Purchaser's Remedies for Deficiency of Quantity

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REAL ESTATE: PURCHASER'S REMEDIES FOR DEFICIENCY OF QUANTITY

Since uniqueness in value inheres in all real estate contracts, the vendor's lack of title to all or a part of the land presents to the purchaser the task of ascertaining those damage and non-damage remedies under which he may recover for the failure of vendor's title, and a computation of the various formulas which have been expressed by the courts in relation to these remedies and their individual components. In this respect, this study will concentrate on a.) recovery in a rescission action; b.) damages recoverable in a breach of contract action or an action based upon the tort of misrepresentation; and, c.) specific performance with abatement (compensation).

As will be developed throughout, the purchaser's initial choice of a particular remedy and his ultimate recovery in monetary amount will vary depending upon the particular conduct of the vendor in relation to the reason underlying his deficiency of title. Of paramount importance to the aggrieved purchaser, having selected his remedy, will be the particular values of the promised realty, of its individual parts, and the initial contract price. This course of conduct on the part of the aggrieved purchaser is necessary since the particular remedy and the recovery afforded by the court for each such remedy may not, in the final analysis, be advantageous to the purchaser. A disaffirming remedy by way of rescission and return of the purchase price paid may be the ultimate recovery advantageous to the purchaser.

RESCISSION, ELECTION OF REMEDIES, AND PURCHASER’S LIEN

In the ordinary case, if a vendor has entered into an executory contract for the sale of real estate to a purchaser, a breach by the vendor will entitle the purchaser to prompt rescission and return of any amount paid on the purchase price. The breach of an executory contract by reason of the failure to give marketable title due to a partial or entire deficiency of quantity will arise only upon the simultaneous arrival of time for performance on the part of the vendor pursuant to the terms of the contract itself.

It is ordinarily not essential, to entitle a vendor to enforce a contract for the sale of land, that at the time he made the contract he should have had title and capacity to convey land, or such means and right to acquire the same as would have enabled him to fulfill it on his part; it is sufficient if he is able to convey the land when, by the terms of the contract or the equity of the case, he is required to do so, in order to entitle himself to the purchase price. The mere lack of title in the vendor at the time he entered

into an executory contract for the sale of the land ordinarily does
not entitle the vendee to rescind.\(^2\) (Emphasis added.)

As illustrated by *Knapp v. Davidson*,\(^3\) the vendor does not automatically incur, on his part, a breach of contract, by reason of his lack of ownership at the time of making the contract. He may make a valid contract for the sale of land where he has only the equitable title, partial title, or a title subject to incumbrances. Similarly, the vendor may enter into an executory contract for the sale of land where he lacks all indicia of title.\(^4\) It is when the vendor is unable to perform, by a failure to convey all or a part of the promised consideration at the time stipulated in the agreement, or at a reasonable time where no time for performance is stated, that he may be compelled to respond to the purchaser in full damages.\(^5\)

If, when the time for performance arrived, the defendants were unable to convey a marketable title, the plaintiff had the same legal remedies afforded in other similar cases. He then could rescind the contract and recover the purchase money already paid. He could have his action at law for damages. If title to only a portion of the land could be secured, he could have a proportional abatement made from the purchase price.\(^6\)

Generally, exceptional circumstances will allow a purchaser to rescind a purely executory contract for the sale of land. In *Zunker v. Kuehn*,\(^7\) plaintiff and defendant agreed to exchange lands, with the defendant pointing out certain lands having a frontage of 110 feet as being owned by him. Defendant’s subsequent deed covered a strip of land covering but ninety-nine feet. Upon plaintiff’s action for rescission, it was held that the defendants had made false representations of facts which induced the making of the contract and which representations would be grounds for relief by way of rescission. A similar case for rescission arises if it is clear that performance on the part of the vendor will be impossible in the future.\(^8\)

Case law is to the effect that an action involving rescission or involving the right to rescind a contract and to recover the amount paid on the purchase price may be an action at law or in equity.\(^9\)

\(^2\) 55 AM. JUR. *Vendor and Purchaser* §271, p. 718 (1946).
\(^3\) 179 Wis. 493, 192 N.W. 75 (1921).
\(^4\) Wiegman v. Alexander, 4 Wis. 2d 118, 90 N.W. 2d 273 (1958).
\(^5\) Knapp v. Davidson, 179 Wis. 493, 192 N.W. 75 (1921).
\(^6\) Id. at 501, 192 N.W. at 78.
\(^7\) 113 Wis. 421, 88 N.W. 605 (1902). See Knudson v. George, 157 Wis. 520, 147 N.W. 1003 (1914); Knapp v. Davidson, 179 Wis. 493, 501, 192 N.W. 75, 78 (1921), wherein it is stated that “[s]uch a case is presented when there is fraud which induces the contract...”
\(^8\) Knapp v. Davidson, *supra* note 5, at 501, 192 N.W. at 78. It is also stated therein that “[i]n some cases the insolvency of the vendor has been treated as a fact proper to be considered.”
One induced by fraud to enter into a contract may take any one of three courses: (1) Rescind, restore the preexisting status, and sue at law to recover his payments; (2) offer to restore the status, keep his offer good, sue in equity to rescind and recover his payments; (3) affirm the contract and sue for the damages resulting from the fraud.\(^9\) (Citations omitted.)

