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# Fraud in Realty Transactions

David S. Lake

# *Fraud in Realty Transactions*

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IN REAL ESTATE TRANSACTIONS, the law will protect the innocent, unwary, and sometimes stupid, buyer from fraud, misrepresentation and deceit. This article presents a summary of that law, categorized according to the specific matter misrepresented (*i.e.*, misrepresentations of value, income, size or quantity, and condition or quality).

## Value

The word *value* as applied to real estate, is the price which it will bring when offered for sale by one who desires, but is not obliged to sell, and when bought by one who is under no necessity to buy it.[1] Value can be stated as either fact or opinion.

In *McMullen v. Griggs*[2] an opinion on the value of land, both in its improved and unimproved state, was intentionally inflated in order to borrow money from plaintiff loan company. The court noted that the loan company, competent to judge the value of the property, had full opportunity to, and did, examine the property. Its decision was based on the fact that even though defendant stated the value untruthfully, the plaintiff had the opportunity and competence to determine value for itself.[3]

The defendant in *Spencer v. King*[4] represented that out-of-state land given as collateral security had a value far in excess of its true value. He did this contemporaneously with giving his promissory note for the exchange of plaintiff's real estate. The court, in its charge to the jury, said that even though an expression of value is untrue, it is not ground for fraud if honestly given. However, when the seller has superior knowledge, as he

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* B.A., Youngstown University; Director of Circulation, Industrial Publishing Corp., Cleveland; Fourth-year student at Cleveland-Marshall Law School of Baldwin-Wallace College.

[1] See 16 Ohio Jur. 2d Damages, section 70.

[2] 3 Ohio Cir. Ct. N. S. 504 (1902).

[3] See Belmont Mining Co. v. Rogers, 10 Ohio Cir. Ct. 305, 6 Ohio Cir. Dec. 619 (1895), where the court held that representations that a gold mine was valuable cannot be misrepresentations as they are only opinion.

[4] 3 Ohio N. P. 270, 5 Ohio Dec. N. P. 113 (1896).

did here, and expresses the value of his land as a *specific fact,* there may be a basis for an action for misrepresentation.[5]

If the vendor represents the value of his property truthfully and honestly, he can set any value.[6] In *Williams v. State of Ohio,*[7] the defendant was convicted of obtaining money by false pretenses. He had represented that the land he was selling was worth $11,000, where in fact, at the very most its value was $330. It was decided that if the statement of value *is* opinion, there can be no foundation for misrepresentation. But, if the statement is made as an existing fact when it is known to be false, an action for misrepresentation will lie.

Where the defendant misrepresented the value of land by stating that there was a house on it, the court said that the defense of *caveat emptor* is unavailable to one who states fact and not opinion. The speaker cannot escape liability on the ground that his statements were opinion if he went further and made specific representations purporting to be fact.[8]

A statement by a real estate agent that a certain sum was the best price that could be obtained was fact, not opinion.[9] But a statement that a certain sum is a "good price" is opinion and not actionable.[10]

**Income**

Cases illustrative of the law concerning misrepresentation of income arose, in the main, during the period when the Federal Housing and Rent Act of 1947 was in effect.[11]

Thus, in *Steiner v. Roberts*[12] the defendants, in an effort to

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[5] Shepherd v. Woodson, 328 S.W. 2d 1 (Mo. Sup. Ct. 1959); cf. Frankfort v. Wilson, 353 S.W. 2d 490 (Tex. Civ. App. 1961); where the seller stated that the land was a "valuable property." This was held to be only opinion. See Miller v. Protrka, 193 Ore. 585, 238 P. 2d 753 (1951) as to "trade talk."

[6] Chaney v. Cahill, 11 Ohio L. Abs. 472 (Ohio App. 1931); also Wilson v. Hicks, 40 Ohio St. 418 (1884); Boesch v. Guarantee Title and Trust Co., 18 Ohio L. Abs. 655 (Ohio App. 1935).

