintain they are, in any event, entitled to an award in unjust enrichment for BOL's rent-free occupation of their land.

In contrast, BOL first asserts that the court of appeal's statements in the prior suit between the Carrieres and BOL that the lease is still in effect are mere *dicta*, such that this court must now pass on BOL's contentions that the lease was either terminated prior to foreclosure by virtue of the Carrieres' letters to Occhipinti regarding default and termination or by the trustee's rejection of the lease in Occhipinti's bankruptcy, or was terminated by virtue of the foreclosure itself. Alternatively, BOL maintains that as only a right of occupancy, use or enjoyment was mortgaged by Occhipinti and therefore acquired by BOL at the Sheriff's sale, it has no obligation under the lease to pay rents to the Carrieres. BOL also asserts that the "step in the shoes" provision in the lease is optional, not mandatory, and that as it never exercised its option under the lease to "step in the shoes" of Occhipinti, it does not owe rents to the Carrieres pursuant to that provision of the lease. Finally, BOL maintains that as the Carrieres cannot meet the requirements for an award in unjust enrichment and, further, that as BOL has not been unjustly enriched in any event, no such award is warranted.

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[12] La. C.C. art. 493, in pertinent part, states:

> Buildings, other constructions permanently attached to the ground, and plantings made on the land of another with his consent belong to him who made them. They belong to the owner of the ground when they are made without his consent.
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> When the owner of buildings, other constructions permanently attached to the ground, or plantings no longer has the right to keep them on the land of another, he may remove them subject to his obligation to restore the property to its former condition. If he does not remove them within 90 days after written demand, the owner of the land acquires ownership of the improvements and owes nothing to their former owner.

The Prior Suit

In the instant case, the court of appeal found its prior decision in the previous suit between these parties to be "law of the case" as to the issue of the existence of the lease after BOL's foreclosure and subsequent purchase at the Sheriff's sale. *Carriere*, 662 So.2d at 496. BOL maintains this is error in that the court of appeal's decision in the previous case regarding the continued existence of the lease is *obiter dicta*. Instead, BOL maintains, the trial court's judgment in the previous suit which declared the lease terminated was never properly before the court of appeal, as only BOL appealed the trial court's decision and BOL did not assign as error the trial court's decision that the lease was terminated. BOL therefore re-asserts in this court arguments made in the previous suit and in the instant suit, *i.e.*, that the lease between Occhipinti and the Carrieres was terminated by either: (1) the letters of default and termination sent by the Carrieres to Occhipinti in, respectively, June and July of 1989, prior to BOL's foreclosure; (2) the bankruptcy trustee's rejection of the lease as an asset of Occhipinti's bankruptcy estate, prior to BOL's foreclosure; or (3) BOL's foreclosure and the subsequent Sheriff's sale.[13] However, a review of the pleadings in the previous suit convinces us that the court of appeal properly considered and decided the issue of the existence of the lease in that suit and, upon the denial by this court of the Carrieres' writ application, *Carriere*, 575 So.2d at 392, the court of appeal's decision became a final judgment.

In the previous suit, the Carrieres filed a "Petition To Terminate Lease and for Possession of Premises" against Occhipinti, seeking termination of the lease and eviction of Occhipinti from the premises. After BOL filed suit for executory process against Occhipinti, foreclosed on the mortgage, and purchased the collateral at the Sheriff's sale, the Carrieres amended their petition to name BOL as an additional defendant as BOL was now the owner of Occhipinti's interest and the occupier of the premises. After trial

[13] Though we address herein BOL's assertion that the court of appeal's decision in the prior suit between these parties did not result in a final judgment regarding the continued validity of the lease, we note that BOL makes this argument in the alternative. BOL first asserts that the lease was canceled *prior* to its foreclosure because: (1) the Carrieres sent Occhipinti letters of default and termination which, under the terms of the lease, resulted in a termination of the lease; and (2) the bankruptcy trustee rejected the lease as an asset of the bankruptcy estate. However, BOL's position that the lease was canceled by either of these events is belied by the fact that under the lease, if such a termination had occurred prior to foreclosure, ownership of the building would have vested in the Carrieres. If such were the case, BOL's subsequent foreclosure against *only Occhipinti* could not have resulted in ownership of the building by BOL.

