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PROFESSIONAL NEGLIGENCE OF ARCHITECTS AND ENGINEERS

GEORGE M. BELL*

Our courts have erected a protective legal structure around architects and engineers which has been sufficient, at least in the past, to shelter members of those two professions from any extensive liability for their misconduct. However, it would seem that this legal structure was erected on an unfirm foundation and cracks are appearing in the walls so that occasionally architects and engineers have been held legally responsible for their errors.¹ Such responsibility has in general been confined to a liability to the person hiring the professional service. As yet there has been no case which has ruled the architect or engineer liable for a negligently caused physical injury to persons on or off the premises after the structure has been turned over to the owner.

Although one court has attempted to delineate the differences between architects and engineers, for the purpose of this paper no attempt will be made to comply with that definition.² It is apparent from an examination of the cases dealing with the tort liability of these two professions that the distinguishing characteristics of the two professions have had no bearing on liability.³ Furthermore, the courts have not segregated the two professions into those who are licensed to practice as contrasted with those who practice these professions without being licensed. The builder who attempts to furnish plans and specifications has so far picked up the same tort liability as the

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1. As the result of a demand by architects and engineers for a professional liability insurance, at least one insurance company, Continental Casualty Company, has made available to these two professions a broad form of public liability insurance. This policy became available about two years ago. Apparently earlier policies did not meet the desires of these professions. The December, 1957 issue of the *Journal of the American Institute of Architects* explained that a demand for an inclusive public liability policy had arisen because of a steady increase since World War II in the number of suits brought against the two professions for bodily injury and property damage. See also the June, 1957 issue of the *American Engineer*.

2. An architect: "One who, skilled in the art of architecture designs buildings, determining the disposition of both their interior spaces and exterior masses, together with the structural embellishments of each, and generally supervises their erection." An engineer: "Underlying all groups is the work of the civil engineer, whose field particularly is that of structures. Foundations, simple or extremely complicated, are within his realm. He designs and supervises the construction of bridges and great buildings, tunnels, dams, reservoirs and aqueducts." *Rabinowitz v. Hurwitz-Mintz Furniture Co.*, 19 La. App. 811, 133 So. 498, 499 (1931), quoting *ENCYCLOPEDIA BRITANNICA*.

3. *E.g.*, *Cowles v. City of Minneapolis*, 128 Minn. 452, 151 N.W. 184 (1915) (engineer); *Peterson v. Rawson*, 15 N.Y. Super. 234 (1857) (architect).

licensed architect or engineer.⁴ It would seem, however, that the courts should make a distinction between the licensed and the unlicensed on the basis of the degree of competence and that in the future we may find the courts insisting upon a higher standard of performance for the licensed than is demanded for those less competently trained.⁵

This article is an attempt to cover the tort liability of those who prepare plans, drawings or designs for structures on real property and of those who supervise the work of builders in order to assure the owner the structure for which he has bargained. The bulk of the decided cases has involved architects. For this reason, architects are referred to predominantly. However, in practically all situations, the word engineer could be substituted for architect when an engineer is furnishing a similar service.

LIABILITY TO THIRD PERSONS FOR PERSONAL INJURIES FROM DEFECTIVE STRUCTURES WHERE THE DEFECT ARISES AS A RESULT OF CARELESSNESS IN THE PREPARATION OF THE PLANS AND SPECIFICATIONS

A few courts have concluded that those who design structures on land should be liable to third persons lawfully on the premises during the course of construction when such persons are injured as a result of a careless design of the structure.⁶ To recover, the injured person must prove that the architect did not live up to the standard of his profession, that the plans were substantially followed and that the defect in the plans was the cause of the injury.⁷

After the structure is completed and accepted by the owner, courts have denied liability on the part of the designer. The architect and the engineer along with the contractor have in the older cases shared the benefit of the privity of contract doctrine. In cases decided prior to *MacPherson v. Buick Motor Co.*,⁸ courts concluded that those who design structures on land should have no liability to a person injured after completion of the structure unless the injured person hired the professional service.⁹

4. *Barrague v. Neff*, 202 La. 360, 11 So. 2d 697 (1942); *Louisiana Molasses Co. v. La Sasser*, 52 La. Ann. 2070, 28 So. 217 (1900).

