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said that the rule of the principal case is logical and consistent with the principle of the single year unit in taxation as expressed by the *Sanford & Brooks Case*. It also appears that this rule affords a more realistic tax treatment where this type of transaction is involved because there is not an artificial severing of the connection between these interrelated transactions which would be required by the rule of the *Switlik Case*. Certainly to this extent, it may be said that the rule of the principal case is fair to both the taxpayer and the government.

HAROLD M. FRAUENDORFER

Damages—Similarity of Rule as to Damages in Automobile Accident and Defrauded Vendee Cases—Plaintiff brought action to recover damages for alleged fraud in connection with the sale of a pre-fabricated house which sold for \$6500.00. Testimony of a building contractor placed the estimated value of the house, if it were as represented, between \$6500.00 and \$7,000.00; its estimated value at the time of the suit, between \$4,000.00 and \$4500.00. The contractor also testified that the house could be repaired and brought up to the value it would have had, had it been as represented, for \$1700.00. The trial court entered an order granting a new trial unless the plaintiff would elect to take judgment on the sum of \$1700.00, considered by the court as the lowest possible amount a jury could return as damages, instead of the \$3,000.00 awarded by the jury. Plaintiff appealed. *Held*: \$2,000.00 was the least amount to which the verdict should have been reduced. Order reversed unless plaintiffs consented to acceptance of judgment for \$2,000.00. *Kimball v. Antigo Bldg. Supply Co.*, 333 Mich. 423, 53 N.W. 2d 315 (1952).

In deciding the case the court based its decision as to damages upon the rule that a defrauded vendee, by way of damages, is entitled to the difference between the value of the thing as represented and its actual value. Purporting not to decide the question as to the admissibility of evidence of cost of repairs in determining damages, the court expressly refused to accept the supposed dual method of determining damages normally used in automobile negligence cases, i.e., reasonable cost of repair or difference in value, as advocated by the defendant and advanced in the dissenting opinion.

A defrauded vendee has several alternatives in bringing suit. "He may elect to affirm the transaction and sue for the benefits to which he is entitled thereunder or for damages for deceit. On the other hand, he may elect to disaffirm the contract, frequently doing so by electing to rescind and be restored to his former position, recovering money paid out or recovering property, and in very many cases invoking the aid of a court of

equity for the purpose of attaining rescission and further relief; or he may, in repudiation of the transaction, set up fraud as a defense to an action brought against him on the contract."¹

The proper measure of damages, in the case of a defrauded vendee electing to sue at law has caused considerable conflict. The majority or "benefit of the bargain" rule grants the defrauded party the difference between the property's actual value and what its value would have been had the property been as represented. The minority or "out of the pocket" rule allows the vendee to recover the difference between the actual value of the property and the amount or value of the consideration given in exchange.²

Though Wisconsin follows the majority rule³ an application of the minority rule in this case would not effect a different result, as the price paid for the house, \$6500.00, coincides with the \$6500.00 estimate of its value as represented. Thus, in determining the lowest possible damages a jury could award, the top evaluation would be the same under both rules.

Under either standard of damages however, it is necessary to elect between alternative methods of proving the actual value. Both the majority and minority opinions in the principal case agree as to the substance of the rule but differ as to how the total damages are to be determined. The majority opinion takes a straight estimate of the actual worth of the property, while the minority opinion determines the actual worth of the property by taking the agreed upon "represented value" less what it would cost in repairs to make the property worth that amount. The difference in both cases is then determined as being the lowest possible figure the jury could arrive at in determining damages, subject to possible increase by reason of such factors as delay, inconvenience, and so forth.

While in most cases opinion testimony of real estate men, appraisers and other experts in real estate values is taken in evidence in determining property values, the final decision as to the "actual" and the "if as represented" value is left up to the jury. However, independent evidence of various other facts has been admitted in determining property values, e.g., rental fees,⁴ cost of improvements,⁵ established patronage or custom of business,⁶ reputation of the property,⁷ or the nontaxable character of the land purchased.⁸

¹ 24 AM. JUR. FRAUD AND DECEIT §190.

² 124 A.L.R. 37; 55 AM. JUR. VENDOR AND PURCHASER §573; 24 AM. JUR. FRAUD AND DECEIT §226; 37 C.J.S. FRAUD §143b.

³ *Mueller v. Michels*, 184 Wis. 324, 197 N.W. 201, 199 N.W. 380 (1924).

⁴ *Bomarjee v. Pike*, 43 Cal. App. 502, 185 P. 479 (1919).

