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Guarantee Clauses In Building Contracts

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COMMENTS

GUARANTEE CLAUSES IN BUILDING CONTRACTS

Under Louisiana Civil Code article 2762, an undertaker or architect who agrees to furnish materials or perform work by the job "shall bear the loss" resulting from faulty workmanship or materials.[1] For wood or frame work, this warranty extends for five years;[2] for brick or stone, ten years.[3] Although the warranty covers the entire building,[4] it apparently applies only to original construction — not to repairs and alterations.[5] Recovery under the warranty of article 2762 requires proof that the defect resulted from faulty workmanship or defective materials.[6]

Contracting parties, free to choose terms and conditions having the force of law between them,[7] may expressly alter this code warranty. Building contracts have provided for shorter

1. LA. CIVIL CODE art. 2762 (1870): "If a building, which an architect or other workman has undertaken to make by the job, should fall to ruin either in whole or in part, on account of the badness of the workmanship, the architect or undertaker shall bear the loss if the building falls to ruin in the course of ten years, if it be a stone or brick building, and of five years if it be built in wood or with frames filled with bricks."

Defective material is also covered by this article. Delee v. Hatcher, 19 La. Ann. 98 (1867); Powell v. Markham, 18 La. Ann. 581 (1866); Lewis v. Blanchard, 8 Mart.(N.S.) 290 (La. 1829); Draube v. Rieth, 114 So. 2d 879 (La. App. Orl. Cir. 1959). See generally Comment, 7 LA. L. REV. 564 (1947).

2. LA. CIVIL CODE art. 2762 (1870). See note 1 *supra*.

3. *Ibid.*

4. This is the apparent meaning of "fall to ruin in whole or in part" in article 2762. See, *e.g.*, Rinaudo v. Treadwell, 212 La. 510, 32 So. 2d 907 (1947); Parker v. Brown, 150 So. 2d 306 (La. App. 2d Cir. 1963); Kuhlman v. Talley, 145 So. 2d 101 (La. App. 3d Cir. 1962).

5. No Louisiana case has attempted to apply this article to anything except original construction. Recovery for faulty repairs is obtained under article 2769, which provides: "If an undertaker fails to do the work he has contracted to do, or if he does not execute it in the manner and at the time he has agreed to do it, he shall be liable in damages for the losses that may ensue from his non-compliance with his contract."

6. Fremont v. Harris, 9 Rob. 23 (La. 1844); Draube v. Rieth, 114 So. 2d 879 (La. App. Orl. Cir. 1959).

7. LA. CIVIL CODE arts. 1764, 1901, 1963 (1870). There are, of course, exceptions to this rule. Articles 11 and 12 limit the power to contract in derogation of public order, good morals, or prohibitory laws. See, *e.g.*, Phillips v. Bryan, 172 La. 269, 134 So. 88 (1931); Boring v. Louisiana State Ins. Co., 154 La. 549, 97 So. 856 (1923). See also LA. CIVIL CODE arts. 1779(4), 1893 (1870) (unlawful cause).

prescriptive periods[8] and broader warranty coverage,[9] but perhaps the most common provision of the contract is the guarantee clause. Frequently ineptly drawn and susceptible of a variety of interpretations, a typical guarantee clause provides:

> "All workmanship and materials shall be fully guaranteed against defects for a period of one year from the date of completion of the work."[10]

The purpose of this note is to examine the legal effects of clauses of this nature which appear to guarantee against the same defects as the code warranty.[11]

Term

The usual guarantee's term limitation is susceptible of two interpretations: the defect must be either discovered within that period, or merely so manifest that it is discoverable by ordinary inspection. Although there is dictum indicating that the defect must be discovered within the guarantee period,[12] no case has squarely presented the problem.[13] It is submitted that the more reasonable interpretation would require only that

8. French Market Ice Mfg. Co. v. Landauer, 4 Orl. App. 80 (La. App. Orl. Cir. 1906) (six-month prescriptive period running after a one-year guarantee period).

9. Cellized Block Flooring v. Campbell, 188 So. 674 (La. App. Orl. Cir. 1939) (floor guaranteed against all defects with only a few limited exceptions).