5. *Hill v. Polar Pantries*, 219 S.C. 263, 64 S.E.2d 885 (1951); PROSSER, TORTS § 31 (2d ed. 1955). Architects have been treated the same as physicians and added duties are placed on the architect who practices in a large urban community. *Hubert v. Aitkin*, 2 N.Y. Supp. 711 (C. P. 1888).

6. *Paxton v. Alameda County*, 119 Cal. App. 393, 259 P.2d 934 (1953); cf. *Lottman v. Barnett*, 62 Mo. 159 (1876); *Potter v. Gilbert*, 115 N.Y. Supp. 425 (App. Div. 1st Dep't 1909).

7. *Bayne v. Everham*, 197 Mich. 181, 163 N.W. 1002 (1917).

8. 217 N.Y. 382, 111 N.E. 1050 (1916).

9. *Mayor, City of Albany v. Cunliff*, 2 N.Y. 165 (1849); *Geare v. Sturgis*, 14 F.2d 256 (D.C. Cir. 1926); and *Ford v. Sturgis*, 14 F.2d 253 (D.C. Cir. 1926) even though decided subsequent to *MacPherson v. Buick* gave the designer the benefit of the privity of contract doctrine.

It is not difficult to identify the apparent reason why architects and engineers have not been held fully responsible for their errors which cause physical injuries. It is obvious that a carelessly designed structure may well endanger a large number of persons; the possible plaintiffs are numerous. In addition the period of liability may be extensive. The statute of limitations starts as of the date of the injury even though the work was performed at a much earlier time.¹⁰ In the analogous situation involving the building contractor an 18-year lapse of time between the completion of the construction and the injury has not been considered a bar to recovery.¹¹ Theoretically the architect or engineer remains accountable for the work of his entire career. The statute of limitations affords such professions little protection.

It would seem that this potential liability should not endure for such a long period of time. In most areas, the tortfeasor's period of accountability is ended after a few years. Although the privity of contract doctrine does not cut down the period of accountability, it does drastically narrow the scope of liability by eliminating the bulk of the possible claimants. However unjust the period of liability of architects and engineers may be, the solution is not to eliminate arbitrarily a large number of otherwise meritorious claims but to attack the statute of limitations problem directly.

Privity of contract appears to have an enduring existence even though it has been subject to relentless attacks.¹² No purpose would be served by repeating the arguments against the doctrine. It would seem clear, however, that any court that accepts *MacPherson v. Buick* as far as chattels are concerned should likewise reject the privity doctrine when structures on land are involved. No reason appears why those who design chattels and those who design structures on land should not receive the same treatment.¹³ This issue was before the court in *Inman v. Binghamton Housing Authority*.¹⁴ In that case lack of privity of contract was not considered fatal in a suit by a third person injured as a result of an architect's careless design of a building. The court concluded that *MacPherson v. Buick* should be equally applicable to structures on land as well as to chattels. The architect's defense of lack of privity of contract was rejected.

10. *Inman v. Binghamton Housing Authority*, 3 N.Y.2d 137, 164 N.Y.S.2d 699, 143 N.E.2d 895 (1957); *Noted in* 27 U. CINN. L. REV. 132 (1958); see also 10 VAND. L. REV. 156 (1956).

11. *Hale v. Depaoli*, 33 Cal. 2d 228, 201 P.2d 1 (1948).

12. *E.g.*, *Hanna v. Fletcher*, 231 F.2d 469 (D.C. Cir. 1956). The second appeal in the same case is found at 261 F.2d 75 (D.C. Cir. 1958). However, other recent cases accept the privity doctrine. *E.g.*, *Kendrick v. Mason*, 234 La. 217, 99 So. 2d 108 (1958); *Greenwood v. Lyles & Buckner, Inc.*, 329 P.2d 1063 (Okla. 1958).

13. *Brooks v. Allis Chalmers Mfg. Co.*, 329 P.2d 575 (Cal. App. 1958) (designer of chattel liable for negligent injury to a third person).

14. 3 N.Y.2d 137, 164 N.Y.S.2d 699, 143 N.E.2d 895 (1957).

