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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

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.[4] 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.[5] 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.[6] 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

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FRANÇAIS 133, § 179 (1938) [hereinafter cited as BEUDANT]: "However, an absolute exactness is not always required, especially when immovables are involved. Concerning this, four cases should be distinguished:

"(1) An immovable is sold, whatever it amounts to, for a fixed price. The immovable has been sold without regard to its area; it is not necessary to take account of any difference. [LA. CIVIL CODE art. 2495 (1870)]

"(2) An immovable is sold at so much per acre, without indicating either the area or the total price. The price will result from the measuring and no difficulty is possible; the area will be disclosed by the measuring and the price determined thereby. [LA. CIVIL CODE art. 2492 (1870)]

"(3) An immovable is sold, at the rate of so much per measure, by indicating in advance the area and the price. A tract of 50 acres is sold for a hundred thousand francs, at the rate of two thousand francs per acre. The hundred thousand francs representing the fifty acres, the latter should be delivered. Any shortage or excess, however inconsiderable it may be, gives rise to a diminution or an augmentation proportional to the price. Also, if the real acreage is greater than that stated in the contract, the buyer may resist the sale if the excess is equal to a twentieth of the declared acreage [LA. CIVIL CODE arts. 2492, 2493 (1870)]. If, however, the clause 'without guaranty of the area' is included the buyer must take delivery without a modification of the price.

"(4) A particular immovable is sold and the area and a total price are fixed by the contract. A certain domain, having an area of 50 acres, for a hundred thousand francs; the measure is not given here as an element for fixing the price but as a means of verification. Consequently an absolute exactness is not required because a total sum has been specified without fixing the rate per measure and the parties must evidently attach less importance to the exact measure than to the whole. The difference in area gives rise to a proportional supplement or diminution in the price, but only if it is equal to a 20th at least. [LA. CIVIL CODE art. 2494 (1870)]." (As translated in SMITH, LOUISIANA AND COMPARATIVE MATERIALS ON SALES AND LEASES 148 (1954).)

4. There is a fourth situation which is not specifically dealt with in the Louisiana Civil Code. In sales where there is a price at so much per measure, but there is mention of neither quantity nor total price, the price is merely determined by subsequent measuring. See BEUDANT § 137(2). See also Carbajal v. Tessier, 163 La. 894, 113 So. 138 (1927).

5. LA. CIVIL CODE art. 2492 (1870); Carbajal v. Tessier, 163 La. 894, 113 So. 138 (1927) (art. 2492 applied). Even if the buyer does not require delivery of the amount agreed upon, he may nevertheless demand diminution of the price. LA. CIVIL CODE art. 2492 (1870).

6. LA. CIVIL CODE art. 2493 (1870); Phelps v. Wilson, 16 La. 185 (1840) (art. 2494 applied).

still be entitled to a supplement of the price, but the buyer precluded 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 between actual and indicated area gives rise to a proportionate increase[8] 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,

7. This is not perfectly clear from the wording of the article, but it is the way the French treat the situation (BEUDANT § 137(3)), and it seems the logical construction of Article 2493. Thus, it is submitted the article should be interpreted as if it read: "If the quantity is more than specified, the buyer must supplement the price; but if the overage is more than one-twentieth, the buyer may either give the supplement or recede from the contract." An analogous problem is encountered in connection with LA. CIVIL CODE art. 2494 (1870). See note 8 *infra.*

8. Article 2494 does not seem to provide for an increase to the seller, but only for a diminution to the buyer. However, the court in Phelps v. Wilson, 16 La. 185 (1840), said in dictum that such an increase would be allowed, and this seems just. Construing Article 2496 in conjunction with Article 2494 achieves the same result. There is, however, some question of the validity of this construction. The French counterpart of Article 2496 immediately follows the French counterpart of Article 2494. In drafting the Louisiana Civil Code, the redactors inserted Article 2495, which does not appear in the French Code, between Articles 2494 and 2496. The language of Article 2496, "in cases where there is room for an augmentation of price for the surplus," implies that the article should be construed in conjunction with Article 2494 if the original intent evidenced in the French Code is to be preserved in Louisiana law. This construction, that the intent and the symmetry of the articles are not disturbed by the insertion of Article 2495, has not been discussed in any Louisiana jurisprudence.

9. LA. CIVIL CODE art. 2494 (1870). See Pike v. Kentwood Bank, 146 La. 704, 83 So. 904 (1919); Gladstone Realty v. Currie, 126 La. 115, 52 So. 237 (1910); Fortin v. Blount, 1 Mart.(N.S.) 179 (La. 1823). The parties may stipulate to the contrary, however, under Article 2494.

10. LA. CIVIL CODE art. 2495 (1870); Campbell v. Cook, 151 La. 267, 91 So. 731 (1922) (Art. 2495 applied); Johnston v. Quarles, 3 La. 90 (1831) (Art. 2495 applied). *Cf.* LA. CIVIL CODE art. 854 (1870); Marginy v. Nivet, 2 La. 498 (1831) (Art. 854 applied).

11. LA. CIVIL CODE art. 2495 (1870). See also Wurzburger v. Meric, 20 La. Ann. 415 (1868); Kirkpatrick v. McMillen, 14 La. 497 (1840).

12. Hunley v. Ascani, 174 La. 712, 141 So. 385 (1932); Phelps v. Wilson, 16 La. 185 (1840); Cuny v. Archinard, 5 Mart.(N.S.) 238 (La. 1826); Wiltz v. Home Building and Loan, 24 So.2d 204 (La. App. 1st Cir. 1945); Sharpless v.

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).

13. See generally Smith, *A Refresher Course in Cause*, 12 LA. L. REV. 2 (1951).

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).

16. Ragan v. Gwinn, 19 La. Ann. 133 (1867).

17. Hunley v. Ascani, 174 La. 712, 714, 141 So. 385, 385 (1932).

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

19. Wurzburger v. Meric, 20 La. Ann. 415 (1868).

20. 112 La. 158, 36 So. 307 (1904). See also Kirkpatrick v. McMillen, 14 La. 497 (1840).

21. 112 La. 158, 161, 36 So. 307, 308.

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.

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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).

However, when he cannot see, by buildings, or fences, or other marks or monuments just what the boundaries of the property are, it may be said that he is influenced by the surface area or by the measurements . . . ." 134 So. 2d at 682.

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.