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A SYNTHESIS OF THE LAW OF MISREPRESENTATION

By Fowler V. Harper* and Mary Coate McNeely†

I. INTRODUCTION

Several important contributions have been made to the subject of responsibility for misrepresentation, materially aiding in an understanding of the various fragments of the common law which govern the subject. It is believed that they throw sufficient light on the entire subject to make some effort at synthesis profitable. They suggest the possibility of attempting to formulate a major issue in misrepresentation cases, and investigating the applicability of the several segments of the law to the issue as thus framed.

Among these contributions is that of Professor Smith¹ who, in discussing the question of liability for the negligent use of language, contended that liability should be imposed upon a negligence basis whenever the defendant has offered the misinformation gratuitously, and when it was the sort of misstatement likely to cause substantial pecuniary loss. This general argument has found favor with the courts of some states.² Some years later Professor Williston³ considered the case of Derry v. Peek⁴ in relation to the English rules of implied warranty of a vendor's title to a chattel, the warranty of quality, the liability of an agent who had misrepresented his authority, estoppel by representation, and the rule established by a large number of American cases imposing liability in certain situations for an honest and non-negli-

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¹Smith, Liability for Negligent Language, (1900) 14 Harv. L. Rev. 184.
⁴(1889) 14 A. C. 337.
gent misrepresentation although the action were in form one of deceit. He contended that there is an inconsistency among these various rules resulting entirely from the earlier forms of pleading at common law, and that the toleration of this inconsistency today is a reproach to modern legal science. He suggested as an "harmonious doctrine" a uniform rule of liability for misrepresentation. Professor Bohlen\(^6\) took issue with this thesis, and justified the variations of liability in three types of misrepresentations, his position being that the doctrine of Derry v. Peek,\(^6\) requiring scienter, should be confined to actions for deceit; that liability for negligent misrepresentations be recognized as deriving from the general principles and considerations of the law of negligence; that liability for innocent (that is, unconscious and non-negligent) misrepresentations, be treated as an application or extension of the law of warranty. In 1930, Professor Carpenter,\(^7\) reviewing the positions taken by these three preceding writers, carried forward the general contention made by Bohlen, that negligent misstatements should be governed by rules analogous to those applicable in actions for harm negligently caused to person or tangible property, and vigorously answered Williston's argument for a uniform rule of liability in all cases of misrepresentation. He contended, in substance, that in certain situations justice requires the absolute liability for which Williston argued, whereas in others, fairness seems to require liability only when the misstatement was negligently or consciously made.

Professor Weisiger,\(^8\) in 1930, suggested that the three types of liability and the rules governing them were necessary adequately to govern the variety of relations disclosed in the misrepresentation cases. The manifold form and character of business relations, the interests involved in these transactions, and the positions of the parties present situations which require a graduation of severity in legal responsibility for misstatements.

"In conclusion," says he, "it is believed that three types of liability for misrepresentation ought to be recognized. The nature and relative value of the interests, the plaintiff's opportunity for protecting his interest, the exigencies of business practice and

\(^{6}\)Bohlen, Misrepresentations as Deceit, Negligence or Warranty, (1929) 42 Harv. L. Rev. 735.

\(^{6}\)(1889) 14 A. C. 337.

\(^{7}\)Carpenter, Responsibility for Intentional, Negligent and Innocent Misrepresentation, (1930) 24 Ill. L. Rev. 749.

social customs and the relations existing between the parties should
determine in which class a case will fall."9

Dean Green,10 placing his usual emphasis upon the agencies for
the administration of legal precepts, pointed out the elasticity
afforded by the various doctrinal devices thus available. He seems
cotent to leave the matter in this fluid state.

"Perhaps something can be done by way of formulating clearer
hypotheses, but with types of transactions demanding a range from
the strictest warranty to mere good faith or reasonable belief, or
even less, it would be impossible to make any general formula
which would cover them all. On the other hand, a series of
formulas for different types of cases as variant as human con-
duct itself would necessarily be confusing and soon come to
appear contradictory."11

With a consideration of these various treatments of the frag-
mentary law of misrepresentation in the background, it is believed
that it may be possible to uncover some ideation and common
judicial psychology underlying the apparently inconsistent and
variant cases on misrepresentation.