In the *Inman* case an architect designed a back porch of an apartment building without a protective railing even though the back door opened in such a manner as to force persons on the porch close to the edge. A two-year-old child fell off the unguarded porch six years after the construction had been completed. The court dismissed the case as far as the architect was concerned on the ground that the defect was not hidden, concealed or latent but was open and visible. The decision is open to considerable question on its conclusion that the architect is only liable for a hidden defect in the structure. Furthermore, on the express facts of the case as pointed out in the brief of the plaintiff, the defective porch contained a hidden defect as far as a two-year-old child was concerned. A fixed rule that those who design structures should not be held responsible for injuries resulting from an open visible defect is of doubtful validity. The nature of the defect is only one factor which should be considered along with all the surrounding facts before a determination is made of the propriety of the actor's and the victim's conduct. Just why a person injured by an open visible defect should not recover because of that fact alone from those who have been careless in creating the defect is not clear. Presumably, this is an offshoot from the assumption of risk doctrine or is probably an overzealous application of the contributory negligence doctrine.¹⁵ If the latent defect doctrine is based on assumption of risk then it is obvious the child involved in the instant case was incapable of observing or appreciating the risk involved. The doctrine should not have been applied. Likewise, a two-year-old child can hardly be held guilty of contributory negligence in failing to negotiate successfully a porch without a rail.

A most unusual decision was reached in *Sherman v. Miller Construction Co.*¹⁶ In that case a child was injured at school when he fell off a wall which contained no guard rail. The suit was brought against the architect but was dismissed on the ground that the school board had approved the plans prepared by the architect. The court felt that if the plans were incomplete as a result of the negligence of the architect that the approval by the school board was a complete defense. It would seem that this decision is predicated on the assumption that the owner who desires a building constructed may specify the type and

15. The *Inman* case concluded that since the manufacturer of a chattel is not liable for patent defects the architect should have no broader liability. The court relied upon *Campo v. Scofield*, 301 N.Y. 468, 95 N.E.2d 802 (1950) which appears to be the leading case dealing with the patent defect doctrine in its application to the manufacturer of chattels. The justification of the patent defect doctrine is placed in that case on causation and assumption of risk. The *Restatement of Torts* § 388 has not adopted the patent defect doctrine as far as manufacturers of chattels are concerned. Professor James rejects the doctrine of patent defects as far as product liability is concerned. James, *Product Liability*, 34 TEXAS L. REV. 44, 51 (1955).

16. 90 Ind. 462, 158 N.E. 255 (1927).

quality of the building he wants and as long as the architect meets the requirements of the owner, the architect has discharged his responsibility to third persons. It would seem that such a basic premise is unsound. A designer of an unsafe structure endangers not only the owner but third persons who may come in contact with the structure. The rights of these third persons should not be subject to the agreement between the architect and the owner. An architect should not be privileged to design a building which creates unreasonable risks of injuries to third persons and defend his action on the ground that this is the best the owner could afford or that the building was in accordance with the owner's wishes.¹⁷ A rule of law that would force the architect to prepare plans for a safe building would still leave the architect the privilege to refuse to prepare plans for an inadequate structure thereby eliminating liability on his part. The owner's approval of a defectively planned building should only be a factor to be considered in determining the liability of the owner of an unsafe structure.¹⁸

It is apparent from the *Inman* case and the *Sherman* case that even when privity of contract has been discarded as a defense, courts are still reluctant to protect third persons who are injured as a result of the negligence of an architect or engineer in the preparation of plans and specifications.¹⁹

LIABILITY TO THE OWNER FOR A DEFECTIVE BUILDING

Architects and engineers hold themselves out as competent to produce work requiring: (a) skill in the preparation of plans, drawings or designs suitable for the particular work to be executed; (b) knowledge of the materials to be used and the proper application or use; (c) knowledge of construction methods and procedures. Presumably, if the architect or engineer fails to use reasonable care to produce a satisfactory structure, he may be sued either for a breach of an implied

17. In the unreported decision of *Drexel Institute v. Boulware*, No. 1611 Court of Common Pleas, First Judicial District of Pennsylvania, the court expressly ruled that the owner's approval of the plans and specifications did not relieve the architect of his responsibility for a faulty design. Likewise in *Barraque v. Neff*, 202 La. 360, 11 So. 2d 697 (1942) the owner's approval of the plans was not considered any protection to the architect.

