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A Common Law Intrusion in to the Civil Law: Carriere v. Bank of Louisiana

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A Common Law Intrusion into the Civil Law: *Carriere v. Bank of Louisiana*

I. INTRODUCTION

On April 23, 1982, Richard Carriere, owner of a commercially zoned tract of land in Metairie, Louisiana, entered into a five-year ground lease with Frank Occhipinti. Occhipinti was interested in building a restaurant on Carriere's land. To this end, the parties included a provision in the lease giving the lessee the right to mortgage the lease.[1] After obtaining the lease, Occhipinti built the restaurant with financing from a local bank.[2] As security for the mortgage, Occhipinti pledged his interest in the lease,[3] the restaurant and the improvements located on Carriere's property.[4]

Occhipinti filed for bankruptcy in 1988.[5] Occhipinti thereafter failed to pay rent to Carriere and failed to pay the 1988 property taxes he owed as stipulated in the lease. Further, Occhipinti ceased making mortgage payments to Bank of Louisiana (hereinafter referred to as "the bank"). Consequently, Carriere issued a notice of default to Occhipinti. When the default was not cured, Carriere served Occhipinti with a notice on July 7, 1989 to vacate the premises. Carriere provided the bank with a copy of each notice. Carriere then filed a petition for eviction on July 19, 1989. Days later, the bank filed a petition for executory process for the Occhipinti note and collateral mortgage.[6] Before Carriere's eviction proceeding had been held, the bank purchased Occhipinti's rights in the lease at a sheriff's sale on September 20, 1989. The purchase included the building as well as the improvements located on Carriere's land. Subsequent to this acquisition, Carriere amended his eviction proceeding and named the bank as a defendant, demanding that the lease be terminated and the premises vacated.[7] When the Louisiana

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1. The lease also contained provisions concerning the lessee's liability for lease payments, taxes, and insurance on the property.

2. Occhipinti originally received financing from Gulf Federal Saving and Loan Association. However, as successor in interest, Bank of Louisiana later became the holder of the note.

3. Occhipinti's "interest in the lease" is what the common law refers to as "the leasehold interest," or "leasehold." Although the Louisiana Civil Code does not recognize the institution of "leasehold," the term was recognized and interpreted in *Carriere v. Bank of Louisiana*, 702 So. 2d 648 (La. 1996). Leasehold is defined as: "[a]n estate in real property held by lessee/tenant under a lease." *See* Black's Law Dictionary 890 (6th ed. 1990) and *infra* notes 35-38.

4. The collateral mortgage was in the amount of $1,200,000. *Carriere*, 702 So. 2d at 650.

5. "The bankruptcy trustee found the leasehold improvements [the restaurant] contained no equity over and above the mortgage or liens affecting this property, and alternatively that if there was any equity, it was insufficient to justify administration," and dismissed the ground lease with the improvements from the proceedings. *Id.* at 651.

6. La. Code Civ. P. art. 2631 explains the "use of executory proceedings":

> Executory proceedings are those which are used to effect the seizure and sale of property, without previous citation and judgment, to enforce a mortgage or privilege thereon evidenced by an authentic act importing a confession of judgment, and in other cases allowed by law.

7. *Carriere*, 702 So. 2d at 664.

Supreme Court finally heard the case, the bank had occupied Carriere's land for seven years without paying rent to Carriere, and had refused to pay taxes on the land in accordance with the lease.[8]

In the first Louisiana Supreme Court hearing, the court awarded Carriere damages for past rents and taxes as compensation for the use of his immovable property upon which the bank's separately owned restaurant was located.[9] The court held that when the bank purchased Occhipinti's leasehold interest at the sheriff's sale, the bank purchased both the rights and the obligations under the lease, including the obligation to pay Carriere rent on the property.[10] Moreover, the court held that the doctrine of "judicial control,"[11] which would prevent eviction, should be applied in this circumstance because the bank stood to lose its investment in the property.[12] Thus, although the court decided not to dissolve the lease, it did find that the bank owed Carriere past rents and taxes on the property.[13]

On rehearing, the court reexamined the rights and obligations of a purchaser of a lessee's mortgaged "leasehold estate." The Louisiana Supreme Court held that since the right of occupancy, use and enjoyment possessed by the lessee may be severed from the lessee's obligation to pay rents under the lease, the bank was not liable for rent payments to Carriere, even though the bank's tenant occupied the land and collected rents on the restaurant from a new lessee.[14] The court justified its result by relying on two concepts. First, the court missapplied the principle set forth in *Walker v. Dohan*,[15] which held that the right of occupancy could be severed from the obligation to pay rent, *but only if the rents are paid in full.* Second, the court assigned a meaning to the common law term "leasehold" that is not in the Louisiana Civil Code. Remarkably, the court did not alter its original ruling regarding its decision to exercise "judicial control" over the eviction proceedings nor its decision to not terminate the lease. By neglecting to alter its prior decision regarding these matters, the court allowed the bank to occupy the premises rent-free and to force Carriere to continue paying taxes on the property.[16]

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8. *Id.* at 655.