II. A RATIONALE OF LIABILITY FOR MISREPRESENTATION

Legal liability is normally imposed only when the interests
of one party are so invaded that good social engineering requires
governmental protection. In cases involving misrepresentation,
the plaintiff who has entered into a business transaction with the
defendant or a third person has failed to obtain the advantages
which, from the defendant's misstatements, he has been led to
expect. Whether the invasion of this interest is actionable re-
quires an estimate of what, under the circumstances, the plaintiff
was justified in expecting—not only as to the profitable or non-
profitable results of the transaction, but as to the accuracy and
basis of the defendant's statements.

A person in a business transaction cannot have insurance of
profit unless he enters into an express agreement therefor. He
must take some business risks. "Business risks," however, are of
two kinds: those which arise from the economics of the transac-
tion, and those which result from ignorance of facts of economic

L. Rev. 866.

10Green, Deceit, (1930) 16 Va. L. Rev. 749; Green, Judge and Jury
(1930) 280.

11Green, Deceit (1930) 16 Va. L. Rev. 749, at 761, note 10; Green,
Judge and Jury (1930) 280.
significance and inability to ascertain them with accuracy. As to the first type of risks, the entrepreneur must rely upon judgment—his own or someone else's; as to the latter, he must rely upon knowledge—his own or someone else's. When he relies upon another's statements, whether of judgment or fact, and the enterprise is not satisfactory in result, a legal problem may arise as to whether he was justified as a practical matter in such reliance. The propriety of the plaintiff's expectation involves the business ethics and mores and those general canons of fairness and decency which affect that standard of judgment which, for want of a better name, we call common sense. The interests of a person are protected only when his conduct so conforms to accepted social standards of propriety and common sense that he is regarded as entitled to legal protection. The conduct of the person who suffers loss sometimes is compared to the conduct of the person who causes it, and this comparison is made in the light of the relationship between the parties. Usually one party cannot recover from another unless he has exercised at least as much care for his own welfare as the other party has exercised for it, although in some situations the moral culpability of the defendant may offset the plaintiff's lack of self-protective conduct.  

The present problems may be stated by positing the following question: What does common sense, in view of the accepted business and social mores of the community, entitle one person to expect from another who purports to furnish information or make

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12 While there are frequent intimations in the law of misrepresentation of the major issue of policy as it is presented in some particular aspect, there is no systematic treatment of the entire matter, and little or no effort at coordination of the various technicalities of the law in which this issue is involved. Perhaps the most suggestive synthesis is the treatment of the American Law Institute where a number of rules are arranged under the subheading "Justifiable Reliance." (Restatement of Torts, Tentative Draft No. 13, Secs. 613-621). Here the Reporter has treated the rules pertaining to materiality, misrepresentation by statements of opinion, the plaintiff's duty of investigation, statements of law, and one aspect of the effect of a misrepresentation of intention. The rules governing scienter, however, as well as the rules governing negligent misrepresentations are not included under this head. The rules governing liability for innocent misrepresentation are not included at all in the Restatement, because, no doubt, of the reporter's views as expressed elsewhere (Bohlen, Misrepresentations as Deceit, Negligence or Warranty, (1929) 42 Harv. L. Rev. 735) that these rules are not properly to be classified as rules of the law of Torts. Moreover, the limitations of the Restatement project obviously preclude any formulation of the policy reflected in the legal propositions stated, or any correlation of the effects of these propositions in making effective a consistent program of policy. In other words, since the Restatement is primarily a project in the rational science of law, it does not make explicit the social and economic policies latent in legal formulae.
statements for his guidance in a business transaction? To paraphrase the issue, how far is it desirable and practicable for the law to permit reliance by one party upon another's statements? In so formulating the issue, both ethical factors and considerations of administrative workability are blended. It is believed that this question of *practically justifiable reliance* is susceptible of four distinct answers, varying as the relationship between the parties discloses different inarticulated assumptions as the basis for their conduct.

First, there are situations in which a person endowed with ordinary intelligence will seldom be expected to rely in any respect whatever upon a statement made by another, although such statement apparently is intended to influence his action in a business or commercial transaction. Consequently, he is not practicably justified in relying thereon. He may not rely upon the truth or validity of the statement, nor upon the care or competence of the other to insure its accuracy, nor, indeed, even upon the honesty of the person who makes it. This rule may contain low ethical implications, but it most certainly conforms with common sense, as reflected in popular psychology. Therefore, it may be said to conform to the law and popular morality, although it may not conform either to ideal justice or to ethics. It represents one of the not infrequent situations in which the practical limitations of law and morality preclude a coincidence of their rules with those of justice and ethics.

