

# Qualifying Terms And Relief For Deficiency In Quantity In Land Sales - Carozza v. Peacock Land Corp.

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**Qualifying Terms And Relief For Deficiency  
In Quantity In Land Sales**

*Carozza v. Peacock Land Corp.*<sup>1</sup>

The court appointed trustee for Peacock Land Corporation advertised a mortgage foreclosure sale, describing the property as fronting *approximately three hundred thirty feet* on York Road in Baltimore County. Prior to the execution of the mortgage, a portion of the property had been deeded to Baltimore County, with the result that the trustee could only convey property fronting *two hundred twenty-six feet* on York Road at the time of the sale.

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<sup>1</sup> 231 Md. 112, 188 A. 2d 917 (1963).

Appellants, who bought the property at the foreclosure, excepted to ratification of the sale on the ground that a mistake resulted from the misrepresentation. Appellees claimed that the frontage distances had been qualified by "approximately" and that the purchaser had therefore assumed the risk of a deficiency in quantity. In the alternative appellees claimed that *caveat emptor* applied. The Court of Appeals sustained appellants' exceptions by distinguishing the term "approximately" from "more or less" and determining that the purchasers had not assumed the risk of a deficiency in quantity. The court also ruled that *caveat emptor* does not apply in judicial sales prior to ratification.

The problem often arises of construing contracts for the sale of land in gross<sup>2</sup> containing statements of quantity, acreage or frontage, qualified by such words as "approximately", "about", or "more or less". The cases vary as to the effect of these terms where relief is sought for a deficiency in quantity, but generally hold the terms themselves to be equivalent.<sup>3</sup> However, the Maryland Court of Appeals, in construing the term "approximately" for the first time, did distinguish it from "more or less".

In the majority of jurisdictions, such qualifying terms present no great problem of construction. They are construed as "intended to cover a reasonable excess or deficit."<sup>4</sup> They are not considered to preclude claims of mistake, requests for abatement or suits for damages when there is an unreasonable discrepancy between the estimate and the actual acreage or frontage.<sup>5</sup> In determining what is reasonable, general principles of contract construction are applied in an attempt to determine the intent of the parties. The qualifying terms are considered in connection with all

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<sup>2</sup> A sale in gross is one in which the purchase price is based upon a tract of land as a whole and not upon a particular number of acres. Therefore, quantity is not the essence of the contract. Such a sale has been described as a "contract of hazard." *Kriel v. Cullison*, 165 Md. 402, 408, 169 Atl. 203 (1933). The sale has also been described as one in which "there is no express or implied warranty as to quantity." *Terry v. Rich*, 197 Ala. 486, 73 So. 76 (1916).

<sup>3</sup> *E.g.*, *Alexander v. Hicks*, 242 Ala. 243, 5 So. 2d 781, 782 (1942); *Quindt v. Kilpatrick*, 96 Cal. App. 2d 824, 216 P. 2d 481, 482 (1950); *Harris v. Harang*, 23 So. 2d 786, 790 (La. App. 1945); 8 *Thompson Real Property* § 4580, at 525 (perm. ed. 1940).

<sup>4</sup> *Sims v. Haggard*, 162 Tex. 307, 346 S.W. 2d 110, 115 (1961); *accord e.g.*, *Brewer v. Schammerhorn*, 183 Kan. 739, 332 P. 2d 526, 531 (1958); see Annot. 1 A.L.R. 2d 9 at 90 (1948). This annotation on mistake and sales in gross contains an extensive discussion of the effect of qualifying terms. Comment, *Mutual Mistake as Ground for Relief in a Contract for the Sale of Land in Gross*, 25 *Texas L. Rev.* 165 (1946).

<sup>5</sup> See *Enequist v. Bemis*, 115 Vt. 209, 55 A. 2d 617, 620, 1 A.L.R. 2d 1 (1947).

other factors in a particular case.<sup>6</sup> Among other factors frequently considered are the nature and quality of the land,<sup>7</sup> the main object of the sale,<sup>8</sup> the method of stating the price,<sup>9</sup> and the amount of the purchase price.<sup>10</sup> Some cases actually give a very narrow effect to the qualifying words, construing them to be "words of safety and precaution, intended to cover some slight or unimportant inaccuracy."<sup>11</sup>

On the other hand, there are some jurisdictions in which a very broad effect is given to the qualifying terms. In these jurisdictions no relief is granted, in the absence of fraud, for a shortage of quantity when the statements of quantity are modified by such terms as "about", "approximately", and "more or less".<sup>12</sup> Rather than considering such words as one factor in determining the intent of the parties, these courts apparently construe the terms to mean that the vendee has assumed the risk of any deficiency in quantity.