9. *Id.* at 648.

10. *Id.* at 653.

11. Judicial control is a judicially created doctrine, applicable when a lessor seeks to dissolve a lease for failure of the lessee to pay the rentals timely. Although ordinarily a lessor may dissolve a lease under these circumstances, this right is subject to judicial discretion. The court can deny dissolution of the lease even though circumstances make the action proper. Brewer v. Forest Gravel Co., 172 La. 828, 135 So. 372 (1931).

12. *Carriere*, 702 So. 2d at 655.

13. *Id.*

14. *Id.* at 662.

15. Walker v. Dohan, 39 La. Ann. 743, 2 So. 381, 382 (La. 1887).

16. The *Carriere* court further asserted that Carriere could have brought an unjust enrichment action against the original lessee, Occhipinti. However, this argument would have been futile because the lessee was insolvent and a remedy against him would be of little consolation to the lessor. L.S. Tellier, *Liability of Mortagee or Lienholder of a Lease with Respect to Rents or Covenants Therein*, 73 A.L.R. 2d 1118 §3 (1960). Carriere did bring an unjust enrichment action against the bank, however, the court reasoned that the bank's "enrichment" and Carriere's "impoverishment" were not "without cause," and therefore Carriere was not entitled to recover rental payments and taxes from the

II. EVALUATION

A. Right of Occupancy versus Obligation to Pay Rent

1. When is it Proper to Separate the Right from its Obligation?

A lease is defined by the Louisiana Civil Code as "a synallagamatic contract, to which consent alone is sufficient, and by which one party gives to another the enjoyment of a thing . . . at a fixed price."[17] A lease contemplates "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."[18] As such, the lessor's obligations and rights in a lease cannot be separated.[19] However, one commentator noted:

> 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?[20]

After examining these comments, Louisiana courts have conceded that the severance of the obligation to pay rent and the right of occupancy is legal and possible.[21] However, they were still faced with the question: Under what circumstances could the obligation to pay rent and the right of occupancy be separated?

Louisiana courts first recognized the ability to sever the right of occupancy from the obligation to pay rent in *Walker v. Dohan*.[22] In that case, the court held that the sale of the unexpired term of a lease involved the sale of the obligations and the rights. However, the court acknowledged that the right of occupancy may be severed from the obligation to pay the rent and that the former could be sold alone

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bank. *See Carriere*, 702 So. 2d at 671.

17. La. Civ. Code art. 2669.

18. *Walker*, 39 La. Ann. at 744, 2 So. at 382 (emphasis added). Both the lessor and lessee have both obligations and rights. As a general rule, either the lessor or the lessee may assign their rights to a third party; but in the absence of any special provision, the assignee must fulfill the obligations of the assignor. *See generally* La. Civ. Code arts. 2692, 2710, 1984.

19. The author acknowledges the debate among scholars as to whether a lease is a real right or a personal right. Although the courts consistently classify rights held under a lease as personal, jurisprudence and legislation have given lessees certain characteristics that are more commensurate with rights in a thing than mere rights against the lessor. *See* Prados v. South Cent. Bell, 329 So. 2d 744 (La. 1975); Calhoun v. Gulf Ref. Co. 104 So. 2d 547, 551 (La. 1958). This debate is beyond the scope of this article. For purposes of this article the author will adhere to the majority view that a lease is a real right. *See* George M. Armstrong, *Louisiana Landlord and Tenant Law*, §1.1, at 3 (1995). Assuming arguendo that a lease is a personal right, and personal rights exist only when the underlying obligation is fulfilled, then when a lessee fails to pay rent on the leased property, the rights of the lessee in the lease are extinguished. *See* La. Civ. Code art. 2674.

20. 1 Hen. Dig. 803 (1861).

21. *Walker*, 39 La. Ann. at 747, 2 So. at 383.

22. *Id.*

only in certain circumstances.[23] In *Walker*, a men's clothing store became insolvent and its "right of occupancy" in the leased premises was auctioned for fifty dollars to the new lessee. The clothing store's obligation to pay rent had been secured by certain movables in the leased premises, which had been sold and the proceeds of which were used to pay the yearly rent. The court held that where the rent had been paid to the lessor in full, the right of occupancy could be severed from the obligation to pay the rent.[24] Therefore, the new lessee purchased only the right of occupancy because the rent had been satisfied by the lessor's sale of the secured movables. If the court had held otherwise, the result would have been inequitable because the lessor would have been compensated for the rent twice.