Among other reasons for this divergence is the practical difficulty of determining the exact facts of the situation and the corresponding opportunity for fraud and injustice. Difficulty of administration requires a workable rule. It is not often that one person is not entitled to rely at least upon the sincerity and honesty of another who makes a representation in a business transaction. In the few situations in which this is the case, usually "puffing" or "trade talk," consisting of misrepresentations of opinion by an adverse party, it is so unlikely that any person would, in fact, rely upon the misrepresentation that the law:

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ignores the very rare case in which someone may actually have done so. Common experience suggests so strongly that no sensible person would believe such a representation, that a particular plaintiff will not be permitted to convict himself of such folly. Moreover, there is the attitude, which is not confined to the law of misrepresentation, that a person may be so great a fool that the law cannot protect him even from a knave. Then, too, there are situations in which there is little to be gained by the reliance of one party on statements made by the other. Indeed, as a practical matter, it is commonly believed that such reliance should be discouraged, the mores requiring independence of judgment on the part of both sides to the transaction.

In the second place, there are situations in which the relationship of the parties is such that one person in the exercise of that minimum amount of caution which the law requires is practicably justified in relying only upon the sincerity and honesty of the person who makes the representations to him. He should not expect any particular degree of competence or care from the other, and a fortiori he may not rely upon the other's infallibility. He may expect honesty but no more; he must take the information for what it is worth, and this requires that he assume the risk not only of its accuracy, but of the lack of care and caution on the part of the other to assure such accuracy.

In still other situations, relationships exist which are generally accepted in the community as carrying definite obligations to employ reasonable care to avoid misleading others. In such cases, each party may properly assume that the other will not make representations which he has no reasonable ground to believe to

14A similar situation is presented in the case of liability for innocent misrepresentations where one, though not the only factor that apparently has influenced the courts is the fact that such cases disclose either a type of situation in which the defendant would normally know the facts, or a case in which he has asserted complete knowledge. In either case, the difficulty of determining his exact state of mind and the consequent opportunity for injustice in part induces the courts, as a practical matter of administration, to ignore the exceptional case. This is indicated by such formulae as "the defendant will be presumed to know" the facts which he misrepresented. The question of actual fraud becomes exceedingly subtle in many respects, with a corresponding increase in difficulty of determination. The psychological gradations may be almost imperceptible between knowledge of falsity, knowledge of ignorance of truth or falsity, and doubt as to ignorance thereof; that is, certainty of falsity, certainty of uncertainty, and uncertainty of uncertainty. In other words, a person may consciously make a false statement or he may know that he doesn't know the truth of what he states, or he actually may not know whether he knows. While an introspective analysis may be carried to this point, it is obviously impracticable to expect its legal application to the state of another person's mind.
be true. These assumptions are justifiable as conforming to the ethics of business practice. Here the law quite properly requires the parties to make good the tacit assumptions upon which they deal. Each party is entitled to expect from the other honesty, ordinary care, and reasonable competence in furnishing the information exchanged concerning the subject matter of the relationship.

Finally, there are situations in which action is commonly taken in business negotiations in reliance upon the assumed existence of certain facts. Business proceeds not upon the assumption that representations are merely honestly and cautiously made, but that they are true. These are situations in which the party making the representations is in a position which gives him exclusive access to the facts, or the manner of giving the information constitutes such an assumption of complete knowledge that the psychological effect upon the other is calculated to divert that self-protective investigation which would normally be made. Business would be greatly hampered, and human nature ignored were the law not to lend its sanction to enforce the prevailing assumptions of accuracy thus made. This attitude may be the result of the growth of commerce and industry from its former individualistic basis to its present vast and impersonal form.

"With the acceleration of business generally," says Dean Green,15 "as well as the standardization of the various types of transactions the factors which control judgment demand more and more certainty and precision in sales and credit transactions."

