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# The Distinction Between a Building Contract and a Sale

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## COMMENTS

### THE DISTINCTION BETWEEN A BUILDING CONTRACT AND A SALE

Louisiana Civil Code article 2439 defines a sale as "an agreement by which one gives a thing for a price in current money, and the other gives the price in order to have the thing itself."<sup>1</sup> In contrast, article 2756 characterizes a building contract in the following way: "To build by a plot, or to work by the job, is to undertake a building or a work for a certain stipulated price."<sup>2</sup> Although these two articles appear to identify two easily distinguished classifications of contracts, litigants and courts alike have found "[t]he distinction between a sale and a construction contract [to be] an elusive one."<sup>3</sup>

The first part of this comment will discuss the tests developed by both the courts and commentators to distinguish a building contract from a sale. Specifically, two tests predominant in this inquiry will be examined, as well as a third mode which, though infrequently used, is quite compatible with other provisions of the Louisiana Civil Code.<sup>4</sup>

The second part will focus upon the significance of distinguishing the two forms of contracts, with regard to three particular issues: liberative prescription, burden of proof, and remedies. As a final note, the effects of the "New Home Warranty Act"<sup>5</sup> will be discussed.

In order to aid the practicing lawyer, this comment will bring together in one presentation the tests employed to distinguish between a sale and building contract, as well as arguments for and against each of these tests. It should be noted that these tests are not inflexible. Courts have tended to take a result-oriented approach.<sup>6</sup> Attorneys should formulate their contentions and prepare their defenses accordingly.

#### I. THE DISTINCTION AND ITS TESTS

##### A. *The Fundamental Obligation Test*

In a typical case in which this distinction is relevant, one party contracts to bestow upon another an object the bestowal of which

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1. La. Civ. Code art. 2439.
2. La. Civ. Code art. 2756.
3. *Holden v. Placid Oil Co.*, 512 F. Supp. 644, 646 (E.D. La. 1981).
4. La. Civ. Code arts. 490-498.
5. La. R.S. 9:3141 to :3150 (Supp. 1987).
6. See, e.g., text accompanying *infra* notes 13-16, 29-33, 69-72.

requires some service, labor, or skill to be rendered by the first party. Within this one contract the first party is bound to perform at least two different obligations—obligations to give and to do.<sup>7</sup> Sales are governed by the Civil Code articles concerning obligations to give, whereas building contracts are governed by the articles concerning obligations to do.<sup>8</sup> Taken separately, these obligations present no issue of classification. The situation complicates considerably, however, when these obligations are related within one contract.

Recognizing the frequent interrelation between obligations to do and obligations to give, Louisiana courts have devised what will hereinafter be referred to as the “fundamental obligation” test as a means of classifying the contract in question. Professor Litvinoff has concisely stated that test as follows: “When different obligations are intimately connected . . . one of them must be recognized as fundamental and if it is one to do, for instance, the whole contract will be treated as giving rise to obligations of that kind.”<sup>9</sup> A clearer understanding of this test can be achieved by examining a series of cases in which it was used.

The case of *Papa v. Louisiana Metal Awning Co.*<sup>10</sup> involved a contract requiring the defendant to make and install an aluminum patio cover to be attached to the plaintiff’s house. The cover was specially designed to fit the dimensions of plaintiff’s house and patio. After installing the cover, the defendant was paid in full. The following day several minor leaks were discovered during a rainstorm. As a result of these leaks and other minor defects, the plaintiff sued for rescission of the contract.

The defendant in *Papa* had contracted to assume two obligations. One was to deliver or transfer to the defendant a patio cover; the other was to build and install this cover. The former is properly termed an obligation to give, the latter, an obligation to do.

Affirming the trial court’s decision in favor of the defendant, the second circuit relied heavily on the facts that the cover was “designed,

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7. See La. Civ. Code art. 1756.

8. While all sales are obligations to give, not all obligations to give are sales. Similarly, while all building contracts are obligations to do, not all obligations to do are building contracts.

Furthermore, the term “building contract” is not restricted to agreements involving buildings. Thus, that term has been applied to agreements involving such objects as dentures (*Martin v. Rome*, 486 So. 2d 213 (La. App. 1st Cir. 1986) (Lanier, J., concurring)); carpeting (*Acadiana Health Club, Inc. v. Hebert*, 469 So. 2d 1186 (La. App. 3d Cir. 1985)); chimneys (*Martin v. AAA Brick Co.*, 386 So. 2d 987 (La. App. 3d Cir. 1980)); and display cases (*Henson v. Gonzalez*, 326 So. 2d 396 (La. App. 1st Cir. 1976)).

9. 2 S. Litvinoff, *Obligations* § 157, at 288, in 7 *Louisiana Civil Law Treatise* (1975).

10. 131 So. 2d 114 (La. App. 2d Cir. 1961).

fabricated and erected by [the] defendants,"<sup>11</sup> that it was designed specifically for the dimensions of the plaintiff's house, and that it was permanently attached to the house. The court concluded that the contract was "more than a mere sale of materials[, as] [i]t involved *primarily* the furnishing of labor and the contractor's skill in the performance of the job."<sup>12</sup> Finding that the obligation to do was fundamental, the court classified the contract as a building contract.

A second case illustrating the fundamental obligation test is *Rasmussen v. Cashio Concrete Corp.*<sup>13</sup> In June, 1981, the defendant furnished the plaintiff with a 5.58-ton home sewer treatment plant. Two months later sewage overflowed into the house as a result of the failure of the plant. At least thirteen other embarrassing and unfortunate events occurred over the next three years. In September, 1983, the plaintiff, obviously alleging a contract of sale, filed suit in redhibition<sup>14</sup> asking for the cost of repairs as well as other damages. The first circuit found that the actionable defect resulted from faulty installation.<sup>15</sup> This finding of a defect in the service rendered, rather than in the object itself, would seem to support an action for the breach of a building contract, not an action in redhibition. Yet, the court concluded that the contract was a sale. In support of its conclusion the court stated as follows:

We recognize that a defect in installation results from an inadequate performance of a service. But this fact does not transform the transaction in question from a sale into a contract to do. The primary object of the agreement between the parties was the provision of a functioning sewer treatment plant. The installing of this 5.58-ton unit was secondary, ancillary, to that object, and the contract is best characterized as one of sale. Thus the Civil Code articles on redhibition are appropriate.<sup>16</sup>

The court in *Rasmussen* utilized the fundamental obligation test to reach a conclusion which favored the plaintiff. Refusing to follow a strict, inflexible application of the test, the court apparently preferred to "bend" the test to reach what it believed to be a more just result. *Rasmussen* illustrates the judiciary's tendency towards a result-oriented application of the fundamental obligation test.

