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### Private Law: Sales

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## SALES

*Alain A. Levasseur\**

### SALE OF A THING OR LETTING AND HIRING OF INDUSTRY

Purchase and sale and leasing and hiring are considered to be so nearly related to one another that in certain cases the question arises whether the contract is one of purchase and sale, or one of leasing and hiring. . . .

. . . [I]f I deliver gladiators to you under the condition that twenty *denarii* shall be paid to me for the exertions of every one who issues safe and sound from the arena; and a thousand *denarii* for every one who is killed or disabled; the question arises whether a contract of purchase and sale, or one of leasing and hiring has been made. The better opinion is that, in the case of those who come forth safe and sound, a contract of leasing and hiring was concluded; but so far as those who have been killed or disabled are concerned the contract is one of purchase and sale, for it is apparent that the contract depends upon circumstances taking place as it were under a condition; a contract of sale or hiring having been entered into with reference to each gladiator, for there is no doubt now that property can be sold or leased conditionally.

Likewise, where it is agreed upon between a goldsmith and myself that he shall make me a number of rings of a certain weight and style out of his own gold, and shall receive, for example, two hundred *denarii*; the question arises whether a contract of purchase and sale, or one of leasing and hiring is made. Cassius says that the material is the object of purchase and sale, but that the labor depends upon a contract of leasing and hiring; still, the greater number of authorities are of the opinion that the contract is one of purchase and sale. But if I furnish him with my own gold, and the price of the work is agreed

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upon, it is settled that the contract is one of leasing and hiring.<sup>1</sup>

Letting and hiring is very close to sale and is governed by the same legal rules. For, just as sale is concluded if there be agreement on the price, so letting and hiring is deemed to be contracted if the fee (*merces*) be settled. And the letter has the action on letting while the hirer has the action on hiring.

. . . .  
. . . [T]he question is asked, if a goldsmith agree with Titius to make rings of a specified weight and shape out of his own gold and to receive, say, ten gold pieces, is the contract to be regarded as sale or as letting and hiring? Cassius indeed says that there is a sale of the material but a letting and hiring of the work. But the view prevailed that the contract is sale. If, though, Titius gave his own gold and a fee was settled for the work, there is no doubt that the contract is letting and hiring.<sup>2</sup>

The above excerpts are old illustrations of a recurrent problem, that of the choice to be made between two conceivable legal labels or characterizations suitable to a single set of facts. The predicament is compounded by the awareness of the drastically different legal effects which flow from the selection of one nominate contract over another.<sup>3</sup>

On three occasions in the past judicial year the Fourth Circuit Court of Appeal was confronted with the same basic issue of characterization of the facts as either a *locatio operis*—lease of industry or building contract—or a sale of a thing. The facts of the three cases will be briefly stated before an examination is made of the issues of characterization or

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1. THE INSTITUTES OF GAIUS, in 1 THE CIVIL LAW 171 (S. Scott trans. 1932).

2. INSTITUTES 3.24.pr and 3.24.5 in THE INSTITUTES OF JUSTINIAN: TEXT, TRANSLATION AND COMMENTARY 234-35 (J. Thomas trans. 1975).

3. "This system of classification [of contracts] reflects the general technique and ideology of the Code Napoleon. Influenced by the optimistic rationalism of the eighteenth century, the French codifiers relied on principles of definition and classification." Comment, *The Innominate Contract: A Possible Solution to Problems Created by the Classification of Contracts in the Louisiana Civil Code*, 24 LOY. L. REV. 207, 207 (1978).

classification on the one hand and the connected issue of assignment of the risk of loss on the other.

### *The Facts*

In *Jefferson Parish School Board v. Rowley Co., Inc.*<sup>4</sup> the defendant had been awarded, through public bidding, the job of furnishing and installing a science laboratory. While renovation of the school building was in process, a fire of unknown origin destroyed \$36,000 worth of tables and cabinets intended for the school lab. As the plaintiff school board had paid for these goods, the assignment of the risk of loss became an essential issue, the resolution of which was contingent upon the answer to the first and determinant question of the exact nature of the contract—was it a sale or a furnish-and-install contract?