18. In the employer-builder relationship, the employer's failure to discover a defect in the plan does not relieve the builder of liability for following plans that were so obviously defective that no reasonable man would follow them. PROSSER, *TORTS* § 85 (2d ed. 1955).

19. Liability has been approved in principle in a few cases. *Moran v. Pittsburgh-Des Moines Steel Co.*, 166 F.2d 908 (3d Cir. 1948) (designer-manufacturer liable for wrongful death); *Paxton v. Alameda County*, 119 Cal. App. 393, 259 P.2d 934 (1953) (architect liable for negligently caused injuries to third persons during construction but mere deviation from customary practice does not establish negligence); *Potter v. Gilbert*, 115 N.Y.Supp. 425 (App. Div. 1st Dep't 1909) (defective complaint); cf. *Clemens v. Benzinger*, 207 N.Y. Supp. 539 (App. Div. 4th Dep't 1925) (careless supervision).

term of his contract or in negligence. It would seem, however, that courts have not made any distinction between the two theories. The few cases that have been brought have been decided on a theory of negligence.²⁰

An architect or engineer does not warrant the perfection of his plans nor the safety or durability of the structure any more than a physician or surgeon warrants a cure or a lawyer guarantees the winning of a case.²¹ All that is expected is the exercise of ordinary skill and care in the light of the current knowledge in these professions. When an architect or engineer possesses the requisite skill and knowledge common to his profession and exercises that skill and knowledge in a reasonable manner, he has done all that the law requires. He is held to that degree of care and skill and that judgment which is common to the profession.²²

Obviously for an owner to recover for a defective building it is necessary for him not only to show that the architect or engineer fell below the requisite standard of care in the preparation of the plans but that the plans were substantially followed so that the defective building arose as a result of the defective plans and not as a result of improper workmanship on the part of the contractor.²³ The typical case arises where the owner refuses to pay the architect's fee on the ground that a defective building was erected as a result of improper plans.²⁴

In *Bayshore Development Company v. Bonfoey*,²⁵ the owner sued the architect for damages on the ground that the completed building was not waterproof. The court recognized the liability of the architect under such circumstances and held that the measure of damages was an amount equal to the difference between the value of the building as actually designed and constructed and the value it would have been

20. *E.g.*, *Schreiner v. Miller*, 67 Iowa 91, 24 N.W. 738 (1885); *Hill v. Polar Pantries*, 219 S.C. 263, 64 S.E.2d 885 (1951). See also the unreported decision of *Drexel Institute of Technology v. Boulware*, No. 1611 Court of Common Pleas, First Judicial District, Pennsylvania (1954)—“An architect implicitly warrants not only that he has the skill, knowledge and judgment required to produce a result that will meet the needs of his employer, but that in the preparation of plans and specifications and in the supervision of the work he will employ that skill, knowledge and judgment without negligence. For negligence in the performance of his work he is liable to his employer if damage results.”

21. *Chapel v. Clark*, 117 Mich. 638, 76 N.W. 62 (1898); cf. *Cowles v. City of Minneapolis*, 128 Minn. 452, 151 N.W. 184 (1915). The fact that the professional service was gratuitous does not relieve the designer from the duty to use due care. *Robitscher v. United Clay*, 143 A.2d 99 (D.C. Munic. Ct. App. 1958).

22. *Hubert v. Aitken*, 2 N.Y. Supp. 711 (C. P. 1888) (professional standards of the community are used to determine architect's liability); *Surf Realty Corp. v. Standing*, 195 Va. 431, 78 S.E.2d 901 (1953); *School District v. Josenhans*, 88 Wash. 624, 153 Pac. 326 (1915).

23. *Bayne v. Everham*, 197 Mich. 181, 163 N.W. 1002 (1917).

24. *Chapel v. Clark*, 117 Mich. 638, 76 N.W. 62 (1898); 73 Sol. J. 744 (1929); 76 Sol.J. 556 (1932).