[7] 77 Ohio St. 468, 83 N. E. 802 (1908); Herrick v. State of Maine, 159 Me. 499, 196 A. 2d 101 (1963).

[8] Chapman v. Orrachio, 8 Ohio L. Abs. 250 (App. 1929); Manley v. Carl, 2 Ohio Cir. Ct. 161 (1900).

[9] Staley v. Harvey, 189 Tenn. 482, 226 S. W. 2d 88 (1949).

[10] *Ibid.*

[11] The term income is used also to mean rents, profits, etc. The cases later cited usually involve only one term used in its broad form to include all of the others.

[12] 72 Ohio L. Abs. 391, 131 N. E. 2d 238 (1955), case of first impression. This same problem has arisen in many jurisdictions at a much earlier date.

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sell their four suite apartment building represented that they were receiving forty-five dollars rent per month from each suite, but neglected to mention that the forty-five dollars per month was ten dollars over the maximum fixed by the Rent Act.

The general rule is that if the purchaser relies on his *own* knowledge (in the purchase), he cannot recover for a misrepresentation by the seller.[13] But the purchaser has a *right* to rely on a statement by the seller as to the income of the property being sold.[14] He need not make an investigation to determine the truth of the seller's statement. Carrying this reasoning one step further, the court ruled that even though the sellers inform the purchaser of the correct rental income, they have the additional duty to alert the purchaser to the fact that the rents being charged violate the maximum allowed by law.[15]

The court quoted approvingly from Section 592 of the Restatement of the Law of Torts:

> A statement in a business transaction which, while stating the truth so far as it goes, the maker knows or believes to be materially misleading because of his failure to state qualifying matter is a fraudulent misrepresentation.

Facts concerning income are not only material but go to the very heart of the transaction. Obviously, a buyer should be able to rely on the seller's facts regarding income, while the seller should have the duty to communicate complete information rather than half-truths.

The earlier cases set down the rule that false statements by a seller as to the income from real estate are to be treated as

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See Tucker v. Beazley, 57 A. 2d 191 (D. C. App. 1948); Borzillo v. Thompson, 57 A. 2d 195 (D. C. App. 1948); Fuhrman v. Farkas, 99 Cal. App. 2d 564, 222 P. 2d 105 (1950); Ceferatti v. Boisvert, 137 Conn. 280, 77 A. 2d 82 (1950), where the defendant *thought* that the rent was not over the legal maximum, so the court held that this was not misrepresentation; Greenberg v. Berger, 46 So. 2d 609 (Fla. 1950). Contra: the purchaser must check himself to determine the legal maximum.

[13] Wilkinson v. Root, Wright 686 (1834).

[14] Nelson v. Buck, 6 Ohio L. Abs. 279 (Ohio App. 1927); Estl. v. Fabian, 6 Ohio L. Abs. 703 (Ohio App. 1928); Henschel v. Schreiber, 72 N. E. 2d 107 (Ohio App. 1946); see 27 A. L. R. 2d 41 et seq.

[15] Henschel v. Schreiber, *ibid.;* the seller must inform the buyer that a five year lease at $200.00 per month is worthless as the tenant has moved out, Corder v. Laws, 148 Colo. 310, 366 P. 2d 369 (1961)

statements of fact, and if false may form a basis for fraud.[16] This is followed even though the buyer is a businessman and could have investigated.[17] However, it has been held that a statement as to future income is only opinion and as such is not actionable.[18]

### Size or Quantity

A statement that a piece of property is of a certain size, even though mistaken, is a misrepresentation.[18] In *Yaru v. Alliance First National Bank*[19] the seller stated, mistakenly, that the lot he was selling had a 50-foot frontage where in fact it was only forty-nine feet. This was held to be not a mutual mistake, as the seller should have known the true size before making any representations concerning it.[20]

An earlier decision held that where a buyer was shown property with a building on it, which turned out to be partly on a public street, there could be damages recovered for misrepresentation.[21]