An action at law to recover back that which has been paid by the purchaser on a contract, void due to the vendor's fraud, presupposes a precedent rescission of the contract by an affirmative act of the plaintiff-purchaser.\(^11\) Under (2) above, an action in equity to rescind a contract supposes the need for equity jurisdiction to effect the ultimate rescission by way of the actual decree in the action. Such decree will impose upon the terms of the rescission the return of the amount paid on the contract by the purchaser, as deemed equitable under the circumstances.\(^12\)

Rescission, being a disaffirming remedy, is thought to be entirely inconsistent with the affirmative remedies available to an aggrieved purchaser in actions for breach of contract or fraud (misrepresentation). As stated by Williston:

> The doctrine of election of remedies is not peculiar to actions based upon fraud, but it is, perhaps, most frequently applied or discussed in connection therewith. The defrauding party has the alternative but inconsistent rights and remedies of affirmance of the transaction and recovery of damages for the deceit, or of disaffirmance and restitution where restitution is available. As pointed out in the Restatement of Contracts, 'a choice between remedies for an injury must be distinguished from a choice between substantive rights and privileges.' However, the choice of substantive rights necessarily produces a corresponding limitation in the field of possible remedies. Cases of contracts voidable for fraud raise both the problems of election between substantive rights and between inconsistent remedies. The traditional view has been that the choice between substantive legal relations—between contract or no contract—is made by mere manifestation of election, whether that be simply by the injured party's conduct in other ways, or by his bringing suit for rescission or action for damages for deceit.\(^13\)

In *Bischoff v. Hustisford State Bank*,\(^14\) plaintiff's complaint first stated a cause of action for the rescission of the contract due to fraud. In the alternative, plaintiff pleaded a second cause of action to recover

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\(^9\) Annot., 95 A.L.R. 1000 (1935).
\(^11\) Ludington v. Patton, 111 Wis. 208, 86 N.W. 571 (1901).
\(^12\) Ibid.
\(^13\) § 1528 (rev. ed. 1937); See Annot., 6 A.L.R. 2d 15 (1949).
damages for fraud. The court held that the doctrine of election of remedies did not apply and that the complaint was proper, since if the plaintiff had proceeded to trial on the first cause of action based upon rescission, had been unsuccessful, he would not have been barred from suing on the breach of contract action.

The second action would not have been an attempt to relitigate the issues presented in the first cause of action. He would have sought recovery in the second cause of action upon an entirely different ground than the recovery sought in the first cause of action. It has been said that the doctrine of election of remedies is a harsh, and now largely obsolete, rule, the scope of which should not be extended. . . . While the causes of action joined in this case would, as already pointed out, rest upon an inconsistent state of facts, the remedy sought in one is no substitute for the remedy sought in the other. A suit in the first instance upon the contract for damages for breach would no doubt be an affirmation of it, which would preclude an action for rescission, but the reverse is not true.\textsuperscript{15}

The rationale of the \textit{Bischoff} case has been further explained in \textit{Schlotthauer v. Krenzelok},\textsuperscript{16} wherein plaintiff, after commencing an action for rescission sold the farm and personalty received under the contract, was refused permission to amend his complaint to state a cause of action for damages for fraud and deceit. Upon plaintiff's instituting a new suit, the defendant pleaded that plaintiff had made a prior election of remedies which precluded the prosecution of the damages action. The county court dismissed the complaint upon a finding of a "binding election." Upon appeal, faced with this "binding election of remedies at time of commencement of the suit" rationale, the Supreme Court stated that: "The more recent cases . . . raise grave doubt as to whether Wisconsin has not completely abandoned the holding of the earlier cases that a conclusive election of remedies is made as of the time of the commencement of the action."\textsuperscript{17} Also, it is stated that "[t]he cases . . . lay down the principle that if the plaintiff has mistaken his remedy then there has been no binding election by the commencement of suit that precludes him from thereafter pursuing the proper remedy to judgment."\textsuperscript{18}

The \textit{Schlotthauer} decision, while rejecting the election of remedies principle, has reached a like result in the theory of affirming and disaffirming \textit{substantive rights}. As stated by the court, in holding that plaintiff's cause of action for fraud was not barred by commencement of a prior action in equity for rescission:

\textsuperscript{15} Id. at 320, 218 N.W. at 357.
\textsuperscript{16} 274 Wis. 1, 79 N.W. 2d 76 (1956).
\textsuperscript{17} Id. at 3, 79 N.W. 2d at 78.
\textsuperscript{18} Ibid.
The reason why a suit at law to recover damages for fraud bars a subsequent suit for rescission is not because there has been an election of inconsistent remedies, but rather that the act of instituting an action at law for damages recognizes the existence of the contract and affirms it. Once having been so affirmed, the right to rescind is forever lost. Such act is no different than any other act indicating an affirmance of the contract, such as proceeding with the performance of the contract after discovery of the fraud, or disposing of some of the property acquired under the contract, thus putting it beyond the power of the defrauded party to rescind and place the parties in status quo.  