10. This clause was under consideration in Russell v. Bartlett, 139 So. 2d 770 (La. App. 4th Cir. 1961). See also the clause under consideration in Police Jury of Parish of Vernon v. Johnson, 111 La. 279, 280, 35 So. 550, 551 (1903): "[T]he contractor shall at any time when required by the supervising architect, within one year from and after the completion and acceptance of the work herein contracted, make good any and all latent defects not discernible at the final examination and occupation thereof; such as evidence of the use of improper materials or labor in any branch of the work, causing the same to be imperfect and defective in construction or finish."

The clause in Michel v. Efferson, 223 La. 136, 146, 65 So. 2d 115, 118 (1953) provided: "Unless otherwise called for all material and workmanship shall be guaranteed for a period of one year, starting from the date of acceptance of the contract." Barraque v. Neff, 202 La. 359, 363, 11 So. 2d 697, 698 (1942): "[A]nd shall remedy any defects due to faulty materials or workmanship which appear within a period of one year from the date of completion of the contract."

11. There may be guarantee clauses which cover defects other than those covered in the code warranty; however, only guarantee clauses which parallel the code warranty will be scrutinized in this article.

12. Police Jury of Parish of Vernon v. Johnson, 111 La. 279, 35 So. 550 (1903). See also Michel v. Efferson, 223 La. 136, 65 So. 2d 115 (1953); Barraque v. Neff, 202 La. 359, 11 So. 2d 697 (1942). *But cf.* Russell v. Bartlett, 139 So. 2d 770 (La. App. 4th Cir. 1961), in which the court said that the defect "must become apparent" within the guarantee period. *Id.* at 777.

13. In the *Barraque*, *Michel*, and *Russell* cases, *supra* note 12, the defect was both discoverable and discovered within the guarantee period. In Police Jury of Parish of Vernon v. Johnson, 111 La. 279, 35 So. 550 (1903), the defect was neither discovered nor discoverable within the period. See note 12 *supra*.

the defect be discoverable within the guarantee period.[14] Under this view the guarantee clause is the contractor's express promise that no defect due to faulty workmanship or materials will appear[15] during the guarantee period. To require discovery of the defect within the guarantee period would impose an unreasonable burden of inspection on a contractee, who should be allowed to assume the work was completed without defect if none were discovered on his initial inspection.

Prescription

Since the guarantee clause makes no mention of prescription, Louisiana courts have flatly rejected claims by contractors that the period stipulated for the duration of the guarantee also governs the time within which an action must be brought.[16] Absent express contractual change, therefore, prescription of the guarantee is the same as that for the code warranty action.[17] The applicable rules and their operation, however, are shrouded in ambiguity. Article 2762 imposes liability "if the building falls to ruin in the course of ten years, if it be a stone or brick building, and of five years if it be built in wood or with frames filled with bricks."[18] Under the chapter "Of Prescription," article 3545 provides that "the action against an undertaker

14. Admittedly this will be fraught with problems of proof, particularly if several years lapse after the guarantee period expires before a defect is discovered; however, if the contractee can establish that the defect became manifest while the guarantee was operative, he should be allowed to recover.

15. Terminology in this area can lead to confusion. Generally the defects guaranteed against are ones of original construction; therefore, these defects cannot occur during the guarantee period in the sense that they originate — they were present in the original construction. However, they can become more and more aggravated until they are manifest and finally discovered. The very existence of a time limitation indicates that there is not to be recovery for every defect present from the beginning. If there were, that would be identical to a guarantee against *any* defect which can be traced to original construction regardless of when actually discoverable or discovered. As that would be inconsistent with the presence of a time limitation, the guarantee clause must protect against only those defects which become manifest, or perhaps at least both manifest and discovered, within the period, and excludes those which, though present from the beginning, remain hidden.

If the guarantee clause covers other defects than those of original construction (see note 31 *infra*), it can be argued more plausibly that defects which occur within the period but remain hidden until after the guarantee period, are covered. A more reasonable interpretation of the parties' intentions, however, would seem to require that these defects also become at least manifest while the guarantee is extant. It is unlikely that the contractor would concede to protect against defects originating from sources not within his control, unless they were manifestly interfering with his building within the guarantee period.

