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MEASURE OF DAMAGES FOR FRAUD IN THE SALE OF REAL PROPERTY.—The plaintiff, Sarah L. Pedaltry, contracted with the defendant company's agent to purchase certain lots, the agent representing that he would resell the lots for her immediately at a profit. At the time of making the contract plaintiff turned over to defendant stocks as security for payment of the purchase price and a contract she held to purchase another lot. The lots were never sold for her. Later she contracted with a third party to purchase less valuable property for which her interest in these lots was taken as part payment. In an action for damages for fraud and deceit, plaintiff alleged that the defendant's agent made the false representations about procuring a purchaser in order to get her stock and sought to recover as damages its value plus interest. The trial court awarded plaintiff a judgment for \$16,997.64. On appeal the Appellate Court reversed the decision and remanded it for a new trial, holding that she was not entitled to recover for fraud and deceit in absence of a showing of value, if any, of the property which she received in exchange for her contract with the defendant, notwithstanding her testimony that she had "lost everything."¹

The promise of a vendor to resell property at a profit for a purchaser in order to induce him to buy and without any intention of performing is fraud.²

²⁵ MacPherson v. Buick Motor Co. (1916), 217 N. Y. 382; 111 N. E. 1050; Glanzer v. Shepard (1922), 233 N. Y. 236, 135 N. E. 275; Dickle v. Nashville Abstract Co. (1890), 89 Tenn. 431, 14 S. W. 896.

²⁶ Coggs v. Bernard (1703), 2 Ld. Raym. 909, 27 Eng. Rul. Cas. 238; Nolton v. Western R. Corp. (1857), 15 N. Y. 444, 69 Am. Dec. 623; Gregor v. Cady (1839), 32 Me. 131, 19 A. 108.

²⁷ This is true not only as between the contracting parties and strangers, but also as between the parties themselves. See the demand for liability on the independent contractee for injuries occasioned by the negligent actions of independent contractors in non-hazardous activity. Clarence Morris, *The Torts of an Independent Contractor* (1934), 29 Ill. Law Rev. 339; Roscoe T. Steffen, *Independent Contractor and the Good Life* (1935), 2 U. of Chicago Law Rev. 501.

²⁸ Ellis v. Lindmark (Minn., 1929), 225 N. W. 395; Dickle v. Nashville Abstract Co. (1890), 89 Tenn. 431, 14 S. W. 896; Skaggs v. Missouri-Kansas-Texas R. Co. (1934), 228 Mo. App. 808, 73 S. W. (2d) 302.

¹ Pedaltry v. George F. Nixon & Co. (Ill., 1937), 6 N. E. (2d) 290.

² Boulevard Land Company v. King (Cal. App., 1932), 13 P. (2d) 864.

The law is well settled that one who has been induced to enter into a contract by fraud may rescind the contract and recover back the consideration paid, or he may retain the money or property received thereon, and recover the damages sustained by the fraud.³ Of course, he has no cause of action unless the fraud has caused detriment,⁴ because fraud without resulting pecuniary damage is not grounds for the exercise of remedial jurisdiction, either equitable or legal.⁵

Where the defrauded party brings an action on the case for damages for deceit he has the burden of proof of the fraud and the damages caused thereby.⁶ There are two rules followed by courts in fixing damages for deceit. One, the "Out of Pocket" rule, allows the injured party to recover the difference in value between what he parted with under the fraudulent inducement and what he received.⁷ Thus he recovers his actual loss. The other, the "Loss of Bargain" rule, which is the weight of authority among state courts, allows him to recover the difference between the actual value of what he received and what he would have received if the representations had been true.⁸ Damages will never be the full consideration paid unless what is received in return is absolutely worthless.⁹ Usually what plaintiff receives is not without some value, however small it may be.

Where the suit involves consequential damages, courts allow recovery of such damages as naturally and proximately result from the fraud.¹⁰ In arriving at a verdict the court considers the original consideration given, the value of any personal or real property received in exchange therefor, the value of any interest in the original contract or property which is still retained,¹¹ any outlays legitimately attributable to defendant's conduct,¹² and any subse-

³ Kornblau v. McDermant (1916), 90 Conn. 624, 98 A. 587; Siltz v. Springer (1908), 236 Ill. 276, 85 N. E. 748; Ettlenger v. National Surety Co. (1917), 221 N. Y. 467, 117 N. E. 945; Sanders v. Hickman (Tex. Civ. App., 1921), 235 S. W. 278; 2 Sedgwick, Damages, 842; 27 R. C. L. 379; 12 R. C. L. 409.

