The Obligation to Deliver in Sales of Land

Claiborne Dameron
THE OBLIGATION TO DELIVER IN SALES OF LAND

In a contract of sale, the obligation to deliver is one of the two principal obligations which must be fulfilled by the vendor. A discrepancy existing between the actual physical content of the property and the legal description contained in the act of sale constitutes a breach of the obligation "to deliver the full extent of the premises, as specified in the contract." Because of the harshness that might result from insisting upon delivery of the "full extent of the premises" in all cases, certain modifications are recognized. Of course, if property is sold at a stated price per measure—for example, a certain lot at ten dollars per acre—and no content has been promised, no difficulty arises since the exact price will be determined by the measuring. But, when the content of the lot is expressed in the contract, what should be the result of an error in this indication, and what are the respective rights of the parties? It is the purpose of this comment to analyze the code articles dealing with this problem and to interpret them in the light of their historical background.

Based on the nature of the transaction as evidenced in the deed, three different types of sales of real estate are distinguished: (a) sales at the rate of so much per measure, for example, a certain lot at ten dollars per acre—and no content has been promised, no difficulty arises since the exact price will be determined by the measuring. But, when the content of the lot is expressed in the contract, what should be the result of an error in this indication, and what are the respective rights of the parties? It is the purpose of this comment to analyze the code articles dealing with this problem and to interpret them in the light of their historical background.

1. Art. 2475, La. Civil Code of 1870: "The seller is bound to two principal obligations, that of delivering and that of warranting the thing which he sells."


At the 1938 session of the Louisiana Legislature a bill was passed amending Article 2498 so as to apply its provisions (one-year prescription for diminution, supplement or cancellation) to sales of movables: Official Calendar of the Senate of the State of Louisiana (1938) Senate Bill No. 63. This proposed statute was, however, vetoed by the Governor. See Hebert and Lazarus, The Louisiana Legislation of 1938 (1938) 1 LOUISIANA LAW REVIEW 80.


6. For example—a certain tract of land in the parish of X, fronting on the Mississippi River and bounded on the other three sides by the properties
SALES AT THE RATE OF SO MUCH PER MEASURE

Art. 2492. If the sale of an immovable has been made with indication of the extent of the premises at the rate of so much per measure, the seller is obligated to deliver to the buyer, if he requires it, the quantity mentioned in the contract, and if he cannot conveniently do it, or if the buyer does not require it, the seller is obliged to suffer a diminution proportionate to the price.

Art. 2493. If, on the other hand, there exists an extent of more than what is specified in the contract, the buyer has a right, either to give the supplement of the price, or to rescind from the contract, should the overplus be upwards of a twentieth part of the extent which is declared.

When a sale of land specifies the content of the property it may be presumed that the purchaser desired the exact amount stipulated in the contract. If the seller cannot deliver that quantity, and if he cannot satisfactorily make up for the deficiency with other land, he must suffer a proportionate diminution in the price. The article of our Code, as well as the corresponding article of the Code Napoleon, are silent regarding the vendee's right to demand a cancellation of the sale on the ground of such deficiency. Following the principles of the tacit resolutory condition, the purchaser would be able to resolve the sale for a breach of the seller's obligation to deliver the full extent agreed upon. But Article 2492 derogates from the harshness of this rule and furnishes one of its modifications. The purchaser has the right of resolution only when the law specifically grants it—such a right is accorded in Article 2493, hence, the silence of Article 2492 is decisive. It is presumed that a vendee, having contracted to pay a certain price, cannot or would not complain when the price was reduced. But the presumption no longer exists when it is clear that the extent of land actually conveyed is not sufficient to fulfill the particular purposes for which it was intended. In such a case rescission should be available to the vendee, just as it is when he has been

evicted from such a material part of the property that he would not have purchased without it.\textsuperscript{11} The same argument would hardly be open to the vendor for it is difficult to see how he would suffer when made to transfer an extent less than that agreed upon except, of course, that he receives a smaller price.

Where there is a deficiency, then, in sales at so much per measure, the vendee may demand the full extent of the land promised or, if that is impossible, he may obtain a proportional diminution of the price. In addition, under the French authorities, he has the option of receding from the contract when the deficiency is so great as to render the land unfit for the purpose for which it was intended.