⁵ *Shane v. Jacobson*, 136 Minn. 386, 162 N.W. 472 (1917).

⁶ *Redding v. Godwin*, 44 Minn. 355, 46 N.W. 563 (1890); *Van Vliet Fletcher Auto Co. v. Crowell*, 171 Iowa 64, 149 N.W. 861 (1914).

⁷ *Rowley v. Shepardson*, 85 Vt. 266, 81 A. 917 (1911).

⁸ *Daves v. Jenkins*, 46 Kan. 19, 26 P. 459 (1891).

The Wisconsin court, in assessing damages in auto negligence cases, follows the majority rule, i.e., in cases of complete destruction of the vehicle or where the cost of repairs exceeds the reasonable market value of the automobile, the damages should be the reasonable market value of the automobile before the accident less its junk value after the accident.⁹ However, where the car can be repaired and the repairs will not exceed the reasonable market value of the car, the measure of damages is the difference between the reasonable market value of the automobile immediately prior to the injury at the place thereof and its reasonable market value after the injury at the place thereof.¹⁰

Obviously, the reasonable market value of the auto prior to the accident could be determined only by an estimate or by a comparison of what similar cars were selling for at that time. On the other hand, the reasonable market value of the car after the injury could be determined in several ways—by a “total” estimate or by the reasonable cost of repairs necessary to restore the vehicle to its condition prior to the accident. Where, as is frequent in the case of a damaged automobile, market value is difficult to determine, the Wisconsin courts will accept either type of evidence.¹¹

While both the value of the car after the accident and the reasonable cost of repairs may be arrived at by estimates, we may infer from the reasoning of the Wisconsin court that an itemized listing of estimated repairs and their costs would in some cases more accurately determine the value of the damaged car than would a straight estimate of market value after accident.

As a practical matter, the opinion testimony of a witness as to the estimated value of a piece of property is not conclusive of the property's worth. Rather, counsel offering such testimony as evidence, or his opposition, usually inquires as to the qualifications of the person making the estimate, the basis thereof, and as to any pertinent fact

⁹ *Calumet Auto Co. v. Dinny*, 190 Wis. 84, 208 N.W. 927 (1926). “Upon the question of damages the evidence showed that the automobile was worth \$275.00 when loaned to Wolfmeyer; that it would cost more than that amount to place it in a serviceable condition; and that after the accident it was worth only \$25.00 for junk. The court found in accordance with this testimony and rendered judgment in favor of the plaintiff for \$250.00. . . . The findings of the court was well sustained by the evidence and cannot be disturbed.”

¹⁰ *Chapleau v. Manhattan Oil Co.*, 178 Wis. 545, 190 N.W. 361 (1922). “Where injury to personal property does not effect its destruction, that is, where it is susceptible of repair, ordinarily the measure of damages is the difference between the reasonable market value of the property immediately before the injury at the place thereof and its reasonable market value after the injury at the place thereof; and it is also held that such measure is not what it actually costs to repair but what it would reasonably cost to put the property in such condition as it was before.”

¹¹ See *Vetter v. Rein*, 203 Wis. 499, 234 N.W. 712 (1931); in which the court cites and quotes verbatim the rule as to damages in *Chapleau v. Manhattan Oil Co.*, 178 Wis. 545, 190 N.W. 361 (1922), concluding, “It thus appears that the reasonable cost of repairs is also a proper measure of damages.”

that may in some way add to or detract from the testimony. In the course of such procedure, presuming the article to be repairable, the cost of repairs as a basis of the estimate or as being in contrast with the estimate, is usually sought. In the present case, subsequent to qualifying the witness, plaintiff's counsel brought forth testimony as to the reasonable cost of repairing the building, before inquiring as to its estimated worth.¹²

Certain similarities are thus to be found in both fraud and auto damage law: First, the actual values of property before and after an accident are largely evidentiary problems met by accepting qualified opinion testimony as well as other evidence and leaving the final determination to the jury; Second, where a person on the ground of fraud is allowed to rescind a contract, he can recover his entire consideration plus possible accessory damages, just as, in the case of complete destruction of an automobile, the owner is allowed to recover its full value less junk value plus possible accessory damages; Third, in an auto accident where reasonable repair costs are less than the reasonable market value of the automobile prior to the accident, damages are measured by the difference between the reasonable value of the automobile before and after the accident; in the case of a defrauded vendee damages are measured by the difference between the property's actual and "if as represented" values, i.e., a top value is fixed for the article and damages are determined by the relation of an estimated present actual value to that top value.