The defendant in *FMC Corp. v. Continental Grain Co.*<sup>5</sup> had entered into a contract with the plaintiff who had undertaken to design, furnish, install and erect on Continental's premises barge unloading equipment for grain. Shortly after the beginning of operation, the whole facility had to be shut down due to mechanical failures. As a result, Continental suspended its payment on the contract, which resulted in a suit against them by FMC. The issues of warranty and liability having been raised, the court of appeal was once again confronted with the problem of characterization of the contract. The plaintiff argued that the contract was a sale under which they could not be held liable for damages as the contract included a limitation of their warranty; the defendant contended that the contract was one "to do"—a construction contract—which, as such, barred the plaintiff from contractually removing their liability for negligent acts.

In the third case, *Bel v. Capital Properties, Inc.*,<sup>6</sup> the plaintiff agreed to fabricate and install six ornamental canvas awnings on the defendant's hotel. Within six months of their installation, the awnings proved unsatisfactory and the defendant

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4. 350 So. 2d 187 (La. App. 4th Cir.), *cert. denied*, 352 So. 2d 238 (La. 1977).

5. 355 So. 2d 953 (La. App. 4th Cir. 1977).

6. 357 So. 2d 1330 (La. App. 4th Cir.), *cert. denied*, 359 So. 2d 1306 (La. 1978).

refused to pay the plaintiff the price set forth in the contract. Who was to bear the risk of loss—the plaintiff under the warranty rules of the sale of a thing or the defendant under the codal provisions of the letting out of industry?

### *Characterization of the Contract*

By the terms of articles 1777 and 1778 of the Civil Code,<sup>7</sup> parties to a contract are presented with the choice of either fitting their agreement under “the particular rules of certain contracts,” which are established in the Code and are referred to as nominate contracts, or devising some particular and unnamed contract to regulate their dealings. Such a particular and innominate contract must, however, meet the four general requisites necessary to the validity of any agreement, among them that of “a certain object, which forms the matter of agreement.”<sup>8</sup> It may occur that the determination of the true nature of the object of a contract will be decisive in characterizing the contract whenever the will of the parties is not clearly stated or sufficiently apparent from the provisions of the contract.

The primary object of any contract is the juridical transaction which the parties have in mind, such as the transfer of ownership of a thing. This juridical transaction, however, cannot materialize unless it creates obligations for the parties, which, in turn, become the objects of the contract and consist of giving, doing or not doing.<sup>9</sup> One could argue that in the final analysis it is not the thing itself which is the object of the contract but more accurately, the right which bears on the thing.

When the ownership of a thing is transferred there is no problem in identifying the object-thing of the contract with the

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7. LA. CIV. CODE art. 1777 provides: “Contracts in general, under whatever denomination they may come, (and whether they may) or may not be included in any of the above divisions, are regulated by certain rules, which are the subject of this title.”

LA. CIV. CODE art. 1778 provides: “Certain contracts are regulated by particular rules which are established in the parts of the Code which treat of those contracts.”

8. LA. CIV. CODE art. 1779 provides: “Four requisites are necessary to the validity of a contract: 1. Parties legally capable of contracting. 2. Their consent legally given. 3. A certain object, which forms the matter of agreement. 4. A lawful purpose.”

9. LA. CIV. CODE art. 1883 provides: “Every contract has for its object something which one or both of the parties oblige themselves to give, or to do, or not to do.”

object-right of the contract. But when a lesser right than ownership is transferred it becomes very important to differentiate between the thing itself and the right to that thing, as the latter becomes the true object of the contract. This distinction is explicitly made in article 1884 where it is stated that the object of a contract may be the thing itself, its use (the right to use the thing) or its mere possession (the right to possess as opposed to the right to own).<sup>10</sup>

Since, strictly speaking, the true object of a contract is the obligation which it creates, it is necessary to focus on the kinds of obligations into which parties to a contract may enter. Article 2063 of the Civil Code provides:

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. This 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.

A party to a contract may, therefore, have entered into a single contract and yet be bound to perform two or more different obligations. In the *Jefferson Parish School Board* case, for instance, the defendant was bound "to give" (in the sense of deliver) the furnishings and "to do," to wit, install them. The problem is thus posed—should one of these obligations be selected and singled out as the primary obligation with the inevitable effect it will have on the characterization of the contract as a sale or a contract of industry, or should these two different obligations be considered separately as if there were two separate contracts or as if there were a contract of a mixed nature, a sale-construction contract?

