Louisiana Law Review

Volume 7 | Number 4
May 1947

Building Contracts in Louisiana

Walker P. McMurdo

BUILDING CONTRACTS IN LOUISIANA

The articles governing building contracts in Louisiana are found under the general title "Of Lease." Article 2673 states that there are two species of contracts of lease:

(1) the letting out of things,

(2) the letting out of labor or industry.

In Article 2745 we find that

"Labor may be let out in three ways:

(1) Laborers may hire their services to another person.

(2) Carriers and watermen hire out their services for the conveyance either of persons or of goods and merchandise.

(3) Workmen hire out their labor or industry to make buildings or other works."

Thus we are directed to Section 3 of Chapter 3 of the general title "Of Lease." The section heading reads "Of Constructing Buildings According to Plots, and Other Works by the Job, and of Furnishing Materials."

Article 2756 states that

"To build by a plot, or to work by the job, is to undertake a building or a work for a certain stipulated price."

This article is introductory and indicates the broad field to which the article on Section 3 may well apply. Article 2771 amplifies Article 2756 by stating that

"Masons, carpenters, blacksmiths and *all other artificers,* who undertake work by the job, are bound by the provisions contained in the present section, for they may be considered as undertakers each in his particular line of business." (Italics supplied.)

The scope of the section is further broadened and clarified by Article 2757 which states

"A person, who undertakes to make a work, may agree, either to furnish his work and industry alone, or to furnish also the materials necessary for such a work."

Although the articles in this section have been applied almost exclusively to what is commonly known as building contracts, it takes only a little imagination to realize the breadth of its possible scope. Theoretically the articles in this section affect everyone who undertakes a job for a certain, specified price from the rug cleaner up through the architect of the state capitol building.

The question of the applicability of the articles in this section

has arisen in several cases where, because of the verbal and indefinite nature of the contract, it was uncertain as to whether the contract was one of sale or a building contract. The question first arose in *Hunt v. Suares*[1] where the plaintiff was to furnish and install marble mantelpieces in the defendant's house. During the installation, defendant's home burned, destroying the mantelpieces. Plaintiff claimed that the contract was one of sale, that ownership passed to defendant upon delivery, and that he was therefore entitled to the purchase price. Defendant contended that the plaintiff was undertaking a job for a certain specified price, furnishing his own materials, and that Article 2758 places the risk of loss on the plaintiff until completion of the work. The contract here was verbal and the evidence as to its exact nature was conflicting. The court, impressed by the fact that the mantelpieces were ready-made and the fact that the cost of putting them up was trifling as compared with the cost of the article itself, held that the contract was one of sale. In *Margin v. Jorgens*[2] the same question of the interpretation of a verbal contract arose. Here the contract involved the installation of four Reems floor heaters. The court held that the contract involved the labor and skill of the plaintiff in cutting the floors, running pipes and other works which placed in it the category of a construction contract thereby denying the defendant his defense based on a redhibitory vice.[3] In the case of *Dugue v. Safety Oil Burners,*[4] the contract involved the furnishing and installation of an oil burner. The court held that the contract was one of sale and allowed the owner to rescind on grounds of redhibitory defects. This case was distinguished in *Margin v. Jorgens*[5] on the ground that the oil burner was already attached to an existing hot air system, thereby not requiring much labor or skill. The court also cautiously pointed out that Article 2769 was not pleaded in this case.[6]

As the contracts for the furnishing and installation of floor heaters, attic fans, small air-conditioning units, et cetera, are usually verbal, the problem posed by these cases will no doubt continue to confront the courts. The principle of weighing the price of the article installed together with the cost and amount of labor and skill involved seems to be the most reasonable way

1. 9 La. 434 (1836).
2. 24 So.(2d) 384 (La. App. 1946).
3. Art. 2520, La. Civil Code of 1870.
4. 142 So. 161 (La. App. 1932).
5. 24 So.(2d) 384 (La. App. 1946).
6. Art. 2769, La. Civil Code of 1870.

to ascertain the actual intention of the parties with regard to the nature of the contract. The distinction, of course, is important for the responsibilities imposed and the remedies offered by the articles of this section are entirely different from those set forth in the title "Of Sale."

In the case of *Matthews v. Rudy*,[7] defendant agreed to build a house on a lot owned by him in accordance with his own plans and specifications. After completion of the house, the property was to be transferred to the plaintiff for a price agreed upon for the whole. Later the house began to deteriorate because of vices and defects, and plaintiff brought suit under Article 2762.[8] The defendant contended that the contract was one of sale and pleaded one year prescription under Article 2534. The court held that the agreement was in the nature of a construction contract, although from the facts as given, it might have been viewed as a sale with a suspensive condition. In view of the extensive building programs now being undertaken in which entire subdivisions are raised under contracts similar to the one in this case, this decision may be favorable to the eventual owners of houses constructed in this manner. The five and ten year warranty of good workmanship under Article 2762 is a much more valuable right than the right to sue for redhibitory defects within one year under Article 2534.