Similarly, in *D'Aquin v. Armant*,[25] the lessor of a bakery auctioned and sold his lease for the sum of forty-five thousand dollars.[26] The purchaser soon thereafter defaulted on the rent payments and the lessor sued for the past and future rent payments. The purchaser argued that he never agreed to pay the rent on the lease but had only agreed to pay the purchase price. The *D'Aquin* court held that where the rent had not been satisfied, the purchaser at an auction-sale of a lease must pay the subsequent rent to the lessor according to the lease.[27] The court also explained that the bid, or the amount that the purchaser pays for the lease, is a premium or a bonus for the lease, so that the lessor enjoys the purchase price *and* the rent payments from the purchaser.[28] The lessee cannot "sever his rights from his obligations, and transfer one without the other."[29]

Likewise, in *Brinton, Syndic v. Datas*,[30] the lessor sold the unexpired term of a lease to a third party who paid only the purchase price to the lessor, but did not pay the rent. The third party argued that the price paid for the lease was for the occupancy of the premises during the term of the lease yet to run, and not as a provision for the lease. The court held that where the rents have not been paid, the

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23. 39 La. Ann. at 743, 2 So. at 381.

24. The dissent in *Walker* further stated:

> [o]f what advantage would the right to the lease be without the right of occupancy, and what would be the benefit of the right of occupancy without the lease? The lease confers the right of occupancy, and the right of occupancy is the consideration of the lease . . . Whoever, therefore, acquired the right of occupancy under the lease, acquired the lease, and whoever bought the lease, bought the right of occupancy under it. If by purchasing the lease, the. . .[purchaser] incurs the obligations of a lessee, it is clear that acquiring the right of occupancy is acquiring the lease, and is an indisputable voluntary assumption of consequent obligations.

39 La. Ann. at 747-48, 2 So. at 384 (Bermudez, J., dissenting).

25. 14 La. Ann. 217 (1859).

26. *Id.*

27. *D'Aquin*, 14 La. Ann. at 218. "If indeed it were the *lessor* who sold his interest in the lease, the transferee would, of course, be vested with the right to collect and keep the rent accruing thereafter; because that is the right of the lessor under the contract." *Id.* at 219 (emphasis added).

28. *Id.* at 219. When the lease is sold at the sheriff's sale, the purchaser of the lease is agreeing not only to pay a price for the lease, but also the rental payments for the property. The purchase price is then considered a "bonus" and does not count toward or replace the lease payments.

29. *Id.*

30. 17 La. Ann. 174 (1865).

sale of the lessee's rights in a lease to a third party imposes upon the buyer the obligation to pay the lessor the rents accruing after the sale.[31]

As these cases show, Louisiana courts have repeatedly held that the right of enjoyment and the obligation to pay the rent can be severed only *after* the rents have been paid in full.[32] Accordingly, Louisiana courts have formed an exception to the general rule that the right of enjoyment and the obligation to pay the rent cannot be severed. Considering the concepts behind *Walker* and its progeny, the *Carriere* court incorrectly found that the bank had severed the right of occupancy from the obligation to pay rent, because the rent on the property had not been paid in full. Even though it is possible to separate the right of occupancy from the obligation to pay the rent, "that right is lost when the underlying rent obligation is unfulfilled."[33] The naked right of occupancy in a "leasehold" setting cannot survive without satisfaction of the underlying rental obligation.[34]

2. What is a "Leasehold" in Louisiana?

In *Carriere*, the court justified its decision to let the bank occupy the land rent-free by allowing the severance of the right of occupancy from the obligation to pay rents. Under the language of the mortgage, Occhipinti mortgaged the "Leasehold Estate," rather than the "Ground Lease." The court reasoned that since Occhipinti used the terms "that Leasehold Estate," and not "the Ground Lease," Occhipinti mortgaged only the right of occupancy and not the obligation to pay the rent. Thus, the court defined "leasehold" as only the right of occupancy, and assigned a meaning to the common law term "leasehold" that is not a part of the Louisiana Civil Code. In fact, "[t]he term 'leasehold estate' is unknown in the civil law."[35] Nevertheless, the term is found in several sections of our revised statutes that deal with leases.[36] Unfortunately, none of those statutes provide a concrete definition of the term "leasehold." Therefore, one must look elsewhere for guidance.

A "leasehold" is defined in Black's Law Dictionary as: "[a]n *estate* in real property held by lessee/tenant under a lease."[37] "Estate" is defined as: "[t]he degree, quantity, nature, and *extent of interest* which a person has in real . . . property."[38] Examining this common law terminology, the "extent of interest," discussed in the definition of "estate," seems to contemplate both the obligations as well as the rights of real property. If the terms are substituted, a "leasehold" would be an estate (or extent of interest) in real property held by the lessee. Thus, if a

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31. *Id.*

32. Walker v. Dohan, 39 La. Ann. 743, 2 So. 381 (1887); D'Aquin v. Armant, 14 La. Ann. 217 (1859); Leham v. Dreyfus, 37 La. Ann. 587 (1885); Brinton, Syndic v. Datas, 17 La. Ann. 174 (1862).