#### *An Economics Approach*

Determining which obligation is "fundamental" can be an abstract and speculative task. For this reason Louisiana courts have often resorted

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11. *Id.* at 117.

12. *Id.* (emphasis added).

13. 484 So. 2d 777 (La. App. 1st Cir. 1986).

14. See La. Civ. Code art. 2520. Redhibition is a remedy applicable only to sales.

15. *Rasmussen*, 484 So. 2d at 778.

16. *Id.*

to consideration of certain economic factors to facilitate application of the fundamental obligation test. Professor Levasseur has correctly noted:

On several occasions, the Louisiana courts have followed this approach of weighing the economics of the situation and have ruled that the contract was a sale or a hiring of industry whenever they were satisfied that the "primary obligation" was one to give and the "accessory obligation" was one to do or vice versa.<sup>17</sup>

Thus, courts have weighed the cost and the value of the obligation to do against the cost and the value of the obligation to give. The obligation which is "fundamental" is the one having the greatest weight in this inquiry.

In *KSLA-TV, Inc. v. Radio Corp.*,<sup>18</sup> a Louisiana federal district court had the opportunity to decide whether a contract was a building contract or a sale, and used the fundamental obligation test supported by this economics approach. In this case, KSLA-TV hired RCA to construct a television antenna tower. RCA engaged Stainless, Inc., to design and fabricate the tower, and to hire another subcontractor to install it. Construction was completed in November, 1964. In October of 1977, the tower collapsed, and KSLA-TV filed suit in redhibition against RCA and Stainless. In its motion for summary judgment, Stainless asserted that the contract between KSLA-TV and RCA was a building contract.

The court noted that the contract in question placed upon the defendants obligations to do in designing, fabricating, and erecting the tower, and an obligation to give in transferring its ownership.<sup>19</sup> The court saw the task before it as having to determine which obligation was fundamental, a process which it recognized as one often entailing an examination of the economic factors involved in performance of the contract.<sup>20</sup> If the value and/or cost of the obligation to do is "trifling" when compared to the value and/or cost of the obligation to give, said the court, then the fundamental obligation is to give and the contract is one of sale. Yet, if the cost of the obligation to do is more than a "trifling" aspect of the agreement, then a building contract exists.<sup>21</sup> With these principles in mind, the court reasoned that "[w]hen one

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17. Levasseur, *The Work of the Louisiana Appellate Courts for the 1977-1978 Term—Sales*, 39 La. L. Rev. 705, 712-13 (1979).

18. 501 F. Supp. 891 (W.D. La. 1980), *aff'd*, 693 F.2d 544 (5th Cir. 1982). On appeal, the Fifth Circuit agreed with Judge Stagg's opinion and adopted it as their own, but remanded the case so that the trial court could consider two new issues not relevant to the subject matter of this Comment.

19. *Id.* at 894.

20. *Id.*

21. *Id.*

considers the value of the fabrication and design *in conjunction with* the cost of erection, there is no question that the contract 'involved primarily the furnishing of labor and the contractor's skill in the performance of the job.'<sup>22</sup> Additionally, the court found "it . . . absurd to suggest that a 1,709-foot, 7-inch television tower was 'purchased' and was then 'installed' at a relatively trifling cost upon KSLA's property."<sup>23</sup> Thus, the court utilized the fundamental obligation test supplemented by a balancing of economic factors to hold that the contract was a building contract.<sup>24</sup>

The *KSLA-TV* approach received similar application in *Martin v. Rome*,<sup>25</sup> a recent case in which the defendant was sued for dental malpractice arising from an agreement to provide dentures. Noting that the major portion of the defendant's fee was for his services<sup>26</sup> and that the taking of impressions of the plaintiff's gums was the first step in the manufacturing of the dentures,<sup>27</sup> the court found the agreement to be a building contract. Furthermore, the court seemed to suggest that the "installation"—an obligation to do—was more than a trifling aspect of the contract. Consequently, it is reasonable to conclude that the court used the economics approach to the fundamental obligation test, though it did not expressly label its analysis as such.<sup>28</sup>

The *KSLA-TV* analysis was modified somewhat by the second circuit in *Austin's, Inc. v. Brown*.<sup>29</sup> The plaintiff corporation sought to purchase cash registers for a restaurant soon to be opened. The defendant proposed, and the plaintiff agreed to, a computer system which performed many other tasks in addition to a cash register function. The contract required the defendant to provide computer hardware along with programming and training. The total price of the contract was \$9,810, of which \$2,830 was for the programming and training. The system was installed and the cash register function operated satisfactorily; however, the defendant's attempt to write a program which adequately performed the other agreed upon tasks was unsuccessful. As a result, the defendant offered to refund the plaintiff's down payment or to replace the system with something more conventional. The plaintiff refused both offers. Five months after the restaurant's timely opening the plaintiff brought suit requesting specific performance or general damages.

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22. *Id.* at 896 (emphasis in original) (quoting *Papa*, 131 So. 2d at 117).

23. *Id.* at 895.

24. *Id.* at 896.

25. 486 So. 2d 213 (La. App. 1st Cir. 1986).

26. *Id.* at 216.

27. *Id.* at 215.

28. *Id.*

29. 474 So. 2d 1383 (La. App. 2d Cir. 1985).