The abundant legal literature which exists on this issue is

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10. The distinction is also imposed by Civil Code article 1885: "All things, in the most extensive sense of the expression, corporeal or incorporeal, movable or immovable, to which rights can legally be acquired, may become the object of contracts." In other words, there are "things" which cannot become "objects" of contracts because they cannot become "objects" of an obligation whereas, *in abstracto*, the obligation itself could have been the object of a contract.

indicative of its controversial nature. Pothier presented the problem as follows:

The contract of letting and hiring of industry (*locatio operis*) is very much like the contract of sale. Justinian in his Institutes, *de loc. cond.* 3.25, says that with respect to certain contracts, one can wonder whether they are contracts of sale or contracts of industry, and he gives this rule to distinguish between them: when it is the workman who provides the material, it is a contract of sale: whereas when I provide the material for the work that I ask him to do, the contract is a letting and hiring of industry.<sup>11</sup>

Article 1711.6 of the French Civil Code follows this broad distinction where it provides:

*Les devis, marché ou prix fait, pour l'entreprise d'un ouvrage moyennant un prix déterminé, sont aussi un louage, lorsque la matière est fournie par celui pour qui l'ouvrage se fait. [Estimate, agreement or settled price for the undertaking of work on condition of a determined price are also hire, when the material is furnished by the one for whom the work is done.]*<sup>12</sup>

The apparently clear doctrine of this article, the emphasized part of which was deleted from the corresponding Louisiana Civil Code article 2756,<sup>13</sup> is rendered far less clear when article 1787 of the French Civil Code, or its equivalent, article 2757 of the Louisiana Civil Code, is read in parallel: "Art. 2757. 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."

The contradiction arising from the juxtaposition of the two articles of the French Civil Code<sup>14</sup> would not have come into

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11. R. POTHIER, *TRAITÉ DU CONTRAT DE LOUAGE ET TRAITÉ DES CHEPTELS* § 394, as contained in *OEUVRES DE POTHIER* (1806) (Writer's trans.).

12. *FRENCH CIV. CODE* (J. Crabb trans. 1977) (emphasis added).

13. *LA. CIV. CODE* art 2756 provides: "To build by a plot, or to work by the job, is to undertake a building or a work for a certain stipulated price."

14. The contradiction resides in that article 1787 of the French Civil Code (Louisiana Civil Code article 2757) considers that a person who furnishes both his services and the materials for his work has entered into a contract of industry, whereas the

being had the *Tribunat*<sup>15</sup> ratified the draft of the projet of article 1787 as it was presented. This draft included two additional sentences as follows:

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.

*In the first situation we have a pure hiring of industry.*

*In the second, it is the sale of a thing when it is made.*<sup>16</sup>

After some discussion in the *Tribunat*, the decision was made to drop "the last two subparagraphs of this article, as being of pure doctrine and as not having the nature of a legislative provision."<sup>17</sup>

It can be said, then, that the intent of the drafters of the French Civil Code was to consider a contract as a sale whenever the person who furnished his industry also furnished the materials for the work. A contract is a *locatio operis*, on the other hand, when the proprietor furnishes the materials to the person who is to furnish only his industry. Such was the opinion of the Romans,<sup>18</sup> the great majority of the commentators,<sup>19</sup> and the international law of the sale of corporeal movables.<sup>20</sup>

reading of article 1711(6) of the French Civil Code (Louisiana Civil Code article 2756) would lead to labeling such a contract as one of sale. Indeed, if, when the materials are "furnished by the one for whom the work is done" we have a contract of hire, a *contrario*, when the materials are provided by the person who also furnishes his work we ought to have another kind of contract, a contract of sale in particular.

15. The *Tribunat* was one of the four assemblies under the French Constitution of December 15, 1799 or Constitution of the year VIII.

16. 14 LOCRÉ, LA LÉGISLATION CIVILE, COMMERCIALE ET CRIMINELLE DE LA FRANCE—CODE CIVIL 328 (1828) (emphasis added) (writer's trans.).

17. LOCRÉ, *supra* note 16, § 38 at 401 (writer's trans.).

18. See notes 1 and 2, *supra*.

19. 2 G. BAUDRY-LACANTINERIE ET A. WHAL, DU CONTRAT DE LOUAGE n° 3872, as contained in 22 G. BAUDRY-LACANTINERIE, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL (3d ed. 1907); 2 A. COLIN ET H. CAPITANT, COURS ÉLÉMENTAIRE DE DROIT CIVIL FRANÇAIS n° 1088 (10th ed. 1948); 2 L. GUILLOUARD, TRAITÉ DU CONTRAT DE LOUAGE n° 772 (3d ed. 1891); 10 T. HUC, COMMENTAIRE THÉORIQUE ET PRATIQUE DU CODE CIVIL § 413, at 570 (1897); 10 M. PLANIOL ET G. RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—CONTRATS CIVILS n° 5 (2d ed. 1956). See LA. CIV. CODE art. 2450 which states: "A sale is sometimes made of a thing to come: as of what shall accrue from an estate, of animals yet unborn, or such other like things, although not yet existing."