16. Michel v. Efferson, 223 La. 136, 65 So. 2d 115 (1953); Russell v. Bartlett, 139 So. 2d 770 (La. App. 4th Cir. 1961).

17. LA. CIVIL CODE arts. 3544, 3545 (1870).

18. See note 1 *supra*.

or architect for defect of construction of buildings of brick or stone, is prescribed by ten years."[19] There is no jurisprudence indicating whether prescription under article 3545 runs simultaneously with the warranty of article 2762 — from acceptance of the work[20] — or from the time the cause of action under article 2762 arises. The French majority position is that their counterparts to articles 2762 and 3545 establish a single delay,[21] both periods — term of warranty and prescription — running concurrently from the acceptance of the work.[22] Thus the cause of action must arise and the action be instituted within the same ten-year period.[23] This interpretation, however, is based on language in the French counterpart to article 3545 providing that after ten years, contractors "are released from all responsibility."[24]

The Louisiana Civil Code of 1808 also provided that contractors were "released from all responsibility,"[25] tracing the French article exactly except for the addition of a limitation of five years for frame buildings. In 1825, however, the wording of article 3545 was changed to its present form, providing that "the action . . . is prescribed by ten years."[26] The redactors gave no reason for the change. The apparent meaning of the article as it now stands, with the shift of emphasis from "release from responsibiltiy" to prescription of "the action," is that prescription does not begin to accrue until the cause of action arises — when a defect covered by the code warranty becomes manifest.[27] This interpretation gives meaning to the legislature's change in the article, and conforms article 3545 to the

19. LA. CIVIL CODE art. 3545 (1870).

20. Brasher v. City of Alexandria, 215 La. 887, 931, 41 So. 2d 819, 834 (1949).

21. "[T]he two articles establish a single delay and this delay includes, at the same time, the time during which the responsibility for accidents lasts, and the prescription of the action." 2 PLANIOL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) no. 1914(3) (1959).

22. "The ten years run from the acceptance of the work." *Id.* at no. 1913.

23. "[I]f an accident does not take place in the ten years, the architect [undertaker] is fully discharged." *Ibid.*

24. FRENCH CIVIL CODE art. 2270.

25. LA. CIVIL CODE art. 73 (1808).

26. LA. CIVIL CODE art. 3509 (1825): "The action against an undertaker or architect for defects of construction of buildings of brick or stone is prescribed by ten years."

27. Clearly the cause of action — the defect in workmanship or materials — existed as soon as the building was completed; however, a further event of some kind — either discovery or manifestation — is bound to be necessary before the contractor becomes amenable to liability. See note 15 *supra*.

general principle that prescription commences to run against a cause of action from the time it arises.[28]

Acceptance of the proposed interpretation would not, however, remove all ambiguities from article 3545. The article establishes expressly only a ten-year prescription for 'buildings of brick or stone." There is no reference to the five-year period for frame buildings which was in the 1808 predecessor to article 3545, corresponding with the five-year period in which the action must arise under article 2762. The alteration may be attributed to one of three possible causes. First, either the inclusion of "of brick or stone," after "buildings," or the omission of "or in wood or with frames filled with bricks" following "buildings of brick or stone" was accidental, the redactors intending to provide a standard ten-year prescription on all buildings. Another possibility is that the omission was intentional and the redactors intended for the general prescription of ten years in article 3544 to apply to buildings made of "wood or with frames filled with bricks." A third possibility is that the omission of all reference to the five-year prescription for wood buildings was accidental; the redactors intended to retain the correspondence between the duration of the warranty and the prescriptive period. The first two possibilities give the contractee a ten-year period within which to file suit, while the third necessitates an inferred five-year limitation. Since there is an ambiguity in the article and a five-year limitation is not express, it would seem inequitable to sustain a plea of prescription to a cause of action brought on a frame building after five but prior to ten years.

In summary, the period specified for the duration of a guarantee does not change the rules of prescription applicable to actions against contractors. Although these rules reek with ambiguity, it is submitted that the most reasonable interpretation would be that the right of action under the warranty of article 2762 — and consequently a guarantee clause — would prescribe ten years from the time the cause of action arises[29] whether the building is of wood or brick.

28. For the view that prescription does not accrue until the cause of action arises, see generally State *ex rel.* Bourgaux v. Fontenot, 192 La. 95, 187 So. 66 (1939); R.E.E. De Montluzin Co. v. New Orleans & N.E.R.R., 166 La. 822, 118 So. 33 (1928); Lanusse v. Minturn, 11 La. 256 (1837); Girod v. Barbe, 153 So. 326 (La. App. Orl. Cir. 1934). See also French Mkt. Ice Mfg. Co. v. Landouer, 4 Orl. App. 80 (La. App. 1906) (accrual of contractual prescriptive period delayed until cause of action arose or until guarantee expired).