In affirming the lower court's classification of the contract as a sale, the court reasoned that although the contract required the defendant to provide extensive programming and training, because the cost of those services comprised only one-fifth of the total cost, the fundamental obligation was to give.<sup>30</sup>

This analysis represents an interesting modification to the approach taken in *KSLA-TV* under which, if the obligation to do constitutes more than a "trifling" aspect of the agreement in terms of its cost or value, then the entire contract is to be characterized as a building contract.<sup>31</sup> This "more than trifling" standard would seem to weigh heavily in favor of the litigant who seeks to convince a court that a building contract was formed. The court in *Austin's, Inc.* did not adhere strictly to this standard; rather, the court admitted that the obligation to do, which accounted for over twenty percent of the total price, was extensive, but still classified the contract as one of sale. Apparently, the court placed the obligation to do and the obligation to give on a more equal footing than in the approach taken in *KSLA-TV*, in that, whichever obligation outweighed the other prevailed. The following statement by the court supports this analysis:

[The defendant's] obligation to design, program, install, and train the restaurant employees to operate, [sic] the system is more than trifling installation of a thing sold. These obligations to do, however, . . . while somewhat substantial, do not negate the characterization of the contract as a sale, which imposes the obligation to give or to deliver.<sup>32</sup>

Though both variations of the economics approach are viable, it is suggested that the *KSLA-TV* notion is the more accepted theory.<sup>33</sup>

### B. *The Duhon Test*

Another approach to distinguishing a sale from a building contract was developed by the third circuit in *Duhon v. Three Friends Homebuilders Corp.*<sup>34</sup> The plaintiffs in *Duhon* contracted with the defendant for the construction of a home. Under the agreement, the plaintiffs were to select a floor plan, color scheme, and appliances. The defendant agreed to build the house and move it, completed, to the plaintiff's lot. After the house was moved, the plaintiffs noticed several major defects

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30. *Id.* at 1387-88.

31. See discussion of *KSLA-TV* in text accompanying *supra* notes 18-24.

32. 474 So. 2d at 1387.

33. See, e.g., *Hunt v. Suares*, 9 La. 434 (1836); *PPG Indus., Inc. v. Schega*, 362 So. 2d 1128 (La. App. 4th Cir. 1978).

34. 396 So. 2d 559 (La. App. 3d Cir. 1981).

and filed a suit in redhibition to rescind the contract and recover the price paid. The defendant filed a motion for summary judgment on the grounds that the contract was one to build and not one of sale, and that therefore the suit in redhibition was improper. In approaching the problem of classification, the third circuit reasoned that three factors determine whether a transaction is a sale or a building contract. First, in a building contract the party receiving the performance has some control over the specifications of the object.<sup>35</sup> Second, negotiations in a building contract "take place before the object is constructed."<sup>36</sup> Finally, "and perhaps most importantly, a building contract contemplates not only that one party will supply the materials, but also that that party will furnish his skill and labor in order to build the desired object."<sup>37</sup> Finding that the contract at issue met each of these tests, the court concluded that the agreement was a building contract and upheld the trial court's ruling dismissing the plaintiff's suit in redhibition.<sup>38</sup>

Cases applying the test adopted in *Duhon* include *Trahan v. Broussard*<sup>39</sup> and *Degeneres v. Burgess*.<sup>40</sup> In *Trahan*, the defendant contracted with the plaintiff to add pool and game rooms to the latter's house. The defendant convinced the plaintiff not to hire an architect and designed the addition himself. Twenty-one months after the room was completed, the walls collapsed, and the plaintiff filed suit alleging breach of a building contract and, in the alternative, redhibition.

The third circuit utilized the *Duhon* method of classification, and found that all three elements of a building contract existed: the plaintiff had input into the specifications; the parties negotiated the transaction prior to construction; and the defendant contributed his skill and labor in addition to the materials in rendering his performance.<sup>41</sup>

The facts of *Degeneres* are slightly more complicated. In September, 1977, LaRussa Enterprises contracted with Burgess to build a house on LaRussa's land and in accordance with LaRussa's plans, but subject to certain modifications required by Burgess. During construction Burgess noticed leakage problems and elicited a promise from LaRussa to repair them. After completion of construction an act of sale was passed between LaRussa and Burgess in June of 1978. In April of 1979, Burgess sold the house to the plaintiffs. Prior to moving in, the plaintiffs discovered serious leakage problems, and, in June of 1980, after having contended with the leakage problems for over a year, the plaintiffs filed suit for

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35. *Id.* at 561.

36. *Id.*

37. *Id.*

38. *Id.*

39. 399 So. 2d 782 (La. App. 3d Cir. 1981).

40. 486 So. 2d 769 (La. App. 1st Cir. 1986).

41. *Trahan*, 399 So. 2d at 784.



the breach of a building contract against both Burgess and LaRussa. The lower court decided in favor of the plaintiffs over LaRussa, but in favor of Burgess over the plaintiffs. Only LaRussa appealed.

The result of the appeal turned largely upon the proper classification of the contract between LaRussa and Burgess.<sup>42</sup> If the contract were found to be a sale, then the plaintiff's suit would be barred by the one year prescriptive period for actions in redhibition. This period would have commenced upon discovery of the leaks.<sup>43</sup> If, however, the contract were found to be a building contract, the plaintiffs' suit would have been timely.<sup>44</sup>

Following the *Duhon* three-factor test, the court classified the agreement as a building contract. Burgess had inserted modifications into the house plans (factor one) through negotiations conducted prior to the house's construction (factor two), and the defendant had agreed to supply both the materials and the labor necessary to build the house (factor three).