33. Carriere v. Bank of Louisiana, 702 So. 2d 648, 658 (Calogero, C.J., concurring), *on reh'g*, 702 So. 2d 662 (La. 1997).

34. *Id.* at 658.

35. Michael H. Rubin & S. Jess Sperry, *Lease Financing in Louisiana*, 59 La. L. Rev. 845, 863 (1999).

36. *See, e.g.*, La. R.S. 9:1131.10; 9:1131.24; 44:1; 56:499.2 and 56:700.11 (1998).

37. *See* Black's Law Dictionary 890 (6th ed. 1990) (emphasis added).

38. *See id.* at 547 (emphasis added).

lessee's extent of interest is the obligations as well as the rights in the lease, then the very definition of leasehold contemplates both the obligations and the rights in the leased property.

The Uniform Commercial Code defines a "leasehold interest" as the "interest of the lessor or the lessee under a lease contract."[39] "'Lease contract' means the *total legal obligation* that results from the lease agreement. . . ."[40] Therefore, if the "lease contract" contemplates the *total legal obligation*, and a leasehold includes the interests *under these obligations*, then by virtue of these definitions, a leasehold contemplates all the rights and obligations that arise under the lease—*including the payment of the rent*. Had the *Carriere* court examined these common law sources, it may not have determined that the clause "that leasehold estate" referred to anything less than the entire lease—the rights as well as the obligations. As such, the *Carriere* court was incorrect in finding that the term "leasehold estate" included only the rights in the leased property and not its consequent obligations.

Since "leasehold" is a common law term, an examination of common law jurisprudence regarding the application and interpretation of leaseholds is necessary. In fact, the common law jurisprudence reveals three differing views on the right of a lessor to hold a mortgagee of a leasehold liable for rent payments: the "conveyance" approach, the "New York" approach, and the "California" approach. Although the *Carriere* court did not explicitly state that it adhered to any of these approaches, the result reached on rehearing seems to indicate that the court followed the California approach but failed to apply it correctly.

a. The Conveyance Approach

The law in some common law states incorporates the concept that a mortgage is a conveyance, rather than a lien. From this standpoint, when property is mortgaged, the mortgagee actually receives the title to the property. This concept, properly known as the "conveyance" approach operates to create "privity of estate" between the mortgagee of the leasehold interest and the lessor of the property.[41] A consequence of this approach is that the mortgagee is liable to the lessor on the lessee's covenants on the lease. The outcome is the same whether or not the mortgagee has "taken possession" of the leased premises.[42]

For example, in *Mayhew v. Hardesty*,[43] a Maryland court regarded the mortgagee of a leasehold as the assignee of the lease. The court applied the rule that where a party takes an assignment of a lease, the whole legal estate passes, and he thereby becomes liable on the real covenants, whether or not he actually possessed or occupied the premises.[44] Likewise in *Farmers' Bank v. Mutual*

39. Rev. U.C.C. § 2A-103(m).
40. Rev. U.C.C. § 2A-103(l) (emphasis added).
41. Tellier, *supra* note 16, at 1118.
42. *Id.*
43. 8 Md. 479 (Md. 1855).
44. *Id.* at 479. *See also* Lester v. Hardesty, 29 Md. 50 (Md. 1868); Gibbs v. Didier, 125 Md. 486 (Md. 1915); Williams v. Safe Deposit & Trust Co., 167 Md. 499 (Md. 1934); Hart v. Home Owners'

Assurance Society,[45] the court declared it to be well settled that where a party takes an assignment of a lease by way of a mortgage, the whole interest passes to him. Therefore, the assignee becomes liable on the covenant for payment of rent, even though he has never occupied or possessed the premises.[46]

The conveyance approach, although equitable, does not have a place in Louisiana law. Louisiana law does not recognize that title to a lease is transferred by a deed of mortgage. In Louisiana, "[a] mortgage neither gives 'title' nor possession to the mortgagee. . . ."[47]

b. New York Approach

In those states that subscribe to the idea that a mortgage is a "lien" and not a conveyance,[48] there are two distinct views as to the right of a lessor to hold a mortgagee of the lessee's interest liable for rents under the lease.[49] Under one view, referred to herein as the "New York" approach, the mortgagee is liable only if he has gone into possession of the leased premises. If the mortgagee has never had possession, he is not liable for breach of the covenants in the lease. If the mortgagee of a leasehold takes possession of the leased premises, he is to be regarded as in privity of estate with the lessor and is, therefore, liable to the lessor on the lessee's covenant to pay rent. On the other hand, if the mortgagee was never in possession, he is not liable.