It is believed that the bulk of the case material will indicate that courts have proceeded as if they were following some such analysis as the one suggested. The issues frequently are clouded by narrow doctrinal discussions, but the application or misapplication of formulae usually has led to proper results. In some instances, however, the case law seems to defy clarification. It sometimes happens that courts impose liability in one situation although the misinformation was innocently given, but require scienter in another case which seems indistinguishable from the former. In such cases there is often apparent no consciousness of inconsistency. In others, on the apparent assumption that the explanation is entirely satisfactory, the discrepancies are attributed to the character of the action, thus confirming Maitland's observation that although the forms of action are dead, their ghosts haunt us still.

15Green, Deceit, (1930) 16 Va. L. Rev. 749; Green, Judge and Jury (1930) 280.
It is also to be observed that the problem of the extent of liability seems susceptible of the same rationalization. Here again, the various relationships of the parties reveal the interests which the law seeks to protect and the loss against which they are to be protected. Thus, in some situations it is the purpose of the law to insure to one of the parties the benefits which he is justified in expecting from the transaction which he is negotiating. In others, although the law seeks to protect a party against certain losses resulting from his justifiable reliance upon representations made by the other, there is no particular policy which requires assurance of the advantage which he had hoped to gain. Here again, whether the one or the other policy should be made effective will depend upon community standards of what the parties in the particular relationship in question are justified in expecting from each other.

III. "Fact" and "Opinion"

The problem presented in the foregoing discussion assumes the giving of misinformation which has proved harmful to the plaintiff in a business transaction. Implicit in this assumption is the problem of what constitutes misinformation. The defendant has communicated some idea, ordinarily by written or spoken language, upon which the plaintiff has relied to his damage. It is necessary to consider what is regarded as "misinformation" or "misrepresentation" for which there may be legal responsibility.

Every legal problem involving liability for the use of written or spoken language is plagued by the distinction between statements of fact and statements of opinion. This is true not only in the law of misrepresentation, but as well in defamation and disparagement, where "falsity" is an essential condition to liability. The policy of the law in these fields is to prevent harm which results when one person misleads another. "Truth," therefore, is a complete defense in all such actions.\(^{16}\) There are, to be sure,

\(^{16}\)This is the common law rule in defamation, modified only by statutes in a few states, the constitutions in others, and judicial decision in one, making something more than truth, usually "good motives" or "justifiable ends," also necessary to complete the defense. See Florida, constitution, sec. 13; Illinois, constitution, art. II, sec 4; Nevada, constitution, art. I, sec. 9; Rhode Island General Laws, (1923) sec. 4915; Maine, Revised Statutes, (1930) ch. 96, sec. 47; Massachusetts, General Laws, (1921) ch. 231, sec. 29; Kansas, constitution, art. I, sec. 11; Nebraska, Compiled Statutes, (1929) secs. 20-849; Wyoming, constitution, art. I, sec. 20; Pennsylvania, Statutes, (1929) sec. 13757; Delaware, Revised Code (1915) sec. 4218. In New Hampshire, Hutchins v. Page, (1909) 75 N. H. 215, 72 Atl. 689.
important deviations of policy which reflect reactions to the type of situation in which the defendant has given the misinformation and the purpose for which it presumably was given. For instance, in actions for defamation, the burden of proving the truth of the defamatory matter is upon the defendant,17 whereas in actions for disparagement18 and misrepresentation19 the burden is upon the plaintiff.

It is to be noted that in misrepresentation, the defendant has misled the plaintiff himself, whereas in defamation he has misled a third person to the plaintiff's loss. Thus, in the case of misrepresentation, the plaintiff complains because he himself has been induced to enter into some commercial transaction by his reliance upon the misstatements which the defendant has made. In defamation, however, he complains because some third person has believed or is presumed to have believed the defendant's misstatements about him, and has been induced or is presumed to have been induced20 to act in reliance thereon to the plaintiff's loss. In the former case, the plaintiff must prove that the defendant's statements were false; in the latter case, the defendant must prove that his statements were true. In the former case, the plaintiff has had, or may have had, some opportunity to protect himself; action on his part, although induced by mistake, was at least voluntary. In the latter case, the plaintiff has, indeed, been helpless. Since his loss results in no way from any action taken on his part, he has not even had the opportunity of detecting the falsity of the harmful language. This difference may well account for stricter requirements for recovery in the former case than in the latter.