The applicability of these articles has also arisen in respect to the prescriptive period of wages,[9] tort responsibility of an independent contractor,[10] assertion of a vendor's privilege,[11] the right to rescind for failure of consideration,[12] the distinction between the letting and hiring of services at so much per day and the hiring of services for a job,[13] and the difference between a sale and the furnishing of materials by the job.[14] It is also interesting to note the astute attempt of counsel to avoid the applicability of the articles in this section by basing the action on the rules for quasi-contracts.[15]

---

7. 4 La. App. 226 (1926).
8. Art. 2762, La. Civil Code of 1870.
9. State ex rel. Szarbary v. Recorder of Mortgages, 13 Orl. App. 292 (La. App. 1916).
10. Plumb v. Hammong Lands, 130 So. 257 (La. App. 1930).
11. St. Mary Iron Works v. Community Manufacturing Enterprise, 119 So. 564 (La. App. 1924).
12. Johnson v. Cooil, 14 Orl. App. 40 (La. App. 1916).
13. Sumerall v. Wetherbee, 15 La. App. 234, 130 So. 875 (1930).
14. American Paint Works v. Metairie Ridge Nursery Co., 1 La. App. 396 (1925).
15. National Contracting Co. v. Sewerage & Water Board of N.O., 141 Fed. 325, 72 C.C.A. 473 (C.C.A. 5th, 1905).

Destruction of Subject Matter Before Delivery

Articles 2758 through 2761 deal with the question of responsibility for the destruction of the subject matter during performance of the construction contract and before delivery. Article 2758 lays down the rule for those cases where the undertaker furnishes the materials for the work. It provides that "if the work be destroyed, *in whatever manner it may happen*, previous to its being delivered to the owner, the loss shall be sustained by the undertaker, unless the proprietor be in default for receiving it, though duly notified to do so."[16] (Italics supplied.)

Article 2759 is concerned with those cases where the undertaker does not furnish the materials, but only his work or industry, and in this case if destruction take place before delivery "the undertaker is only liable in case the loss has been occasioned by his fault." These articles are based on the well-established precept of *Res Periit Domino*—that along with ownership goes its ever-present attribute, the risk of loss. When the undertaker furnishes the materials, he is theoretically considered the owner until the work is completed and delivered and as such must bear the loss in case of destruction. On the other hand, where the proprietor furnishes the material and destruction occurs before delivery, the responsibility for loss is borne by the proprietor, but in this case "the undertaker shall not be entitled to his salaries, unless the destruction be owing to the badness of the materials used in the building."[17] The theory here is that the undertaker is in a sense the "owner" of his work and industry until the product of such work and industry be delivered.

Article 2761 delves further into the idea of delivery, ownership, and responsibility for loss by providing that

> "If the work be composed of detached pieces, or made at the rate of so much a measure, the parts may be delivered separately; and that delivery shall be presumed to have taken place, if the proprietor has paid to the undertaker the price due for the parts of the work which have already been completed."

It has been held that the term "work" as used in this article applies to the labor by which a thing is produced as well as the

16. Art. 2758, La. Civil Code of 1870.
17. Art. 2760, La. Civil Code of 1870.

thing itself.[18] In *Dreyfus v. City of New Iberia*[19] the contract called for the construction of a sidewalk at so much per square foot. The court held that the work was one "made at the rate of so much per measure" and upheld the contractor's demand for payment for that part of the work already completed. This article has made only a very slight appearance in Louisiana cases, but it is nevertheless extremely important. It draws the distinction between entire and divisible contracts[20] about which there has been a great deal of jurisprudence in the common law.[21] In Louisiana, the distinction is important not only with regard to the question of ownership and responsibility for loss but also as it may relate to the rights, remedies and damages for non-performance of the entire contract.

Notice should be taken here of Articles 2063 and 2065[22] which define and lay down the rules for conjunctive (divisible) contracts. Article 2065 provides that where a sum is promised to be paid in installments, a conjunctive obligation is created and the payment of the installments may be severally enforced. As the construction of buildings is often an expensive undertaking, necessity as well as convenience demands that the contract price be paid in installments. These payments usually take the form of what is known as progress payments, that is, as certain stages of work are completed, corresponding installments become due and payable. Although it is clear that the undertaker may demand payment of the installments as the successive stages are completed, does this also mean that ownership of the completed stages passes to the proprietor when the installments are paid? The only case found directly in point holds that the payment of installments creates a presumption of delivery and that owner-

18. Levy & Son v. Paquette, 144 La. 344, 80 So. 269 (1918).

19. 150 La. 1020, 91 So. 439 (1922).