In *Astor v. Hoyt*,[50] the foundation case of the New York approach, the court recognized that the assignee of a leasehold is liable on covenants of the lease that run with the leasehold. The court stated that: "If a mortgagee takes possession of the mortgaged premises lawfully, he must then be considered an assignee and the assignee must take the estate [with the burden]."[51] "Possession is the mother of [the mortgagee's] liability."[52]

Because Louisiana recognizes that a mortgage is a security interest rather than a conveyance of title,[53] the New York approach would be compatible with

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Loan Corp., 169 Md. 446 (Md. 1936); Union Trust Co. v. Rosenburg, 171 Md. 409 (Md. 1937); Jones v. Burgess, 176 Md. 270 (Md. 1939); Abrahams v. Tappe, 60 Md. 317 (Md. 1883).

45. 31 Va. (4 Leigh) 69 (Va. 1832).

46. *Id.*

47. La. Civ. Code art. 3278 cmt. (b).

48. In jurisdictions that consider a mortgage as a "lien" and not a conveyance, a mortgage is a security arrangement and creates in the mortgagee a lien rather than conveying full title. *See infra* notes 48-58 and accompanying text.

49. *See generally* North Chicago Street R. Co. v. Le Grand Co., 95 Ill. App. 435 (Ill. 1901); Olcese v. Val Blatz Brewing Co., 144 Ill. App. 597 (Ill. 1908); McKee v. Angelrodt, 16 Mo. 283 (Mo. 1852); Smith v. Brinker, 17 Mo. 148 (Mo. 1852); Knox v. Bailey, 4 Mo. App. 581 (Mo. 1877); State ex rel Johnson v. Commercial State Bank, 142 Neb. 752 (Neb. 1943); Century Holding Co. v. Ebling Brewing Co., 173 N.Y.S. 49 (1918); Levy v. Long Island Brewery, 56 N.Y.S. 242 (1899); Talley v. James Everard's Breweries, 116 N.Y.S. 657 (1909); Astor v. Hoyt, 5 Wend. 603 (N.Y. 1830).

50. 5 Wend. 603 (N.Y. 1830).

51. *Id.* at 603.

52. McKee v. Angelrodt, 16 Mo. 283 (Mo. 1852).

53. *See supra* note 47 and accompanying text.

Louisiana law. In the *Carriere* case, the application of the New York approach would have been equitable, making the bank liable for the rents. This result seems only fair because the bank was occupying the land, collecting rent from the lessees, and having Carriere pay property taxes. Nevertheless, the *Carriere* court did not follow the New York approach. Rather, it seems to have taken an approach developed by the California courts.

c. California Approach

Under the third related common law approach, herein referred to as the "California" approach, whether such mortgagee is or is not in possession of the premises is immaterial.[54] Based on this approach a mortgagee of a leasehold can under no circumstances be regarded, *at least prior to foreclosure of the mortgage,* as holding the same interest in the leasehold as the original lessee. Consequently, he is not an assignee of the lease, and therefore not liable for payment of rent.

However, the California approach does not seem to apply to situations where the mortgagee has already foreclosed on the property. In *Johnson v. Sherman*,[55] the leading case on this approach, the mortgagee had taken possession of the premises, but had not foreclosed on the mortgage. The court noted that in California, a mortgagee is regarded as never having the title to the mortgaged property *until judicial foreclosure and sale.*[56] Although the court does not discuss this point, it seems to make the distinction that a mortgagee, once he has foreclosed on the property, effectively becomes the assignee of the lease. Thereafter, the mortgagee becomes liable on the obligations of the lease.[57]

Although the *Carriere* court seems to have adopted the California approach to the mortgaging of leaseholds in Louisiana, the *Carriere* court failed to make the distinction that the *Johnson* court did. Based on the holding in *Johnson*, the California approach would not apply in a case such as *Carriere*, because the bank had already foreclosed on the mortgage. Therefore, while the bank would not have been liable for rents accruing before the foreclosure of the mortgage, the California approach would have made the bank liable for rents accruing thereafter. As such, although the *Carriere* court did not specifically state that it was following the California approach, the *Carriere* court applied the California approach incorrectly by allowing the bank to occupy the land rent-free after the foreclosure of the mortgage.