Different considerations come into play when the actual content of the land is in excess of the amount described in the sale. The general rule being that a vendor should deliver the exact amount agreed upon, it would seem that a vendee should have a right to refuse any excess. But Article 2493 establishes another modification to the basic principle. It would be inequitable to compel a vendor to transfer an extent of realty greater than that specified for the original contract price. It would be, in effect, to compel a donation of the overplus. The wording of Article 2493, as well as of the corresponding article of the Code Napoleon,\textsuperscript{12} is ambiguous and certainly no absolute right is therein given to the vendor for a supplement of the price when the excess is less than one-twentieth of the extent agreed upon. There could be found no Louisiana case in point, but the French authorities are agreed that the vendor does have an action in such a case.\textsuperscript{13} The vendee has the option of paying for the overplus or receding from the contract only when the surplus exceeds the one-twentieth part.\textsuperscript{14} If the overplus is less than that fraction, the vendee must pay the supplement and cannot recede.\textsuperscript{15} It is reasoned that, because un-

\footnotesize{
\textsuperscript{11} Art. 2511, La. Civil Code of 1870.
\textsuperscript{12} Art. 1618, French Civil Code.
\textsuperscript{13} 24 Laurent, op. cit. supra note 9, at 188, no 192; 6 Marcadé, Explication du Code Civil (1875) 248; 16 Duranton, op. cit. supra note 10, no 224.
\textsuperscript{14} No matter how great the excess the vendor must content himself with a supplement in the price and cannot recede. Citizens' Bank of La. v. Lenoir, 118 La. 720, 43 So. 385 (1907).
\textsuperscript{15} 5 Aubry et Rau, Droit Civil Français (5 ed. 1907) 70, § 354, note 23; Troplong, op. cit. supra note 10, at 437, no 336; 24 Laurent, op. cit. supra note 9, at 188, no 192.
}
der Article 1619 of the Code Napoleon (corresponding to Article 2494 of our Code) there is no augmentation or diminution unless the difference between the real and contract measure is more than one-twentieth, it may be concluded that every difference is taken into consideration when the sale is made at the rate of so much per measure, because the measure determines the true price. But, may this negative inference be logically argued in Louisiana if the vendor is no longer allowed a supplement of the price when the sale is made under Article 2494? This question is still undecided.

The result reached in France seems to be equitable and our code article should be changed so as to clearly give the right of action to a vendor. It may be presumed that a purchaser would not be too hard pressed if made to pay for a little additional land, whereas, if he were allowed to recede from the contract, the vendor would be made to suffer for the slightest error in measurement. On the other hand, if the error be too great—arbitrarily set at one-twentieth—the vendee would be imposed upon were he not given the option of paying for the surplus or receding from the contract. For further protection of the vendee, whenever he exercises his option and withdraws from the agreement, it is provided that he may obtain not only the price paid but all expenses occasioned by the contract.

In the opinion of the writer, Article 2496 can have no application to sales made at so much per measure. If the reasoning of the French writers is followed in Louisiana and the vendor allowed a supplement in the price when the excess is under one-twentieth, Article 2496—if applicable—would clearly conflict with Article 2493 in allowing rescission by the vendee. If, in such a case, no action for the supplement is allowed, the effect of the articles would be the same, that is, the vendee would have the op-

16. 24 Laurent, op. cit. supra note 9, at 187, no 191.
17. On the basis of Art. 1619, French Civil Code, "... eu égard à la valeur de la totalité des objets vendus," it has been stated that the difference of one-twentieth should be calculated according to the price and not according to the extent of the terrain: Troplong, op. cit. supra note 10, at 445, no 343. Where different parts of the land sold vary in value, the same result might be reached in Louisiana despite the omission in the corresponding Art. 2494, La. Civil Code of 1870, "... regard being had to the totality of the objects sold." (Italics supplied.) Cf. 2 Planiol, op. cit. supra note 3, no 1458.
19. Art. 2496, La. Civil Code of 1870: "In the case where there is room for an augmentation of price for the surplus of the measure, the buyer has the option to give the supplement, or to recede from the contract."
tion to pay for the excess or recede when the surplus was more than the twentieth part. If the French interpretation of Article 2493 is accepted in Louisiana, the general application of Article 2496 should not be extended to sales at the rate of so much per measure so as to nullify the special application of Article 2493. Our two code articles, although not as definitely tied together as the corresponding articles of the Code Napoleon, should govern the rights of vendor and vendee in all sales of the type therein described.

SALES OF A CERTAIN DESCRIBED BODY FOR A LUMP PRICE

ART. 2494. In all other cases, whether the sale be of a certain and limited body, or of distinct and separate objects, whether it first set forth the measure, or the designation of the object, followed by its measure, the expression of the measure gives no room to any supplement of the price, in favor of the seller, for the overplus of the measure; neither can the purchaser claim a diminution of the price on a deficiency of the measure, unless the real measure comes short of that expressed in the contract by one-twentieth part, regard being had to the totality of the objects sold; provided there be no stipulation to the contrary.