In *Douglas v. Plotkin*[22] the seller showed the buyer a lot which he said was 20′ x 100′ and pointed out a barn which was supposedly on the property. It turned out that the lot was only 20′ x 80′ and that the barn was on an alley later opened by the city. The court recited what are now the elements of an action for misrepresentation,[23] adding, "Where a person claims the

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[16] Nimbs v. Potter, 5 Ohio L. Abs. 372 (App. 1927); Zill v. Kocham, 9 Ohio L. Abs. 71 (App. 1912); see Spiess v. Brandt, 230 Minn. 246, 41 N. W. 2d 561 (1950) where the seller falsely represented that he was making "good money"; Kotz v. Rush, 218 Ark. 692, 238 S. W. 2d 634 (1951).
A statement that farmlands had produced from 350-450 tons of hay per season is fact and not opinion, Weitzel v. Jukich, 73 Idaho 301, 251 P. 2d 542 (1952).

[17] Johnson v. Tilden, 23 Ohio Cir. Ct. N. S. 161, 41 Ohio Cir. Dec. 180 (1912); Molnar v. Beriswell, 122 Ohio St. 348, 171 N. E. 593 (1930).

[18] Lincoln v. Keene, 51 Wash. 2d 171, 316 P. 2d 899 (1957); Lanning v. Sprague, 71 Idaho 138, 227 P. 2d 347 (1951).

[19] 47 Ohio L. Abs. 439, 72 N. E. 2d 919 (App. 1945).

[20] See Benefield v. Dailey, 33 Ala. App. 376, 34 So. 2d 26 (1948).

[21] Pierce v. Tiersch, 40 Ohio St. 168 (1883); Stone v. Farnell, 239 F. 2d 750 (9th Cir. 1956).

[22] 13 Ohio Cir. Ct. 461 (1897); see Allen v. Shackelton, 15 Ohio St. 145 (1864), where a lot was untruthfully represented to have a hotel on it; Schonrock v. Taylor, 212 S. W. 2d 260 (Tex. Civ. App. 1948).

[23] Recovery can be had where the representations are: material, substantial, affecting the identity, value or character of the subject matter; false; reasonably relied upon by the buyer and, an inducement to the transaction.

benefits of a contract he has induced . . . by means of misrepresentations, even honestly made, there can be recovery. . . ."

Another problem is whether an incorrect statement of quantity in a legal description constitutes a misrepresentation and grounds for damages.

In *Brumbaugh v. Chapman*[24] the deed stated the boundaries of a plot by metes and bounds and also stated an acreage. It turned out that the actual number of acres was less than stated in the deed. The court held that the acreage stated in the deed, rather than being a representation or warranty, is ". . . in connection with, and as a part of . . ." the description of the land conveyed.[25]

To what effect is the statement that the land contains "x" number of acres "more or less"? The court, in *Ketchem v. Stout*,[26] replied that the buyer will not be entitled to damages, particularly if the lesser quantity is equal in value to the price paid. However, if the seller actually misrepresents, or conceals facts, this rule doesn't hold.

### Quality or Condition

One of the most illuminating pronouncements concerning this area came in *Traverse v. Long*.[27] In this case defendant listed his house for sale with a real estate broker. Plaintiff met this broker to negotiate a purchase. On an inspection tour of the premises plaintiff seeing some patched spots in the driveway,

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[24] 45 Ohio St. 368, 13 N. E. 584 (1887). The court here does note that if the deficiency is considerable, this may be evidence of fraud or mistake. It also thinks that the proper way to guarantee specific acreage is by warranty.

[25] *Id.* at 370 and 586; see Libby Creek Logging Inc. v. Johnson, 225 Ore. 336, 358 P. 2d 491 (1960); Heise v. Pilot Rock Lumber, 222 Ore. 78, 352 P. 2d 1072 (1960).