25. 75 Fla. 455, 78 So. 507 (1918).

if it had been properly designed and constructed. It seems that there are two other measures of damages that have been applied: (a) the cost of correcting the defect;²⁶ and (b) the cost of correcting the defect together with the difference, if any, in the value of the corrected building as compared to the value of the building if it had been originally constructed in accordance with suitable plans.²⁷ It would seem that this third measure of recovery has distinct advantages in an appropriate case. Obviously some defects are so trivial or easy correctable in relationship to the balance of the structure that the corrections can bring the building completely up to standard. On the other hand, there are other defects which are so basic that the correction does not completely bring the owner back to the position he would have been if the building had been properly designed in the first place. This third measure of damages will in many cases be the only measure of damages that would fully compensate the owner for his loss.

NEGLIGENT SUPERVISION OF CONSTRUCTION

It is customary to provide in the contract that the architect or engineer shall superintend the erection of the structure in accordance with the plans and specifications.²⁸ It is the duty of the architect to prevent the structure from being erected so that it will contain a material variation from the plans and specifications. One court has stated that architects are supposed to snoop, pry and prod.²⁹ However, the supervisor is not an insurer that contractors will perform their work.³⁰ He must use reasonable care to prevent material deviations from the plans and specifications and to prevent substandard workmanship. If he fails to use reasonable care, he is liable to the owner for the defects which could have been eliminated if he had properly performed his obligation.³¹ Even the owner's payments to the contractor after the owner had knowledge of defective work will not preclude the owner from recovering from the architect damages caused by careless supervision.³² It is the duty of a supervisor to insist upon performance

26. *Barraque v. Neff*, 202 La. 360, 11 So. 2d 697 (1942); *Schwartz v. Kuhn*, 126 N.Y. Supp. 568 (Sup. Ct. 1911).

27. *Foeller v. Heintz*, 137 Wis. 169, 118 N.W. 543 (1908).

28. AIA Doc. No. B-121, Standard Form of Agreement Between Owner and Architect, Condition 7.

29. *Day v. National-U. S. Radiator Corp.* No. 59, at 697, 19th Judicial District Court, Louisiana (1959) (unreported case).

30. *Cowles v. City of Minneapolis*, 128 Minn. 452, 151 N.W. 184 (1915); *Surf Realty Corp. v. Standing*, 195 Va. 431, 75 S.E.2d 901 (1953).

31. *Palmer v. Brown*, 127 Cal. App. 2d 44, 273 P.2d 306 (1954); *Schreiner v. Miller*, 67 Iowa 91, 24 N.W. 738 (1885); *Schwartz v. Kuhn*, 126 N.Y. Supp. 568 (Sup. Ct. 1911); *Gilman v. Stevens*, 54 How. Pr. (N.Y. Super.) 197 (1877); *Peterson v. Rawson*, 15 N.Y. Super. 234 (1857); *Foeller v. Heintz*, 137 Wis. 169, 118 N.W. 543 (1908).

32. *Pierson v. Tyndall*, 28 S.W. 232 (Tex. Civ. App. 1894).

in accordance with the terms of the contract.³³ The good faith of the supervisor in allowing the builder to depart from the approved plans is no defense.³⁴ In an unreported lower court decision of *Day v. U. S. Radiator Corp.*,³⁵ the plumbing contractor completed the installation of a hot water system. A safety valve called for in the design of the system had not been installed. The system was tested by the plumbing subcontractor and resulted in an explosion. In holding that the architect was liable for the extensive damage, the court pointed out that if the architect had properly supervised the work he would have observed the danger in the installation of the hot water system. The mere fact that the subcontractor had not requested inspection of this system did not relieve the architect of his responsibility.

One case had indicated that the function of the architect's supervision is to assure that the owner receives the building for which he has contracted and that the duty does not include supervision to protect the owner from liability to third persons arising out of the manner in which the building is being constructed. In *Clinton v. Boehm*,³⁶ a state statute required that all elevator shafts be guarded during construction. A workman recovered judgment against the owner for injuries received in falling down an unguarded shaft. The owner attempted to recoup his loss by suing the architect for negligence in not insisting on proper guards on the shaft. The owner's claim was rejected on the ground that the duty to supervise construction did not include the duty to see that guard rails were provided.

It would seem that this decision unduly narrows the scope of the supervisor's responsibilities. The usual owner is not in a position to protect himself by recognizing and eliminating conditions occurring during construction which create unreasonable risks of harm to third persons. The very purpose of securing professional help is to cope with the obvious inability of the owner. Courts have held that the supervisor owes to workmen a duty of using due care and that a workman injured as a result of careless supervision is entitled to recover from the architect.³⁷ A corresponding duty to the owner to protect him from claims for personal injuries would not appear to be too onerous.