At present, the *Duhon* test is a popular and well-established means of distinguishing between a building contract and a sale.<sup>45</sup> Moreover, though the *Duhon* decision was rendered less than a decade ago, the test created therein contains elements supported by prior jurisprudence as relevant to making the classification under consideration.<sup>46</sup>

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42. The contract at issue was not that between the plaintiff and Burgess, but the one between LaRussa and Burgess. This is because the plaintiff was allowed to subrogate himself to the rights of Burgess. As Burgess' rights against LaRussa were dependent on the contract's classification, so stood the plaintiff's rights. In deciding the subrogation question the court reasoned that since redhibition allows a purchaser to assert the rights of his seller against the seller's vendor, then, by analogy, a subsequent purchaser ought to be entitled to assert the rights of his seller against a prior contractor. *Degeneres*, 486 So. 2d at 774.

43. See La. Civ. Code art. 2546.

44. See La. Civ. Code art. 2762.

45. In addition to those cases previously discussed, see *Hebert v. McDaniel*, 479 So. 2d 1029 (La. App. 3d Cir. 1985); *Acadiana Health Club, Inc. v. Hebert*, 469 So. 2d 1186 (La. App. 3d Cir. 1985); *Strecker v. Credico Fin., Inc.*, 444 So. 2d 783 (La. App. 4th Cir. 1984).

46. The case of *Wurst v. Pruyn*, 250 La. 1109, 202 So. 2d 268 (1967), involved a contract for the construction of a house. Over five years after that agreement the plaintiffs filed suit alleging breach of the building contract. The cause of this suit was a cracked foundation. In finding that the plaintiffs' suit had not prescribed, the Louisiana Supreme Court concluded that the agreement in question was a building contract. This conclusion was based in part on the facts that (a) the building plans had been modified at the request of the plaintiffs and (b) the agreement was reached at the beginning of construction.

The first of these factors is reflected in the first element of the *Duhon* test which states that the party receiving the performance shall have some control over the specifications of the object. The second factor could reasonably be interpreted as a forerunner of the second element of *Duhon* which concerns whether negotiations for the contract occurred

Having considered the fundamental obligation test and the *Duhon* test independently, the next stage of analysis is to evaluate each in light of the other.

C. *A Comparative Analysis*

An assessment of the comparative worth of each of the aforementioned tests must focus upon one basic principle of contract interpretation—that a court's primary objective in the classification and construction of a contract should be to give effect to the intentions of the parties at the time of contracting. With this in mind, the following assertions are made.

As previously discussed, the fundamental obligation test without benefit of economic balancing is often abstract and impracticable to apply.<sup>47</sup> An important issue arises, however, as to whether a balancing of the cost and/or value of the obligation to do against the cost and/or the value of the obligation to give effectively reflects the parties' intentions at the time of contracting. Professor Levasseur argues that it does not:

A reliance on a value test is an appealing one because of its simplicity and its mathematical objectivity. It pays little attention, however, to the realities of the contractual process where men bargain by means of words which too often do not reflect their intimate feelings and intent.<sup>48</sup>

The fundamental obligation test, as supplemented by the economics approach, fails to consider the parties' intentions. This failure is borne

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prior to construction.

In the case of *Mangin v. Jorgens*, 24 So. 2d 384 (La. App. Orl. 1946), the plaintiff sued for the balance owed on the transfer and installation of four floor heaters of a particular brand. Because of minor defects, the defendant reconvened for rescission of what he claimed was a sale. The court found that a building contract, and not a sale, existed, reasoning that the contract "involved [sic] more than a mere sale of materials, i.e., the furnishing of labor and the contractor's skill in the performance of the job." *Id.* at 386.

The similarity between the court's statement and the third element of the *Duhon* test is unmistakable, though the cases are arguably distinguishable. In *Duhon*, the contractor provided skill and labor to build the object desired; in *Mangin*, on the other hand, the plaintiff only contracted to furnish and install heaters built by another. This distinction is of doubtful import, however, in light of the following statement by Judge McCaleb in *Mangin*: "This, while not a contract to build a house, is a construction contract as it contemplated erection and installation . . ." *Id.* Thus, although an argument can be made to the contrary, there is a sound basis for the proposition that the third factor of the *Duhon* method of classification was also established in the jurisprudence prior to the *Duhon* decision.

47. See text accompanying *supra* note 23.

48. Levasseur, *supra* note 17, at 713.

out by its application. The courts which have subscribed to this notion have tended to find a building contract rather than a sale.<sup>49</sup> This tendency suggests that the courts have been content to use a mechanical decision-making process, rather than one which considers the intent of the parties in each individual case.

Arguably, the three factors of the *Duhon* test present more satisfying grounds for classification. These factors raise three factually-oriented questions which explore the circumstances of the parties' actions and their expectations. Element one considers what the parties actually agreed to by looking to who participated in considering the specifications of the object. Element two determines when, relative to the creation of the object, the parties engaged in negotiations. Element three is concerned with how the parties expected the contract to be carried out. Thus, the *Duhon* test requires a judicial evaluation of the circumstances and expectations of the agreement which will in turn reflect the intentions of the parties.

Nevertheless, like the fundamental obligation test, the *Duhon* test is open to criticism. For instance, if element two—consideration of when the agreement was reached—is viewed in isolation, it fails to distinguish a building contract from a sale of a future thing.<sup>50</sup>

In addition, one can argue that element three does not help distinguish between a building contract and a sale; it only answers whether a distinction needs to be made. If element three is not satisfied (i.e., if the contract does not contemplate that one party would use skill and labor as well as supply materials), then no issue of classification arises. This is so because if the contract involves only obligations to do or only obligations to give, then the interrelation of obligations which gives rise to a dispute over the contract's classification does not exist.

In the end, however, it must be emphasized that both tests have generally led to fair and accurate results.<sup>51</sup> While there have been ex-

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49. See text accompanying *supra* notes 31-33.

50. Consider a hypothetical. *A* desires three display cases like one he saw in a picture. He offers to pay *B* to produce these display cases, the latter accepts, and a contract is formed. Element two considered alone would require the contract to be classified as a building contract, even though there is reason to believe a contract for the sale of a future thing exists. Of course, the obvious antithesis to this argument is that neither the elements of the *Duhon* analysis nor the facts of a real case are considered in isolation. For the final disposition of a case similar to the hypothetical above, see *Henson v. Gonzalez*, 326 So. 2d 396 (La. App. 1st Cir. 1976) (a pre-*Duhon* case which relied in part on the fact that negotiations were completed prior to the building of the display cases to classify the agreement as a building contract).