Louisiana courts must decide when it is appropriate to separate the right of occupancy from its consequent obligations. Louisiana courts should be faithful to the Louisiana civil law tradition and apply *Walker* to all leasehold situations, thereby allowing the right of occupancy to be separated from the obligation to pay rent only when the rents are paid in full. However, if Louisiana courts continue to

54. Tellier, *supra* note 16, at 1118.
55. 15 Cal. 287 (Cal. 1860).
56. *Id.* at 287 (emphasis added).
57. *Id.* at 289.

follow the common law approaches to leasehold situations, they must choose one approach and then correctly apply it. Either the New York approach or the California approach would be appropriate considering Louisiana's view on mortgages.[58] However, the New York approach seems more equitable because it takes into account whether the mortgagor is occupying the land.

B. Judicial Control: When is it Properly Applied?

On rehearing, the *Carriere* court did not reverse its original decision to exercise "judicial control" over the eviction proceedings and choose to not terminate the lease. By neglecting to reverse its decision, the court allowed the bank to occupy the premises rent-free and forced Carriere to continue paying taxes on the property.

The Louisiana Civil Code states that: "[t]he lessee may be expelled from the property if he fails to pay the rent when it becomes due."[59] However, the Louisiana Supreme Court has held that although a lessor may ordinarily dissolve a lease for failure of the lessee to pay rentals timely, this right is subject to judicial control according to the circumstances.[60] The cases where courts have applied judicial control of leases generally involve circumstances where a lessee has made a good faith error and acted reasonably to correct it.[61] An examination of the cases illustrates when the doctrine of judicial control is properly applied.

In *Brewer v. Forest Gravel Co.*,[62] the lessor sought cancellation of the lease because the lessee withheld part of the rent on a mineral lease to pay severance tax. The lessor contended that the lessee owed the severance tax. The court ruled that the tax was indeed owed by the lessee, but refused to cancel the lease because of nonpayment of the portion of the rent withheld by the lessee to pay the tax.[63] The supreme court concluded that the lessee did not arbitrarily refuse to pay the rent but made a good faith error by refusing to pay more than he believed was due.[64] The court held that under such circumstances it would be inequitable to the lessee to cancel the lease.[65]

Similarly, in *Edwards v. Standard Oil Co. of Louisiana*,[66] the lessee's rent payment became due on July 15, 1931. The lessee had mailed a check to its local agent for delivery to the lessor on July 10, 1931, but the check did not reach the lessor until six days after the due date "owing to some oversight, or perhaps some

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58. *See* text accompanying *supra* notes 48-58.

59. La. Civ. Code art. 2712.

60. *See* Brewer v. Forest Gravel Co., 172 La. 828, 135 So. 372 (1931); Huckabay v. Red River Waterway Comm'n, 663 So. 2d 414 (La. App. 2d Cir. 1995); Sieward v. Denechaud, 120 La. 720, 730, 45 So. 561, 564 (1908).

61. Brewer v. Forest Gravel Co., 172 La. 828, 135 So. 372 (1931); Edwards v. Standard Oil Co. of Louisiana, 175 La. 720, 144 So. 430 (1932); Baham v. Faust, 333 So. 2d 261 (La. App. 1st Cir. 1976).

62. 172 La. 828, 135 So. 372 (1931).

63. *Id.* at 832, 136 So. at 373.

64. *Id.*

65. *Id.*

66. 175 La. 720, 144 So. 430 (1932).

fault in mail deliver[y]."[67] The lessor refused to accept the check and returned it to the lessee. The supreme court reversed the lower court's judgment canceling the lease for failure to timely pay the rent, reasoning that it would be inequitable to the lessee who had mailed the rent payment on time.[68]

In *Baham v. Faust*,[69] the lessee's rent payment was due on February 28, 1975. The rent was not received by lessor's attorney until March 8, 1975 and was refused at that time. The court noted that the lease did not provide for a place of payment. Further, the parties in this case had not established a custom of making payment at a particular location.[70] Therefore, the lessor was required to collect the rent at the lessee's dwelling according to Louisiana Civil Code article 1862.[71] Additionally, the court looked to the fact that the lessee was willing to pay the rent: "The record contains ample evidence of the willingness of the [lessee] to pay the rent when due. The lessor cannot create a cause of action entitling him to cancel the lease by his own failure to collect the rent at the place where due."[72]

In *Belvin v. Sikes*,[73] the lessors sued for the dissolution of their lease because of non-payment of rent by the lessee. The lessee owed rent twice yearly, on the first of March and September. On February 28, 1939, the lessee paid the lessors the rent that was to discharge his rent obligation up to September 1, 1939. However, the receipt given by the lessors to the lessee erroneously read "in full payment of lease up to Oct. 1, 1939." On October 2, 1939, the lessee tendered the amount that would have paid the rent until March 1, 1940. This tender was refused, and the lessor told the lessee that the lease was terminated due to non-payment of rent and that the lessee was expected to vacate the premises.[74] The court found that the October 2 tender prevented the lease from lapsing and continued the life of the lease. The court held that the lessee relied in good faith upon the receipt stating that the rent was paid until October 1, 1939. Therefore, the court invoked judicial control and refused to terminate the lease.[75]