As a general rule, where the purchaser is entitled to rescind his contract due to a breach by the vendor and so elects to rescind, a lien arises to secure the quasi-contractual right of the purchaser to recover the payments made on the contract price.  

Weidner v. Hyland, proceeding upon a different rationale as to time but yielding a like result, held on rehearing that the lien attached when payment was made on the purchase price and remained whenever the right to recover the payment existed by reason of the vendor's default in performance.  

As set forth in Miswald-Wilde Co. v. Armory Realty Co., on rehearing, the lien is limited to recovery of the payments made on the contract, with interest thereon. This opinion goes on to state that the lien will not be extended to cover or secure the aggrieved purchaser's possible loss of profits on the purchase of the land, suffered by reason of the vendor's breach of contract.

**Contract Damages**

*Flureau v. Thornhill*, decided in England in 1775, is credited with the formulation of the so-called "out-of-pocket" (good faith) rule as to the recovery of damages for the vendor's breach of contract to convey a marketable title. Flureau bought a rent issuing from a leasehold and paid a sum certain as a deposit on his purchase. Upon examination of the title, it was found to be unmarketable and the vendor, Thornhill, offered to return the deposit with interest and costs. Flureau refused, demanding a further sum by way of damages for the loss of bargain on his contemplated purchase. The jury having awarded damages for this loss of bargain, and the vendor having appealed for a new trial, it was held that:

... [T]he verdict [was] wrong in point of law. Upon a contract for a purchase, if the title proves bad, and the vendor is (without

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19 Id. at 5, 79 N.W. 2d at 78.  
21 216 Wis. 12, 19, 255 N.W. 134, 256 N.W. 244, 245 (1934). See Wis. Stats. §§235.45 and 235.53, (1963), whereby a lien arises upon the recording of a contract for the sale of land.  
22 210 Wis. 53, 71, 243 N.W. 492, 244 N.W. 589, 246 N.W. 305, 306 (1933).  
This out-of-pocket (good faith) rule yields the recovery of an amount similar to that for rescission, the amount the purchaser has paid on the contract.

The English doctrine is followed with slight qualification in a few American states. In most American cases, however, which purport to follow the English authorities, the rule restricting damages to those appropriate for rescission is clearly limited to cases where the vendor has not been guilty of bad faith.

In McFarlane v. Dixon, defendants agreed to sell plaintiff two lots for a total price of $2000. The contract referred to the two lots as belonging to one McIntryre, deceased. The contract went on to state that the vendor-defendants were the residuary legatees and devisees under McIntryre's will. The lots had been included in McIntryre's inventory, but in effect one of the lots belonged to another party and did not descend to the vendor-defendants. In affirming the lower court's finding, that there was, as a matter of law, no element of tortious conduct on the part of the defendants, it was stated that:

The defendants believed that they had the right to make the contract as the residuary legatees under the will, and that they could convey good title. . . . [w]ere circumstances well adapted to raise the belief that they were within their rights in making the contract. [Emphasis added.]

* * *

The cases we have cited are in line with the leading case decided in England in 1775, Flureau v. Thornhill, . . . which has been much discussed by the courts and text-writers. Counsel for appellant do not content that the rule adopted in that case and by this court should be changed, but that it should not be applied in the present case, because, it is argued, defendants should have known the state of the title of the land they bargained to sell.

As the above quotation points out, Wisconsin is committed to the rule of Flureau v. Thornhill where the vendor believed that he had a right to enter into a contract for the sale of the promised quantity of land.

Where the vendor's title to all or a part of the promised consideration fails, the question of whether the purchaser will be able to recover

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24 Ibid.
26 176 Wis. 652, 187 N.W. 671 (1922).
27 Id. at 654, 187 N.W. at 672.
28 Id. at 657, 187 N.W. at 673.
damages greater than the amount paid on the purchase price will depend upon the particular jurisdiction's decisions relating to the "good faith—bad faith" conduct of the vendor.

Under the rule generally prevailing in the United States, however . . . the only rule defensible on principle, allowing the purchaser the difference between so much of the contract price as is unpaid and the market value of the land, is applied in every case where the vendor breaks his contract without legal excuse. . . .

Where the purchaser makes total default, the general rule both in England and the United States allows recovery of the difference between the contract price and the market value as in the case of personal property.29 [Emphasis added.]