20This rule appears in the formula that if the defamatory language is a libel or is slander per se, damages need not be proved. Hayward v. Maroney, (1912) 86 Conn. 261, 85 Atl. 279; Price v. Clapp, (1907) 119 Tenn. 425, 105 S. W. 864; Reilly v. Curtiss, (1912) 83 N. J. L. 77, 84 Atl. 199; Moore v. Maxey, (1910) 152 Ill. App. 647; Fields v. Bynum, (1911) 156 N. C. 413, 72 S. E. 449; Childers v. San Jose Publ. Co., (1894) 105 Cal. 284, 38 Pac. 903.
Here again, the deep-rooted individualism of Anglo-American people finds expression in the common law. A man's ability to take care of himself gives significance in law to his opportunity to do so. The difference in the rules governing burden of proof in these two actions constitutes but one aspect of a liability which is far stricter for defamation than for misrepresentation.

While this consideration is pertinent to an action for defamation as compared with an action for misrepresentation, it will not serve to explain the similarity between the rules governing the burden of proof in actions for disparagement and misrepresentation. Justification for the rule in actions for disparagement is implied, however, in the policy which in a subtle way makes necessary the rule concerning burden of proof. This policy is a fundamental one in the law of torts, namely, to require as a condition to shifting a loss from one to another, that the claimant establish the existence of his loss. Thus, a plaintiff, complaining of a tortious invasion of his interests by the defendant, is required to establish not only the existence of his interest, but the fact of its invasion by the defendant. In the case of disparagement of title, it is the plaintiff's property interest that is alleged to have been invaded. Accordingly, he must establish the existence of such property interest. To do so, however, is to establish the falsity of the defendant's denial of his property interest. The requirement that the defendant in such an action has the burden of proof on the issue of the truth of his disparaging publication would obviously be inconsistent with the rule that the plaintiff has the burden of establishing the existence of the property interest which he claims has been disparaged. In the case of defamation, it is unnecessary that the plaintiff prove the existence of his interest. The interest which he claims to have been invaded is the interest in his reputation. Obviously he has a reputation. The law indulges the presumption that it is better than as represented by the defendant. The reasons which justify the burden of proof on the issue of falsity in actions for defamation thus do not prevail in the action for disparagement.

21 This rule appears in the various "conditions" or "elements" of a "cause of action" in tort which the plaintiff is required to establish.


It has been held that if the title which the plaintiff claims to have been disparaged is doubtful, he cannot recover. Millman v. Pratt, (1824) 2 B. & C. 486; Thompson v. White, (1886) 70 Cal. 135, 11 Pac. 564; Wells-bach Light Co. v. American Lamp Co., (S.D. N.Y. 1899) 99 Fed. 501.
Since truth, therefore, constitutes a basis for immunity in misrepresentation, as well as in other actions for loss caused by language, there is immediate embarrassment when the test of truth or falsity is applied to statements which purport to represent the opinion or judgment of the person who uses the language. Statements of fact are subject to such a test because the statement is subject to verification. Facts may be ascertained with some considerable objectivity. The existence of the facts is independent of the person who makes the statement of fact. On the other hand, such ascertainment has much less application to expressions of opinion, mostly subjective to the person who so expresses himself. The difference is that between a statement of objective facts and a subjective interpretation of those facts. Whether the person actually holds the opinion which he professes is, of course, a question of fact. The validity of the opinion itself, however, is a question of judgment which is less amenable to objective criteria. There is, however, some objectivity to judgment or opinion, in the sense that it embodies a guide to action based upon a prediction as to future developments. Thus, a "good" bargain implies a prediction as to a combination of future events that suggests the proposed transaction as an economically desirable one. So, too, a "good" book, play or picture represents a judgment, in part, at least, that its object will be regarded as conforming to certain standards of literary or artistic criticism.

This subject recently has received limited treatment in defamation under the caption of "fair comment." It is recognized that a statement which is an expression of opinion may be as defamatory as a statement of fact concerning another's conduct. The defense of "fair comment," however, is restricted to the defamatory expression of an opinion concerning that which is regarded as the subject of "public interest." Limited treatment is also accorded this problem in the field of disparagement.

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23A defamatory communication may consist of a statement of opinion based upon facts known or assumed by both parties to the communication. Restatement of Torts, Tentative Draft No. 12, sec. 1008.