ART. 2496. In the case where there is room for an augmentation of price for the surplus of the measure, the buyer has the option to give the supplement, or to recede from the contract.

20. Art. 1618, French Civil Code, reads as follows: "Si, au contraire, dans le cas de l'article précédent, il se trouve une contenance plus grande que celle exprimée au contrat, l'acquéreur a le choix de fournir le supplément du prix, ou de se désister du contrat, si l'excédant est d'un vingtième au-dessus de la contenance déclarée."

"If, on the contrary, in the case mentioned in the foregoing article, the area is greater than is expressed in the contract, the purchaser has the choice between paying the surplus of the price or rescinding the contract, if the surplus exceeds by one-twentieth the area specified." (Transl. Cachard, French Civil Code, rev. ed. 1930) (Italics supplied.)

21. The object of these terms—"whether it first set forth the measure, or the designation of the object, followed by its measure"—was to prescribe a distinction admitted in the older law which the French codification desired to exclude. If the act of sale first set forth the measure, diminution or augmentation was allowed because it was presumed that the parties, by first mentioning the contents, had contracted with reference to the specific content. But, if the act of sale described the property and then set forth the measure, the presumption was reversed and no recovery was allowed. 3 Moullon, Examen du Code Napoleon (1855) 208; 5 Aubry et Rau, op. cit. supra note 15, at 70, § 354; Troplong, op. cit. supra note 10, at 441-442, no 338.

22. This means that if the real estate sold is composed of different pieces of land, the deficiency of one should be compensated with the excess of the other. 2 Planiol, op. cit. supra note 3, no 1468.
The difference between the type of sale contemplated in Article 2494 and the one previously discussed is simply the omission of words indicating that the land is sold at so much per measure. When the price is fixed in a lump, without indication of a price for the unity of measure, the deficiency can give rise to a diminution of the price only when it exceeds the twentieth part of the total. The corresponding article of the Code Napoleon has been criticized by some French writers because of its purely mechanical standard. It was suggested that, in the case of an excess, the purchaser be not allowed to recede, but be made to pay the supplement or return the overplus of land. In this manner, the sale would be carried out as was originally intended by the parties. The intention of the parties, however, is presumed to be focused upon the specific body of land rather than on its actual measurements and relief is allowed only when the discrepancy is very large. The obligations of the vendor to deliver the full extent agreed upon becomes an obligation to deliver the specific tract agreed upon, the content expressed in the contract becoming an approximation of the size of the body of land. If the act of sale describes the property by referring to the township, range and section, the sale is generally held to come under the provisions of Article 2494, although at least one Louisiana case seems to have erroneously concluded that such a sale was made at the rate of so much per measure even though a lump price was paid. The code article makes no provision for an action of rescission by the vendee when the deficiency is greater than one-twentieth. However, the same argument might be advanced under this article—though possibly with less force—as was suggested in the discussion of Article 2492, namely, that rescission should be allowed if the deficiency is so great that the vendee would not have purchased with knowledge of it.

When there is an overplus of less than one-twentieth of the content agreed upon, it is clear that the vendor has no action and, hence, must suffer the loss just as does the vendee in the case of a corresponding deficiency. Let us consider now the case in which the surplus exceeds the twentieth part of that agreed upon.

23. 3 Maleville, Analyse Raisonnée de la Discussion du Code Civil (1805) 379.
26. See note 10, supra.
As Article 2494 is now written, it appears doubtful whether the seller has an action for a supplement of the price. The corresponding article of the Code Napoleon\(^{27}\) provided a remedy to the vendor when the surplus was greater than one-twentieth and, in our Code of 1808,\(^{28}\) there appeared a literal translation of that article. But, in the Code of 1825,\(^{29}\) the words "exceeds or" were intentionally omitted, apparently limiting the right of action under the article to one in diminution by the vendee; the reason for this inequality between the vendor and vendee—if such was the purpose of the amendment—was not explained.\(^{30}\) It seems that equitable considerations should operate in favor of a seller as well as a purchaser when an innocent error has been made.

Another important change was made in the Code of 1825. Article 2495 was inserted and, as a consequence, the words restricting the application of Article 2496 to the case mentioned in what had been the preceding article (now Article 2494) had to be omitted.\(^{31}\) As has already been seen, Article 2496 cannot be applied to sales at so much per measure and it certainly can have no application to sales made by metes and bounds. If it is to have any effect at all, it must then operate in the situation contemplated in Article 2494. This reasoning may conceivably have some weight with the court. But, if, by the very terms of that article, it is found that the vendor has no action for a supplement of the price because of an overplus, Article 2496 is useless and has no efficacy whatsoever.