51. See, e.g., *Degeneres v. Burgess*, 486 So. 2d 769 (La. App. 1st Cir. 1986); *Austin's, Inc. v. Brown*, 474 So. 2d 1385 (La. App. 2d Cir. 1985); *Henson v. Gonzalez*, 326 So. 2d 396 (La. App. 1st Cir. 1976); *Papa v. Louisiana Metal Awning Co.*, 131 So. 2d 114 (La. App. 2d Cir. 1961).

ceptions in which courts have utilized one test or the other to reach surprising results,<sup>52</sup> on the whole, each approach has provided a means to distinguish effectively and predictably between building contracts and sales.

Despite these comments favorable to both tests, it is worthwhile to consider a third worthy, but often overlooked, test.

#### *D. The Accession Test*

The accession test can be grounded in the following theory: if the object of the contract is to be built upon the land of the "owner" rather than the builder, then the contract is a building contract—not a sale—regardless of which party has the obligation to supply the materials. This theory may be derived from the following excerpts from Planiol:

The contract which has as an object a future thing is not a sale, if the thing is to be produced by the labor of the promisor.<sup>53</sup>

.....

If the creation of the thing to be delivered depends on the work of the promisor (or of workmen under his orders), the contract has no longer as object only the alienation of a thing; it includes in addition the remuneration by the job of a work to be effected; it forms therefore a mixed transaction being at the same time sale and contract by the job.<sup>54</sup>

.....

It follows, that when the contractor undertakes to construct a house on land which is delivered to him by his client, the agreement is (under the jurisprudence) a lease and not a sale, because the land is considered as the principle part of the thing, the building is only an accessory.<sup>55</sup>

Professor Levasseur has noted that Pothier proposed a comparable idea:

"The bargain that I have made with an undertaker whereby he is to build me a house is no less a contract of hiring of

52. See *FMC Corp. v. Continental Grain Co.*, 355 So. 2d 953 (La. App. 4th Cir. 1977), withdrawn, 356 So. 2d 1001 (La. 1977), wherein the court held that a contract to design, engineer, fabricate, and install a huge grain barge unloading system was a sale. This case has been criticized by courts and commentators alike. See *Gulf States Utils. Co. v. Ecodyne Corp.*, 635 F.2d 517 (5th Cir. 1981), and Levasseur, *supra* note 17, at 715 (1979). An appeal of this decision was withdrawn as a result of the parties settling the dispute.

53. 2 M. Planiol, *Traité Élémentaire de Droit Civil* No. 1902, at 142 (11th ed. La. St. L. Inst. trans. 1959).

54. *Id.* at 143.

55. *Id.* at 143 n.7 (citation omitted).

industry, even though by the terms of our contract he is to furnish the materials, because the land which I furnish for the erection of the house, is the principle thing in a house."<sup>56</sup>

Professor Levasseur explains Pothier's theory of classification in the following way:

This attribute of the ownership of the things added, joined, or incorporated into the property is founded on the maxim "*accessorium sequitur principale*." By application of this principle it does not matter whether the improvements, additions, or erections were made with materials that belong to the proprietor or the undertaker or a third party—regardless of their origin they belong to the proprietor of the immovable by accession.<sup>57</sup>

The ideas of the above three commentators can be consolidated to arrive at the following line of reasoning: under the law of accession, ownership of the materials used to build the object of the contract becomes vested in the landowner prior to performance of the contract in question. Thus, when performance occurs, the contractor contributes only his skill and labor; he does not transfer the ownership of the materials or the newly-built object, because he can not—ownership is already vested in the landowner. Since a sale requires the transfer of ownership of some thing,<sup>58</sup> it is not possible that the contract is a sale. Therefore, the contract must be classified as a building contract.<sup>59</sup>

One argument against the accession theory would be to cite Louisiana Civil Code article 2456 for the proposition that the sale of the goods came into existence *prior* to their delivery to the land of the party receiving the performance.<sup>60</sup> Such an argument, however, would be based upon the erroneous assumption that the materials required to build the

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56. Levasseur, *supra* note 17, at 714 (quoting R. Pothier, *Traité du Contrat de Louage et Traité des Cheptels* § 394, as contained in *Oeuvres de Pothier* (1806) (A. Levasseur trans.)).

57. *Id.* at 714.

58. See La. Civ. Code art. 2439.

59. This analysis parallels that of a situation in which the owner purchases the materials himself and then hires the contractor to build the object. Once the contractor finishes building the object and the owner pays him, can it be said that the contractor fulfilled any obligation to give? Certainly not. Since at the time of the execution of the contract the contractor did not own the materials, he could not transfer the ownership of the materials of the resulting object. There being no transfer of ownership, there can be no sale. Only an obligation to do was performed; therefore, the contract must have been a building contract.

60. La. Civ. Code art. 2456 states:

The sale is considered to be perfect between the parties, and the property is of right acquired to the purchaser with regard to the seller, as soon as there exists an agreement for the object and for the price thereof, although the object has not yet been delivered, nor the price paid.

object are themselves the object(s) of the contract. The object is, rather, the house, swimming pool, patio, etc. which has not yet come into existence when the *materials* to build it (e.g., nails, lumber, shingles, concrete, etc.) are placed upon the land of the party receiving the performance. Louisiana Civil Code article 2439, in defining a sale, requires consent, a price and an *object*. The materials, unassembled, are simply not the object.