on the merits the trial court rendered judgment in favor of the Carrieres, declaring the lease terminated and ordering BOL to vacate the premises. BOL appealed the judgment, asserting in the court of appeal that the trial court had erred in not declaring the lease terminated prior to the foreclosure by virtue of either the Carrieres' letters of default and termination to Occhipinti or the bankruptcy trustee's rejection of the lease as an asset of the bankruptcy estate. In addition, BOL asserted the Carrieres had been estopped by deed, *i.e.*, by the lease terms and covenants, from evicting BOL, and that the Carrieres had waived and subordinated any right they had under the lease to collect rents from BOL or hold BOL liable for any obligations under the lease. Based on these pleadings, the pleadings in the trial court below, and the issues actually litigated in the trial court below, the court of appeal found:

> The only issue raised by the Carrieres in their pleadings and in the judgment was their right, as lessors, to terminate the lease and evict Occhipinti and/or its successor, Bank of Louisiana. The ownership of the improvements and the rights of the mortgagee were never at issue and were in fact not adjudicated at trial, and the mortgage itself is not in evidence.
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> The lease contract is the law between the parties. Bank of Louisiana's rights to possession, if any, must flow from that lease agreement and its amendments.

Carriere, 570 So.2d at 44.

After reviewing the lease, its amendments, and the record below, the court of appeal stated:

> We hold that, as to the Bank of Louisiana, the Carrieres were not entitled to terminate the lease and evict it. However, with regard to Bank of Louisiana's argument that rejection of the lease by the trustee in bankruptcy had the effect of terminating the lease and, with it, the Carrieres' rights, we hold that the lease agreement continues in effect until it is terminated or expires....
>
> We expressly do not rule on the ownership of the property. Disputes as to ownership of property must be adjudicated in an ordinary proceeding and not in a summary eviction proceeding. [Citation omitted]. Nor do we rule on Bank of Louisiana's mortgage rights, as evidence pertaining to that issue is not in the record. In addition, neither the right of the Carrieres to rental payments, if any, nor the right of the Bank of Louisiana to exercise the option to extend the lease is before us. These are issues which must be resolved in other proceedings.

Carriere, 570 So.2d at 46. Thereafter, the Carrieres' writ application in this court was denied. *Carriere*, 575 So.2d at 392.

After considering the pleadings filed in the previous suit and the court of appeal's decision, we find

the court of appeal properly considered the existence of the lease to be at issue in BOL's appeal of the trial court's judgment terminating the lease and ordering BOL to vacate the premises. We also find the court of appeal considered and thereafter rejected BOL's contentions that the lease had been terminated by virtue of either the Carrieres' letters of default and termination to Occhipinti, the bankruptcy trustee's rejection of the lease and improvements as assets of the bankruptcy estate, or BOL's foreclosure. As such, the judgment of the court of appeal holding "the lease agreement continues in effect until it terminates or expires," *Carriere*, 570 So.2d at 46, constitutes a final judgment as to these matters, and they cannot now be re-litigated in the instant case.

The Mortgage: Right of Occupancy or Entire Interest in Lease

Though the court of appeal decided in the previous suit that the lease agreement continued in effect, and we have decided herein the court of appeal's decision constitutes a final judgment as to that issue, that decision does not resolve the primary issue raised in this case, *i.e.*, does BOL owe the Carrieres rents for its occupation of the Carrieres' land. Occhipinti ceased making rental payments in January of 1989. BOL purchased the collateral which Occhipinti had mortgaged on September 20, 1989 at the Sheriff's sale. Regarding any liability for rental payments which BOL may have had as **mortgagee** during that time period for rental payments, the lease specifically addresses this issue and states:

> (E) No liability for the payment of the rental or the performance of any of LESSEE's covenants and agreements hereunder shall attach to or be imposed upon any mortgagee or holder of any indebtedness secured by any mortgage upon the leasehold estate, all such liability being hereby expressly waived by LESSOR.