20. UNIFORM LAW ON THE INTERNATIONAL SALE OF GOODS art. 6, Hague Conference of 1964 reads: "Contracts for the supply of goods to be manufactured or produced shall



Some commentators have suggested a different solution based upon an alternative interpretation of the two subparagraphs deleted by the *Tribunat*. According to Aubry et Rau:

Until the work has been completed and received, the relations between the parties are governed mainly by the rules of hiring of industry and the rules of sale do not become applicable until then. Such is the idea expressed, so we think, by the wording of the projet: "it is the sale of a thing *when it is made*."<sup>21</sup>

A greater problem of characterization occurs when the person who furnishes his industry also furnishes a part, instead of the whole, of the materials. According to the *Cour de cassation* and some French commentators, in such a case the criterion for the distinction between sale and letting of industry is one of economics and one which can be easily justified on the basis of the maxim "accessorium sequitur principale."<sup>22</sup>

But, considering that the court in the decision under appeal has shown that in the deal in litigation the value of the materials was far superior to the value of the industry strictly speaking, the court has properly held that the said deal was not a hiring of industry, but rather the sale of a future thing . . . .<sup>23</sup>

On several occasions, the Louisiana courts<sup>24</sup> have followed this approach of weighing the economics of the situation and

be considered to be sales within the meaning of the present law, unless the party who orders the goods undertakes to supply an essential and substantial part of the materials necessary for such manufacture or production." See generally CONFÉRENCE DIPLOMATIQUE SUR L'UNIFICATION DU DROIT EN MATIÈRE DE LA VENTE INTERNATIONALE (1966).

21. 5 C. AUBRY ET C. RAU, DROIT CIVIL FRANÇAIS—DU LOUAGE § 374, at 656 n.2 (7th ed. 1964) (writer's trans.).

22. Essentially the maxim means that an accessory to a thing follows and merges with it. See Judgment of 1<sup>er</sup> août 1950, Cass. Civ., S.1951.1.100; Judgment of 1<sup>er</sup> déc. 1970, Cass. Comm. [1970] Bull Civ. n° 325; 2 A. COLIN ET H. CAPITANT, *supra* note 19, at n° 1087; 1 L. JOSSERAND, COURTS DE DROIT CIVIL POSITIF FRANÇAIS, CONFORME AUX PROGRAMMES OFFICIELS DES FACULTÉS DE DROIT 1315 (1977).

23. Judgment of 1<sup>er</sup> août 1950, Cass. Civ., S.1951.1.100, 101 (writer's trans.).

24. Hunt v. Suares, 9 La. 434 (1836); Kegler's Inc. v. Levy, 239 So. 2d 450 (La. App. 4th Cir.), cert. denied, 256 La. 1150, 241 So. 2d 253 (1970); Papa v. Louisiana Metal Awning Co., 131 So. 2d 114 (La. App. 2d Cir. 1961).

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>25</sup> In this respect, the cases of *Jefferson Parish School Board* and *Capital Properties, Inc.* do not deviate from the previous jurisprudence.

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. A faithful characterization of a contract should, therefore, include an analysis of the requirements of: first, the subjective *cause* of the contract; second, the requirement of *consent*, especially under its aspect of error as to the person which is almost always irrelevant in a contract of sale but quite important in a contract of industry; and third, an analysis of the *object* of the contract.<sup>26</sup>

The legal issue of the characterization of the contract in the context of the facts of the case in *FMC* has raised very little controversy among the commentators. Their view can be stated as follows: a contract is one of industry whenever the erection of a building is to be done on the owner's land even if the

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25. One wonders what the courts would do in the event the cost of materials and the cost of workmanship were equal in amount or so close to being equivalent that a blind adoption of the economics criterion would become meaningless. Perhaps other factors, such as the personality of the provider of the services, his special or unique ability, or his technique should be considered to tilt the scale one way or the other, or the agreement could be seen as a mixed contract and divided into two separate contracts. This alternative is expounded by 11 M. PLANIOL ET G. RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—CONTRATS CIVILS* n° 912, at 148 (2d ed. 1956), who would see in these contracts a combination of a sale and a hiring of industry. A question raised by this alternative is prompted by the requirement that in a contract of sale the parties agree on the price of the thing. LA. CIV. CODE art. 2439. In "mixed contracts" it is very rare that there is a preliminary agreement of the price of the thing. This evaluation is often determined only upon completion of the work and can be, thereby, more or less under the exclusive control and determination of the obligor which is specifically prohibited by articles 2034 and 2035 of the Civil Code.