In *Tullier v. Tanson Enterprises, Inc.*,[76] the lessee failed to pay the rent due on December 1, 1975 and January 1, 1976. The lessor mailed two notices of default, as required by the lease, to the lessee.[77] On March 1, 1976 the lessee wired the lessor a sum sufficient to pay the 1975 property

67. *Id.* at 721, 144 So. at 431.
68. *Id.*
69. 333 So. 2d 261 (La. App. 1st Cir. 1976).
70. *Id.* at 262.
71. La. Civ. Code art. 1862 provides in part:
Performance shall be rendered in the place either stipulated in the agreement or intended by the parties according to usage, the nature of the performance, or other circumstances. In the absence of agreement or other indication of the parties' intent, . . .the performance shall be rendered at the domicile of the obligor.
72. *Baham*, 333 So. 2d at 263.
73. 2 So. 2d 65 (La. App. 2d Cir. 1941).
74. *Id.* at 66.
75. *Id.* at 67.
76. 359 So. 2d 654 (La. App. 1st Cir. 1978).
77. *Id.* at 658.

taxes, attorney fees, and rentals due through April 1976. The lessor received the funds on March 3, 1976, but refused to accept them. The lessor thereafter sued to evict the lessee.[78] The court held that the payment made following the default notices was untimely due to no fault of the tenant because of a malfunction of the transmittal device of the bank that forwarded the funds, and because of Mardi Gras, a bank holiday. The court found that the lessee had made a good faith effort to cure his default by submitting rentals and paying the taxes. Therefore, the court exercised judicial control and refused to cancel the lease.[79]

Similarly, the court reversed a lease cancellation in *Housing Authority of the City of Lake Charles v. Minor.*[80] On May 9, 1977, the deadline for the May rent, the lessee's wife paid the rent with a third-party check from the lessee's employer. The lessor returned the check due to insufficient funds on Friday, May 13, 1977 and on the same day delivered a written notice to the lessee's wife demanding that the lessee vacate the premises for non-payment of rent. The lessee's wife paid the rent the following Monday. The lessor accepted the payment but deposited the check into an escrow account pending the eviction proceedings.[81] Reasoning that it would have been inequitable to the lessee to cancel the lease, the court exercised judicial control and refused to cancel the lease.[82]

As these cases show, Louisiana courts exercise judicial control only in special circumstances. These circumstances are limited to cases where it would be inequitable to the lessee for the lease to be terminated. In *Carriere*, by foreclosing on the mortgage and purchasing the leasehold themselves, the bank extinguished the mortgage by confusion, thereby replacing Occhipinti as lessee.[83] As lessee, the bank willfully refused to pay rent to Carriere. Therefore, dissolution of the lease and eviction would have been proper under the doctrine of judicial control because the willful nonpayment of rent by the bank was inequitable to Carriere, not the lessee, for whom the doctrine was established. Because it was inequitable to Carriere and allowed the bank to occupy the land rent-free, the *Carriere* court incorrectly decided not to overturn the earlier ruling exercising judicial control, thereby abusing the doctrine of judicial control.

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78. *Id.* at 659.

79. *Id.* at 660.

80. 355 So. 2d 271 (La. App. 3d Cir. 1977).

81. *Id.* at 272, 273.

82. *Id.* at 274, 275.

83. *See* Department of Culture, Recreation & Tourism of the State of Louisiana v. Fort Macomb Dev. Corp., 385 So. 2d 1233, 1235 (La. App. 4th Cir. 1980). When Occhipinti stopped making mortgage payments, the bank had two options to recover its losses. The bank could either "step into the lessee's shoes" or could foreclose on the property. The bank chose the later, but by buying the mortgaged property, the bank extinguished the mortgage through confusion and in actuality, replaced Occhipinti as the lessee. *See* Carriere v. Bank of Louisiana, 702 So. 2d 648 (La. 1997). Consequently, the bank should have been liable to Carriere for rents.