[26] 20 Ohio 453 (1851); in Fisher v. Zimmer, 286 N. Y. App. Div. 1129, 146 N. Y. S. 2d 170 (1955), the court determined that the variance in acreage was material to both parties. See Nathanson v. Murphy, 132 Cal. App. 2d 363, 282 P. 2d 174 (1955).
cf. Brodsky v. Hall, 196 Md. 509, 77 A. 2d 156 (1950), where the court considered whether the statement "one acre more or less" was of essence to the sale.

[27] 165 Ohio St. 249, 135 N. E. 2d 256 (1956); followed in McConnell v. Mantle, 88 Ohio L. Abs. 313, 179 N. E. 2d 179 (1961); see 55 Am. Jur. 551, sec. 79; 91 C. J. S. 908. Buist v. C. Dudley DeVelbiss Corp., 182 Cal. App. 2d 325, 6 Cal. Rptr. 259 (1960); Cohen v. Vivian, 141 Colo. 443, 349 P. 2d 366 (1960); Asburn v. Miller, 161 Cal. App. 2d 71, 326 P. 2d 229 (1958); Blackman v. Howes, 82 Cal. App. 2d 275, 185 P. 2d 1019 (1947).

asked if the driveway was on firm ground. (The property abutted a ravine and the driveway was built up from fill.) Though the testimony was in conflict, it seems at least that the broker represented, in his opinion, that the driveway footing was sound. Reversing the appellate court, the Supreme Court held that where conditions are open to inspection the principle of *caveat emptor* applies to sales of real estate:

> Where . . . the purchaser has the opportunity for investigation and determination without concealment and hindrance by the vendor, the purchaser has no just cause for complaint *even though there are misstatements and misrepresentations by the vendor not so reprehensible in nature as to constitute fraud* (italics added).[28]

While the Court seems to condone *small* misrepresentations (whatever those may be), the decision must be looked at in light of the fact that it should have been obvious to even a child that the driveway was not on firm ground.

In not so broad language the court in *Dieterle v. Bourne,*[29] said that a buyer who didn't inspect the property carefully, when given the opportunity, is precluded from any recovery, even where there are misrepresentations.

What is the situation when a defect in the property, if pointed out to the buyer, would squelch the sale? *Goodal v. Hunt,*[30] ruled that the mere relation of buyer and seller *does not* create a duty of disclosure.

This rule was used to good advantage in *Shubert v. Neyer.*[31] The seller said nothing to the buyer about two previous landslides in the backyard of the residence purchased. The court, in a lengthy opinion finally ruled that "mere silence is not a representation." Further, that where there is no duty to speak, "silence as to a material fact does not of itself constitute fraud." [32]

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[28] *Id.* at 252 and 259.

[29] 57 N. E. 2d 405 (Ohio App. 1943); Bowlds v. Smith, 114 Ohio App. 21, 180 N. E. 2d 184 (1961); Riley v. White, 231 S. W. 2d 291 (Mo. App. 1950). cf. Bryant v. Troutman, 287 S. W. 2d 918 (Ky. App. 1956); and Finerock v. Carney, 263 P. 2d 744 (Okla. Sup. Ct. 1953), where the court held that *caveat emptor* does not apply where the vendor conceals defects.

[30] 6 Ohio Dec. Reprint 897 (Ohio Dist. Ct. 1880).

[31] 165 N. E. 2d 226 (Ohio App. 1959).

[32] Silence in representing farmlands: Manley v. Carl, *supra,* n. 8, where it was said that as long as the seller doesn't say anything with respect to con-

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The court implied, in *Pumphry v. Quillen,*[33] that where one asserts a fact which implies knowledge of the truth of that fact, it may be found that there was intent to deceive. In this case the seller made representations concerning the construction of the walls of a residence. It turned out that the walls of the house were a mixture of clay and straw covered with tar on the outside and plaster inside. The court struck down the defense that the defendant did not know of what materials the walls were constructed.