26. There is little doubt for example that a contract for a work of art to be performed by an artist is a contract of industry rather than a sale of the canvas and the paint by the artist. M. Planiol, *Note accompanying the Judgment of 20 mars 1895, Seine, D.1898.2.465*; A. Wahl, *Note accompanying the Judgment of 2 déc. 1897, Paris, S.1900.2.201. Contra, G. BAUDRY-LACANTINERIE ET A. WAHL, supra note 19, at n° 4187 bis.*

materials are furnished by the builder. Pothier had already espoused this doctrine:

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 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 principal thing in a house, *cum aedificium solo cedat*.<sup>27</sup>

The foundation for this approach is article 551 of the French Civil Code (Louisiana Civil Code article 504): "All that which becomes united to or incorporated with the property, belongs to the owner of such property, according to the rules hereafter established." 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. The French courts have consistently held that the proprietor of the land becomes owner of the materials used by the undertaker as soon as they are incorporated into the building and the work progresses.<sup>28</sup>

Louisiana courts have followed the same doctrine and have held that a contract involving work to be done on the owner's land or building is a building contract even though the under-

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27. R. POTHIER, *supra* note 11, at § 394 (writer's trans.). See also G. BAUDRY-LACANTINERIE ET A. WAHL, *supra* note 19, at n° 3874; 12 R. BEUDANT, COURS DE DROIT CIVIL FRANÇAIS n° 180 (2d. 1947); L. GUILLOUARD, *supra* note 19, at n° 775; 1 L. GUILLOUARD, TRAITÉ DE AL VENTE ET DE L'ÉCHANGE n° 66 (2d ed. 1890); 3 J. MAZEAUD, L. MAZEAUD ET M. MAZEAUD, LEÇONS DE DROIT CIVIL n° 1336 (3d ed. 1968); 11 M. PLANIOL ET A. RIPERT, *supra* note 19, at n° 912.

28. Judgment of 13 août 1960, Cass. Req., D.1861.1.105; Judgment of 20 févr. 1883, Cass. Req., S.1883.1.313; Judgment of 27 févr. 1905, Cass. Req., D.1908.1.333, S.1906.1.505. One of the latest cases brought before the *Cour de cassation* involved a corporation that had agreed to deliver a prefabricated house, erect it on the land, dig a well, and install a sewerage system. The court of appeal held that the contract was a building contract, and the third civil section of the *Cour de cassation* upheld. Judgment of 17 oct. 1973, Cass. Civ., D.1974.1.556.

taker is required to furnish some of the materials.<sup>29</sup> In conformity with this analysis, the court correctly held that the contract in *Jefferson Parish School Board* was a sale and that the installation agreement in *Capital Properties* was a hiring of industry.<sup>30</sup> However, the court in *FMC* decided that the construction agreement was a sale and that the warranty limitations in the contract controlled the obligations of the plaintiff. The facts of the case perfectly follow the classic example of a building contract, and it is unfortunate that only the dissenting opinion saw it that way.

### *Assignment of the Risk of Loss*

The determination of the true nature of a contract must be made wisely and with foresight due to the important legal effects attached to a contract of sale as opposed to a contract of industry. Thus, for instance, in the sale of a future thing the ownership of the thing is transferred to the buyer only after the thing has come into existence and is available for delivery. On the other hand, in a contract of industry where the materials are furnished by the undertaker they remain his property until completion of the work to be delivered or until the proprietor has been put in default, whereas if the materials are furnished by the proprietor they remain his property.<sup>31</sup>

The assignment of the right of ownership to a party carries with it the important consequence of allocating the risk of loss to the owner because of the rule *res perit domino* as set out in articles 1909 and 1919 of the Civil Code.<sup>32</sup> If this rule is applied

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29. See, e.g., *Airco Refrigeration Service, Inc. v. Fink*, 242 La. 73, 134 So. 2d 880 (1961); *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); *Southern Patio, Inc. v. Brown*, 153 So. 2d 924 (La. App. 4th Cir. 1963); *Papa v. Louisiana Metal Awning Co.*, 131 So. 2d 114 (La. App. 2d Cir. 1961).