⁴ Nunemacher v. Western Motor Transport Co. (Cal. App., 1927), 255 P. 266; Struve v. Tatge (1918), 285 Ill. 103, 120 N. E. 549; 2 Pomeroy, Equity Jurisdiction (4th Ed.), sec. 898.

⁵ Black, Rescission & Cancellation, sec. 37; 2 Pomeroy, Equity Jurisdiction (4th Ed.), sec. 898.

⁶ Roosevelt v. Mo. State Life Ins. Co. (1935), 78 F. (2d) 752; U. S. v. Mammoth Oil Co. (1926), 14 F. (2d) 705; Kusha v. Vankat (1930), 341 Ill. 358, 173 N. E. 343; Means v. Flanagan (1898), 79 Ill. App. 296; Motzkus v. Kamondy (1929), 248 Mich. 260, 226 N. W. 816.

⁷ Smith v. Bolles (1889), 132 U. S. 125, 10 S. Ct. 39; Sigafus v. Porter (1900), 179 U. S. 116, 21 S. Ct. 34; Hotaling v. Leach & Co. (1898), 247 N. Y. 84, 159 N. E. 870, 57 A. L. R. 1136; Peek v. Derry (1887), L. R. 37 Ch. Div. 541; McCormick, Damages (1935), 451; 57 A. L. R. 1137.

⁸ Glindemann v. Ehrenpfort (1915), 29 Cal. App. 87, 154 P. 481; Johnson v. Niles Invisible Door Check Co. (1921), 221 Ill. App. 65; Chesrown v. Black (1910), 155 Ill. App. 422; Siltz v. Springer (1908), 236 Ill. 276, 85 N. E. 748; McCormick, Damages (1935), 451, and cases cited; 57 A. L. R. 1143, and cases cited.

⁹ Chesrown v. Black (1910), 155 Ill. 422.

¹⁰ Hotaling v. Leach & Co. (1928), 247 N. Y. 84, 159 N. E. 870; Peek v. Derry (1887), L. R. 37 Ch. Div. 541; 57 A. L. R. 1137 ff.

¹¹ Crater v. Binninger (1869), 33 N. J. L. 513, 97 Am. Dec. 737.

¹² Medley v. Lamb (Tex. Civ. App., 1920), 223 S. W. 1048.

quent events or circumstances calculated to aid in forming a correct estimate.¹³ Just how far courts will go in allowing recovery of miscellaneous kinds of consequential damages depends on whether the contract theory of "contemplation of party"¹⁴ or usual tort theory of "proximateness of the result"¹⁵ is adopted as a measure.

The original doctrine, that in actions on the case the gist of the action itself is the showing of actual damage and, hence, that without proof of actual damage the action will fail and nominal damages even will not be allowed, is still followed by courts in actions for fraud and deceit.¹⁶ Thus where there is no actual damage proved there is no cause of action.¹⁷ To show actual damage it is necessary for plaintiff to give enough evidence to show the value of what he received and of what he lost, in order to show that he suffered damage,¹⁸ unless the loss is on the face of his claim.¹⁹ Otherwise the court does not know but that what he received was of equal or even greater value than that with which he parted.²⁰ Unless it was less, he has suffered no actual damage. For example, recovery has been denied for depreciation in the market value of iron where it was not shown how much was used or what was done with the remainder;²¹ for the full amount of notes purchased by fraud because it was not shown how a settlement, which was made on the notes, was made or what amount was paid;²² and for land on evidence that it was the "poorest land in whole country."²³ There have been many cases involving fraud in stock transactions in which recovery has been denied because of want of evidence of value to prove actual damage.²⁴

Now, it is repeatedly announced by courts that, where in an action for damages plaintiff establishes fact of loss, but not its amount, he may recover nominal damages.²⁵ Whether in cases of fraud and deceit, where loss or damage is an essential, merely establishing a substantial loss of an unknown

¹³ *Campbell v. Hillman* (1854), 15 B. Mon. (Ky.) 508.

¹⁴ *Hadley v. Baxendale* (1854), 9 Exch. 341.

¹⁵ *Smith v. Bolles* (1889), 132 U. S. 125, 10 S. Ct. 39.

¹⁶ *Bailey v. Oatis* (1911), 85 Kans. 339, 116 P. 830; *Alden v. Wright* (1891), 47 Minn. 225, 49 N. W. 767; *McCormick, Damages* (1935), 89.

¹⁷ *West Florida Land Company v. Studebaker* (1896), 37 Fla. 28, 19 So. 176; *Russell v. Industrial Transportation Co.* (1923), 113 Tex. 441, 251 S. W. 1034.