It may be concluded that not only are the rules strikingly similar in principle, but for all practical purposes, identical. On the other hand, it is exceedingly difficult to reconcile the rule that a witness should present estimates from which it is concluded that \$2,000.00 is the lowest possible difference in value with the fact that the same witness's testimony as to the reasonable cost of repairs, presumably offered as the basis of his ultimate estimate, should, when totaled, equal but \$1700.00.

This particular problem is absent in most fraud cases inasmuch as the nature of the property in the majority of fraud cases is such that it cannot be practicably repaired or otherwise remedied. If the defrauded vendee wishes to retain the property he must take it as it is and receive the damages in compensation. In such cases the estimated worth of the property, in the opinion of qualified witnesses, would probably be accepted as superior evidence. However, courts in some jurisdictions have recognized that in cases where property fraudulently sold can be brought up to the value it would have had were it as represented, the general rule of damages can be applied and the reason-

¹² Record, p. 173-98.

able cost of repairs can be used as a measure of the difference in value between the property as is and as represented.¹³

A similar solution has been arrived at where schools, fraudulently purporting to give a definite type of training or education which would qualify one for a nursing certificate or a degree in dentistry or medicine, have failed to live up to their claims. In several such suits based on fraud the measure of damages was not an evaluation of the training actually received as compared with what the student had been told he would receive; as such would be practically impossible to ascertain, but rather, what it would cost the student to continue his education until such certificate or degree could be attained.¹⁴

The case points out the need for a solid rule governing the admissibility of and the weight to be assigned testimony in fraud cases concerning estimates of the reasonable cost of repairs. As the dissenting opinion points out, there seems to be no practical or logical reason for making a distinction between the rules of evidence in the case of a defrauded vendee and an auto damage case.

Perhaps a more practical solution to both problems would be to adopt as a rule of evidence that: An itemized estimate of the reasonable cost of repairs necessary to bring the property to the value it would have had were it as represented, or the auto to the condition it was in prior to the accident, will be admitted as prima facie evidence of that difference in value; that such estimate will be the proper measure of damages to be awarded unless affirmatively met by (1) proof that such cost of repairs will exceed the value of the auto prior

¹³ *Shane v. Jacobson*, 136 Minn. 386, 162 N.W. 472 (1917). In an action brought for alleged misrepresentation in the sale of a farm the jury upon evidence that the farm was worth \$12,000.00 in its present condition without certain drainage tile, previously represented by the vendor as having been installed when the farm was sold by him for \$17,300.00, fixed the damages at \$5,300.00. The appellate court held that it was error to exclude evidence that the tile could be installed and damages thereby fixed at a much lower figure than \$5,300.00 saying, that it "would shock one's sense of justice" to place the defrauded vendee's loss at a figure much higher than that necessary to repair or replace that which was falsely represented at the time of the sale. "The actual cost of placing tiling thereon, and the extent to which such improvement would increase the value was proper and very material evidence." *Dinwidde v. Stone*, 21 Ky. L. Rep. 584, 52 S.W. 814 (1899). The measure of damages for falsely misrepresenting a lot and building conforming with the grade of the street was the amount necessarily expended in making it conform. *Nun v. Howard*, 216 Ky. 685, 288 S.W. 678 (1926). In an action for deceit the measure of damages for fraudulently misrepresenting that a well gave good, pure water was determined by the reasonable cost of a new well. *Okoomian v. Brandt*, 161 Conn. 427, 126 A. 332 (1924). In an action for deceit the measure of damages for misrepresenting that the house rented for a certain rate higher than that actually being paid was the cost of installing electrical wiring which would warrant a higher rent. The actual cost was determined to "more accurately measure the damages than by attempting to find the true value of the estimate made by real estate experts."

¹⁴ *Kerr v. Shurtleff*, 218 Mass. 167, 105 N.E. 871 (1914); *Clayton v. Quatto*, 7 Div. (Aia.) 993, 130 So. 395 (1930).

to the accident or the value the property would have had were it originally as represented, or (2) proof that such repairs, if made, will not be sufficient to restore the auto to its condition prior to the accident or to raise the property to the value it would have had were it as originally represented, or (3) proof that such repairs, if made, will place the auto in excess of its value prior to the accident or the property in excess of the value it would have had were it as originally represented.

Were such the rule, the trial court would not have been in error in holding that the jury could return \$1700.00 (the reasonable cost of repairs) rather than \$2,000.00 (straight estimate) as the lowest possible damages the jury could award.

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