29. For purposes of actually computing prescription should the matter ever

Warranty Coverage

The warranty under article 2762 pertains only to defects of original construction. Does an express guarantee clause of the type under consideration[30] extend coverage to defects not traceable to original construction?[31] A distinction can be made between a guarantee clause that states affirmatively what is covered[32] and one which merely states what is not covered. In the former only defects from the stated causes — *e.g.*, workmanship or materials — are covered.[33] Thus only to the extent that the guarantee expressly provides coverage beyond defects of original construction is the scope of the code warranty expanded. On the other hand, under a clause which guarantees against all defects except those from certain specified causes, the contractor is answerable for any defect, unless it is attributable to one of the excluded causes.[34]

Burden of Proof

Whether as plaintiff in an action for breach of warranty[35] or as plaintiff in reconvention to a suit by the contractor for the price of the work,[36] the contractee claiming under article 2762 must affirmatively assert and prove that the defect resulted from poor workmanship or materials.[37] As in warranty cover-

become crucial, practice may well have to override theory and the courts are likely to find themselves faced with a third date — day defect was actually discovered. Impossibility of pinpointing the day the defect "became manifest so that it could have been discovered by ordinary inspection" will probably force courts to adopt "date of discovery" to determine when the "action" is prescribed, notwithstanding its arising when the defect becomes "discoverable."

30. See clauses quoted note 10 *supra*.

31. *E.g.*, (1) ordinary wear and tear; (2) improper design; (3) weather; (4) animals; (5) malicious destruction; (6) interruption of utility services; (7) operation of adjoining property; (8) Acts of God; (9) failure to perform proper maintenance.

32. See clauses quoted note 10 *supra*.

33. Michel v. Efferson, 223 La. 136, 65 So. 2d 115 (1953); Barraque v. Neff, 202 La. 360, 11 So. 2d 697 (1942); Police Jury of Parish of Vernon v. Johnson, 111 La. 279, 35 So. 550 (1903); Russell v. Bartlett, 139 So. 2d 770 (La. App. 4th Cir. 1961); Di Franco v. Ascani, 127 So. 76 (La. App. Orl. Cir. 1930).

34. A. & O. Builder v. Labiche Plumbing Service, 75 So. 2d 39 (La. App. Orl. Cir. 1954); Cellized Block Flooring Co. v. Campbell, 188 So. 674 (La. App. Orl. Cir. 1939). *Cf.* Vaupel v. Lamply, 181 Ind. 8, 103 N.E. 796 (1914); Scott v. Keeth, 152 Mich. 547, 116 N.W. 183 (1908); Miller v. Zander, 147 N.Y. Supp. 479, 85 Misc. 449 (1914), *aff'd*, 151 N.Y. Supp. 1130, 116 App. Div. 969 (1915) (concerning similar warranties in contracts of sale).

35. Fremont v. Harris, 9 Rob. 23 (La. 1844); Draube v. Rieth, 114 So. 2d 879 (La. App. Orl. Cir. 1959).

36. Powell v. Markham, 18 La. Ann. 581 (1866).

37. Usually, however, the very existence of a defect within a reasonable time after the completion of the work is presumptive evidence of faulty workmanship or materials. Barraque v. Neff, 202 La. 364, 11 So. 2d 697 (1942); Fremont v. Harris, 9 Rob. 23 (La. 1844).

age, the burden of proof under a guarantee clause depends on the particular language used. In a clause which affirmatively states which defects are covered, the contractee, as under the code warranty, must prove the defect is covered by the guarantee.[38] If, on the other hand, the clause provides a general guarantee with certain exceptions, all the contractee has to establish is the existence of the defect; the burden then shifts to the contractor to prove that it was attributable to an excluded cause.[39]

Impact on Implied Warranty

The problems created by the coexistence of the code warranty and guarantee clauses of the type under consideration have not been considered. The jurisprudence does not reveal whether incorporation of a guarantee clause which covers the same defects as article 2762 wholly or partially abrogates the code warranty. Initially, this inquiry must turn on whether article 2762 is susceptible of being contractually superseded.