¹⁸ *Bingham v. Fish* (1916), 89 N. J. L. 688, 99 A. 337; 12 R. C. L. 423.

¹⁹ *Westerfeld v. N. Y. Life Ins. Co.* (1910), 157 Cal. 339, 107 P. 699.

²⁰ *North American Savings & Loan Association v. Phillips* (Colo., 1934), 31 P. (2d) 492; *Globe Yarn Mills v. Armstrong* (1926), 191 N. C. 125, 131 S. E. 416.

²¹ *Mueller Furnace Company v. Cascade Foundry* (1906), 145 F. 596.

²² *Blythe v. Simmons* (1914), 107 Miss. 510, 65 So. 571.

²³ *West Florida Land Company v. Studebaker* (1896), 37 Fla. 28, 19 So. 176.

²⁴ *Glindemann v. Ehrenpfort* (1915), 29 Cal. App. 87, 154 P. 481; *North American Savings & Loan Association v. Phillips* (Colo., 1934), 31 P. (2d) 492; *Carlson v. Burg* (1917), 137 Minn. 53, 162 N. W. 839; *Lams v. Fish* (1914), 86 N. J. L. 321, 90 A. 1105.

²⁵ *Van Velsor v. Seeberger* (1895), 59 Ill. App. 322 (condition of house falsely represented and deteriorated afterwards in numerous ways, but amount of damage not shown); *Gluck v. Hotchner* (1919), 176 N. Y. S. 756; *Sanders v. Hickman* (Tex. Civ. App., 1921), 235 S. W. 278; *Storseth v. Folsom* (1908), 50 Wash. 456, 97 P. 492; *Jesse v. Tinkham* (Wis., 1932), 239 N. W. 455; *McCormick, Damages* (1935), 91.

amount, rather than actual amount of loss, satisfies the requirement, to the extent of entitling plaintiff to nominal damages, is an open question. Earlier and stricter judges would have answered "no." But today the trend is toward allowing nominal damages and a prediction is that the answer will be "yes" in the future.²⁶

For example, a Washington Court gave nominal damages to plaintiff when he showed evidence of the cost of an entire road though only part of it was obstructed by defendant.²⁷ Another court allowed the defrauded party to keep the land and recover the full contract price therefor on an allegation that the land was worthless and without market value.²⁸

The decision of the trial court in the principal case seems to extend the doctrine of nominal damages to actions for deceit. In doing this they apparently find that the allegation, "lost everything," establishes substantial loss of an unknown amount. Thus they awarded plaintiff the value of her stock and interest which seems a fair verdict if "lost everything" means what the words suggest.

There are two possible ways to uphold the reversal of this decision. First, if the Appellate Court adheres to the strict rule that, in the absence of a showing of the amount of damages suffered, plaintiff can recover nothing, it was entirely correct in reversing the decision. No matter which rule would be employed in determining plaintiff's damages, in order to ascertain them in dollars and cents, the court must know what she received in this second transaction.

Now, on the other hand, if pecuniary damage *is* necessary in an action for fraud and deceit even to recover nominal damages, the Appellate Court was quite right in reversing the decision because without a showing of the extent of the failure of consideration in her transaction with the third party, she has not shown even the fact of pecuniary damage, much less the amount. In the absence of any showing in the case as to why the court demanded evidence of what became of the contract other than that she "lost everything," the writer submits that the second rationale is better.

M. J. W.

IMPLIED EASEMENTS—WAYS OF NECESSITY AS INVOLVED IN EMINENT DOMAIN PROCEEDINGS.—Defendant owned in her own right 120 acres of land to which the only means of ingress and egress to and from the public highway was by a private way running along the north side thereof and over certain land held by her and her husband as tenants by the entirety. In these circumstances the state, under a complaint which purported to deprive the defendant of all her right, title, and interest, condemned for forestry purposes a strip off the north side of the dominant estate which included the way in question. In the proceeding below the damages were assessed upon the assumption that the defendant was cut off from all access to the public way. Appeal by the State.

²⁶ Teets v. Hahn (1927), 5 N. J. Misc. 538, 137 A. 559; Douglas v. Ohio River R. Co. (1902), 51 W. Va. 523, 1 S. E. 911; McCormick, Damages (1935), 91.

²⁷ Storseth v. Folsom (1908), 50 Wash. 456, 97 P. 492.

²⁸ Lian v. Henry Bradford & Co. (1920), 209 Mich. 172, 176 N. W. 412.