At least one Louisiana case explicitly supports the accession theory. In *Parker v. Brown*<sup>61</sup> the court expressly relied upon the fact that the construction occurred on the land of the party receiving the performance in finding the agreement to be a building contract. The contract required the defendant to build a house for the plaintiff on a lot owned by the plaintiff. More than one year after the performance of the contract, the plaintiff sued for damages arising from certain defects in the construction. Brown's principal defense was that the one-year liberative prescription under redhibition had run. Judge Ayres, writing for the second circuit, held that the one-year liberative prescription of redhibition was inapplicable, as the contract was "a construction contract wherein defendant agreed to construct a dwelling for plaintiff . . . on a certain-described lot owned by plaintiff."<sup>62</sup>

Other Louisiana courts required to classify a transaction as a sale or a building contract have reached decisions which are consistent in result with the accession theory. In each of these cases<sup>63</sup> the factual setting involved the construction of some object on the land of the party receiving the performance. In none of these cases, however, did the court arrive at the conclusion that the agreement was a building contract through reasoning which required consideration of which party owned land on which the construction occurred. Nevertheless, it is important to note that this theory of classification is not inconsistent with the results reached in these cases.

It is thus reasonable to conclude that there is both express and implied support for the accession theory in Louisiana law. Furthermore,

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61. 150 So. 2d 306 (La. App. 2d Cir. 1963).

62. *Id.* at 307.

63. See, e.g., *KSLA-TV, Inc. v. Radio Corp.*, 501 F. Supp. 891 (W.D. La. 1980); *Airco Refrigeration Serv. v. Fink*, 242 La. 73, 134 So. 2d 880 (1961); *Acadiana Health Club, Inc. v. Hebert*, 469 So. 2d 1186 (La. App. 3d Cir. 1985); *Trahan v. Broussard*, 399 So. 2d 782 (La. App. 3d Cir. 1981); *Bel v. Capital Properties, Inc.*, 357 So. 2d 1330 (La. App. 4th Cir.), writ denied, 359 So. 2d 1306 (La. 1978); *Catalina Pools v. Sellers*, 322 So. 2d 812 (La. App. 4th Cir. 1975); *Long Leaf Lumber, Inc. v. Summer Grove Developers, Inc.*, 270 So. 2d 588 (La. App. 2d Cir. 1972); *A. A. Home Improvement Co. v. Irwin*, 203 So. 2d 888 (La. App. 4th Cir. 1967); *Papa v. Louisiana Metal Awning Co.*, 131 So. 2d 114 (La. App. 2d Cir. 1961); *Mangin v. Jorgens*, 24 So. 2d 384 (La. App. Or. 1946); and *St. Mary Iron Works v. Community Mfg. Enter.*, 9 La. App. 743, 119 So. 564 (La. App. 1st Cir. 1929).

this test is easy to administer and would result in consistent, predictable decisions. Nevertheless, as with the fundamental obligation and the *Duhon* tests, this approach is not without its limitations. The most notable drawback of the accession test is that it provides no guidance if the construction occurs on the land of the builder. Is it proper to reason *a contrario* that because the construction occurred on the builder's land, the agreement is a sale and not a building contract? Such a conclusion appears unwarranted.

A second shortcoming of the accession test may be that it has been applied only to immovables. Whether courts will be willing to apply this test to movables is unknown. An opportunity for such application may exist where, for instance, an owner contracts with another for a new floor in his mobile home.

In addition to these two limitations, there are two other problems with the accession view. Because it is applied mechanically to certain particular factual settings the intentions of the parties are likely to be ignored. Lastly, from a practical perspective, both the *Duhon* and the fundamental obligation tests are widely used to classify contracts and have generally produced just results.<sup>64</sup> There is little practical necessity for a third test.

#### E. Conclusion of Part I

Each of the three modes of distinguishing between a building contract and a sale has its own unique advantages and disadvantages. All three tests should be recognized as valid foundations for argument. Both the fundamental obligation and *Duhon* tests are presently in active use by the Louisiana courts and are producing just results. Because the *Duhon* test involves factually-oriented and efficiently administered elements which generally reflect the intentions of the parties and which produce justified conclusions, it is suggested as the best approach of the three.

## II. THE SIGNIFICANCE OF DISTINGUISHING BETWEEN A SALE AND A BUILDING CONTRACT

The distinction between a building contract and a sale affects the rights and obligations of the parties at every stage of judicial consideration. Under the appropriate circumstances the distinction will materially affect whether the plaintiff can maintain a suit, whether the plaintiff will prevail, and the nature and extent of the recovery. Thus, the impact of the distinction will be examined with respect to issues of liberative prescription, burden of proof, and remedies, respectively.

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64. See *supra* note 51.

### A. *Liberative Prescription*

The time limit within which a plaintiff must bring a suit in redhibition is one year from the date of sale unless the seller is presumed to know of the defect, in which case the suit prescribes within one year of the plaintiff's discovery of the defect.<sup>65</sup> In contrast, a party to a building contract must file suit within five years, if the defective building is made of wood, or ten years, if the building was constructed of stone or brick.<sup>66</sup>

*Broussard v. Pierret*<sup>67</sup> provides a typical example of the prescriptive issue. In that case, the plaintiff entered into a contract with the defendant for the latter to construct a house on the defendant's land. The house was completed and an act of sale was executed in 1962. Thereafter, defects in the sheetrock were discovered. Though the defendant made several attempts at repair, the defects remained, and the plaintiff filed suit in 1965. The defendant alleged that the suit had prescribed due to the expiration of the one-year prescriptive period applicable to sales. Judge Tate, writing for the third circuit, found a building contract rather than a sale to exist. "[T]he purchaser's right to recover damages for defective performance is subject to the ten-year building-contracts prescription of LSA-Civil Code Article 2762, not the one-year sales prescription of LSA-Civil Code Article 2534."<sup>68</sup> Thus, the plaintiff's suit had not prescribed.

An interesting result-oriented case is *Hill v. John L. Crosby, Inc.*<sup>69</sup> The defendant built a house with the intention of selling it to any purchaser. In October, 1969, the plaintiffs bought the house. By 1971

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65. La. Civ. Code art. 2534 states in part: "The redhibitory action must be instituted within a year, at the farthest, commencing from the date of the sale. This limitation does not apply where the seller had knowledge of the vice and neglected to declare it to the purchaser."