LIABILITY TO THE OWNER AND TO A SURETY FOR CARELESS CERTIFICATION OF PAYMENTS TO BE MADE—THE ARCHITECT OR ENGINEER AS AN ARBITER

The problem of the liability of an architect who is careless in certifying the amount of work completed or that payments may be made,

33. *Lotholz v. Fiedler*, 59 Ill. App. 379 (1895).

34. *Foeller v. Heintz*, 137 Wis. 169, 118 N.W. 543 (1908).

35. No. 59, at 697, 19th Judicial District Court, Louisiana (1959) (unreported case).

36. 139 App. Div. 73, 124 N.Y. Supp. 789 (1st Dep't 1908).

37. *Clemens v. Benzinger*, 207 N.Y. Supp. 539 (App. Div. 1925).

is complicated by the dual status of an architect in his relationship to the owner and the contractor. Under the standard form of contract prepared by the American Institute of Architects the architect is an arbitrator in disputes as to the execution and progress of the work.³⁸ The losing party to a dispute settled by the decision of an architect or engineer may well feel that the decision was carelessly made or that the arbiter did not have the requisite skill to render a proper decision. However, since the arbitrator acts in a quasi judicial capacity, he should act without fear of annoying litigation and solely on the basis of his convictions and conclusions.

It would seem that in the event of conflicting claims as to the progress and execution of the work that the certificate of the architect resolving the dispute would be judicial in nature. As such the architect is only liable for fraud and is not answerable to the owner or to the contractor for a careless decision.³⁹ However, when the architect is rendering a partisan service to the owner there seems to be little question that this certification must be made with reasonable care after the exercise of professional judgment.⁴⁰ A failure to exercise due care while acting for the owner will render the architect liable to the owner for damages sustained. The leading case on this problem is *Corey v. Eastman*.⁴¹

The contract in *Corey v. Eastman* provided for partial payments as the work progressed. The contractor secured a certificate from the architect that more than the amount of work necessary for the first payment had been completed. The owner seemed to doubt this statement and questioned the architect on it. The architect reassured him the certificate was correct. The owner paid the builder in accordance with the certificate and shortly thereafter the builder went into insolvency. It was shown that the certificate was carelessly made and the owner sought to recover the damage sustained. The jury awarded a judgment in favor of the owner against the architect and this was sustained on appeal.

A carelessly issued certificate by an architect may injure not only the owner but the surety. In the case of *Hall v. Union Indemnity Co.*,⁴² the architect certified progress payments which overpaid the contractor who thereafter defaulted. The owner brought suit against the surety on its bond guaranteeing faithful performance. The surety company defended on the ground that the architect had not followed

38. Article 39, The General Conditions of the Contract for the Construction of Buildings, AIA Doc. No. A-201.

39. See, e.g., 76 U. PA. L. REV. 327 (1928).

40. An architect is an agent of the employer to assist him in building. *Coombs v. Beede*, 89 Me. 187, 36 Atl. 104 (1896).

41. 166 Mass. 279, 44 N.E. 217 (1896).

42. 61 F.2d 85 (8th Cir. 1932).

the contract in issuing the certificate. The contract provided that payments would be made upon invoices presented by the contractor. The architect accepted mere estimates by the contractor in lieu of detailed invoices for labor and materials incorporated into the building. The court ruled that the architect in certifying amounts due on the basis of these estimates was acting as agent of the owner and that the architect's violation of the terms of the contract was chargeable to the owner. As a result of the improper certification procedure the risks to the surety were increased. Consequently, the surety would have been released under the bond except for an estoppel that was found in the case.

Careless certification on the part of the architect has in one case been sufficient to support a cause of action by the surety. The surety sued the architect in *State for the Use of National Surety Corp. v. Malvaney*.⁴³ In that case the architect approved the release to the contractor of most of the retainage fund. The contractor used the money to pay part of his personal debts, leaving unpaid a large number of debts incurred in the construction of the building. The surety company claimed that the retainage fund was for the protection of the surety as well as the owner and that the architect was negligent in releasing the retainage fund before ascertaining the status of the debts owed by the contractor in connection with the construction of the building. The court pointed out the ease with which the architect could have ascertained the principal creditors and the status of the claims. It was concluded that the architect was careless in accepting the contractor's word on the vital question of the unpaid claims and that the architect owed a duty of using due care not only to the owner but to the surety as well.