Thus, BOL is clearly not liable as **mortgagee** for rental payments which Occhipinti failed to make from January of 1989 until September 20, 1989.

We turn now to the issue of whether or not BOL, as the third party purchaser at a Sheriff's sale of the mortgaged "leasehold estate" and improvements located thereon, is liable to the Carrieres for rental payments which Occhipinti failed to pay subsequent to September 20, 1989. Resolution of this issue requires a determination not made in the previous suit or in the instant suit in the courts below as to what, exactly, was mortgaged by Occhipinti. BOL could not acquire anything more at the Sheriff's sale than that which was mortgaged by Occhipinti. As a result, depending on the nature of the collateral mortgaged and thereafter acquired by BOL, the lease continued in effect after the judgment in the previous suit with

either Occhipinti retaining the obligation to pay the Carrieres rents under the lease, or BOL, by virtue of its acquisition of the collateral at the Sheriff's sale, also acquiring the obligation to pay the Carrieres rents under the lease.

In the June 26, 1987 mortgage to BOS, Occhipinti mortgaged "THAT LEASEHOLD ESTATE created and existing by virtue of a Ground Lease by and between ... [the Carrieres and Occhipinti]." Beyond this initial description of that which is mortgaged, the mortgage goes on to declare:

> All rights, duties and obligations of the *mortgagor* and *mortgagee* as provided for in the Ground Lease dated Aril 23, 1982, between Shirley Hartman, wife of/and Richard P. Carriere, lessors and Frank A. Occhipinti, Inc., Lessee registered at COB 1029, Folio 580 in the Parish of Jefferson, State of Louisiana and the amendments to Ground Lease are incorporated into and made part of this act of Mortgage as if copied herein in extenso for all purposes. (Emphasis added).

Although the parties failed to describe that which was mortgaged as "THAT RIGHT OF OCCUPANCY, USE AND ENJOYMENT created and existing by virtue of a Ground Lease by and between" the Carrieres and Occhipinti, they nevertheless explicitly chose to describe that which was mortgaged as something other than Occhipinti's entire lease, instead describing it as "THAT LEASEHOLD ESTATE created and existing by virtue of a Ground Lease." Notably, Occhipinti did <u>not</u> mortgage "THAT GROUND LEASE by and between [the Carrieres and Occhipinti]."

First, we are unwilling to impose a requirement that, as a matter of law, only by the use of the phrase "THAT RIGHT OF OCCUPANCY, USE AND ENJOYMENT" may the parties to a mortgage create a mortgage of less than the entire interest of the lessee. Second, in our view, the mortgage at issue herein, in using the phrase "THAT LEASEHOLD ESTATE created and existing by virtue of a Ground Lease," neither explicitly states nor reasonably implies that a mortgage of Occhipinti's entire lease is intended or even contemplated by the parties. Instead, we conclude the use of the phrase "leasehhold estate" as opposed to "THAT GROUND LEASE" or "THE LEASE" or "THE ENTIRE LEASE" connotes a mortgage of something less than Occhipinti's entire interest in the lease is being mortgaged.

