Sales - Per Aversionem - Buyer's Prior Viewing of Property

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NOTES

SALES — PER AVERSIONEM — BUYERS' PRIOR VIEWING OF PROPERTY

Plaintiff agreed to buy from defendant for a lump sum an unimproved lot, described in the contract to sell as “Lot 300, Sq. 14, Sable corner Norton, St. Bernard Parish, on grounds measuring about 80 x 106, or as per title.” Plaintiff had viewed the property before signing the agreement, but there was no physical evidence of its boundaries. After signing the agreement, plaintiff discovered from a survey plat that the lot’s actual depth on one side was 16 feet less than described in the agreement. As this shortage resulted in a deficiency of more than one-twentieth of the area stated in the agreement, plaintiff sued for diminution of the purchase price under Civil Code Article 2494.1 Defendant contended that Civil Code Article 2495 precluded diminution; the proposed sale was by boundaries (per aversionem) because plaintiff had viewed the property prior to signing the agreement. The trial court rendered judgment for plaintiff, and the court of appeal affirmed. Held, a buyer's viewing of property with no visible physical boundaries does not render the sale per aversionem. The measurements of the property appearing in the purchase agreement were controlling and diminution of the purchase price was an appropriate remedy for the buyer.2 Scurria v. Russo, 134 So. 2d 679 (La. App. 4th Cir. 1961).

Litigation with reference to disparity between the quantity agreed upon and that actually delivered in sales of immovable property arises in three factual situations contemplated by the Louisiana Civil Code.3 Classification of the sale in question

1. Plaintiff's alternative demand was for return of his deposit with a like amount as penalty for failure of defendant to perform, which penalty was stipulated in the contract.
2. Upon refusal of plaintiff to perform under the agreement, defendant sold the property to another. Since the property could not be tendered to plaintiff with a diminution in price, a return of the deposit with a penalty was ordered. On rehearing, the judgment was reversed insofar as it allowed attorney's fees to plaintiff.
3. LA. CIVIL CODE arts. 2492, 2943 (sales by rate per measure with extent of premises indicated), 2494 (sales for a lump sum, extent of premises indicated), 2495 (sales by boundary for a lump sum) (1870).

The articles of the French Civil Code, to which the Louisiana provisions generally correspond, are lucidly discussed in 11 BEUDANT, COURS DE DROIT CIVIL

[468]
determines whether either party is entitled to an increase or diminution of price. Civil Code Articles 2492 and 2493 deal with sales at a rate per measure in which the extent of the premises is indicated. If the quantity is less than indicated, the buyer may demand delivery of the quantity indicated, and if the seller cannot perform, the buyer is entitled to a diminution proportionate to the price agreed upon. However, should the premises contain more acreage than specified and the overage exceed one-twentieth of the quantity specified, the buyer has the option to pay a proportionate supplement of the price or recede from the contract. Although never discussed in the jurisprudence, it would appear that if the overage does not exceed one-twentieth of the quantity specified, the seller should...
still be entitled to a supplement of the price, but the buyer pre-
cluded in the alternative from receding from the contract.7

Civil Code Article 2494 contemplates the sale of property
with an indication of the extent of the premises but for a lump
sum rather than at a rate per measure. Any discrepancy be-
tween actual and indicated area gives rise to a proportionate
increase8 or diminution of price only if the real measure varies
by one-twentieth from that mentioned in the agreement.9

Article 2495 covers the sale, for a lump price, of property
"designated by adjoining tenements, and sold from boundary
to boundary"—called a sale per aversionem. Disparity may
arise if the sale contains mention of the areal extent of
the premises.10 In this situation, there can be neither increase nor
diminution of the purchase price.11 The rationale of the rule is
that since the parties described the property by boundaries they
must have attached importance to the property itself rather
than to its actual measure;12 consequently, the boundaries,
rather than the measure, describe the object that is the purchaser’s cause.¹³ In accord with this rationale, if there exists an error as to the defined object, an adjustment of the price may be allowed on the basis of error.¹⁴ If one of the parties is in bad faith — if the seller knows the indicated measure is less, or the buyer more, than it is in fact — it would seem adjustment of the purchase price accordingly would be justified.¹⁵

The Code apparently limits the applicability of Article 2495 to a definite set of facts, i.e., immovable property designated by adjoining tenements and sold from boundary to boundary, with a price fixed at a lump sum. However, the jurisprudence has not observed the rigidity demanded by Article 2495 when the buyer has viewed the property before buying. By using this “prior viewing” factor, sales which should be governed by Article 2494 have been treated as sales per aversionem under Article 2495. The following factual situations have been found sufficient, if there was a lump sum price, to “convert” the sale to one per aversionem subject to Article 2495; when a tract was described as having one and one-half arpents between described lateral boundaries, but the sale took place on the premises with physical boundaries evident to the buyer:¹⁶ when the description read “the double cottage Nos. 1728-1730, Seventh Street between Carondelet and Baronne, the ground measuring approximately 30’ x 120’ or as per title,”¹⁷ the court holding that since the buyer had seen the property the words “or as per title” meant he would receive everything he saw and wanted to which the seller had title;¹⁸ when the buyer had been on the premises and seen that the property was enclosed all around,