If the French law is to be followed—and it seems more equitable—the words "exceeds or" should be replaced before the words "comes short of" in Article 2494, and Article 2496 should be placed immediately after it with the additional words necessary to restrict its application to sales of a certain described body for a lump price. If the French jurisprudence is not to be followed and the vendor to be denied the right to a supplement when the surplus exceeds one-twentieth, Article 2496 should be repealed because it would serve no purpose and would be inferentially in conflict with Article 2494.

\(^{27}\) Art. 1619, French Civil Code.
\(^{29}\) Art. 2470, La. Civil Code of 1825.
\(^{30}\) Projet of the Civil Code of 1825, 1 La. Legal Archives (1937) 306.
\(^{31}\) Article 1620 of the Code Napoleon was copied in La. Civil Code of 1808 (p. 353) Book III, Title VI, Art. 44, which began, "Where the vendor is entitled under the last article to an increase in the purchase price, . . . ." Art. 2472, La. Civil Code of 1825 (like Art. 2496, La. Civil Code of 1870) was changed to read, "In the case where there is room, . . . ." (Italics supplied.)
It is interesting to note another change in Article 2496. The corresponding article of the Code Napoleon provides that the vendee who chooses not to recede must pay the supplement with interest. In such a case no interest payment is required by our Article 2496. It seems that the vendee, having enjoyed the possession of a part of the land for which he has not paid, and having obtained the fruits from that portion, should be required to pay the supplement with interest.

**SALES BY METES AND BOUNDS**

**ART. 2495.** There can be neither increase nor diminution of price on account of disagreement in measure, when the object is designated by the adjoining tenements, and sold from boundary to boundary.\(^{33}\)

**ART. 854.** If anyone sells or alienates a piece of land, from one fixed boundary to another fixed boundary, the purchaser takes all the land between such bounds, although it gives him a greater quantity of land than is called for in his title, and though the surplus exceeds the twentieth part of the quantity mentioned in his title.

These articles made their first appearance in our Code of 1825.\(^{34}\) They have no counterpart in the Code Napoleon, but the principle of sales *per aversionem* was long recognized by Roman and French law and, even prior to 1825, had been applied in Louisiana.\(^{35}\) These cases were probably responsible for the insertion of these articles in the Code of 1825.

A sale by metes and bounds is a type of sale frequently used in rural sections of the State. The law presumes in such a case that the exact measurements are immaterial, and it is now the accepted rule that a sale by metes and bounds conveys all the property found within the boundaries given.\(^{37}\) This rule is not

---

32. Art. 1620, French Civil Code.
33. Cf. Art. 1503, Quebec Civil Code: "The rules contained in the last two preceding articles do not apply, when it clearly appears from the description of the immovable and the terms of the contract that the sale is of a certain determinate thing, without regard to its quantity by measurement, whether such quantity is mentioned or not."
35. 24 Laurent, op. cit. supra note 9, at 184, no 187; 16 Duranton, op. cit. supra note 10, no 220.
36. Innis v. McCrummin, 12 Mart. (O. S.) 425 (La. 1822); Macarty v. Foucher, 12 Mart. (O.S.) 114 (La. 1822); cf. Archinard v. Miller, 8 Mart. (O.S.) 713 (La. 1820).
37. Cuny v. Archinard, 5 Mart. (N.S.) 233 (La. 1826); Johnston v. Quarles, 3 La. 90 (1831); Marigny v. Nivet, 2 La. 498 (1831); Curator of Grafton v.
affected by the fact that the quantity is indicated and the excess or deficiency exceeds the twentieth part. Of course, good faith is required in sales by metes and bounds as much as in any other contract. A vendor who has fraudulently misrepresented the facts, cannot shelter himself behind the principle that the sale was by metes and bounds, and that consequently he is not liable to make up the deficiency. The operation of the rule established by Article 2495 has been extended to mortgages. Since a mortgage is a species of alienation, the mortgagee, like a purchaser, cannot claim as subject to his mortgage a tract of land not falling within the fixed boundaries as defined in the act of mortgage. Such boundaries necessarily control acreage, and determine the extent of the premises mortgaged.