Further, the additional mortgage paragraph quoted, *supra*, does nothing more than incorporate into the mortgage the rights, duties and obligations of the mortgagee and mortgagor, *vis-a-vis each other*, contained in the lease and its amendments. In addition, this conclusion is supported by Paragraph 15 of

the first amendment to the lease, which amended Paragraph 19 of the original lease. The amendment, in pertinent part, states:

> The parties agree, however, that any leasehold mortgage to LENDER shall require the LESSEE pledge and mortgage all rights and title it may have to the premises and to its leasehold interest and allow said LENDER to exercise all of LESSEE's rights, to stand in LESSEE's place, and to take over from LESSEE in the event of either a default on said indebtedness or if in the opinion of LESSEE it must act to protect its interests in the leasehold. Nothing contained in this article or in any other part of the lease shall operate to prevent the LENDER from so exercising its right to protect its security interests in the premises.

This carefully drafted amendment requires the lessee to mortgage all of his *rights* to the lender under any leasehold mortgage, but omits reference to lessee's *obligations* under the lease. As the lender consistently required throughout the lease, however, the lease also explicitly states that "[n]othing contained in this article or in any other part of the lease" would operate to prevent the lender from electing to foreclose on the collateral.

We therefore hold the use of the phrase "THAT LEASEHOLD ESTATE created and existing by virtue of a Ground Lease" in the description of that which was mortgaged creates a mortgage by Occhipinti of only his right of occupancy, use and enjoyment. As such, BOL, when it purchased Occhipinti's mortgaged collateral at the Sheriff's sale following foreclosure, acquired ownership only of the building and other constructions on the leased premises and Occhipinti's right of occupancy, use and enjoyment under the lease with the Carrieres. The obligation to pay the Carrieres rents under the lease therefore remained with Occhipinti, and the Carrieres cannot now recover rents under the lease from BOL, the third party purchaser at a Sheriff's sale of the mortgaged collateral.

Unjust Enrichment

The Carrieres argue they are entitled to an award in unjust enrichment for BOL's rent-free occupation of their land. Prior to the enactment of La. C.C. art. 2298 (Acts 199, No. 1041, § 1, effective January 1, 1996), this court held on several occasions that the five requirements for a showing of unjust enrichment or *action de in rem verso* are: (1) there must be an enrichment; (2) there must be an impoverishment; (3) there must be a connection between the enrichment and the resulting impoverishment; (4) there must be an absence of "justification" or "cause" for the enrichment and impoverishment; and (5) there must be no other remedy at law available to plaintiff. *See, e.g., Baker v. Maclay Properties Co.,*

94-1529, p. 18 (La. 1/17/95), 648 So.2d 888, 897, and cases cited therein. The legislature, subsequent to our decision, codified the remedy of unjust enrichment by enacting La. C.C. art. 2298, and it is clear from the language of that article that unjust enrichment under Article 2298 is, as it always has been under our decisions, a "subsidiary remedy." *See* La. C.C. art. 2298[14]

In the instant case, the Carrieres are not entitled to recover rental payments and property taxes from BOL under the theory of unjust enrichment because BOL's "enrichment" and the Carrieres' "impoverishment' were not "without cause" under Article 2298 and our case law. By its very terms, Article 2298 excludes from recovery those cases wherein the "enrichment results from a valid juridical act or the law." Likewise, prior to the adoption of this Article, this court stated repeatedly that one of the prerequisites for recovery under the theory of unjust enrichment was an absence of justification or cause for the enrichment or impoverishment. "[O]nly the unjust enrichment for which there is no justification in law or contract allows equity a role in the adjudication." *Edmonston v. A-Second Mortgage Co. of Slidell, Inc.*, 289 So.2d 116, 122 (La. 1974). See also *Edwards v. Conforto*, 636 So.2d 901, 907 (La. 1993).

Although there was arguably an enrichment on the part of BOL and an impoverishment on the part of the Carrieres, it was one justified under the law. As previously explained, when BOL purchased Occhipinti's mortgaged collateral at the Sheriff's sale following foreclosure, it acquired ownership only of the building and other constructions on the leased premises and Occhipinti's right of occupancy, use and enjoyment under the lease with the Carrieres. The obligation to pay the Carrieres rents under the lease therefore remained with Occhipinti. By operation of law, BOL has never been legally obligated to pay the Carrieres rental payments and property taxes and was legally entitled and, indeed, intended, as purchaser of the mortgaged collateral, to receive the "enrichment" resulting from its purchase of Occhipinti's "leasehold estate" without the attendant obligation to pay rents.