24In the Restatement of Torts, the phrase "public concern" is substituted for the more usual phrase "public interest," presumably on the theory that the public is often "interested" in matters which are none of its "concern."

What is to be included in the classification of public interest has been worked out by a technique of inclusion and exclusion. Matters currently held to be a proper subject of public interest include the works of authors, painters, entertainers and performers, musicians, scientists, and educators. Dibdin v. Swan, (1793) 1 Esp. 28; Tabart v. Tipper, (1808) 1 Campb. 350; McQuire v. Western Morning News, [1903] 2 K. B. 100; Thompson
The method of treatment of these problems in the law of misrepresentation is charged with several subtle complications.


Included, also, are persons who, though not professionally engaged in any public activity, occasionally participate in public affairs or sponsor public causes or movements, or otherwise submit their activities for public appraisal that they are not permitted to object when the verdict is unfavorable. Campbell v. Spottiswoode, (1863) 3 B. & S. 769; Henwood v. Harrison, (1872) L. R. 7 C. P. 606; Dakhyl v. Labouhere, (1908) 2 K. B. 325; Flanagan v. Nicholson Publ. Co., (1915) 137 La. 588, 68 So. 964.

This, however, leaves a wide area of what may be called purely private conduct which may be adversely criticized, and which is outside the scope of the principle of fair comment. Some test other than the usual one of "falsity" is necessary to determine whether the expression of a defamatory opinion in such situations is actionable. "On the other hand, a statement may be a characterization of the person about whom it is made which expresses the maker's unfavorable judgment upon undisclosed facts of the other. In such a case, the maker must show the existence of facts which justify the terms in which he has described the person of whom he spoke." Restatement of Torts, Tentative Draft No. 13, sec. 1024A, Comment b.

"If the defamatory matter consists of a statement of defamatory fact and disparaging comment based thereon, the truth of the facts carries with it a privilege to make such comment thereon as a reasonable man might make. If the comment may be understood as implying the existence of other facts sufficient to justify it, and if it be so understood, proof of the stated facts is not a defense." Restatement of Torts, Tentative Draft No. 13, sec. 1024A, Comment b. This comment is based upon and supported by Denman v. Harper, (1837) 3 Bing. N. C. 759; Walker v. Brogden, (1865) 19 C. B. (N.S.) 65. If the comment "infers a new fact, the defendant must abide by that inference of fact," although "it would be extravagant to say that, in cases of libel, every comment upon facts requires a justification." Denman, C. J., in Cooper v. Lawson, (1838) 8 Ald. & E. 746, 753. See the discussion by the writer in Harper, Privileged Defamation, (1936) 22 Va. L. Rev. 642, 655 ff.


The privilege here is absolute, whereas in an action for defamation the defense of fair comment is met by proof that the defendant was insincere in the expression of defamatory opinion. The competitor who slanders his rival's goods is protected by a privilege which is not defeated by proof that the unfavorable comparison did not represent the defendant's true opinion, but this defense in disparagement is a narrow one, and is not available to persons who express a disparaging judgment of another's goods when the element of competition is not present. There seem to be no standards developed in the cases for disparaging opinions by non-competitors.

The English law carefully distinguishes a statement of opinion which connotes "positive" rather than mere "comparative" defects. See Cundy v.
First of all, account must be taken of the very important difference as to statements which are in form expressions of opinion, but which in a practical sense are statements of fact. This is always the case when an opinion is expressed upon facts which are unknown to the recipient. Since an opinion is a judgment or an appraisal of certain facts, it cannot exist apart from the facts thus characterized. Therefore, unless the facts interpreted are stated or otherwise known, they must be supplied by implication. It is for this reason that in every case in which the facts upon which the opinion is based are unknown, the opinion is logically an implication of facts which would make the opinion reasonably appropriate thereto.

Thus, many cases of misrepresentation by opinion are treated by the courts as statements of fact to which the test of truth or falsity is applicable. The opinion is "true" if the facts upon which it is based are such as to make it a proper or justifiable characterization thereof. This treatment is consistent with that employed in the cases dealing with fair comment in actions for defamation, where it is repeatedly held that the defense of fair comment is applicable only when the facts upon which the comment is based are stated or otherwise known to the recipient. In such cases, the comment is readily distinguishable from the facts, and if the statement of fact is true or privileged, the comment is privileged criticism. Because the subject thereof is a matter of public interest as to which public policy encourages the free expression of opinion, the comment is privileged.