III. EFFECTS OF *CARRIERE*, RELEGATION TO CONTRACT LAW, AND HOW TO AVOID THE RESULT OF *CARRIERE V. BANK OF LOUISIANA*

If the Louisiana courts and the Louisiana Legislature do not recognize the error of *Carriere*, the decision will hinder the operation of Louisiana Civil Code article 3286,[84] which provides for mortgaging of leases, thereby inhibiting commerce. After the *Carriere* decision, would a lessor allow his leased property to be mortgaged knowing that if the leasehold was foreclosed on, the lessor would not be able to compel the mortgagee to pay rent on the property that he possessed? The owners of raw land will not receive money from the use of the property, and they will have to pay taxes to keep it. What economic incentive is there? As a result, owners of land will not allow lessees to mortgage their interest in leased property. Instead, property owners will either wait to sell their property for cash or deal only with those people who are in great financial shape. Investors like Occhipinti in *Carriere* will not be able to start their own business. Although this decision is great news for banks—who is going to agree to be the lessor? The result of *Carriere* will inhibit the mortgaging of a lessee's interest in leased property (or "leaseholds" in common law terminology). A corollary of this result is that lessors will never execute leases like the one in *Carriere* again, and lessees will be the ones who suffer. Louisiana courts must resolve this issue for Louisiana landowners to be able to compete in the national marketplace. To avoid inhibiting the use of Louisiana Civil Code article 3286, *Carriere* should be read as standing for the proposition that parties are generally permitted to negotiate the kind of deal they desire. The inequitable result in *Carriere* would thereby be narrowed to an interpretation of contract law, rather than a general statement concerning the mortgaging of rights in leased property.

In order to avoid the result in *Carriere*, parties should be more vigilant in drafting lease documents. Specifically, attorneys for the lessors should draft mortgage contracts that explicitly provide that the mortgagee will be liable for rents if the mortgagor/lessee defaults on the rent payments. Attorneys should examine the lease in *Carriere* and avoid its language, being careful not to use common law terminology frivolously. Further, Louisiana attorneys should provide definitions of the language they use in the contract, or at the very least, make sure the terminology used is well defined in Louisiana jurisprudence. Lawyers should take care not to be sloppy in this respect, and keep in mind that even though Louisiana attorneys habitually use common law terms, the terms may not have meaning in Louisiana civil law. Attorneys should also note that Carriere later sued his lawyers in malpractice for their mistake.

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84. The pertinent part of La. Civ. Code Art. 3286 provides:
The only things susceptible of mortgage are:
(4) The lessee's rights in a lease of an immovable with his rights in the buildings and other constructions on the immovable.

IV. CONCLUSION

In light of the holding in *Walker*,[85] the *Carriere* court incorrectly held that the bank had severed the right of occupancy from the obligation to pay the rent and had purchased the right of occupancy alone. Even though it is possible to separate the right of occupancy from the obligation to pay the rent, "that right is lost when the underlying rent obligation is unfulfilled."[86] The naked right of occupancy in a leasehold setting cannot survive without satisfaction of the underlying rental obligation.[87] Therefore, where the rent on mortgaged property has not been paid in full, the obligation to pay the rent cannot be separated from the right of occupancy. Consequently, the *Carriere* court incorrectly allowed the bank to occupy the land without paying rent to Carriere.

The *Carriere* court not only disregarded the *Walker* decision, but also misapplied the chosen common law doctrine on leaseholds. Further, no reasoning was offered as to why the court chose this path. The court simply pointed to *Walker* to show that the separation of the rights from the obligations was possible, but then failed to apply the *Walker* holding properly. To add insult to injury, the court then failed to apply the California approach correctly.

Finally, the *Carriere* court should have overturned the prior ruling exercising judicial control over the lease. Louisiana courts apply judicial control only in such cases where it would be inequitable *to the lessee* for the lease to be terminated. In *Carriere*, the bank essentially became the lessee when it purchased the leasehold and extinguished the mortgage by confusion.[88] Thereafter, the bank continued to occupy Carriere's property rent-free. To terminate the lease in this situation would certainly not be inequitable to the lessee. As such, the *Carriere* court incorrectly concluded not to overturn the earlier ruling exercising judicial control. This oversight has allowed the bank to occupy Carriere's land rent-free and without paying property taxes from 1989 until the lease expires in 2002. By not overturning the earlier ruling, the court abused the doctrine of judicial control, allowing the doctrine to be exercised in favor of a lessee who willingly, and to its advantage, failed to pay rent to the lessor. Since the doctrine of judicial control was established to protect innocent lessees, the court should amend this ruling to avoid misuse in the future.

Due to the increase in interstate markets, there will continue to be conflicts between the common law and the civil law traditions. In addition to the differences between the common law and the civil law, each common law jurisdiction has conflicting approaches to mortgaging a lessee's interest in a lease, resulting in divergent outcomes. Therefore, it is important that Louisiana courts decide beforehand which approach should be taken so that the reasoning is clear and attorneys can predict the outcome. If the *Carriere* decision is not corrected soon,

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85. *See supra* text accompanying note 22.

86. Carriere v. Bank of Louisiana, 702 So. 2d 648, 658 (Calogero, C.J., concurring), *on reh'g*, 702 So. 2d 648, 653 (La. 1997).

87. *Carriere*, 702 So. at 653-54.

88. *See supra* text accompanying note 83.

Louisiana courts will continue to apply Louisiana lease law incorrectly and will befuddle commerce and investment in Louisiana.

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