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Patrick H. Martin
Louisiana State University Law Center

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MINERAL RIGHTS

*Patrick H. Martin**

The oil and gas industry in Louisiana, as elsewhere, is suffering from a significant downturn in activity. The active rig count on October 18, 1982, was 279, compared to 476 one year earlier. This slackening of drilling activity is a reflection of the current surplus of both oil and natural gas on domestic and world markets. Consequently, the price of a barrel of crude oil has declined to about $34 and uncontrolled natural gas has decreased from highs of $9.50 or $10 per MMBTU to about $3.30 per MMBTU, not much more than the controlled price for section 102 gas (under the Natural Gas Policy Act.)[1] Be that as it may, the cases recently reported are the offspring of a more furious past. A law suit takes years to move from the events that gave rise to it through discovery, trial, appeal, and finally to reported decision. Thus the number of court decisions in the past year reflects a degree of activity no longer extant in the industry.

LEGISLATIVE DEVELOPMENTS

In 1981 the Louisiana Legislature amended the Mineral Code[2] in one significant aspect. Articles 206 and 207 provided a procedure for a lessor or landowner to demand a recordable release of an expired lease or other mineral right, with damages and attorney's fees the consequence for failure to provide the release.[3] These articles were amended to provide as follows:

> § 206. Obligation of owner of expired mineral right to furnish recordable act evidencing extinction or expiration of right; mineral lease.
>
> A. Except as provided in Paragraph B of this Article, when a mineral right is extinguished by the accrual of liberative prescription, expiration of its term, or otherwise, the former owner shall, within thirty days after written demand by the person in whose favor the right has been extinguished or terminated, furnish him with a recordable act evidencing the extinction or expiration of the right.

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* Associate Professor of Law, Louisiana State University.

1. 15 U.S.C. §§ 3301-3432 (Supp. IV 1980).
2. LA. MIN. CODE: LA. R.S. 31:1-215 (1974).
3. LA. R.S. 31:206, 207 (1974).

B. When a mineral lease is extinguished prior to the expiration of its primary term, the former lessee shall, within thirty days after the extinguishment, record an act evidencing the extinction or expiration of the lease in the official records of all parishes wherein the lease is recorded.

§ 207. Effect of failure to furnish act evidencing extinction or expiration of right; mineral lease.

If the former owner of the extinguished or expired mineral right fails to furnish the required act within thirty days of receipt of the demand or if the former lessee of a mineral lease fails to record the required act within thirty days of its extinguishment prior to the expiration of its primary term, he is liable to the person in whose favor the right or the lease has been extinguished or expired for all damages resulting therefrom and for a reasonable attorney's fee incurred in bringing suit.[4]

In 1982 the legislature, upon recommendation of the Louisiana Law Institute, enacted a series of seven amendments to the Mineral Code to clarify application of the principles of the Mineral Code to lignite developments.[5] Article 11 of the Mineral Code was modified to indicate more clearly that owners of separate mineral rights in the same tract of land owe duties to one another in exercising their respective rights.[6] Article 61 was amended so that the inclusion of the rights to a tract of land in a mining plan will serve as an obstacle to exercise of the rights if all requirements of the provision are met.[7] Several words were deleted from article 115 to avoid redundancy in the newly adopted definition of a "mining plan."[8] A clause was added to article 178, regarding partition of land burdened by mineral rights, to make it clear that partition by licitation will not be precluded simply because the mineral values of tracts containing lignite might be ascertainable.[9] A provision was added to article 191 to specify that under the "open mine doctrine," the usufructuary of land may enjoy the benefits of mining operations which are taking place when the usufruct is created.[10] Article 195 was amended to give, in effect, a usufructuary veto power over lignite developments on land burdened by his

4. 1981 La. Acts, No. 612, § 1.

5. 1982 La. Acts, No. 780, § 1, *amending* LA. R.S. 31:11, 61, 115(c), 178, 191(B), 195, 213(c). The author of this article was the reporter for the Louisiana Law Institute committee which was responsible for the amendments.