Although in the earliest Maryland cases no disproportionate weight was given to the presence of qualifying terms,<sup>13</sup> there are a series of later decisions in which the term "more or less" was construed to mean that the vendee had assumed the risk of any deficiency in quantity.<sup>14</sup> This latter construction stemmed from the case of *Jones v. Plater* where the court said that "unless the words 'more

<sup>6</sup> *Russo v. Corideo*, 102 Conn. 663, 129 Atl. 849 (1925); *Coble v. Agnew*, 128 So. 2d 158 (Fla. 1961); *Burke v. Smith*, 57 Okla. 196, 157 P. 51, 53 (1916).

<sup>7</sup> See *Raben v. Risnikoff*, 95 App. Div. 68, 88 N.Y.S. 470, 471 (1904) where the court quoted *Siebel v. Cohen*, 54 N.Y. Super. Ct. 436 (1887): a "difference of a few inches more or less in the lines within which a city lot is bounded might cause a difference in pecuniary value exceeding that of acres of farm land."

<sup>8</sup> See *Pollack v. Wilson*, 33 Ky. 25 (1835). Here the court determined that a mill seat was the principal inducement to the purchase and that the rest of the land was of little value or importance.

<sup>9</sup> *Hill v. Johnson*, 214 Ala. 194, 106 So. 814, 816 (1925). "That the land is valuable in proportion to acreage, and not by reason of special improvements, and that the price is in round figures, such as \$2,500 for 500 acres, more or less, are circumstances indicating that area was a material basis of the contract."

<sup>10</sup> See *Gardner v. Kiburz*, 184 Ia. 1268, 168 N.W. 814 (1918) where the court granted relief for a deficiency of three percent in acreage, emphasizing that three percent of the purchase price was \$1500.

<sup>11</sup> *Pittsburgh Outdoor Advertising Co. v. Surowski*, 164 Pa. Super. 383, 64 A. 2d 854, 856 (1949); *accord*, *Pierce v. Lefort*, 197 La. 1, 200 So. 801, 803 (1941); *Parrow v. Proulx*, 111 Vt. 274, 15 A. 2d 835, 838 (1940).

<sup>12</sup> *Spires v. Nix*, 256 Ala. 642, 57 So. 2d 89 (1952); *Young v. Bradshaw*, 224 Ark. 467, 274 S.W. 2d 466 (1955); *Salzer v. Poulos*, 276 Ky. 143, 122 S.W. 2d 996 (1938).

<sup>13</sup> *Brown v. Wallace*, 4 G & J 479 (Md. 1832); *Andrews v. Scotton*, 2 Bland 629 (Md. 1830); *Hoffman v. Johnson*, 1 Bland 103 (Md. 1826).

<sup>14</sup> *Tyson v. Hardesty*, 29 Md. 305 (1868); *Hall v. Mayhew*, 15 Md. 551 (1860); *Smallwood v. Hatton*, 4 Md. Ch. 95 (1853); *Hurt v. Stull*, 3 Md. Ch. 24 (1849), *aff'd*, 9 Gill 446 (Md. 1851); *Jones v. Plater*, 2 Gill 125, 41 Am. Dec. 408 (Md. 1844).

or less' lead to such a conclusion, they are useless and insensible."<sup>15</sup> Dictum in the *Jones* case recognized the possibility of a sufficiently large deficiency in quantity warranting relief on the basis of mistake.<sup>16</sup> The later case of *Hurt v. Stull*<sup>17</sup> followed this decision, but added dictum to the effect that relief could only be granted in instances of fraud, thereby failing to accept the dictum of the *Jones* case. The Court of Appeals in the instant case avoided these decisions by distinguishing the term "approximately" from "more or less".

An examination of the more recent Maryland cases reveals that it was unnecessary to distinguish between "more or less" and "approximately", as the *Hurt* and *Jones* cases are no longer good law in Maryland. In *Baltimore Permanent Bldg. & Land Soc'y v. Smith*,<sup>18</sup> the court was required to construe the phrase "about sixty-five acres": No attempt was made to distinguish the term "about" from "more or less". All circumstances surrounding the sale were considered and damages were granted for the deficiency in quantity. After the *Land Soc'y* case, there were a series of decisions involving the phrase "more or less" in which language similar to that of the court in the *Hurt* case was used.<sup>19</sup> In none of these cases, however, was the term arbitrarily construed without regard to other circumstances. A definite break was made from the *Jones* line of decisions in *Kriel v. Cullison*, where it was held that the words "more or less", "when used to qualify a representation of quantity . . . will be construed . . . as indicating an intention on the part of the parties . . . to assume the risk of quantity, which, *until rebutted by evidence of a different intent* inherent in the instrument or extrinsic to it, will be recognized and enforced."<sup>20</sup> This statement represents a

<sup>15</sup> *Supra* note 14, at 127. The court relied on a similar statement by Justice Story in *Stebbins v. Eddy*, 22 Fed. Cas. 1192, 1195 (No. 13,342) (C.C.D.R.I. 1827).