Whether or not the parties intended to enter into a contract in the nature of a sale by metes and bounds is a question of construction and intention, to be decided by the trial judge. When nothing but boundaries are given, there could be but one intention. It has been held, however, that a sale of a tract of land between certain limits containing a certain number of acres but qualified by the phrase "so as to include said number of acres" is not a sale by metes and bounds. To determine into which type of sale a certain agreement falls, it is necessary to take into consideration the various words and phrases which indicate the intention of the contracting parties. When the property is described as being bounded by four streets, the sale is usually considered as being by metes and bounds. Likewise, contiguous lands set apart as distinct bodies on the maps of the United States surveys


41. Hoover v. Richards, 1 Rob. 34 (La. 1841).

may serve as boundaries in a sale by metes and bounds. It is interesting to note that a sale may be considered as being by metes and bounds under one set of facts but not under another. That is, when property is described by reference to boundaries on three sides the sale cannot be considered as one by metes and bounds except with reference to the width or length, as the case may be, between the two opposite boundaries. This is a novel situation but the principle is clearly applicable in part to such a case.

IN GENERAL

It must be kept in mind that the parties may, by the terms of their contract, exclude the application of all the articles above discussed, or any part of them. Louisiana jurisprudence is barren of contests over any such stipulations. It has been held in France that, when the parties have agreed in the contract to augment or diminish the price according to the excess or deficiency in measure, it is presumed that they have manifested an intention that the contract be irrevocable and the vendee can no longer recede because of an overplus. The effect of the phrase "non-guaranty of contents" and of many similar phrases has been litigated to a great extent in France. The authorities are not in complete accord and the decisions seem to be in conflict. In the final analysis the question is one of intention to be decided by the judge who possesses knowledge of all the facts and surrounding circumstances.

The short prescriptive period—which will run against minors—established for bringing the action in supplement or diminution of the price was deemed advisable to insure certainty in land titles and to protect the rights of creditors. Although the article states that prescription runs from the day of the sale, if the parties have fixed a certain day on which to measure the land, prescription begins running on that day.

45. 24 Laurent, op. cit. supra note 9, at 198, no 199.
46. Ibid.
47. Art. 2498, La. Civil Code of 1870: "The action for supplement of the price on the part of the seller, and that for diminution of the price or for the cancelling of the contract on the part of the buyer, must be brought within one year from the day of the contract, otherwise it is barred." Cf. Art. 1622, French Civil Code.
49. 10 Huc, Commentaire du Code Civil (1892) 134.
The action quanti minoris must not be confused with the action for diminution or cancellation because of eviction. In the former case the vendor owns the land delivered but does not convey the stipulated amount. In the latter case, there is an outstanding title in a third party and, the sale of the property of another being null, the one year prescriptive period does not apply.\textsuperscript{50}

The articles of our Code allowing actions for diminution of price apply equally to leases\textsuperscript{51} and forced sales.\textsuperscript{52} The corresponding article of the Code Napoleon, with regard to lease, gives a right of action to both lessor and lessee.\textsuperscript{53} From 1808 to the present, our Code has given a right of action only to the lessee. There seems to be no valid reason why a vendor should be allowed an action and a lessor denied the same.

When determining which type of sale was intended, certain fundamental rules of interpretation are used by the courts. Primarily, the construction given by the parties themselves and their possession are usually considered the best guides as to their intention and as to the extent of lands sold.\textsuperscript{54} Where lands are sold according to a plan, the plan controls the description contained in the act.\textsuperscript{55} And finally, as a last resort, if there is ambiguity in the description, the act must be construed against the vendor.\textsuperscript{56}

Claiborne Dameron

\textsuperscript{50} Robbins v. Martin, 43 La. Ann. 488, 9 So. 108 (1891); Alcus & Co. v. Vizard Improvement Co., 156 La. 195, 100 So. 395 (1924).

\textsuperscript{51} Art. 2701, La. Civil Code of 1870; McVea v. Vance & Logan, 110 La. 998, 35 So. 262 (1903).

\textsuperscript{52} Arts. 2620, 2621, La. Civil Code of 1870; Hall v. Nevill, 3 La. Ann. 326 (1848); 10 Huc, op. cit. supra note 49, at 130. But the right of a purchaser at a forced sale is limited to an action in diminution; he cannot demand a rescission of the sale. Hall v. Nevill, supra; 16 Duranton, op. cit. supra note 10, no 362.

\textsuperscript{53} Art. 1765, French Civil Code: "Si, dans un bail à ferme, on donne aux fonds une contenance moindre ou plus grande que celle qu'ils ont réellement, il n'y a lieu à augmentation ou diminution de prix pour le fermier, que dans les cas et suivant les règles exprimés au titre de la Vente."

"If, in a farming lease, a smaller or larger area has been given to the property than it really has, the price which the farmer has to pay shall only be increased or reduced in the cases and according to the rules specified in the title Of Sale." (Transl. Cachard, French Civil Code, rev. ed. 1930) (Italics supplied.)


\textsuperscript{55} Millikin v. Minnis, 12 La. 539 (1838); Whitney v. Saloy, 26 La. Ann. 40 (1874).