Not only was there justification in the law that BOL be enriched by not having the obligation to

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[14]La. C.C. art. 2298 provides, in pertinent part:

> A person who has been enriched without cause at the expense of another person is bound to compensate that person. The term "without cause" is used in this context to exclude cases in which the enrichment results from a valid juridical act or the law. The remedy declared there is subsidiary and shall not be available if the law provides another remedy for the impoverishment or declares a contrary rule.

make rental payments, but there is also justification for such result in "a valid juridical act" as referred to by Article 2298 and signed by the Carrieres. The Carrieres agreed to, and the lease itself authorized, the mortgage of the "leasehold estate," which we have explained constitutes a mortgage of only the right of occupancy, use and enjoyment possessed by the lessee by virtue of the lease and does not include the lessee's obligation to pay rents under the lease. There can be no dispute that the very essence of a mortgage is that upon the failure of the obligor [Occhipinti] to perform the obligation that the mortgage secures [making loan payments to the mortgagee], the mortgagee has the right to "cause the property to be seized and sold in the manner provided by law and to have the proceeds applied toward the satisfaction of the obligation in preference to claims of others". La. C.C. art. 3279. The Carrieres should have contemplated that their agreement in the lease to allow Occhipinti to mortgage the "leasehold estate" included the possibility that Occhipinti would fail to make the loan payments, the mortgagee would foreclose on the mortgaged property securing the loan, and a third party would purchase the "leasehold estate" or right of occupancy, use and enjoyment at a Sheriff's sale without having the obligation to pay rents. Indeed, it was intended that such a result occur should there be a foreclosure. The Carrieres' impoverishment in this case resulted from Occhipinti's failure to pay them rental payments and the taxes on the property, not from any action by BOL as third party purchaser of the mortgaged collateral.

It is well-settled that the subsidiary remedy of unjust enrichment requires fulfillment of all five of the recognized conditions in order to succeed. *Edwards*, 636 So.2d at 903. However, in addition to there being "justification" or "cause" for the enrichment and the impoverishment which precludes the application of unjust enrichment in this case, we note there was another remedy at law available to plaintiff which was to proceed against Occhipinti for his failure to pay rent. Irrespective of whether or not there is a judgment terminating the lease, a lessor can still file a suit against a lessee on the lease contract seeking past rental payments due. This action prescribes in three years under La. C.C. art. 3494. The Carrieres had a remedy under the law for their impoverishment and that remedy was pursuing an action against the person liable to them under the law for the rental payments — Occhipinti. Whether or not they could have been successful in that action because of Occhipinti's bankruptcy is not a factor which should considered with respect to the third party purchaser of the "leasehold estate" who acquired that "leasehold estate" at a Sheriff's sale without the attendant obligation to pay rent. The existence of a "remedy" which precludes

application of unjust enrichment does not connote the ability to recoup your impoverishment by bringing an action against a **solvent** person. It merely connotes the ability to bring the action or seek the remedy. That the party whom the Carrieres authorized in the lease to mortgage only the right of occupancy, use and enjoyment while retaining the obligation to pay rent might file for bankruptcy and be unable to make rental payments is a risk attendant to every business transaction, and the impoverishment to the Carrieres which resulted therefrom does not justify a finding that BOL was **unjustly** enriched.