20. See Seguin v. Debon, 3 Mart. (O.S.) 6, 5 Am. Dec. 735 (La. 1813), where this distinction was drawn.

21. See 9 Am. Jur. §§ 43-48, 59-67, for the extent and importance of this distinction at common law.

22. Art. 2063, La. Civil Code of 1870: "A conjunctive obligation is one in which the several objects in it are connected by a copulative, or in any other manner which shows that all of them are severally comprised in the contract. The contract creates as many different obligations as there are different objects; and the debtor, when he wishes to discharge himself, may force the creditor to receive them separately."

Art. 2065, La. Civil Code of 1870: "Where a sum is promised to be paid at different instalments, a conjunctive obligation is created, and the payment may be severally paid or enforced. Rents, payable at fixed periods, come also under this rule."

ship (with its consequent risk of loss) is thereby transferred.[23] It is submitted, however, that Article 2761 is applicable only when the subject matter of the contract is "composed of detached pieces" or "made at the rate of so much a measure" and that ownership should not necessarily pass simply because the contract calls for progress payments. A house or other building is not normally composed of "detached pieces" in the sense of Article 2761, and to hold that ownership of the various stages passes as the installments are paid is not consistent with the common practice of the procurement of Builders' Risk Insurance so as to satisfy the requirements of an insurable interest.

Under Article 2758, the phrase "in whatever manner it may happen" does cast upon the undertaker a loss occasioned for unexplained reasons, but the phrase does not hold the undertaker liable for a loss due to faulty plans or specifications for which the owner was solely responsible.[24] In *American Sheet Metal Works v. Equitable Real Estate Company*,[25] plaintiff contracted to cover defendant's passageway with a glass roof. The court held that it was undue interference on the part of the defendant owner to construct a brick wall while plaintiff was performing his work and placed the responsibility of loss on the defendant owner. Also, it has been held that the liability imposed by this article is not a matter of public policy and may be assumed by the owner.[26]

Duration and Extent of the Liability of Undertaker and Architect After Completion

Article 2762 governs the duration and extent of the liability of the undertaker and architect for the effects of bad workmanship after the building has been completed and delivered. This article provides that

> "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."

---

23. Industrial Homestead Ass'n v. Junker, Docket No. 7402, Orleans Appeal, Teissier's Digest of the Unreported Decisions of the Court of Appeal (1923) 35.

24. Penn Bridge Co. v. New Orleans, 222 Fed. 737 (C.C.A. 5th, 1915).

25. 12 Orl. App. 111 (La. App. 1914).

26. Tatum v. Andrews, 165 La. 222, 115 So. 466 (1928).

"Badness of workmanship" as used in this article includes badness of materials even though furnished by the owner, for it is the duty of the undertaker to reject them if they are unfit.[27] To hold the undertaker liable, the owner must show by a clear preponderance of evidence that the ruin was due to badness of workmanship or defective materials and not to defects in the soil[28] or to faulty plans or specifications[29] for which the architect would be responsible. Neither the architect nor the undertaker, however, is responsible for ruin caused by the defects in the soil[30] or the refusal of the owner to have the excavation in the soil properly prepared for the building.[31]

Article 2762 refers to all latent defects which may cause ruin in part or in whole and acceptance and occupancy does not waive the owner's right to recover for damages due to such defects[32] as the owner could not with reasonable diligence have discovered them. The owner, however, must not delay unreasonably in complaining of such defects when to do so would increase the burden of the undertaker.[33]

The word "building" as used in Articles 2762 and 3545 would seem to apply only to houses, barns, garages and similar structures. In *Federal Land Bank of New Orleans v. Lococo*,[34] the court indicated that a derrick would fall within its application, from which it may be argued that towers, tanks, cisterns, bridges, et cetera should likewise be affected. But when these other structures are included, a question of prescription may arise, for the articles lay down prescriptive periods for wood, stone or brick buildings only.

In the case of *Schott v. Ingargolia*[35] the question arose as to the tort liability of the contractor for injuries sustained by a third person when a building collapsed. The defendant contractor filed an exception of no cause of action. The court held that, admitting that the collapse was directly occasioned by the contractor's un-

27. Delee v. Hatcher, 19 La. Ann. 98 (1867).
28. Fremont v. Harris, 9 Rob. 23 (La. 1844).
29. Police Jury of Parish of Vernon v. Johnson, 111 La. 279, 35 So. 550 (1903).
30. Fremont v. Harris, 9 Rob. 23 (La. 1844). See also Art. 1793, French Civil Code, which makes the undertaker liable for ruin caused by defects in the soil.
31. Powell v. Markham, 18 La. Ann. 581 (1866).
32. Levy v. M. Schwartz and Bro. and Wm. Golding, 34 La. Ann. 209 (1882); Ascano v. Macaluso, 120 So. 506 (La. App. 1930).
33. Corley v. Hill, Harris & Co., Inc., 8 La. App. 693 (1928).
34. 178 So. 192 (La. App. 1938).
35. 180 So. 462 (La. App. 1938).