This measure of contract damages is traditionally known as the "benefit-of-bargain" (bad faith) rule.30

The 1904 case of Arentsen v. Moreland,31 sets forth the circumstances which will equal bad faith conduct on the part of a vendor-defendant. A vendor, who contracts to convey title to lands which he knows he does not own, in which case he would lack the "belief of a right to convey" as illustrated by McFarlane, is liable for the benefit-of-bargain measure of contract damages if he is unable to acquire title prior to the time for performance. As stated in Lommen v. Danaher;32 "having agreed to do what he had no right to do, taking his chances upon being able to acquire such right, he is guilty of a species of bad faith. . . ." Similarly, where the vendor agrees with the plaintiff-purchaser to convey certain lands, but conveys in the interim to another, the vendor will be liable for benefit-of-bargain damages.33 Upon the right of the purchaser to maintain a breach of contract action with a measure of benefit-of-bargain damages where the vendor declares, prior to the time for conveying, that he will not perform, it has been stated:

The majority rule is that where the vendor in an executory contract for the sale of land declares positively, prior to the time set for performance on his part, that he will not perform the contract at all, the vendee may, if he so elects, treat the contract as immediately breached in omnibus, and thereupon maintain an action for damages.34

As previously noted, the purchaser, under the good faith measure

30 Lommen v. Danaher, 165 Wis. 15, 161 N.W. 14 (1917).
31 122 Wis. 167, 99 N.W. 790 (1904).
32 165 Wis. 15, 22, 161 N.W. 14, 17 (1917).
33 122 Wis. 167, 176-182, 99 N.W. 790, 793-796 (1904). See Annot., 90 A.L.R. 337 (1934); Anderson v. Tri-State Home Improvement Co., 265 Wis. 455, 462, 67 N.W. 2d 853, 858, 68 N.W. 2d 705 (1955) wherein it was stated that if the vendor makes promises and at the time of making them he has a present intent not to perform, the promises may amount to fraudulent representations.
34 Annot., 102 A.L.R. 1082, 1083 (1936).
of damages rule in an action on the breach of contract, will be able to recover the money paid on account of the purchase price, together with the reasonable expenses incurred, and interest. In the case of a bad faith breach of contract by the vendor wherein the vendor knows at the time of conveying that he lacks title, the purchaser will recover his loss of bargain on the contract. This recovery will be computed as the fair market value of the promised consideration (land) less the amount still owing on the agreed contract price.

It is readily apparent that the purchaser will be concerned with the measure of recovery formula for breach of contract damages in two particular aspects. First, the purchaser will have to prove that the vendor's conduct concerning his contracting to convey that which he does not own in whole or in part was "bad faith" conduct on his part. The second, and most important, aspect of the purchaser's damages suit for breach of contract will be the actual amounts paid and bargained for (contracted) by the vendor and purchaser. In this respect, the purchaser will have to have originally contracted for the benefit of the bargain by agreeing to pay less than the fair market value of the promised quantity of land. Where the purchaser has not contracted for the benefit of the bargain, the recovery will be limited to the return of the purchase price paid, either by way of an action for breach of the contract or for rescission.

By way of summary on the measure of damages recoverable under either the out-of-pocket or benefit-of-bargain rule, the rules constituting the typical actionable conduct on the part of the vendor are best stated by Chief Justice Cooley, in Hammond v. Hannin:

The principle underlying these cases is that if a party enters into a contract to sell, knowing that he cannot make a title, he is remitted to his general liability, and the exception introduced by Flureau v. Thornhill does not apply. So if a person undertakes that a third party shall convey, and is unable to fulfill his contract, the authorities are that he shall pay full damages. Such contracts are speculative in character, and the party giving them understands the risk he assumes when the covenant is entered into. . . .

There are numerous cases which decide that if the vendor acts in bad faith—as if, having title he refuses to convey or disables himself from conveying, the proper measure of damages is the value of the land at the time of the breach: the rule in such case being the same in relation to real as to personal property. . . . And the cases before referred to, in which the party undertook to sell that which he did not own and knew he could not control.

may also, . . . be considered as involving a degree of bad faith, and generally been so regarded by the courts.

Specific Performance With Abatement

The English case of Cleaton v. Gower,38 decided in 1674, dealt with the formulation of another remedy available to an aggrieved purchaser in those situations where a part of the promised consideration is unavailable. Cleaton agreed with one Gower, vendor-defendant, to open certain mines belonging to Gower and the latter was to furnish cordwood for that purpose at rates specified in the agreement. Cleaton entered into performance of the agreement and paid for the cordwood at the rate specified. Cleaton thereafter demanded execution of the agreement in specie, whereupon the defendant claimed that he was only a life tenant and therefore unable to execute the agreement. The court decreed that the defendant should execute the agreement in specie as far as capable of his doing and likewise should satisfy the plaintiff with such damages as he has sustained in not enjoying the premises.39

Specific performance with abatement (compensation) is an attempt to preserve the rights of both the purchaser and the vendor under the original contract and will be applied by the courts in aid of a purchaser who is willing and desirous to take the partial interest which the vendor is able to convey, especially where the purchaser is the party calling upon the court for this particular form of relief.40 As stated by the Wisconsin court, "'If, when the time for performance arrived, the defendants were unable to convey a marketable title, the plaintiff . . . [i]f title to only a portion of the land could be secured, . . . could have a proportional abatement of the purchase price.'"41

Of historical and theoretical import is both the relationship and the difference between damages in a breach of contract action and of specific performance with abatement.