Where the seller orally represented that the plumbing and sewers were in excellent condition and had passed a local inspection, the court held that an action would lie. They said that where the seller makes a positive statement of fact, which he knows to be untrue, and upon which the buyer relies, an action for damages will lie.[34]

In *Fiebig v. Brofford,*[35] the seller misrepresented the construction of his house. In truth, the shingles and the flashings were faulty. The court, citing *Gleason v. Bell,*[36] reiterated the rule that a positive statement of fact implies knowledge of its truth. Where the seller makes a statement of fact, not knowing whether it is true or false, he puts himself in the same position as one who intentionally misstates a fact. This rule may seem needlessly harsh upon the seller. It does have the effect of protecting a buyer (who usually has less knowledge concerning the real estate) from the overzealous seller, who will say anything or agree to anything, just to make a sale.

Where the seller represents that a house is constructed of the best materials and in workman-like manner, and the buyer,

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ditions, he's in the clear. See also Kallgren v. Steele, 279 P. 2d 1027 (Cal. App. 1955); but see Lingsch v. Savage, 213 Cal. App. 2d 729, 29 Cal. Rptr. 201 (1963) where the court ruled that a seller, who knows of facts not accessible to the buyer which will affect the desirability of the property, has a duty to disclose such information.

[33] 165 Ohio St. 343, 135 N. E. 2d 328 (1956); Sullivan v. Ulrich, 326 Mich. 218, 40 N. W. 2d 126 (1949).

[34] Morris v. Miller, 104 Ohio App. 461, 149 N. E. 2d 751 (1957).

[35] 58 Ohio L. Abs. 494, 97 N. E. 2d 52 (1950).

[36] 91 Ohio St. 268, 110 N. E. 513 (1915); also 88 Ohio App. 461, 77 N. E. 2d 683 (1950).

after moving in, finds a multitude of defects,[37] a jury question is presented as to which of the defects were latent.[38] The buyer waives all defects which a normal and proper inspection would have revealed.[39]

One of the usual arguments advanced by a seller being sued for misrepresentation is that the deed includes all prior negotiations. This is the general rule as enunciated in *Galvin v. Keen,*[40] but the court went further to say that the rule ". . . does not apply, however, to matters not consummated by the delivery of the deed. The conveyance of the land was but a part performance of the undertaking." [41]

When a home is purchased during construction, and the plans provide for a concrete floor of four inches in the basement but the floor is only one to two inches in depth, damages can be had. This was the problem in *Rapp v. Murray.*[42] The seller claimed that the contract with all covenants was merged in the deed. The court rejected this,[43] demolished the seller's contention, and concluded ". . . that the acceptance of a deed to the land upon which a building was in process was not, ipso facto, a bar to an action for breach of the terms of the contract to build. [44]

Where there was a covenant in the contract for the sale of real estate that all assessments were paid, the making of the deed

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[37] Included among the defects were: well of insufficient depth, green lumber, cracked and sagging walls, ruined paint, warped doors and windows, no metal lath in the corners, defective furnace, leaky roof, tar paper on garage roof instead of shingles, garage cement floor cracked and inadequate electrical circuits.

[38] Dennis v. Hoffman, 102 Ohio App. 283, 143 N. E. 2d 155 (1956); Rehr v. West, 33 Ill. App. 160, 76 N. E. 2d 808 (1948).

[39] *Ibid.*

[40] 100 Ohio App. 100, 135 N. E. 2d 769 (1954); Brint v. Doyon, 7 Ohio L. Abs. 427 (App. 1929).

[41] *Id.* at 104 and 772. Referring to a contract for the sale of land and construction of a house upon it.

[42] 112 Ohio App. 344, 171 N. E. 2d 374 (1960); see Druid Homes Inc. v. Cooper, 272 Ala. 415, 131 So. 2d 884 (1961) where it was held that there is no implied warranty that improvements on the property were constructed in a good workmanlike manner; Coutrakon v. Adams, 39 Ill. App. 2d 290, 188 N. E. 2d 780 (1963); Shapiro v. Kornicks, 103 Ohio App. 49, 124 N. E. 2d 175 (1955).