skillful and defective workmanship, he would still not be liable to a third person who is injured by the fall of the building. The court was of the opinion that, if the contractor owed the duty to protect all third persons against hidden defects, it would be difficult to measure the extent of his responsibility, and no prudent man would then engage in such occupations. When the undertaker furnishes the material, however, he is the owner of the building until delivery and as such is liable in tort under Articles 670 and 2322.[36] The question still remains as to the extent of his liability to the owner under Article 2762. Is it limited merely to damages arising out of the contract such as the owner may collect for the repair of his building, or does it also extend to personal injuries? The courts heretofore have had no occasion to delve generally into the nature and extent of the undertaker's liability under this article. However, in view of the large building programs of today with their use of experimental methods and materials, the problem of the extent of the undertaker's liability under this article may soon confront the courts. By analogy from the interpretation placed on Article 2695 governing the lessor's liability to the lessee for the condition of the leased premises,[37] a suggested answer is that Article 2762 will apply only as between the owner and undertaker, but that the owner's right to recover will be extended to include damages for personal injuries in addition to damages for repair of his building.

Rules Governing the Payment for Extra Work

Articles 2763 and 2764 lay down the general rules governing the payments for extra work, that is, work in addition to that agreed upon because of changes in the original plot, plans, or specifications. Article 2763 denies the undertaker any recovery unless he can prove that the changes necessitating the extra work "have been made in compliance with the wishes of the owner." Article 2764[38] makes an exception to this rule " . . . where the alteration or increase is so great, that it can not be supposed to have been made without the knowledge of the owner. . ." and also "where the alteration or increase was necessary and has not been foreseen." Under these articles the consent or knowledge of the owner does not necessarily have to be express. It may be

36. Mahon v. Spence, 11 La. App. 604 (1929).

37. Art. 2695, La. Civil Code of 1870: "The lessor guarantees the lessee against all the vices and defects of the thing, . . . and if any loss should result to the lessee from the vices and defects, the lessor shall be bound to indemnify him for the same."

38. Art. 2763, La. Civil Code of 1870.

implied when the owner is present at the construction, witnesses the performance of the extra work, and makes no objection thereto.[39] Also when the owner furnishes the materials, a presumption is raised that the change in plans was made with his consent.[40]

Custom or usage plays an important role in the determination of what is extra work. Thus custom was relied upon to determine what amount of plastering was called for by the contract and what amount was extra,[41] whether "putting in hangers" was extra and also what unexplained dotted or broken lines meant in the plans.[42] It is also now understood that when work is called for either by the plans or specifications, though not in both, the work is part of the contract and cannot be deemed "extra."[43]

Difficulty in interpreting these articles arises when they have to be construed with certain stipulations in the construction contract itself. The most troublesome is the clause often inserted in building contracts to the effect that no recovery for extra work shall be allowed unless such work bears the written authorization of the owner. Several cases[44] have interpreted such a stipulation to mean that the existence of a written authorization is a condition precedent to the undertaker's right to recover for "extras"; that, in the absence of clear and convincing proof, such a stipulation has been waived, parol evidence is inadmissible to prove such "extras" even though the alteration was so great that it could not be supposed to have been made without the knowledge of the owner or even if the alteration or increase was necessary and could not be foreseen. These cases are based on the theory that the contract is the law as between the parties. Other cases oppose this doctrine and hold that the undertaker may recover for extra work despite such a stipulation in the contract. Thus in the following situations parol evidence was admitted and recovery was allowed: (1) where it was shown that the alteration was so great that it could not have escaped the owner's

39. Doyle v. Ryan, 9 Rob. 402 (La. 1845); Mathias v. Lebret, 10 Rob. 94 (La. 1845). See also Art. 1816, La. Civil Code of 1870.

40. Andrews v. Jacobs, 4 La. 101 (1832).

41. Fritz Jahncke, Inc. v. Fidelity & Deposit Co. of Maryland, 166 La. 593, 117 So. 729 (1928).

42. E. W. Ullrich Glass Co., Inc. v. Interstate Electric Co., 171 La. 836, 132 So. 363 (1931).

43. Delaney v. John O. Chisolm and Co., 166 La. 406, 117 So. 443 (1928). See also E. W. Ullrich Glass Co., Inc. v. Interstate Electric Co., 171 La. 836, 132 So. 363 (1931).