6. LA. R.S. 31:11 (1974 & Supp. 1982).

7. LA. R.S. 31:61 (1974 & Supp. 1982).

8. LA. R.S. 31:115(C) (1974 & Supp. 1982).

9. LA. R.S. 31:178 (1974 & Supp. 1982). This is consistent with article 1339 of the Louisiana Civil Code.

10. LA. R.S. 31:191(B) (1974 & Supp. 1982).

usufruct.[11] This was done on the premise that lignite development, unlike oil and gas development, would effectively destroy the value of the usufruct since substantial or total disruption of the surface is involved. Finally, a definition of "mining plan" was adopted.[12] This was necessitated by the fact that several Mineral Code articles incorporate reference to a "mining plan" and no definition has existed since the 1976 Surface Mining and Reclamation Act for Louisiana was extensively amended and reenacted in 1978.[13]

Lessors of mineral rights have had a procedure providing relief for nonpayment of royalty since the Mineral Code's passage in 1974.[14] A similar procedure has now been provided by the legislature for other royalty owners and owners of production payments.[15] Such owners must give notice of nonpayment by demand letter; the lessee or other party owing payment has thirty days in which to pay or respond in writing with a reasonable cause for nonpayment. Failure to pay or state a reasonable basis for nonpayment may lead to a penalty of double the amount owed, together with interest and attorney's fees. Lease cancellation is not available since the person claiming payment is not the lessor.

Also enacted in 1982 by the Louisiana Legislature was a provision for the filing of a plat and for hearings for permits to drill wells within five hundred feet of a residential or commercial structure.[16] This provision applies only to wells to be drilled to a depth greater than 15,000 feet.

LEASE RIGHTS AND MAINTENANCE

Lease maintenance and force majeure were at issue in *Woods v. Ratliff*.[17] A high speed gear had broken in the pumping unit of the lease well, and the lessee stopped all operations after ordering a replacement. More than the ninety-day "cessation of operations" period of the lease (for lease continuance without operations or production when beyond the primary term) passed before the replacement part arrived. The lessors sought lease cancellation, and the lessees defended on the basis of force majeure since it was not their fault that delivery

11. LA. R.S. 31:195 (1974 & Supp. 1982). This is consistent with the original intentions of the drafters of the Mineral Code. *See* LA. R.S. 31:196 (1974), comment.

12. LA. R.S. 31:213(6) (1974 & Supp. 1982).

13. 1978 La. Acts, No. 406, *amending* LA. R.S. 30:902, 904-914, *and adding* LA. R.S. 30:915-932.

14. LA. R.S. 31:135-141.

15. 1982 La. Acts, No. 249, *adding* LA. R.S. 31:212.21-212.23.

16. 1982 La. Acts, No. 483, § 1.

17. 407 So. 2d 1375 (La. App. 3d Cir. 1981).

of the part was delayed. Both the trial court and the third circuit held that the lessees could have restored production by temporary measures. The force majeure clause does not apply when the situation is not truly beyond the control of the lessee, and here a temporary replacement could have been obtained within ninety days. The third circuit held that the lessors did not have to put the lessees in default because the lease terminated by its own terms. However, a timely demand must be made in order to give rise to an award of attorney's fees under articles 206, 207, and 209[18] of the Mineral Code, and such demand was not made at the proper time here. Hence, there could be no award of attorney's fees.

A case decided by the first circuit, *Rebstock v. Birthright Oil & Gas Co.*,[19] raised an issue of lease maintenance where leased land had been pooled with other land on which there was a producing well. The lease contained a clause limiting the lessee's power to pool under the printed "pooling" clause of the lease. The limiting clause stated:

> Notwithstanding anything to the contrary herein contained, any reference to pooling of the property herein leased shall be [construed] to mean any production below the depth of 10,000 feet. Specifically, any production above 10,000 feet shall not be pooled with any other tracts of land.[20]

A unit was formed by the Commissioner of Conservation for a formation above 10,000 feet which included a portion of the leased tract and which would not have maintained the lease if the quoted limiting clause applied. The district court held that the clause restricting pooling to production below 10,000 feet had to be interpreted as applicable only to voluntary pooling. The first circuit adopted the opinion of the district court as its own.