30. However, the plaintiff lost (and rightfully so) under his own theory of hiring of industry because of his failure to prove that some other cause than "materials or workmanship [was] at fault." 357 So. 2d at 1331.

31. LA. CIV. CODE art. 2758 provides:

When the undertaker furnishes the materials for the work, 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 not receiving it, though duly notified to do so.

32. See LA. CIV. CODE arts. 1909 and 1919. The maxim expresses the rule that

to those building contracts in which the undertaker provides the materials in addition to his services for the erection of a building on the owner's property, the owner of the land, because he becomes owner by accession of anything added to his property, ought to be the one to bear the risk of loss.

However, articles 1909 and 1919 of the Civil Code ought to be read differently when they are placed in the context of a contract of industry or a construction contract on the immovable property of another. Indeed, whereas articles 1909 and 1919 contemplate a contract for the transfer of the ownership of a thing to be delivered and thus vest in the owner the right to remove the thing from the vendor's possession, articles 2756 through 2762 of the Civil Code contemplate a work to be done which does not confer on the owner any real power over the materials furnished by the undertaker until the work has been completed. In other words, if the owner of the immovable has a right *in law* over the materials, this right has very little content since the actual control over the materials belongs to the undertaker as part of his overall obligation to do. Therefore, although article 2758 places the risk of loss on the undertaker who furnishes the materials, one should not see in it an application of the rule *res perit domino* since the undertaker loses his ownership of the materials to the benefit of the proprietor as soon as accession takes place; rather it proposes a practical and sensible rule which places the risk of loss on the person who knows, or should know, that the materials he supplies under the terms of the building contract are "incidental to the particular contract, or necessary to carry it into effect."<sup>33</sup> Furthermore, because the undertaker enjoys effective control over the materials and work, one might opine that the undertaker is burdened with an obligation to keep the materials safe as a prudent administrator of the thing of another.<sup>34</sup>

It is a little more difficult to justify the rule of article 2759<sup>35</sup>

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when a thing is destroyed it is lost to the person who was the owner of it at the time.

33. LA. CIV. CODE art. 1903.

34. LA. CIV. CODE art. 1908.

35. LA. CIV. CODE art. 2759 provides: "When the undertaker only furnishes his work and industry, should the thing be destroyed, the undertaker is only liable in case the loss has been occasioned by his fault."

in light of the above explanation. Article 2759 presumes that the materials are furnished by the owner and that only the performance of services is to be provided by the undertaker. This article, in a sense, places the liability for the destruction of the work "in whatever manner it may happen"<sup>36</sup> on the owner, except where the destruction has been occasioned by the fault of the undertaker. Thus, as opposed to article 2758, article 2759 declares that the owner is liable for the risk of loss arising from the materials, whereas the undertaker is liable for the risk of loss arising from a fault in his workmanship. The liability of the owner is merely the liability of a supplier who fails to properly perform an obligation to do (supply good materials), rather than the liability of an owner of materials.

In conclusion it can be said that articles 2758 and 2759 are reconcilable as follows: the risk of the contract, to wit the construction of the work, is always on the undertaker who binds himself to an obligation of result; however, the risk of the loss of the thing will fall on the supplier of the materials, either the owner or the undertaker. Therefore, in *FMC*, the majority was wrong in holding that it did "not see the necessity for division of [the] contract at all or the necessity of classifying it in a particular way."<sup>37</sup> The court should have weighed carefully Continental's argument that "since this contract is an obligation to do, the statutory warranty pertinent thereto becomes effective, and since a large part of the defects was due to the negligent work of FMC, there can be no contractual removal of liability for such negligent acts."<sup>38</sup> The liability of FMC fell under article 2769<sup>39</sup> of the Civil Code, which relates to building contracts, and not under the redhibition articles pertinent to the contract of sale.<sup>40</sup>

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36. LA. CIV. CODE art. 2758 provides the general rule. For the text of the article, see note 31, *supra*.

37. 355 So. 2d at 957.

38. *Id.*

39. LA. CIV. CODE art. 2769 provides:

If an undertaker fails to do the work he has contracted to do, or if he does not execute it in the manner and at the time he has agreed to do it, he shall be liable in damages for the losses that may ensue from his non-compliance with his contract.

40. LA. CIV. CODE arts. 2520-48.