44. Monarch v. Board of Com'rs of McDonough School Fund of City of New Orleans, 49 La. Ann. 991, 22 So. 259 (1897); Ault & Burden v. Shephard, 8 La. App. 595 (1928); French Market Homestead Ass'n v. Usner, 170 La. 783, 129 So. 446 (1930).

knowledge;[45] (2) where the owner was present at the work, saw the additions and made no objections thereto;[46] (3) where a subsequent verbal agreement was entered into abrogating the written contract.[47]

Groner v. Cavender[48] gives an excellent summation of the conflicting cases on this point and concludes that the better reasons are on the side of admitting parol and allowing recovery in cases where the owner must have had knowledge of the changes because of his presence or because of the great extent of the changes, and also in cases where the increase was necessary and has not been foreseen. The principles underlying the decision in this case are waiver and prevention of unjust enrichment which seems also to be the basis of Article 2764. It is to be noted here that extra work, as defined by Article 2763, means additional work brought about by changes in the original plans and specifications and not (as might be indicated by Article 2764) the increased cost of the work originally planned because of undue hardships encountered. The distinction may be illustrated in the following manner: Suppose the plans and specifications call for concrete foundations of a ten foot depth. If the soil is unduly soft and soggy, foundations of a twenty foot depth may be required. This would result in a *change of plans* and hence extra work. But if the soil is unusually hard and rocky, the laying of the ten foot foundations *according to plans and specifications* may involve undue and unforeseen expense, but will not constitute extra work.

Another stipulation often used in building contracts is to the effect that no additional compensation will be allowed if unusual difficulties necessitating change of plans are encountered in the execution of any part of the work. This clause is particularly favorable to proprietors in view of Article 2764 and it has been held that such a stipulation denies the contractor whatever rights he would have under this article.[49]

Death of Undertaker as an Excuse for Non-Performance

Article 2766 provides that

"Contracts for hiring out work are canceled by the death

45. Peterson v. Peralta, 3 La. App. 516 (1926).
46. Wellman v. Smith, 114 La. 228, 38 So. 151 (1905); Hinricks v. Edmonds Realty & Ins. Co., Orleans Appeals, Teissier's Digest of the Unreported Decisions of the Court of Appeal (1923) 36, 38.
47. Harvey v. Mouncou, 3 La. App. 231 (1925).
48. 16 La. App. 565 (1931).
49. O'Leary v. Board of Port Com'rs for Port of New Orleans, 150 La. 649, 91 So. 139 (1921).

of the workman, architect or undertaker, unless the proprietor should consent that the work should be continued by the heir or heirs of the architect, or by workmen employed for that purpose by the heirs."

This article is based on the presumption that the undertaker will personally perform the work and that his skill is especially called for.[50] The right of cancellation provided for seems to run only in favor of the owner and the heirs or personal representatives of the undertaker are bound under the terms of the contract if the owner wishes its continuance. The death of the owner does not affect the contract and it continues in full force.

In *McCord v. The West Feliciana Railroad Company*,[51] where the contractors were members of a partnership, the court held that the death of one of the partners canceled the contract as the owner refused to consent to its completion by the other. The undertaker was allowed compensation for the value of the work done and the materials prepared. The application of Article 2766 in this case proved to be somewhat harsh, for the remaining partner was ready, willing and able to complete the contract, and had set up an extensive outlay of machinery, including a steam sawmill, especially for the purpose of providing lumber for the undertaking.

Insofar as a great number of building contracts are primarily based not on the honesty or skill of the contractor, but rather on the fact that the contractor was the lowest bidder, Article 2766 should be restricted to those cases where the undertaker personally does the work or where it is shown that the skill, honesty or other personal quality of the undertaker was particularly relied upon. Construction today is often undertaken by many large contracting firms and partnerships, and Article 2766 should not be

50. Planiol et Ripert, in commenting on the counterpart of this article in the French Civil Code, state:

"La personnalité du maitre est indifférente au contrat: sa mort n'y met donc pas fin. Ses obligations seront exécutées par ses héritiers, encore que le travail commandé no soit pas de leur goût. Au contraire, l'art. 1795 décide que la mort de l'entrepreneur met fin au contrat. L'entreprise suppose une activité particulière chez l'entrepreneur, et quelquefois des talents personnels. Ses héritiers n'auront pas nécessairement les mêmes dons, ils n'exerceront pas nécessairement la même profession. Ces considérations ont conduit le législateur àposer une règle générale, non seulement pour le cas ou le contrat a été fait intuitu personae, mais pour tous les cas d'entreprise, contrairement a l'ancien droit qui ne considérait pas le contrat comme rompu lorsqué le travail peut être accompli par n'importe qui. Cette regle n'a d'ailleurs aucun caractere d'ordere public et les parties peuvent y déroger dans le contrat." 11 Planiol et Ripert, Tralte Pratique de Droit Civil Francais (ed. 1932) 183, n° 936.

51. 3 La. Ann. 285 (1848).

taken literally, but rather in connection with its historical background.

The "value of the work" referred to in Article 2767[52] has been interpreted to mean the relative or contractual value as opposed to the real or actual value.[53] Thus if the contract was one-half complete upon the death of the undertaker, his heirs would be allowed one-half of the contract price even though this amount might be considerably greater or much less than the actual value of the work. In short, the heirs either benefit by their ancestor's prudent bargaining, or suffer because of his improvidence.