The decision in *Rebstock* is *probably* correct. The effect of an order of the Commissioner of Conservation is to treat operations on or production from each separate tract in a unit as though the activity were on each tract in the unit, and the lessee is prohibited from activity inconsistent with the order. The usual lease form contemplates that the lease terms are subject to all applicable state laws and regulations. Likewise, lessors generally have been concerned with the good faith of the lessee in exercising the pooling power under the lease, not with the regulatory functions of the Commissioner of Conservation.[21] However, a different result may obtain if the lessor

18. LA. R.S. 31:206, 207, 209.
19. 406 So. 2d 636 (La. App. 1st Cir.), *writ denied*, 407 So. 2d 742 (La. 1981).
20. *Id.* at 640.
21. *See* Mallett v. Union Oil & Gas Corp., 232 La. 157, 94 So. 2d 16 (1957); Wilcox v. Shell Oil Co., 226 La. 417, 76 So. 2d 416 (1954); H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 670.2 (1975).

and lessee validly agree that the benefits of unit production above a specific depth would go exclusively to the lessor. Here, it seemed unlikely that this was the agreement.

The plaintiffs in *Rebstock* also sought lease cancellation for nonpayment of royalty. Several demand letters had been sent, but they did not comply with articles 137 and 138 of the Mineral Code.[22] Therefore, the court held that demand had not been made properly.[23]

An oil and gas lessee filed suit in *CCH, Inc. v. Heard*[24] to enjoin his lessor from preventing the lessee's entry onto the leased land to operate an oil well. The lessor defended on the ground that the lease had terminated because of the lessee's failure to produce oil or gas in paying quantities. The third circuit affirmed a decision for the lessor on that ground. The facts clearly indicated that the well was operated by the lessee for over a year at a considerable loss, with no prospect for improvement. The court, applying the standard of article 124 of the Mineral Code,[25] found that the production allocable to the lessee's interest was not sufficient to induce a reasonably prudent operator to continue efforts to secure a return on his investment or minimize his loss. The third circuit faced a similar situation in *Kleas v. Mayfield*.[26] However, the lessee (actually sublessee) argued that the lessors should have been estopped from asserting lease termination because they knew or should have known of the lessee's use of the well for gas storage and they had cashed the lessee's "storage rental" checks. The court held that estoppel could not apply as the lessors did not know of the use of the well as a "storage well" (there was no "storage rental" agreement) and did not know the lessee had reentered the well in 1974. The lessee was liable for attorney's fees incurred at the trial level[27] but not for fees on appeal because the lessor had sought additional relief on appeal. The original lessee remained liable to the lessors despite the sublease because the lessors had not relieved the original lessee expressly in writing.[28] However, the sublessee had contracted to hold the lessee-sublessor harmless; hence it was error for the trial court to dismiss the sublessor's third-party demand for indemnification.

In *Cain v. GoldKing Properties Co.*,[29] the lessors of land under a surface lease sought to force the surface lessee, who had drilled a

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22. 406 So. 2d at 642.
23. LA. R.S. 31:137-138 (1974).
24. 410 So. 2d 1283 (La. App. 3d Cir. 1982).
25. LA. R.S. 31:124 (1974 & Supp. 1976).
26. 404 So. 2d 500 (La. App. 3d Cir. 1981).
27. *See* LA. R.S. 31:206, 207, 209.
28. *See* LA. R.S. 31:129 (1974).
29. 408 So. 2d 1364 (La. App. 1st Cir. 1982).

well directionally from the lessors' land, to vacate the property. The lessee was producing hydrocarbons from the well on the lessors' property, although the well was bottomed on adjacent property. The surface lease was to continue until six months "after Lessee no longer needs the surface location or the facilities" on the leased property.[30] The trial court held that this language created a lease in perpetuity contrary to the Civil Code.[31] The first circuit reversed, however, holding that while the Civil Code prohibits a lease in perpetuity, it does not require that the lease be for a specific term. Rather, a lease will be valid if as in *Cain*, it is stipulated to continue during the existence of a condition.[32]

Payment of bonus money for a lease was the subject of several cases in the past year. In *Texas General Petroleum Corp. v. Brown*,[33] the plaintiff-mineral lessee sought to recover from the lessors bonus money allegedly paid in error. The lessee had given the lessors two bank drafts which were not payable for sixty days, apparently hoping to get releases of former oil and gas leases on the property. However, the defendants' leases expressly excluded warranty and the plaintiff lessee did not prevent payment of the drafts within the sixty-day period. Both the trial court and the second circuit accordingly held that there was no mistake, and defendants were entitled to retain the bonus money.