<sup>16</sup> *Id.* at 128.

<sup>17</sup> 3 Md. Ch. 24 (1849), *aff'd*, 9 Gill 446 (Md. 1851).

<sup>18</sup> 54 Md. 187, 39 Am. Rep. 374 (1880). The court construed "about" as importing "that the actual quantity is a near approximation to that mentioned, that is to say, within a fraction of an acre, or perhaps it might cover a discrepancy of one or two acres." *Supra* at 204. This case was cited with approval in *Md. Constr. Co. v. Kuper*, 90 Md. 529, 45 Atl. 197 (1900), although relief was denied due to the small quantity of the deficiency.

<sup>19</sup> *Neavitt v. Lightner*, 155 Md. 365, 142 Atl. 109 (1928); *Musselman v. Moxley*, 152 Md. 13, 136 A. 48 (1927); *Wagner v. Goodrich*, 148 Md. 318, 129 A. 364 (1925).

<sup>20</sup> 165 Md. 402, 411-12, 169 Atl. 203 (1933). (Emphasis added.) Vendee contracted to buy tracts of land containing forty-five acres, more or less. They actually contained only thirty-one acres with the major tract having a deficiency of eight out of twenty acres. *Kriel's* testimony showed that he was interested only in frontage not in acreage, and that he knew the

position similar to that of the majority of the states. Qualifying phrases are merely one factor, albeit a strong one, in determining whether relief will be granted.

Unfortunately, the latest case, *Brodsky v. Hull*,<sup>21</sup> construing the phrase "more or less", returned to the phraseology of the *Hurt* case. Although using such phraseology (that the vendee assumed the risk of quantity), the court actually applied the "intent test" of the *Kriel* case in determining that plaintiff was not entitled to damages for breach of contract.<sup>22</sup> In dissenting, Judge Marbury criticized the majority for their reliance on phraseology in century old cases and asked for reiteration of the law as stated in the *Kriel* case.<sup>23</sup>

With the decision in *Carozza v. Peacock Land Corp.*, the Maryland Court of Appeals has now construed the qualifying terms most often used to modify statements of quantity in land sale contracts. "About", as construed in *Baltimore Permanent Bldg. & Land Soc'y v. Smith*, and "approximately", as construed in the instant case, are merely factors in determining the intent of the parties by normal principles of contract construction. A similar construction was placed on "more or less" in the *Kriel* case, although this interpretation was weakened by the language in the *Brodsky* case. Since "about", "more or less" and "approximately" are generally considered equivalent, the Court of Appeals, by distinguishing "more or less" and "approximately", perhaps has missed an opportunity to reiterate the *Kriel* case and clear away the complicating vestiges of *Jones v. Plater*<sup>24</sup> and *Hurt v. Stull*.<sup>25</sup>

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boundaries of the property he was buying. The court decided that *Kriel's* testimony, the manner of describing the premises, and the use of "more or less" combined to show the statement of quantity was merely descriptive. Plaintiff was granted specific performance. *Kriel*, however, received an abatement for the deficiency in quantity.

<sup>21</sup> 196 Md. 509, 514, 77 A. 2d 156 (1949). A house was advertised as containing a one acre lot. Vendee inspected it and offered to buy, insisting that a statement of acreage be included in the contract. The lot contained only .46 acres and the vendee sued for breach of contract. No damages were awarded. In his dissent, Chief Judge Marbury relied heavily on the *Kriel* and *Land Soc'y* cases, arguing that plaintiff had shown sufficient evidence of an intent to make quantity material.

<sup>22</sup> *Id.*, at 516. The court said that plaintiff had inspected the lot twice, had time to check for acreage, and acquiesced in describing the lot as containing one acre, more or less. Furthermore, they said, the sale was for a gross sum. The court went on to say that the "rule [that vendee assumed the risk of quantity] does not bar . . . a suit in equity for rescission . . . or abatement . . . [for] mutual mistake." *Id.* at 514-15.

<sup>23</sup> *Id.* at 517.

<sup>24</sup> 2 Gill 125, 41 Am. Dec. 408 (Md. 1844).

<sup>25</sup> 3 Md. Ch. 24 (1849), *aff'd*, 9 Gill 446 (Md. 1851).