Liability of Owner for Non-Performance

The liability of the owner for non-performance of the contract on his part is governed by Article 2765 which provides that

> "The proprietor has a right to cancel at pleasure the bargain he has made, even in case the work has already been commenced, by paying the undertaker for the expense and labor already incurred, and such damages as the nature of the case may require."

This article, because of its seemingly anomalous character, has been the subject of much comment from the very early cases down to the present day.[54] In order to understand best the significance and application of this article, it is necessary at the outset to distinguish between those cases where the owner cancels at his pleasure or for insufficient cause and those where the owner cancels the contract for sufficient cause independent of Article 2765.[55]

When the owner cancels at his pleasure by virtue of the "right" (or privilege) granted under Article 2765, his liability is determined by the penalty set forth in that article. Thus he is liable for the value of the "expense and labor already incurred" and for "such damages as the nature of the case may require." The phrase "expense and labor already incurred" has reference

52. Art. 2767, La. Civil Code of 1870.

53. Thomas v. L'Hote, 22 La. Ann. 73 (1870).

54. Dufour v. Janin, 8 La. 147 (1835); Forrest & Crocker v. Caldwell & Hickey, 5 La. Ann. 220 (1850); Monarch v. Board of Com'rs of McDonough School Fund of City of New Orleans, 49 La. Ann. 991, 22 So. 259 (1897); Glassel, Taylor & Robinson v. John W. Harris Associates, 209 La. 957, 26 So.(2d) 1 (1946).

55. Wickliffe v. Cooper & Sperrier, 167 La. 689, 120 So. 52 (1929); Pittman v. Bourgeois, 152 So. 765 (La. App. 1934); Vazquez v. Gairens, 26 So.(2d) 319 (La. App. 1946).

to the "actual" as opposed to the "contractual" value of work done and the materials furnished at the time of cancellation.[56] The contract ceases to be the sole standard by which the value of the work and labor is to be determined,[57] but it does have some weight in the determination of this value.[58] The phrase "such damages as the nature of the case may require" has invariably been interpreted to include the "loss of profits" because of the cancellation.[59] The contractor or architect, however, bears the burden of showing what his profits would have been.[60] It should be emphasized that even though the owner arbitrarily cancels the contract for insufficient cause, he does so by exercising a legal right given to him by Article 2765. Thus he is not at fault, or guilty of breach, or in bad faith. Even though the cancellation was made to further or protect his own interest, he should not be held responsible for damages for non-performance, on the basis of bad faith.[61]

Whether or not the owner has sufficient cause for cancelling the contract depends upon the materiality of the undertaker's failure to perform. Whether a failure to perform in certain respects is material or not is a question of degree depending largely upon general principles[62] and the facts of each case. However,

---

56. Joublanc v. Daunoy, 6 La. 656 (1834); Dufour v. Janin, 8 La. 147 (1835); Dugue v. Levy, 114 La. 21, 37 So. 995 (1904).

57. Villalobos v. Mooney, 2 La. 331 (1831); Hanemann v. Eberle, 1 La. App. 21 (1924).

58. Foster v. Kokernot, 5 La. 260 (1833).

59. Forrest & Crocker v. Caldwell & Hickey, 5 La. Ann. 220 (1850); Dugue v. Levy, 114 La. 21, 37 So. 995 (1904); Wickliffe v. Sperrier, 167 La. 689, 120 So. 52 (1929); Pittman v. Bourgeois, 152 So. 765 (La. App. 1934).

60. Moore v. Howard, 18 La. Ann. 635 (1866).

61. Dugue v. Levy, 114 La. 21, 37 So. 995 (1904); Cusachs & Co. v. Sewerage & Water Board of New Orleans, 116 La. 510, 40 So. 855 (1906). See also Art. 1934(2), La. Civil Code of 1870.

62. A.L.I., Restatement of Contracts, § 275, contains an excellent summation of these principles. It reads:

"In determining the materiality of a failure fully to perform a promise the following circumstances are influential:

"(a) The extent to which the injured party will obtain the substantial benefit which he could have reasonably anticipated;

"(b) The extent to which the injured party may be adequately compensated in damages for lack of complete performance;

"(c) The extent to which the party failing to perform has already partly performed or made preparations for performance;

"(d) The greater or less hardship on the party failing to perform in terminating the contract;

"(e) The willful, negligent or innocent behavior of the party failing to perform;

"(f) The greater or less uncertainty that the party failing to perform will perform the remainder of the contract."

when the court decides that non-performance of a building contract is material, the breach will be considered active[63] and a putting in default will not be necessary. When the owner cancels for sufficient cause, Article 2765 ceases to be the standard of the owner's liability and the undertaker may not recover for loss of profits.[64] The owner is liable for the value of the work done and materials furnished only if they inure to his benefit.