The ownership of the right to receive bonus and delay rental was at issue in *Andrus v. Kahao*.[34] The sellers of a tract of land had retained an undivided one-half interest in the minerals; thereon the purchasers received the other one-half interest together with the executive rights to all minerals. When the purchasers exercised the executive rights by leasing the land, they retained all bonuses and delay rentals. The owners of the nonexecutive one-half interest brought suit claiming one-half of the bonus and delay rental. Defendants filed an exception of no cause of action based on the assertion that the executive right owner has an exclusive right to bonus and delay rental unless specifically granted or reserved to the nonexecutive owner in the act of sale. The district court and the court of appeal maintained this exception and dismissed the plaintiff's claim. On its first decision the supreme court reversed, stating that while the holdings below were in accordance with the Mineral Code,[35] the rights in question arose before the Mineral Code became effective and it thus did

30. 408 So. 2d at 1365 (quoting the lease).
31. LA. CIV. CODE art. 2674.
32. *See* Poole v. Winwell, Inc., 381 So. 2d 926 (La. App. 3d Cir. 1980).
33. 408 So. 2d 288 (La. App. 2d Cir. 1981).
34. 414 So. 2d 1199 (La. 1982).
35. LA. R.S. 31:105 (1974).

not apply. The supreme court also held that to the extent that the decisions below were in accordance with the jurisprudence prior to the Mineral Code,[36] those cases were overruled so that the case could be heard on its merits as to the intent of the parties. On rehearing, however, the court decided that the earlier decisions had created rules of property which had been relied upon for many years by those dealing with mineral rights in Louisiana. They should not be overruled, concluded the court, particularly since the legislature had codified them by their passage of article 105 of the Mineral Code. Hence, the court reversed its initial decision and affirmed the courts below.

The *Andrus* decision and another recent decision of the Louisiana Supreme Court, *Continental Group v. Allison*,[37] demonstrate a refreshing willingness of the court to explore on rehearing problems with its initial decisions in significant mineral rights cases. In so doing, the court has minimized or removed some practical difficulties that were overlooked or insufficiently appraised in the court's first consideration of the issues.

In *Veazey v. W. T. Burton Industries, Inc.*,[38] the plaintiffs brought a claim for "negligent breach of contract" against their mineral lessee. Their claim arose from a lease executed in 1964 which was subsequently acquired by the defendant. A well was drilled by the defendant in 1965 and then abandoned in a manner which the plaintiffs alleged was negligent and unlawful under the conservation regulations of the state causing injury and loss to plaintiffs. More specifically, a different company, under a 1977 lease from the plaintiffs, drilled a well and discovered that two gas reservoirs discovered by the defendant in its 1965 drilling had been completely depleted and wasted as a result of the defendant's failure to plug and isolate them. The plaintiffs alleged that the value of the gas and condensate that could have been recovered was not less than $25 million. The trial court dismissed the suit on the ground that the petition failed to state a cause of action. The third circuit affirmed, stating that "regardless of whether plaintiffs [alleged] a breach of a contractual obligation or of a duty in tort, there [was] no cause of action because the allegations as to damages [were] too speculative."[39] In arriving at this conclusion, both courts cited several cases involving drainage and the "rule of capture."[40] The courts apparently mistook the issue of

36. Ledoux v. Voorhies, 222 La. 200, 62 So. 2d 273 (1952); Mount Forest Fur Farm of Am., Inc. v. Cockrell, 179 La. 795, 155 So. 228 (1934).

37. 404 So. 2d 428 (La. 1981); *see* Martin, *Developments in the Law, 1980-1981—Mineral Rights*, 42 LA. L. REV. 372, 382-83 (1982).

38. 407 So. 2d 59 (La. App. 3d Cir. 1981), *rev'd and remanded*, 412 So. 2d 88 (La. 1982) (mem.).

39. *Id.* at 59.