La. Civ. Code art. 2646 states in part: "[When the seller has not disclosed his knowledge of the vice,] the action for redhibition may be commenced at any time, provided a year has not elapsed since the discovery of the vice."

66. La. Civ. Code art. 2762 states:

If a building, which an architect or other workman has undertaken to make by the job, shall 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.

One should also be aware of the ten-year peremptive period which runs in favor of those who perform services on immovable property or to improvements thereon. See La. R.S. 9:2772 (Supp. 1987).

67. 215 So. 2d 136 (La. App. 3d Cir. 1968).

68. *Id.* at 138.

69. 353 So. 2d 421 (La. App. 4th Cir. 1977).



they discovered severe mildewing and rotting in one section of the house; however, it was not until August, 1974 that they arranged for laboratory analysis of the problems. This analysis concluded that the defects were the result of the defendant's faulty workmanship. The plaintiffs then filed suit for damages in October, 1974. The court of appeals hesitated to find this to be a sale,<sup>70</sup> recognizing that to do so would bar the plaintiffs' suit. The majority stated its dissatisfaction with the present law by noting: "We are reluctant to accept a thesis whereby a home purchaser who buys a so-called speculative house finds himself with far more limited rights than one who has a house built to his own plans."<sup>71</sup>

To avoid barring the suit and still correctly classify the contract, the court held that the one-year prescription did not begin to run until August, 1974, when the plaintiffs discovered the cause of the defect.<sup>72</sup> The dissent correctly noted, however, that the one-year period began to run at discovery of the *defect*, not its *cause*. Since the defect was discovered in 1971, the dissent concluded that the plaintiffs' complaint should have been dismissed.<sup>73</sup>

*Hill* should be taken as an illustration of the courts' occasional willingness to disregard established law in favor of a more just result. *Broussard* and the code articles cited therein are accurate authority for resolving issues of liberative prescription for building contracts and sales.

### B. Burden of Proof

Under article 2769<sup>74</sup> the contractor in a building contract, upon proving that he substantially, though not completely, performed his obligations, can recover the contract price minus that amount shown by the owner to be required to complete the performance owed. In a sale, however, the seller must deliver or tender delivery of the object (that is, he must *completely* fulfill his obligations) before he can recover the price.<sup>75</sup> How the contract in question is classified, therefore, determines what the party furnishing the object contracted for must prove in order to prevail at trial. If a contract is classified as a building contract, the owner then has the burden of proving what will be required to complete the job so that he may reduce the price in accordance with

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70. *Id.* at 423 n.2.

71. *Id.*

72. *Id.* at 423.

73. *Id.* at 424 (Schott, J., dissenting).

74. Article 2769 states:

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.

75. See La. Civ. Code art. 2551.

the contractor's substantial performance. If the contract is a sale, then the seller must prove delivery, or tender of delivery, in order to recover the price. Thus, distinguishing between a building contract and a sale affects the burden of proof.<sup>76</sup>

This difference is illustrated in *A. A. Home Improvement Co. v. Irwin*.<sup>77</sup> Extending from the floor of the defendants' back porch half way up to the ceiling was a weatherboard wainscoting. The plaintiff was hired to enclose the porch by installing windows from the wainscoting to the ceiling. The plaintiff performed the work, but the defendants refused to pay, alleging leakage and other defects in the plaintiff's workmanship. The plaintiff sued for the contract price and offered evidence at trial which sufficiently proved that, while some defects did exist, there had been substantial performance. The trial court dismissed the plaintiff's suit without prejudice.

The court of appeals reversed, reasoning as follows:

[T]he law governing building and construction contracts is different from that which generally governs commutative contracts, where there can be no recovery in the absence of full and complete performance. However, the doctrine of substantial compliance is sufficient to justify recovery of the contract price by the plaintiff. The owner's remedy in the presence of a substantial compliance or performance of the contract is to allege and prove the nature and extent of the unfinished or defective work, so as to reduce the amount of the plaintiff's judgment by the amount of the cost required to correct the defective work. The burden of proof in a case of this nature as to the defects and omissions on the part of the contractor and the cost of repairing and finishing them lies squarely upon the owners who claim that defective work exists.<sup>78</sup>

The plaintiff recovered the contract price minus whatever amount the trial court determined on remand to be necessary to correct the defects.<sup>79</sup>

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76. See *Airco Refrigeration Serv., Inc. v. Fink*, 242 La. 73, 134 So. 2d 880 (1961); *Henson v. Gonzalez*, 326 So. 2d 396 (La. App. 1st Cir. 1976); *Nichols Ford Co. v. Hughes*, 292 So. 2d 345 (La. App. 2d Cir. 1974).

77. 203 So. 2d 888 (La. App. 4th Cir. 1967).

78. *Id.* at 890.

79. In cases clearly involving a sale (i.e., where no issue of classification exists), Louisiana courts have utilized the device of *quanti minoris* to reduce the amount of the purchase price owed. The burden of proving the defect and the amount of reduction under this approach is properly on the purchaser. In such a situation the burden of proof is substantially similar to that provided for by article 2769. Thus, to the extent that *quanti minoris* is applicable, the difference in burden of proof in building contracts and sales loses significance. For examples of application of *quanti minoris* in this context, see, e.g., *Lemonier v. Coco*, 237 La. 760, 112 So. 2d 436 (1959) (sale of lot and house); *Guillory v. Petre Ford Co.*, 345 So. 2d 1274 (La. App. 3d Cir. 1977) (sale of automobile).

### C. Remedies

Of great advantage to the buyer in a suit in redhibition is the ability to collect attorney's fees. This item of recovery is authorized by article 2545<sup>80</sup> which is applicable only to actions in redhibition.<sup>81</sup> A plaintiff who prevails in an action brought for the breach of a building contract cannot be granted such relief.