Liability of the Undertaker

Article 2769 governs the undertaker's liability when he fails to perform in accordance with the contract. It provides that

> "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 noncompliance with his contract."

This article must be construed with the now well-settled doctrine of substantial performance. Substantial performance is said to exist when there has been no omission in the essential elements of the contract, but when the strict letter of the agreement has not been carried out because of slight deviations or because of technical, unimportant, or inadvertent defects or omissions.[65] The doctrine as applied in the majority of cases[66] is to the effect that when the undertaker has substantially performed, he may sue for the recovery of the entire contract price. The owner in order to escape the payment of *part or all* of the contract price bears the burden of proving the damages caused him by the defects and omission.[67] Because of the language used in this line of cases, it would seem at first glance that the burden of proof is on the proprietor to show damages that he has incurred because of the defects and omissions even in cases where the contractor has not substantially performed.[68] However, a closer inspection will

63. Hill & Markam v. Penny, 15 La. Ann. 212 (1860); Sarrazin v. Adams, 110 La. 124, 34 So. 301 (1902); Parkerson v. Home Protection Service, 24 So.(2d) 256 (La. App. 1945); Vazquez v. Gairens, 26 So.(2d) 319 (La. App. 1946).

64. Peterson v. Sutter, 4 La. App. 180 (1926).

65. Mitchell v. Holomon, 10 La. App. 219, 120 So. 672 (1929).

66. Cairy v. Randolph, 6 La. Ann. 202 (1851); Davidson v. McGrath, 5 La. App. 125 (1926); Reimann Const. Co. v. Upton, 178 So. 528 (La. App. 1938); Lillis v. Anderson, 21 So.(2d) 389 (La. App. 1945).

67. A. M. Blodgett Const. Co. v. Cheney Lumber Co., 129 La. 1057, 57 So. 369 (1912); Boane v. Hardin, 15 La. App. 286 (1930); Merrill v. Harang, 198 So. 386 (La. App. 1940); Lillis v. Anderson, 21 So.(2d) 389 (La. App. 1945).

68. Ibid. See also Slack v. Standard Chevrolet Corp., 197 So. 200 (La. App. 1940).

reveal the distinction between cases where the undertaker has substantially performed and those where he has not.

Thus in cases where the undertaker has not substantially performed, he may still recover for the value of his work and materials which have inured to the benefit of the owner.[69] Recovery is allowed on the theory that the owner should not be unjustly enriched at the expense of the contractor. This is the case even though the undertaker may have "willfully" abandoned the contract,[70] the theory being that the principle of unjust enrichment outweighs the general rule that the wilful violator is entitled to no relief. On the other hand, when the unfinished work is of no benefit to the owner, the undertaker will be denied recovery for his work and material.[71]

The determination of the specific amount of damages to be paid because of breach by the undertaker is a problem of some magnitude. It has been shown in the discussion of Article 2765 that when the owner cancels the contract for insufficient cause, the undertaker is entitled to the profits he would have made had he been allowed to complete the contract. In *American Surety Company of New York v. Woods*[72] the argument was advanced that since the contractor (when the owner is guilty of breach) may recover the profits he would have made by showing that the cost of completing the contract is *less* than the contract price, then the owner (when the contractor is guilty of breach) should likewise recover when the cost of completing the contract would be *more* than the contract price. In this case the undertaker agreed to construct the sewers for $739,000 but, realizing that he would lose money on the contract, cancelled it. It would have cost the owner $912,000 to complete the contract. The receiver of the sewerage company, without having the work completed, claimed as damages the differences between the contract price and the cost of completion. The court disallowed plaintiff's claim holding that when the contractor defaults, the owner has the power to complete the contract himself or to have others do so, but when the owner breaches, the contractor does not have this power. The court also remarked that the owner's loss would be

69. Etie v. Sparks, 4 La. 463 (1832); Allen v. Wills, 4 La. Ann. 97 (1849); Taylor v. Almand, 50 La. Ann. 351, 23 So. 365 (1897); Babst v. Peritz, Orleans Appeals, Docket No. 7458, Teissier's Digest of the Unreported Decisions of the Court of Appeal (1923) 36; Peterson v. Sutter, 4 La. App. 180 (1926).