The record reflects that no option to extend the lease for the 1992-1997 term had been exercised, and that the lease did not otherwise remain viable after its expiration in October 1992. The Carrieres are not entitled to rental payments from BOL for the period of time **prior** to October 1992 for the aforementioned reasons. After the lease terminated, the bank's status was that of owner of an immovable separate from the land's ownership. It no longer enjoyed the right of occupancy, use and enjoyment under the lease because the lease no longer existed. The Carrieres are not entitled to unjust enrichment resulting from BOL's rent-free occupation of the buildings on their property after October 1992 because there existed another remedy at law available to plaintiff which would have terminated BOL's enrichment and the Carrieres' impoverishment. The Carrieres had the right to issue a written demand under La. C.C. art. 493, requiring the bank to remove its building and other improvements permanently attached to the ground at the instant they believed the owner of the building no longer had the right to be on their separately owned land. If within ninety days that removal had not been achieved, the lessor would have acquired ownership of the bank's separately owned building and other permanently attached improvements. This remedy at law was not seized upon by the lessor. Thus, the Carrieres, not having availed themselves of a remedy at law are precluded from recovery on an unjust enrichment theory for the bank's occupancy of their property for the period subsequent to the lease's expiration.

The "Step In The Shoes" Provision of the Lease

Finally, though the court of appeal in the instant case failed to specifically address the nature of the collateral mortgaged by Occhipinti and, hence, the nature of BOL's occupancy of the Carrieres' land, the court nevertheless held that BOL, after acquiring the leasehold estate and improvements at the Sheriff's sale, had tacitly availed itself of the "step in the shoes" provision of the lease and had therefore become the lessee, such that it was now obligated as the lessee under the lease to pay the Carrieres rents. *Carriere*,

95-212 at 13, 662 So.2d at 497. More specifically, the court of appeal found BOL's actions in operating the premises as a restaurant after acquiring the leasehold estate and improvements constituted an exercise by BOL of the "step in the shoes" option contained in the lease. *Id.* We disagree.

The "step in the shoes" provision contained in the lease is optional on the part of the lender, not mandatory, and under the explicit terms of the lease exists as an entirely separate remedy from foreclosure as an available alternative for the lender in the event of a default under the lease by the lessee. As such, in the event of a default on the part of the lessee such as, in the instant case, a failure to pay rents, the lender had the option under the lease to either "step in the shoes" of the lessee or to foreclose on its collateral. In the instant case, BOL, as lender, elected to foreclose on its collateral and later acquired that collateral at the Sheriff's sale. As previously determined herein, the collateral acquired by BOL at the Sheriff's sale was Occhipinti's right of occupancy, use and enjoyment under the lease, along with the improvements constructed on the leased premises by Occhipinti. Therefore, BOL, in operating the building it now owned as a restaurant on premises on which it had a legal right to occupy, did not thereby "step in the shoes" of the lessee. Instead, BOL was appropriately exercising its right to occupy the leased premises, with Occhipinti retaining the obligation to pay rents.

CONCLUSION

Under the specific mortgage at issue in this case, we find the original lessee, Occhipinti, mortgaged to BOS only his right of occupancy, use and enjoyment under his lease with the Carrieres. As such, when BOL, as successor to BOS's interest, foreclosed upon the mortgage and subsequently acquired the collateral at the Sheriff's sale, it acquired only Occhipinti's right to occupy, use and enjoy the leased premises, along with the improvements constructed by Occhipinti on the leased premises, with Occhipinti retaining the obligation under the lease to pay rents to the Carrieres. As such, BOL does not owe the Carrieres rents while it possessed the premises.

Further, because there was justification under the law and under contract for the enrichment which inured to the benefit of the purchaser of the "leasehold estate" at the Sheriff's sale, and because the lessors had available to them another remedy at law, the Carrieres' claim for unjust enrichment is without merit. Finally, BOL's operation of the premises as a restaurant after acquiring the leasehold estate and

improvements at the Sheriff's sale did not constitute a "stepping] in[to] the shoes" of the lessee by BOL under the lease. Instead, BOL, as the owner of the improvements and Occhipinti's right of occupancy, use and enjoyment under the lease, was free to use the premises as a restaurant so long as the lease remained in effect.

REVERSED.