[43] Morris v. Whitiker, 20 N. Y. 41 (1859); see Triplett v. Ostroski, 103 Ohio App. 290, 145 N. E. 2d 209 (1957).

[44] Rapp v. Murray, *supra,* n. 42 at 347, 376.

did not act as a defense for the breach of those covenants.[45] The court said that a covenant to convey is performed by the conveyance, but covenants relating to other matters are not thus performed or satisfied.

A question constantly raised is whether a given statement is fact or opinion. When the seller, an experienced contractor, represented that the house to be sold was well built, the court ruled that this was not opinion but fact.[46] The general rule that opinion is not actionable will be modified when the parties are not equally matched in terms of knowledge or experience.[47]

### Other Matters

When a contract for the sale of real estate states that a lot has sewer, gas, and water service, and that all expenses for them have been paid, it was held to constitute a representation that there was service to the lot itself, and not just to the street.[48] The court further held that an action for damages could be maintained even though the representation was not in the deed.

In *Lefferson v. Burnett,*[49] the seller represented that the water supply (from a well) was ample for all household and yard needs. When the well failed, the buyer sued for damages claiming misrepresentation. The court pointed out that where the seller makes a positive statement of fact which he doesn't know to be true he is liable for misrepresentation if it turns out to be false.

The buyer relied upon the seller's representations that his sewage system was a septic tank buried in the front yard. In

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[45] Mayer v. Sumergrade, 111 Ohio App. 237, 167 N. E. 2d 516 (1960); Rhenish v. Deunk, 118 Ohio App. 63, 193 N. E. 2d 295 (1963); Welsh v. Tonti, 82 Ohio L. Abs. 45 (1958), 163 N. E. 2d 698.

[46] Bolduc v. Therrien, 147 Me. 39, 83 A. 2d 126 (1951); Groening v. Opsata, 323 Mich. 73, 34 N. W. 2d 560 (1948).

[47] Doran v. Milland Development Company, 159 Cal. App. 2d 322, 323 P. 2d 792 (1958); Ramel v. Chasebrook Const. Co., 135 So. 2d 876 (Fla. App. 1961).

[48] Fries v. Gannon, 9 Ohio App. 387 (1918).

[49] 69 Ohio L. Abs. 28, 123 N. E. 2d 533 (1952); see also Kerr v. Parsons, 83 Ohio App. 204, 82 N. E. 2d 303 (1948); Rowell v. Jarvis, 148 Me. 354, 93 A. 2d 485 (1952); Poley v. Bender, 87 Ariz. 35, 347 P. 2d 696 (1959) noted that adjectives such as "good," "sufficient" and "proper" used to describe the water supply of a ranch were only opinion and not actionable.
Statements regarding water supply are considered *fact* and *material,* Clay v. Brand, 365 S. W. 2d 256 (Ark. Sup. Ct. 1963); Zeleny v. Karnosh, 224 Ore. 419, 356 P. 2d 426 (1960).

fact, there was only a concrete tank, (not a septic tank), sitting on land still owned by the seller; but not in clear view to the buyer. The court held that the buyer could recover all reasonable damages since the defect was not discoverable by a normal inspection.[50]

In *Drew v. Christopher Construction Company, Inc.*,[51] the court rejected the seller's contention that evidence of misrepresentation should not be admitted to contradict the contract of sale. Evidence may be admitted to show material misrepresentation with respect to the subject matter which induced the buyer to enter into the contract (to his injury).

Suppose the seller claims that other sublots in a particular allotment had been sold at a price higher than he was now selling? *Ketchum v. Phillips*[52] was such a situation. Seller represented that she had sold other sublots for $20 per foot and that they were worth $25 per foot. However, because she was a good soul, she would sell this lot now for only $13 per foot. The truth of the matter was that she had sold a large number of sublots for only $12 a foot. The court held that the previous price paid for a lot was not a matter of opinion but was an averment of fact.