'Compensation,' on the other hand, using the word in its special and restricted meaning, is an ordinary and constant incident of the remedy of specific performance, a part of the general course of administering the doctrines of equity, and is to be regarded, not as an independent and separate award of damages, but rather as a condition upon which relief of specific performance is granted at all, or as a modification of that relief, so that it may be adapted to the circumstances of the case and the equities of the parties. Although the amount of compensation may be ascertained

39 Annot., 81 A.L.R. 900 (1932); Annot., 148 A.L.R. 563 (1944); Restatement, Contracts §360 (1932).
41 Wiegman v. Alexander, 4 Wis. 2d 118, 127, 90 N.W. 2d 273, 279, 91 N.W. 2d 353 (1957).
upon somewhat the same basis as that upon which damages would be assessed for the same loss, yet the motives and principles upon which compensation is allowed are wholly different from those upon which damages are awarded.\textsuperscript{42}

This relationship is implied in \textit{McFarlane v. Dixon},\textsuperscript{43} previously discussed on the minority exception \textit{Flureau v. Thornhill}, as to a good faith belief in the right to title on the part of the vendor at the time of contracting. The agreed contract price was $2000 for the two lots, with the individual values of the lots being $2200 at the time of breach. The court, after noting that the purchaser was asking for the entirely inconsistent remedy of specific performance with abatement,\textsuperscript{44} granted purchaser such remedy. In computing the amount of the abatement, the court relied upon the damages formula announced in \textit{Messer v. Oestreich},\textsuperscript{45} the wording of which was corrected in the later case of \textit{Semple v. Whorton}.\textsuperscript{46}

In light of these authorities, and others which might be cited, and in the absence of fraud, we conclude that, where the title fails to only a part of the land conveyed, the grantee may recover in an action on the covenants of seizin and right to convey, or upon an agreement to convey, such fractional part of the whole consideration paid as the value at the time of the purchase of the piece to which title fails bears to the value of the whole piece purchased, and interest thereon during the time he has been deprived of the use of such fractional part, but not exceeding six years.\textsuperscript{47} [Emphasis added.]

As quoted, this damage and abatement formula is ambiguous in that the "whole piece purchased" is susceptible of two interpretations. It could be construed to apply to the value of the piece purchased after the abatement of the missing piece, or it could, and is, meant to relate to the value of the whole piece which was included within the original promise of the vendor. A clear and unambiguous definition of this formula is best stated in \textit{Hepler v. Atts},\textsuperscript{48} another damages case.

The measure of the disappointed buyer's damages in such cases is that fractional part of the purchase price which represents the relative value which the part to which title is defective bears to the whole tract the seller purported to convey. ... Represented mathematically, if \( VP \) represents the value of the 25 acres to which title was found by the jury to be defective and \( VW \) represents the value of the whole 125 acre tract which the dece-

\textsuperscript{43} 176 Wis. 652, 187 N.W. 671 (1922).
\textsuperscript{44} Id. at 656, 187 N.W. at 672.
\textsuperscript{45} 52 Wis. 684, 10 N.W. 6 (1881).
\textsuperscript{46} 68 Wis. 626, 32 N.W. 690 (1887).
\textsuperscript{47} Id. at 636, 32 N.W. at 693.
dent purported to convey, the formula for ascertaining the damages recoverable in this case is $VP \times \frac{V}{W}$ [the contract price].

Applied to the McFarlane values, the measure of amount to be abated would be $2,200 \times 2,000 = 1000$. Actually the court's opinion states that the purchaser would receive the individual lot for a payment of $800. Therefore, assuming the $1000 to be what the purchaser would be obligated to pay under the McFarlane facts, where there is a good faith-legal excuse breach of contract by the vendor, the measure of abatement is actually a proration of the original contract price.

There has been some controversy as to whether the damages are to be assessed upon the basis of the value of the land lost, or such proportion of the consideration as the value of the land lost bears to the value of the entire land purported to have been conveyed. In this respect it has been pointed out that the actual value of the land lost is not the true measure of damages. The damages recoverable are relative or comparative, the standard being the consideration or price paid for the whole tract.

The court, in McFarlane, after citing adherence to the good faith exception of Flureau v. Thornhill, cited Arentsen v. Morland, which limits the application of the good faith recovery rule. Arentsen, previously digested herein, holds the vendor liable for benefit-of-bargain damages where he agrees to convey knowing he has no right to title or where he sells to another after contracting with the plaintiff-purchaser. Therefore, it might be implied that, where the vendor is guilty of bad faith, the amount of abatement from the contract price will be the actual value of the deficient part.