Civil Code article 11[40] attempts to spell out situations in which parties may displace or modify legislation in their favor by providing that "in all cases in which it is not expressly or impliedly prohibited, they may renounce what the law has established in their favor." But what cases are "not expressly or impliedly prohibited?" It has been suggested that laws may be classified as either suppletive or constructive.[41] Suppletive laws operate in the absence of a discernible will of the parties to the contrary and thus can be contractually superseded.[42] Constructive laws are those imperative and prohibitory laws which may not be contractually altered.[43] It is only the suppletive laws, therefore, that parties are "not expressly or impliedly prohibited" from renouncing.

Apparently neither the redactors of the French nor the Lou-

38. See note 33 *supra*.

39. Cellized Block Flooring Co. v. Campbell, 188 So. 674 (La. App. Orl. Cir. 1939).

40. "Individuals can not by their conventions, derogate from the force of laws made for the preservation of public order or good morals.

"But in all cases in which it is not expressly or impliedly prohibited, they can renounce what the law has established in their favor, when the renunication does not affect the rights of others and is not contrary to the public good." LA. CIVIL CODE art. 11 (1870).

41. Morrison, *Legislative Technique and the Problem of Suppletive and Constructive Laws*, 9 TUL. L. REV. 544 (1935).

42. *Id.* at 548.

43. *Ibid.*

isiana Civil Codes employed a rigid drafting technique;[44] however, generally the presence of the *ne peut* form or its equivalent signals a prohibitive text,[45] while the use of the future tense marks an imperative text.[46] On the other hand, articles drafted in the present indicative are probably intended to be suppletive.[47] Applying these rather mechanical tests to article 2762, it appears at first blush that the language "shall bear the loss"[48] constitutes a constructive text and thus may not be superseded. However, examination of the Code of 1825 forerunner of the article discloses that the official French text[49] was drafted not in the future but in the present indicative,[50] indicating that it was not intended to be constructive. On this basis, therefore, it would appear that article 2762 can be superseded.

Since an analysis based solely on drafting technique may not be totally reliable, article 2762 may also be tested against the basic command of article 11 that "individuals can not by their conventions, derogate from the force of laws made for the preservation of public order or good morals."[51] Viewed in the light of today's concepts of public policy as well as against the background of Louisiana's civil law heritage with its emphasis on autonomy of the will, no compelling reasons appear to prevent parties from renouncing, in whole or in part, the protection and liability of the code warranty.[52]

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44. *Id.* at 556.
45. *Id.* at 552, n. 24.
46. *Id.* at 552.
47. *Ibid.*
48. "If a building, which an architect or other workman has undertaken to make by the job, should fall to ruin either in whole or in part, on account of the badness of the workmanship, the architect or undertaker *shall bear the loss* if the building falls to ruin in the course of ten years, if it be a stone or brick building, and of five years if it be built in wood or with frames filled with bricks." LA. CIVIL CODE art. 2762 (1870) (Emphasis added.)
49. Although adopted in English in 1870, the text of the article then carried the same error as existed in 1825, when the article was originally mistranslated into English from the French in which it was drafted. The French text, therefore, must be recognized as controlling. Sample v. Whitaker, 172 La. 722, 135 So. 38 (1931); Phelps v. Reinach, 38 La. Ann. 547 (1886); Shelp v. National Surety Corp., 218 F. Supp. 615 (E.D. La. 1963).
50. "*Si l'édifice, construit à prix fait, périt, en tout ou en partie, par le vice de la construction, l'architect or entrepreneur* en est responsable *pendant dix ans pour les maisons en briquer, et pendant cinq ans pour les maisons en bois ou colomboge.*" LA. CIVIL CODE art. 2733 (1825). (Emphasis added.)
51. See note 40 *supra.*
52. The only interest that seems to be involved is the individual's interest in having a well constructed home or other building. Should total or partial renunciation of the protection of article 2762 begin to result in a rash of defec-

Since article 2762 apparently can be superseded, the question becomes whether a guarantee clause of the type being considered will displace it. It certainly can be renounced by express language in the contract to that effect. Beyond this lies the realm of implied renunciation and very little can be said with any certainty as to how an article is impliedly displaced. However, a suppletive provision should be considered superseded if its continued existence would be inconsistent with the operation of a contract provision. Since the guarantee clause under consideration covers the same defects as those covered by the code warranty, it is submitted that the parties have conventionally substituted the terms of the guarantee for those of the code warranty.[53] Their simultaneous or consecutive operation would be anomalous. If the warranty of article 2762 operates simultaneously, the guarantee adds nothing. Furthermore, no sound reason appears for contending that the code warranty commences after expiration of the guarantee term rather than from the acceptance of the work.[54] It appears, therefore, that by insertion of such guarantee clauses the parties should be held to have intended that the code warranty be completely superseded and that their rights be determined by the substituted guarantee clause.[55] Thus, the presence of a guarantee clause apparently limits the substantive rights of a contractee;[56] he may no longer rely on the five or ten year periods in article 2762 — his action against the contractor must arise within the term and coverage of the guarantee.