Similarly, when the seller misrepresents the cost price of land when such price is the basis for fixing the present selling price, an action for damages may be maintained.[53]

An area which has caused the courts concern arises when the seller misrepresents the law. A representation of law is considered to be opinion only and will not support an action.[54] But,

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[50] Grau v. Kramer, 67 Ohio L. Abs. 445, 108 N. E. 2d 368 (1952); Mosser Acceptance Co. v. Perlman, 47 So. 2d 296 (Fla. 1950); Kraft v. Lowe, 77 A. 2d 554 (D. C. App. 1950), where the seller neglected to tell that his plumbing was connected to a septic tank in violation of the building code. McWilliams v. Barnes, 172 Kan. 701, 242 P. 2d 1063 (1952).

[51] 140 Ohio St. 1, 41 N. E. 2d 1018 (1942); the contract read ". . . buildings and their appurtenances thereto in their present condition." The dwelling had no water supply, contrary to seller's representations.

[52] 4 Ohio Dec. Reprint 81 (1878); in Smith v. Patterson, 33 Ohio St. 70 (1877), the price bid by others on a construction job was misrepresented to the plaintiff.

[53] Bryant v. Stohn, 260 S. W. 2d 77 (Tex. Civ. App. 1953), sale of oil royalty acreage; Martin v. State, 200 Miss. 142, 26 So. 2d 169 (1946), oil syndicate selling shares on pro-rata basis.

[54] Mionie v. 341 Grand Street Corporation, 74 N. Y. S. 2d 69 (N. Y. C. City Ct. 1947), where the seller misrepresented the zoning laws.

the courts have been ingenious in handling cases where the buyer has been misled by the seller's statement of the law. In *Bobak* v. *Mackey*[55] the seller represented that the building was in a zone which allowed light manufacturing. It was not. The court said that the classification of a given parcel of land to a use zone was a matter of law, *but* misrepresentation of the zone in which the property was situated was fact and will support an action for damages.

## Damages

No matter what specific item has been misrepresented, the measure of damages is the same; the buyer may recover the difference between the value of the property as represented and its value as it actually exists.[56] In a case where the income of a rooming house was substantially misrepresented to the buyer, the court allowed recovery of the difference between the value of the property if the income had been as represented and its value with the true income.

Punitive damages may be awarded where the seller was motivated by actual malice. In *Waters* v. *Novak*,[57] the seller's sole reason for selling was lack of an adequate water supply. He represented the opposite to his buyer. The court held that if the representations were intentionally false, and if the seller was motivated by actual malice, the jury may consider punitive damages.

## Conclusion

In dealing with misrepresentation, one has clearly to separate fact from opinion. The submission of a mere opinion, however wrong, does not give a cause of action. There will be borderline cases where the distinction between fact and opinion is hard to draw. The seller may decidedly weaken his defense when he wrongly claims or implies that his opinion is backed up by facts.

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[55] 107 Cal. App. 2d 55, 236 P. 2d 626 (1951); see Sorenson v. Gardner, 140 Colo. 317, 334 P. 2d 471 (1959); Pearson v. Allen, 150 Cal. App. 2d 638, 310 P. 2d 688 (1957); Chacon v. Scavo, 145 Colo. 222, 358 P. 2d 614 (1960).

[56] Mohler v. Baker, 88 Ohio App. 461, 97 N. E. 2d 683 (1950); Henschel v. Schreiber, supra note 14; Linerode v. Rasmussen, 63 Ohio St. 545, 59 N. E. 220 (1900).

[57] 94 Ohio App. 347, 115 N. E. 2d 420 (1953).

On the other hand, not every misstatement of facts will be actionable; an honest error will be a valid defense. Likewise, the buyer may lose his right to recovery when he acted in disregard of his own knowledge. He will, however, recover, when the seller by his fraudulent statements has induced him to accept the offer. Fraud refers not only to positive statements but also to the wilful suppression of a material fact. The need to disclose facts may be balanced by the buyer's duty to inspect, but the buyer can claim recovery when the seller, through deliberate falsehoods or malicious silence, has tricked him into an undesirable deal.