If this amount should correspond with the diminution of value attributable to the defect the purchaser would in effect recover pro tanto for his loss of bargain.

While, in the case of deficiency in quantity, the court has recognized the propriety of deducting a sum which bears the same proportion to the whole piece as the amount of land lacking bears to the whole area of land agreed to be conveyed, in some cases the value of the land lost with relation to the value of the whole tract has been used as a basis for a ratable deduction, and there is authority for the view that the value of the property which cannot be conveyed may be considered separately in determining the amount of the deduction or compensation.

49 Id., 192 A. 2d at 140.
52 122 Wis. 167, 99 N.W. 790 (1904).
The following illustrations are intended to present the relative advantage or disadvantage to the purchaser of both the good faith and bad faith abatement formulas under situations of fluctuating values in both the whole consideration promised and the deficient part.

**Illustration A**

Assume a purchaser agrees to acquire a vendor's land at a contract price (CP) of $100,000, based upon an expected conveyance of 200 acres at a value of $500 per acre. Further, assume that, at the time for performance, vendor is able to furnish title to but 180 acres, and that at the time of this breach the value per acre is $550, the value of the promised land therefore being $110,000. The value of the part (VP) would then be $11,000 (20 acres at $550.)

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The good faith-proportional abatement formula results in the purchaser expending $90,000 for acreage with a value of $99,000, while under the bad faith formula the purchaser parts with $89,000 for land valued at $99,000. Here, the value of the parts being equal to the whole, the purchaser under the bad faith rationale recoups an additional $1,000 in compensation.

**Illustration B**

Assume a second contract, wherein the value of the parts is not equal to the whole. For example, a contract price of $10,000, for land worth $12,000 as a whole but individually worth $3,000 as to the deficient part and $6,000 as to the part vendor has title.

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Thus, purchaser will pay either $7,500 or $7,000 for land worth $6,000. Besides paying above the actual value of the land received under either formula, as the value of the part to which title fails increases in value (say either $4,000 or $6,000 the bad faith formula will result in the

greater benefit to the purchaser in comparison to the good faith abatement formula.

Illustration C

Assume circumstances where the fair market value of the promised land is lower in amount than the agreed contract price; the contract price of $100,000 being based upon 200 acres with an agreed value of $500 per acre. The vendor is able to furnish marketable title to but 180 acres, with the fair market value at the time of breach being $450 per acre.

<table>
<thead>
<tr>
<th>Good Faith Formula</th>
<th>Bad Faith Formula</th>
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<tbody>
<tr>
<td>(VP) $9,000</td>
<td>(CP) $100,000</td>
</tr>
<tr>
<td>(VW) $90,000</td>
<td>(VP) $100,000</td>
</tr>
<tr>
<td>(CP) $100,000</td>
<td>(VP) - 9,000</td>
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<tr>
<td>- 10,000</td>
<td>$91,000</td>
</tr>
<tr>
<td>$90,000</td>
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Where the fair market value of the promised consideration is less than the original contract price, the purchaser would expend either $90,000 or $91,000 for land worth $81,000. Under these circumstances, the vendor actually retains the benefit of the bargain, and in greater proportion where he is guilty of bad faith.

Also, where the value of the parts is not equal to the whole, and where the fair market value of the promised consideration is less than the original contract price, the good faith abatement formula results in a less severe loss of the bargain, although both abatements remain advantageous to the vendor. Under these circumstances the purchaser should be cautioned to consider the advantage of a rescission action yielding a return of the purchase price paid thereon.

FALSE REPRESENTATION

It may be possible for the purchaser to maintain an action based upon false representation (misrepresentation) if the vendor induces such purchaser "to purchase land by making materially false representations as to its quality or quantity under circumstances which entitle the vendee to rely thereon. . . ." Of course, the question of whether there was in fact a material misrepresentation upon which to base the purchaser's reliance is always paramount.

Doubtless, the question whether a given title is a good title or not is a question of opinion merely; but a direct representation made by one man to another that he has a free title to certain described real estate cannot be considered as a mere legal opinion. The circumstances may show, perhaps, that it was a mere opinion as to the validity of a certain title, and was so understood by the parties, in which case, of course, fraud cannot be

55 Knudson v. George, 157 Wis. 520, 522, 147 N.W. 1003, 1004 (1914).
predicated upon it; but, on the other hand, the circumstances under which it was given may demonstrate that it was intended and understood as a representation of a fact, and if such is the case, and it was relied upon to the damage of the other party, it becomes an actionable fraud.\textsuperscript{56}