In *Rasmussen v. Cashio Concrete Corp.*<sup>82</sup> the plaintiff filed suit for a defective sewer treatment plant, seeking damages and attorney's fees. The first circuit classified the contract as one of sale and upheld the lower court's decision in favor of the plaintiff.<sup>83</sup> By classifying the contract as a sale the court was able to apply article 2545 and allow the plaintiff to recover attorney's fees. Again, attorney's fees would not have been recoverable had the court concluded that a building contract existed.

### D. New Legislation: The "New Home Warranty Act"

The Louisiana Legislature has recently designated one class of transactions as to which classification as a sale or building contract will be irrelevant. Entitled the "New Home Warranty Act,"<sup>84</sup> this legislation applies *only* to transactions involving newly-constructed buildings used primarily for residential purposes.<sup>85</sup> Excluded are all transactions involving objects that are not buildings or buildings that are to be used for some non-residential purpose. The statute also does not affect transactions involving improvements, additions, or alterations to an already-existing "home."<sup>86</sup>

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80. La. Civ. Code art. 2545 states: "The seller, who knows the vice of the thing he sells and omits to declare it, besides the restitution of price and repayment of the expenses, including reasonable attorneys' fees, is answerable to the buyer in damages."

81. "[The distinction between a building contract and a sale] has relevance to the discussion of . . . attorney's fees that follows. LSA-C.C. art. 2545 and the jurisprudence interpreting it have application only to actions in redhibition." *Rasmussen*, 484 So. 2d at 778 n.2.

82. 484 So. 2d 777 (La. App. 1st Cir. 1986). For a discussion of *Rasmussen* in the context of the fundamental obligation test, see text accompanying supra notes 13-16.

83. *Rasmussen*, 484 So. 2d at 779-80.

84. La. R.S. 9:3141 to :3150 (Supp. 1987).

85. La. R.S. 9:3143(3) (Supp. 1987) defines a "home" as "any new structure designed and used only for residential use." Further, La. R.S. 9:3144(B)(12) excludes from the coverage of this act "[a]ny loss or damage which arises while the home is being used primarily for a nonresidential purpose."

86. This exclusion is implied from a general reading of the entire act, but particularly from La. R.S. 9:3141 (Supp. 1987) and 9:3143(7) (Supp. 1987) in conjunction with 9:3144(A) (Supp. 1987). La. R.S. 9:3141 expresses the purpose of the act as being in part the promotion of commerce "by providing clear, concise, and mandatory warranties

While the act is limited in scope, it does provide the "exclusive remedies, warranties, and prescriptive periods"<sup>87</sup> for those transactions which it covers. Thus, the act's provisions as to prescription, warranties, and remedies will apply regardless of the contract's classification as a sale or a building contract.

The act provides for the following warranties (subject to certain exclusions):

(1) One year following the warranty commencement date, the home will be free from any defect due to noncompliance with the building standards.

(2) Two years following the warranty commencement date, the plumbing, electrical, heating, cooling, and ventilating systems exclusive of any appliance, fixture, and equipment will be free from any defect due to noncompliance with the building standards.

(3) Ten years following the warranty commencement date, the home will be free from major structural defects due to noncompliance with the building standards.<sup>88</sup>

The liberative prescription for each of these warranties is the time period expressed plus thirty days.<sup>89</sup> The exclusive remedies available to an owner for a breach of the warranties by the builder are actual damages, attorney's fees, and court costs.<sup>90</sup> Actual damages shall not exceed the reasonable repair or replacement cost necessary to cure the defect (for a single defect) nor shall they exceed the original purchase price of the home.<sup>91</sup> Incidental expenses and consequential damages, including those for personal injury, are not available.<sup>92</sup>

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for the purchasers and occupants of *new homes*." (emphasis added). La. R.S. 9:3143(7) defines the "warranty commencement date" as "the date that legal title to a home is conveyed to its initial purchaser or the date the home is first occupied, whichever occurs first." In conjunction with this, La. R.S. 9:3144(A) defines the warranties provided by the act, each of which run a specific period of time beginning with the warranty commencement date. It is reasonable to conclude that works such as a remodeled kitchen, a new room, or new floor tile would not be included within these warranties which started to run before the existence of the work sought to be warranted.

87. La. R.S. 9:3150 (Supp. 1987) provides in part: "This Chapter provides the exclusive remedies, warranties, and prescriptive periods as between builder and owner relative to home construction and no other provisions of law relative to warranties and redhibitory vices and defects shall apply."

88. La. R.S. 9:3144(A)(1-3) (Supp. 1987).

89. La. R.S. 9:3146 (Supp. 1987).

90. La. R.S. 9:3149 (Supp. 1987).

91. *Id.*

92. La. R.S. 9:3144(14), (15), (17) (Supp. 1987).

A full and complete analysis of the provisions of the "New Home Warranty Act" is beyond the scope of this comment. The point to be understood is that those transactions which fall within the scope of this act and which may arguably be either a sale or a building contract, do not require such a classification. As to those transactions which fall outside the scope of this act, the significance of the distinction remains viable.

*E. Conclusion of Part II*

With the exception of the "New Home Warranty Act," the above discussion identifies three areas which are particularly impacted by distinguishing between building contracts and sales. These areas, among others of less importance,<sup>93</sup> affect the rights and obligations of each of the parties, and thus reflect the importance of correctly classifying a contract as either a building contract or a sale.

*Lee H. Ayres*

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93. For the proposition that the notion of "putting in default" does not apply to building contract obligations, see *Barber Bros. Contracting Co. v. Chet Homes, Inc.*, 393 So. 2d 352 (La. App. 1st Cir. 1980), writ denied, 396 So. 2d 921 (La. 1981). This case involved Louisiana Civil Code articles 1912 and 1913 of the Code of 1870, the precursors of article 1989 of the 1985 Revision. For the proposition that a vendor's lien *cannot* coincide with a building contract, see *Long Leaf Lumber, Inc. v. Summer Grove Developers, Inc.*, 270 So. 2d 588 (La. App. 2d Cir. 1972).