Adkins, 22 So. 2d 692 (La. App. 2d Cir. 1945).
¹⁴. This situation arises when the parties are agreed upon the boundaries used to describe the premises purchased, but the seller does not own all the land between the boundaries. The purchaser is then allowed a diminution of the price proportionate to the shortage. Guglielmi v. Geismar, 47 La. Ann. 147, 16 So. 742 (1895), detailed facts given in previous appeal, 46 La. Ann. 280, 14 So. 50 (1894); Campbell v. Cook, 151 La. 267, 91 So. 731 (1922) (dictum). Although no cases were found in point, it seems relief on the basis of error should also be allowed when there is mistake concerning the boundaries themselves — one party relying on one physical boundary, and the other on another. The provisions on error are contained in LA. CIVIL CODE arts. 1820-1846 (1870).
¹⁵. It has been so held as to a seller in bad faith. Lesassier v. Dashiell, 13 La. 151 (1839).
¹⁸. 174 La. 712, 141 So. 385 (1932).
although the description contained only the linear measurements of the property.19

On the other hand, in almost identical factual situations, the courts have refused to consider the sale as one per aversionem merely because the buyer viewed the property prior to the sale. However, the general tenor of the decisions seems more a rejection of allowing the “prior viewing” factor to influence classification of the particular sale than a strict adherence to the requirements of Article 2495. For example, *Favrot & Livaudais v. Stauffer*20 involved a sale for a lump sum price of property described as “situated on Carondelet and Perdido Streets, measuring about 30 feet by 100 feet in the square bounded by Poydras and Baronne Streets.”21 Although the buyer had viewed the premises, the sale was held not to be per aversionem. The recited measurements controlled because the buyer had made known his intent to reconstruct a building located on the lot, his plans being based on the recited measurements. In *Fitzgerald v. Hyland*,22 the buyer, after viewing the property, made an offer to purchase based upon the dimensions given him by the seller’s agent. The offer described the property as being situated in square 48, fronting on Jefferson Highway “running thru square the grounds measuring approximately 120 x 205 or, as per title,”23 with the price recited in lump sum. The buyer had seen that the rear boundary of the property was a street, but in classifying the sale as per aversionem, the court said the controlling factor was the phrase in the description, “running thru square.”24

The court in the instant case, although holding the “prior viewing” factor not controlling on the particular facts involved, implied that had the buyer seen visible physical markings or boundaries, the visual inspection would have outweighed the significance of the recited measurements in classification of the sale.25 Thus, the effect of the prior viewing factor in classifying

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20. 112 La. 158, 36 So. 307 (1904). See also Kirkpatrick v. McMillen, 14 La. 407 (1840).
22. 199 La. 381, 6 So. 2d 321 (1942).
23. Id. at 385, 6 So. 2d at 322.
24. It should be noted that the effect of the Fitzgerald holding is to permit a sale to be per aversionem as to depth although not as to width.
25. “When a purchaser can look at the boundaries of the property and his decision to buy is made as a result of seeing those boundaries and knowing just what piece of property he is buying, the sale is made to be per aversionem. . . .
sales of immovable property was apparently made to depend upon what the viewer saw or could have seen; a prior viewing did not automatically convert the sale to one per aversionem.  

According to the instant case, there must be visible markers of some sort to indicate the location of the boundaries before it can be inferred that the buyer intended to buy the property per aversionem with negligible regard for its areal extent. Article 2495 sets forth a mechanical test, dependent upon easily ascertainable factors, for determining whether a sale is per aversionem. Injection of the question whether the buyer viewed the property in order to classify the sale injects his actual intent and displaces the rigid requirements of the Code. However, if the use of this consideration is to continue, limiting the effect of the buyer’s viewing to what he saw or should have seen should at least limit the degree of variance from the exacting requirements for a sale per aversionem contained in the Civil Code.  

Allen L. Smith, Jr.

Torts—Negligently Inflicted Mental Anguish Occasioned by Injury to Another  

Plaintiffs sought damages for mental anguish suffered when their child became violently ill from having eaten rat poison placed in their home by defendant exterminator; they alleged that they could not secure a reliable antidote because the exterminator was unable to identify the poison’s ingredients. The district court dismissed on exception of no cause of action. The court of appeal reversed and remanded.¹ Held, although generally one may not recover for mental anguish resulting from injury to another, plaintiffs stated a cause of action in this case since the exterminator owed a duty directly to them, independently of any duty owed their child, to be able to inform them within a reasonable time of the ingredients of the poison used in their home. Holland v. St. Paul Mercury Insurance Co., 135 So. 2d 145 (La. App. 1st Cir. 1961).  

¹. The father also sued for the child’s benefit for injuries allegedly sustained from eating the poison. The jury, however, ruled for defendants, and that claim was not appealed.