70. Peterson v. Sutter, 4 La. 180 (1832); Slack v. Standard Chevrolet Co., 197 So. 200 (La. App. 1940).

71. Mitchell v. Holomon, 10 La. App. 219, 120 So. 672 (1929).

72. 105 Fed. 741 (C.C.A. 5th, 1901).

certain only in the event that he had the work done at a cost greater than the contract price. The holding in this case was to the effect that when the contractor defaults, the right of the owner to sue for damages is not absolutely dependent upon his completion of the abandoned work, but the damages to which he is then entitled will not include the sum that the contractor would have lost had he complied with the agreement.[73]

In the case of *Fite v. Miller*,[74] the defendant was obligated to drill an oil well but refused to do so. Plaintiff sued to recover the cost of drilling the well as damages. The evidence showed that the chances of striking oil by drilling the well were extremely remote. Plaintiff was allowed to recover the cost of drilling the well even though he had taken no steps to have it drilled by others. The opinion of the court on final hearing was apparently based on the theory that when one party breaches a contract, the proper measure of damages is the difference between the market value of the act contracted for and the contract price. The court therefore found that the injured party was entitled to damages despite the fact that he had taken no steps to have the act performed by others and despite the showing that the act when performed would have been of no benefit to him. However, the court was doubtlessly impressed by the fact that the breach by the defendant deprived the plaintiff of a hope and that such hope was plaintiff's sole benefit under the contract whereas the defendant had received the full performance that the plaintiff had contracted to give him. The above cases present divergent views in regard to the extent of the undertaker's liability for a total or material breach. But note, however, that when the contract has been substantially performed and the owner is seeking reduction of the contract price, credit will be allowed when the owner shows with sufficient certainty[77] the damages occasioned by the defects and omissions[78] in the undertaker's work.

Note on the Remaining Articles in This Section

Article 2768[79] makes the undertaker responsible for the acts

73. But see Leinbard v. Meyer, 11 La. App. 328 (1929), where the holding in this case was apparently ignored.
74. 196 La. 876,200 So. 285 (1940).
75. 105 Fed. 741 (C.C.A. 5th, 1901).
76. Golston v. Bartlett, 112 S.W.(2d) 1077 (Tex. Civ. App. 1938).
77. See note 67, supra.
78. Cairy v. Randolph, 6 La. Ann. 202 (1851); Davidson v. McGrath, 5 La. App. 125 (1926); Merril v. Harang, 198 So. 386 (La. App. 1940).
79. Art. 2768, La. Civil Code of 1870: "The undertaker is responsible for the acts of the persons employed by him."

of the persons employed by him. This article presents an agency problem, that is, master, servant, independent contractor relationship and is conditioned by the principles of agency governing this relationship.

Articles 2770 and 2772-2777 are concerned with the liens of workmen, materialmen, et cetera. These articles have largely been supplanted by statutory material and the subject is beyond the province of the present comment.[80]

WALKER P. McMURDO

DAMAGES FOR PERSONAL INJURIES AND THE SHRINKING DOLLAR

—In 1878 a New York appellate court said, "the counsel for each side has cited numerous cases. But in making comparisons of other cases with the present, we notice two things: one is that the relative value of money has diminished in recent times; another is that, generally, in the older parts of the country the relative value of money is less than in the new."[1]

Since that time this idea has become well recognized and similar expressions have appeared in numerous cases.[2] The effect to be given the fluctuating value of the dollar, however, cannot be expressed in terms of a definite rule. It is only one of a large number of factors to be considered in the determination of the award, many of which can at best be merely approximated.

During and after World War I the purchasing power of the dollar declined rapidly with the consequent increase in the cost of living.[3] It was during this period that the consideration of the present and relative purchasing power of the dollar by the triers of facts[4] as a factor in the determination of awards in personal

80. This material is treated in detail in Daggett, Louisiana Privileges and Chattel Mortgage (1942) 217 et seq., 62 et seq.

1. Gayle v. New York Central and H. R. R. Co., 13 Hun 1, 4 (N. Y. 1878).

2. The following cases are merely representative: Doyle v. New Orleans Ry. & Light Company, 121 La. 945, 46 So. 929, 19 L.R.A. (N.S.) 632 (1908); Rogers v. Hiram J. Allen Lumber Co., Ltd., 129 La. 900, 57 So. 166, 39 L.R.A. (N.S.) 202, 15 Am. Jur. 621 (1912); Stromer v. Dupont, 150 So. 32 (La. App. 1933); Brown v. Homer-Doyline Bus Lines, 23 So. (2d) 348 (La. App. 1945); Illinois Central R. Co. v. Johnson, 205 Ala.1, 87 So. 866 (1920); Estrada v. Orwitz, 170 P. (2d) 43 (Cal. App. 1946); Posch v. Chicago Railways Co., 221 Ill. App. 241 (1921); Johnson v. St. Paul City R. Co., 67 Minn. 260, 69 N.W. 900, 36 L.R.A. 586 (1897); Hurst v. Chicago, B. & Q. R. Co., 280 Mo. 566, 219 S.W. 566, 10 A.L.R. 174 (1920). But cf. Canfield v. Chicago R.I. & P. Ry., 142 Iowa 658, 121 N.W. 186 (1909); Hodkinson v. Parker, 16 N.W. (2d) 924 (S.D. 1944).

3. See table, note 22 infra.

4. The expression "triers of fact" is used to include either the trial judge or the jury, or both, as the case may be.