40. Louisiana Gas Lands v. Burrow, 197 La. 275, 1 So. 2d 518 (1941); McCoy v.

negligent conduct of the lessee in the instant case for the issue of the proof of substantial drainage and profitability of an offset well in drainage cases. In the "rule of capture" cases, the "speculative" nature of the loss is due to the nature of the right claimed and not to the possible proof of the amount of hydrocarbons lost. Further, the duty owed by unrelated, adjacent owners of mineral rights on different tracts of land in "rule of capture" cases was mistaken for the duty owed in the instant case, where the duty arose from the lease.[41] Two questions about the *Veazey* case should demonstrate the difficulties it poses: (1) How specific would plaintiffs have had to be in their allegations in order to meet the standard of *Veazey*? (2) Had the plaintiffs brought their claims a day or so after the alleged negligent actions with the same allegations of loss through defendant's negligence, how could a court possibly have dismissed a claim of the sort here?

The Louisiana Supreme Court recently overruled the affirmation of the defendant's exception of no cause of action and remanded the case for further proceedings, apparently recognizing the problems inherent in the approach taken by the court of appeal.

There have been several very important decisions in the past year on lease royalty clause interpretation. In the typical oil and gas lease, the royalty clause on natural gas specifies that the royalty will be based on the "value" of the gas. Cases in numerous producing jurisdictions have arisen over disputes as to the calculation of this value.[42] The problem has stemmed from the fact that gas has long been sold on a long-term contractual basis and the Federal Power Commission (now Federal Energy Regulatory Commission) has prevented or limited the operation of "escalator" clauses (allowing price increases) in gas purchase contracts subject to federal jurisdiction. This has led to the sale of gas at widely varying prices, even though it is from the same field and indistinguishable from any other gas. Owners of royalty have claimed that the "value" of the gas should be calculated at the time of production in comparison with current sales of other gas, while lessees have asserted that "value" should be ascertained by reference

Arkansas Natural Gas Co., 184 La. 101, 165 So. 632 (1936); Louisiana Gas & Fuel Co. v. White Bros., 157 La. 728, 103 So. 23 (1925); Breaux v. Pan Am. Petroleum Co., 163 So. 2d 406 (La. App. 3d Cir.), *writ ref'd*, 246 La. 581, 165 So. 2d 481 (1964).

41. It is submitted that the Mineral Code may have provided a new standard dictating a different result from that reached in *McCoy*, 184 La. 191, 165 So. 632. LA. R.S. 31:10 & comment.

42. Foster v. Atlantic Ref. Co., 329 F.2d 485 (5th Cir. 1964); Lightcap v. Mobil Oil Corp., 562 P.2d 1 (Kan. 1977), *cert. denied*, 434 U.S. 876 (1977); Tara Petroleum Corp. v. Hughey, 630 P.2d 1269 (Okla. 1981); Texas Oil & Gas Corp. v. Vela, 429 S.W.2d 866 (Tex. 1968).

to their long-term sales contract and the regulated nature of the gas price.

In *Henry v. Ballard & Cordell*,[43] the Louisiana Supreme Court, in a four to three decision, affirmed a "market value" decision in favor of the lessee. The leases in question were executed in 1953, 1960, 1962, and 1964, and provided for a percentage royalty based on the "market value sold or used by the lessee" (two of the leases) or on "the amount realized from such sale" (the other two leases in question). The court sought to determine the true intent of the parties and under the facts, found that the parties "intended that royalties based on the 'market value' of the gas be computed on the basis of the price received for the gas" under the long-term sales contract.[44] The court specifically noted, however, that "[h]ad plaintiffs shown that the purpose of the market value royalty clause was to provide them with protection as to price, regardless of what disposition [was] made of the gas by lessee and regardless of what price was received, then it would [have arrived] at a different conclusion."[45]

It is possible, then, even after *Henry v. Ballard & Cordell*, that the supreme court could affirm or allow to stand the case of *Shell Oil Co. v. Williams*.[46] In this case the fourth circuit, before the supreme court's decision in *Henry*, held in favor of the lessors on a similar claim. In *Williams*, the leases were executed in 1934 and 1952, and the court could not find any intent of the parties to look to the proceeds of a long-term regulated gas sales contract for computation of the value of the gas. Presumably, the Louisiana Supreme Court could allow *Williams* to stand by finding an intent in *Williams* different from that intent found in *Henry*.