LIABILITY TO THE OWNER WHEN THE COST OF THE BUILDING EXCEEDS THE ESTIMATE

It seems clear that if an architect is hired to prepare plans and specifications for a building not to exceed a stated dollar cost he is not entitled to recover his fees if the building as designed exceeds the stated cost.⁴⁴ The further question arises as to the liability of the architect in damages to the owner when the actual cost exceeds the estimated cost. It should be noted that the architect stands in a fiduciary relationship to the owner. A misrepresentation as to the cost of the proposed building should result in liability to the architect.⁴⁵ In

43. 221 Miss. 190, 72 So. 2d 424 (1954), noted in 31 N.D.L. Rev. 54 (1955).

44. *Andry & Feitel v. Ewing*, 15 La. 272, 130 So. 570 (1930); *Lane v. Town of Harmony*, 112 Me. 25, 90 Atl. 546 (1914); *Laing v. School District*, 190 Ore. 358, 224 P.2d 923 (1950); *Beacham v. Greenville County*, 218 S.C. 181, 62 S.E.2d 92 (1950).

45. PROSSER, TORTS §§ 87-88 (2d ed. 1955).

Edward Barron Estate Co. v. Woodruff Co.,⁴⁶ the final estimate on the building by the architect was \$400,000. However, the completed cost was \$700,000. The owner sued the architect for \$300,000 damages and the demurrer of the architect to the complaint was overruled. The court held the architect liable for an intentional misrepresentation of cost. The court did not discuss the measure of damages.

The measure of damages was considered in *Capitol Hotel Co. v. Rittenberry*.⁴⁷ The owner sued to recover damages for the increased cost of the work over the estimate prepared by the architect. In that case the cost exceeded the estimate by \$125,000. The owner claimed that the building which was to be used as a hotel could be operated only at a profit at the estimated price. The court held the architect liable for a negligent disregard of his duty in the preparation of plans and specifications. However, the court did not believe the full \$125,000 should be the measure of the owner's recovery. It was pointed out that the owner still had a building with added value and that it would be inequitable to allow the owner to retain the more valuable building and still recover the difference between the estimate and the actual cost. The court concluded that the damages should be based on a reasonable return to the owner on his investment because the building was constructed as an investment. However, no precise formula was worked out to arrive at the loss in investment which resulted from the increased cost of the building.⁴⁸ It would seem that if the more expensive building does not yield any more income, then the owner's damages are the excessive cost. However, if a part of the excessive cost yields the same anticipated rate of return, then the unproductive portion of the excess cost should be awarded as damages.

LATE DELIVERY OF PLANS

The plans and working drawings must keep step with construction work. Those who prepare plans and drawings should know when their work must be completed. The designer cannot hold up construction by late completion of plans without subjecting himself to a

46. 163 Cal. 561, 126 Pac. 351 (1912). A similar result was reached in *Coombs v. Beede*, 89 Me. 187, 36 Atl. 104 (1896). In the latter case the architect was hired to make plans for a house to cost not more than \$2,500. The lowest bid was \$3,100 and the final cost of construction was \$2,700. The appellate court sent the case back for a new trial after ruling that the architect would be liable for the excess cost only if he had failed to use reasonable care in performing the work. Contributory negligence on the part of the owner may bar recovery. *Benenato v. McDougall*, 166 Cal. 405, 137 Pac. 8 (1913). Architect is not negligent in failing to ascertain the amount the owner could spend. *Clark v. Smith*, 234 Wis. 138, 290 N.W. 592 (1940).

47. 41 S.W.2d 697 (Tex. Civ. App. 1931).

48. *Zeliff v. Sabatino*, 15 N.J. 70, 104 A.2d 54 (1954), detailed a formula in a similar case.

claim for damages for delay. An exactness of performance in this regard is required from architects and engineers.⁴⁹

49. *Edwards v. Hall*, 293 Pa. 97, 141 Atl. 638 (1928); *Osterling v. Frick*, 284 Pa. 397, 131 Atl. 250 (1925).