Conclusion

The warranty under article 2762 protects the contractee from defects in workmanship and materials. This protection may be materially affected by the inclusion of an express guarantee

tively built buildings, it is an individual's injury — not society's; the remedy is simply to stop waiving all protection.

Waivers of this nature are by no means novel. Witness for example quality warranty waivers in sales transactions. See 23 TUL. L. REV. 154 (1935).

53. LA. CIVIL CODE arts. 1963-1967 (1870).

54. See note 20 *supra*.

55. Some guarantee clauses are not, however, inconsistent with the continued validity of the code warranty. For instance, a contractor's guarantee against termite damage for a specified period appears to be additional protection — not a substitute for the code warranty of workmanship and materials. Whether a particular guarantee clause abrogates in whole or in part the code warranty is a problem of contract interpretation on which there is no jurisprudence.

56. Whether such terms were in fact bargained about should be of no moment. This phase of the contract may be imputed to the parties for, absent any fraud, one is presumed to know the law and thus aware of rights or liabilities he may be relinquishing.

clause in the building contract. Often the protection under the guarantee clause is considerably less than that under the code warranty. Parties inserting a guarantee clause into their building contracts should be aware of their rights under the clause and its effect on the code warranty; they should take pains to insure that the clause accurately reflects both their intentions.

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SHUT-IN GAS WELL PAYMENT — ROYALTY OR RENTAL

Under Louisiana mineral lease forms payment of delay rentals permits lessees to defer drilling operations through the primary term of the lease.[1] During and after the primary term, the lease may be maintained by production in paying quantities under the habendum clause,[2] upon which royalties are due to the lessor. In *Smith v. Sun Oil Co.*[3] a well capable of producing gas in paying quantities but shut in due to lack of a market was held not to maintain the lease in effect beyond the primary term under the habendum clause.[4] A special shut-in gas well payments clause then was devised to protect lessees from the automatic termination resulting from lapse of the primary term without production or current operations.[5]

1. See Tate v. Ludeau, 195 La. 954, 963, 197 So. 612, 615 (1940); MERRILL, COVENANTS IMPLIED IN OIL AND GAS LEASES § 23, at 68 (2d ed. 1940); Comment, 27 TUL. L. REV. 353, 356 (1953).

2. Production must be in paying quantities to both lessee and lessor. Vance v. Hurley, 215 La. 805, 41 So. 2d 724 (1949); Brown v. Sugar Creek Syndicate, 195 La. 865, 197 So. 583 (1940); Logan v. Tholl Oil Co., 189 La. 645, 180 So. 473 (1938).

3. 172 La. 655, 135 So. 15 (1931).

4. Moses, *Problems in Connection with Shut-In Gas Royalty Provisions in Oil and Gas Leases*, 23 TUL. L. REV. 374 (1949). Most states are in accord with the Louisiana holding; but there is a strong minority view that "discovery" alone will be sufficient to meet the requirements of production under the habendum clause. See 2 SUMMERS, THE LAW OF OIL AND GAS §§ 299, 300 (1959); Masterson, *The Shut-In Royalty Clause in an Oil and Gas Lease*, 12 SW. L.J. 459, 463 (1958).

5. Due to its nature, gas, unlike oil, can only be stored in the stratum in which it is found. Therefore, unless the lessee has a ready market available and a pipeline to carry it, there will be no production from a completed gas well for some time. This is further complicated by governmental regulatory procedures with which gas producers must cope. By the time the lessee markets the gas the primary term of the lease may, in the absence of a shut-in gas well payment clause, have expired. 2 SUMMERS, THE LAW OF OIL AND GAS § 299 (1959); Moses, *Shut-In Gas Well Problems*, 33 MISS. L.J. 267 (1962). For the clause to operate, the gas well involved must be capable of producing gas in paying quantities. Taylor v. Kimbell, 219 La. 731, 54 So. 2d 1 (1951).