MINERAL SERVITUDES: PRESCRIPTION

An often litigated area of Louisiana mineral rights is prescription of mineral servitudes and royalties. Three reported cases have taken up the issue in the past year.

In *Cox v. Sanders*,[47] the court was presented with the issue of whether the good faith drilling of and production from two wells under a lease granted by only one of two co-owners without the consent of the other co-owner constituted a use of the servitude interrupting liberative prescription. The second circuit concluded that prescription was not interrupted. Where co-ownership of a single mineral servitude

43. 418 So. 2d 1334 (La. 1982).
44. *Id.* at 1340.
45. *Id.*
46. 411 So. 2d 634 (La. App. 4th Cir. 1982).
47. 409 So. 2d 1257 (La. App. 2d Cir.), *writ granted*, 412 So. 2d 1110 (La. 1982).

is involved, one co-owner cannot conduct operations on any of the lands subject to the servitude without the consent of the other co-owner. While it is true that under article 174 of the Mineral Code,[48] the use by one co-owner of the servitude inures to the "benefit" of all co-owners, here the interruption of prescription would not "benefit" the nonconsenting co-owner. Further, article 176 of the Mineral Code,[49] which allows one co-owner to act to prevent waste or the extinction of the servitude, was not applicable, said the court, because neither waste nor extinction was threatened when the acts occurred. Hence, the Court concluded that the consenting co-owners should not have been allowed to rely on unauthorized exploration and production which was contrary to statutory law. *Cox* turns on the meaning of "benefit" in article 174 of the Mineral Code. For future cases, a problem may be created when a co-owner waits to see whether it is or is not to his benefit to have prescription interrupted before asserting his lack of consent to operations or production. Likewise, there may be a problem for the small, fractional interest (*e.g.*, a 1/16th mineral servitude) co-owner who cannot be found or identified until after operations or production have occurred and liberative prescription has accrued. Will a landowner be able to pay the interest owner for his interest and then declare it is not to his benefit to have prescription interrupted?

The case of *Hall v. Dixon*[50] involved the issue of whether the obstacle created by one co-owner of land suspended liberative prescription that would otherwise have accrued in favor of all the other co-owners of the land. The court found that one co-owner had in fact created an obstacle that could be removed only by law suit and there was no requirement in the Mineral Code[51] that the obstacle be created by all or any of the owners of the land subject to the servitude. Thus prescription was suspended as to all concerned. In *Allied Chemical Corp. v. Despot*,[52] the question before the court concerned the effect of both a voluntary and a compulsory unit on interruption of prescription on a tract outside the unit. Both the district court and the second circuit concluded that prescription was not interrupted as to the tract not included in the unit. This is in accordance with article 37 of the Mineral Code,[53] but the second circuit felt it necessary to examine the law in existence prior to the Mineral Code since the rights would have vested prior to its effective date of January 1, 1975. The

48. LA. R.S. 31:174 (1974).
49. LA. R.S. 31:176 (1974).
50. 401 So. 2d 473 (La. App. 2d Cir. 1981).
51. LA. R.S. 31:59-60 (1974).
52. 414 So. 2d 1346 (La. App. 2d Cir. 1982).
53. LA. R.S. 31:37 (1974).

court was of the opinion that the result was the same under the pre-Mineral Code law.[54]

PARTITION

One case involving partition should be noted, *Roberson v. Hollis*.[55] Here the plaintiff and the defendants' predecessor agreed to partition in kind two hundred acres if the plaintiff acquired certain land. The agreement made no provision respecting mineral rights. The defendants refused to partition the land in kind because the plaintiff acquired the land subject to numerous mineral reservations. The plaintiff brought suit to be recognized as the owner of a 57.8 acre tract. The second circuit, in amending a district court decision, ruled that the defendants were correct in their contention that they were not required to accept land in partition which was subject to outstanding mineral rights. Such rights were not excluded from the partition agreement; warranty applies in partition and minerals are included in warranty. Because the parties had stipulated that partition by licitation was appropriate if partition in kind could not be required, the court of appeal amended the district court's judgment of partition rather than reversing it.

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54. Elson v. Mathewes, 224 La. 417, 69 So. 2d 734 (1954).
55. 403 So. 2d 845 (La. App. 2d Cir. 1981).