The term fraud, as used in cases where the vendor represents as a fact that the land is of a particular quantity, has several interpretations. In \textit{Neas v. Siemens},\textsuperscript{57} the vendor-plaintiff brought an action for foreclosure on a land contract. Defendant-purchaser answered and interposed a counterclaim for damages, alleging that the vendor plaintiff fraudulently represented the number of tillable acres contained within the limits of the farm, the condition of certain cattle and machinery, and the amount of insurance protection carried by the vendor on the farm buildings. Upon the question of what constituted false representations, it was stated that “[t]he rule is that in a tort action based upon false representations in the sale of property it is unnecessary to show that the representations were made with fraudulent intent.”\textsuperscript{58} However, in \textit{Knudson v. George},\textsuperscript{59} it was held that where a vendor induces another to purchase land by making materially false representations, the purchaser may affirm the sale and recover the “damages which he sustains. . . . And this he may do whether the representations were made fraudulently or merely negligently.”\textsuperscript{60}

On the other hand, several cases have applied a different interpretation to the term false representation, with the supposed majority rule being:

‘To be actionable the false representation must consist first, of a statement of fact which is untrue; second, that it was made with \textit{intent to defraud} and for the purpose of inducing the other party to act upon it; third, that he did in fact rely on it and was induced thereby to act, to his injury or damage.’\textsuperscript{61} [Emphasis added]

As discussed by Prosser,\textsuperscript{62} there has been a good deal of overlapping between the theories of deceit and misrepresentation, and this increases with the indiscriminate use of the term “fraud.” Thus, the term misrepresentation is broader than the action for deceit itself, and liability in damages for misrepresentation often falls within three familiar divisions; based upon intent to deceive, upon negligence, or upon a

\begin{itemize}
\item \textit{Id. at 55}, 102 N.W. 2d at 263.
\item \textit{Id. at 522}, 147 N.W. at 1004.
\item \textit{Prosser, LAW OF TORTS} §100, pp. 698-99 (3d ed. 1964).
\end{itemize}
policy requiring the defendant to be strictly responsible for his state-
ments.

The rules and formulas for recovery by a defrauded purchaser are
commonly referred to as benefit-of-bargain and out-of-pocket, yet the
elements of the formula of each are entirely different from those re-
covery formulas discussed previously under the Flureau v. Thornhill\textsuperscript{63}
rationale.

The courts of this country are divided as to the proper rule
of damages to be applied in actions for fraudulent representations
inducing a contract. . . . The majority of jurisdictions have
adopted the 'benefit-of-bargain' rule under which the measure
of damages is the difference between the value of the property
as it was when purchased and what it would have been if it had
been as represented. A substantial minority apply the 'out-of-
pocket' rule under which the measure of damages is the differ-
ence between the price paid for the property [the contract price]
and its value when purchased. Wisconsin is committed to the
majority of 'benefit-of-bargain' rule.\textsuperscript{64} [Emphasis added]

Under the benefit-of-bargain rule the price paid by the purchaser is
relevant evidence on the issue of the value of the property if it had
been as represented.\textsuperscript{65}

A fraudulent representation recovery, based upon a tort theory and
allowing recovery for the benefit of the bargain, is the general measure
of recovery of damages for a contract action based upon a breach of
warranty of quality.\textsuperscript{66} It is also apparent that not all cases of fraudulent
representations amount to warranties.\textsuperscript{67} This inconsistency, however,
has resulted in (1) various criticisms of the out-of-pocket rule which
has been adopted by the English courts and a minority of American
courts in deceit actions,\textsuperscript{68} and (2) justifications for the retention of
the majority benefit-of-bargain rule within the tort action of misrepre-
sentation. As stated by Sutherland:

'[T]o allow the plaintiff only the difference between the real
value of the property and the price which he was induced to pay
for it would be to make any advantage lawfully secured to the
innocent purchaser in the original bargain inure to the wrong-
doer; and, in proportion as the original price was low, would
afford a protection to the party who had broken, at the expense
of the party who was ready to abide by, the terms of the con-
tract.'\textsuperscript{69}

\textsuperscript{63} 2 W. Bl. 1078, 96 Eng. Rep. 635 (1776).
\textsuperscript{64} Anderson v. Tri-State Home Improvement Co., 268 Wis. 455, 464, 67 N.W.
\textsuperscript{65} Id. at 464, 67 N.W. 2d at 859.
\textsuperscript{66} 5 WILLISTON, CONTRACTS §1391, p. 3883 (rev. ed. 1937).
\textsuperscript{67} Id. at §1392, p. 3887.
\textsuperscript{68} PROSSER, LAW OF TORTS §105, p. 750 (3d ed. 1964).
\textsuperscript{69} SUTHERLAND, DAMAGES §1172 (4th ed. 1916).
Prosser sets for the following discussion:

As a matter of the strict logic of the form of action, the first of these two rules [out-of-pocket] is more consistent with the purpose of tort remedies, which is to compensate the plaintiff for a loss sustained, rather than to give him the benefit of any contractual bargain. . . . On the other hand, it is urged in support of the majority rule that the form of the action should be of little importance, that in an action in the form of tort for breach of warranty the plaintiff is given the benefit of his bargain and the addition of an allegation of intent to deceive should certainly not decrease his recovery, and that in many cases the out-of-pocket measure will permit the fraudulent defendant to escape all liability and have a chance to profit by the transaction if he can get away with it.70

In Harweger v. Wilcox,71 plaintiff’s action was for tort damages based upon fraudulent representations in relation to their purchase of a farm represented to contain 115 tillable acres, and which in fact contained but from 69 to 77 acres. Plaintiff’s expert witness testified that the actual value of the land was $19,000. Defendant’s expert testified that the land was worth $36,000 as represented and as to actual value. The jury found that the value of the farm as represented was $36,000, with an actual value of $26,000. On appeal, a trial court verdict of $7,250 was held not supportable under the benefit-of-bargain rule where plaintiff’s expert was not allowed to testify as to the value of the land as represented by the defendants. The court stated that: “The trial court correctly stated that Wisconsin is committed to the benefit-of-bargain rule. However, in fraud cases evidence relating to out-of-pocket damages should be admitted as relevant.”72 The case was remanded for a determination by plaintiff’s expert as to the value as represented by defendants.

The dissenting opinion proposed the adoption of flexibility into the measure of damages in misrepresentation cases. “The defrauded plaintiff should have the option of recovering either under the ‘benefit-of-bargain’ rule or the ‘out-of-pocket rule. In fraud cases, the purpose is to wholly indemnify the injured party.”73 Cited in the dissenting opinion is a leading Oregon case, Selam v. Shirley,74 which has, to date, given the most careful consideration to the subject of what damages plaintiff should recover in a misrepresentation case. It has been stated, by Prosser, that Selam v. Shirley has reduced the matter of fraudulent representation recoveries to four workable rules.

1. If the defrauded party is content with the recovery of only

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71 16 Wis. 2d 526, 114 N.W. 2d 818 (1962).
72 Id. at 534, 114 N.W. 2d at 822.
73 Ibid., 114 N.W. 2d at 823.
74 161 Ore. 582, 85 P. 2d 384 (1938), 91 P. 2d 312 (1939).
the amount he has actually lost, his damages will always be measured under that rule.

2. If the fraudulent transaction also amounted to a warranty, he may recover for loss of the bargain, because a fraud accompanied by a broken promise should cost the wrongdoer as much as the breach of promise alone.

3. Where the circumstances disclosed by the proof are so vague as to cast virtually no light upon the value of the property had it conformed to the representations, damages will be awarded equal to the loss sustained, and

4. Where the damages under the benefit-of-bargain rule are proved with reasonable certainty, that rule will be employed.75

As for specific performance with abatement, in misrepresentation circumstances, it has been stated that this particular remedy will not be available to the aggrieved purchaser where the false representations are collateral to the contract.76 The purchaser’s remedy in such a case is rescission or damages for misrepresentation.

On the other hand, the proportional abatement formula set forth in McFarlane v. Dixon77 varies from the one previously quoted in this article in that the “in the absence of fraud” terminology was deleted. Of particular interest is the fact that the McFarlane court, in support of the formula it had set forth, cited Darlington v. J. L. Gates Land Co.,78 wherein the following statement appears:

True, as stated by counsel for defendant, if the action is ex dilicto then the measure of damages is the difference between the market value of the land as it was and the market value as it would have been had it been as represented, while if the action is ex contractu it would be such fractional part of the whole consideration paid as the value of the timber [the piece to which title failed] bore to the whole purchase price, [value of the whole piece purchased]... 

One might argue that specific performance with abatement would be available where the vendor misrepresented the quantity of land contracted for. If so, it would appear to be limited to a specific performance action with a proration of the contract price. Notwithstanding the possibility of specific performance with abatement in misrepresentation cases, Benz v. Zobel79 is indicative of a theoretical objection to such an action where the contract is executory in nature:

There is a well established principle of law that a party defrauded may retain what he has received, stand to his bar-

77 176 Wis. 652, 657, 187 N.W. 671, 672 (1922).
78 151 Wis. 461, 463, 138 N.W. 72, 73, 139 N.W. 447 (1913). See Doctor v. Furch, 76 Wis. 153, 170, 44 N.W. 648, 652 N.W. 826 (1890) wherein the possibility of abatement is mentioned where fraud or mistake is present.
79 255 Wis. 542, 549, 39 N.W. 2d 713, 716 (1949).
gain, and recover for the loss caused him by the fraud. However, he cannot maintain an action for the original wrong practiced on him where with full knowledge of all the material facts he does an act which indicates his intention to stand to the contract and waive all right of action for the fraud. [Emphasis added]

In this respect, the above rationale of Benz v. Zobel would not seem to apply, as a waiver of the right to recover for the fraudulent conduct of the vendor, if purchaser's stopping or abandonment of performance was not reasonably practical, nor where the purchaser was unable to recede from the contract without prejudice.80

Charles J. Hartzheim

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