In a case where the facts are equally well known to both parties, what one of them says to the other is frequently nothing but an expression of opinion. But if the facts are not equally known to both sides, then a statement of opinion by the one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinions. Bowen, L. J., in Smith v. Land and House Prop. Co., (1884) L. R. 28 Ch. D. 7.


For a defamer to have immunity, however, the statement of fact must be such as not to make the publisher liable, i.e., it must be nondefamatory, true or privileged.

As Lord Ellenborough observed, in Carr v. Hood, (1808) at nisi prius, a case involving literary criticism (reported in a note to Tabert v. Tripper, (1808) 1 Camp. 350). "The critic does a great service to the
necessary only that it represent the defendant's actual opinion. An opinion not based on stated or known facts, however, carries an implication of supporting facts and is not privileged as criticism. Proof of the truth of the implied facts is required.

In cases of misrepresentation, also, opinion based upon stated or known or obvious facts is treated as pure opinion. The test of reasonableness and sincerity is the standard by which its actionable character is determined, depending upon the relation of the parties and what they are justified in expecting by way of opinion. There is, of course, even in such a case, the implication that the opinion thus expressed is the speaker's actual judgment, and to this extent is a statement of fact. If the opinion is insincere, that is, if it does not represent the speaker's actual view, it may properly be regarded as a misrepresentation of the "condition of a man's mind" and, therefore, a misrepresentation of fact.

Whether such a misrepresentation of the condition of a man's mind is actionable, however, depends upon whether the condition of his mind is "material," which, in turn, depends upon whether the other party to the transaction is justified in attaching sufficient importance thereto to govern his conduct in a business transaction accordingly. If the opinion is sincere and thus truly represents the judgment of the speaker, there is a misrepresentation of fact in no sense. If, however, the other party is so situated with reference to the speaker as to justify reliance upon the reasonableness of the opinion, an action for negligence will lie if it represents an unreasonable mistake in judgment on the facts. On the other hand, where the defendant's opinion is given without knowledge on the part of the recipient of its factual basis, it requires treatment as a statement of facts sufficient to justify the opinion and the standard of truth or falsity is pertinent.

Statements concerning law are peculiarly susceptible to this analysis. These are sometimes treated as representations of law, sometimes as representations of fact. If the statement announces a legal conclusion upon known facts, it is a representation of law, and necessarily a statement of opinion, for it can have no meaning other than that a court will render a decision on the known facts which conforms to the conclusion stated. This is pure opinion, and is treated as such. The other party may rely upon public, who writes down any vapid or useless publication; such as ought never to have appeared. He checks the dissemination of bad taste, and prevents people from wasting both their time and money upon trash."

30 Merivale v. Carson, (1888) 20 Q. B. D. 275, per Lord Esher, M. R.
31 See infra, p. 986.
this to the same, but to no greater extent than upon any other opinion upon known or readily available facts. If, however, the cards are not all on the table—if the facts upon which the legal conclusion is predicated are not known to the other party, the statement is more than a mere matter of judgment. Mr. Justice Holmes, in discussing this problem, observed that "certain words, such as 'ownership,' 'marriage,' 'settlement,' etc., import both a conclusion of law and facts justifying it, so that when asserted without explanation of what the facts relied on are, they assert the existence of facts sufficient to justify the conclusion."33

Jessel, M. R., in Eaglesfield v. Marquis of Londonderry,34 approaching the problem from the other end, reaches an analogous result.

"A misrepresentation of law," says he, "is this: when you state the facts and state a conclusion of law, so as to distinguish between facts and law. The man who knows the fact is taken to know the law;35 but when you state that as a fact which no doubt involves, as most facts do, a conclusion of law, that is still a statement of fact and not a statement of law. . . . There is not a single fact connected with personal status that does not, more or less, involve a question of law. If you state that a man is the eldest son of a marriage, you state a question of law, because you must know that there has been a valid marriage, and that that man was the first born son after the marriage, or in some countries, before. Therefore, to state it is not a representation of fact seems to arise from a confusion of ideas.

"It is not the less a fact because that fact involves some knowledge or relation of law. There is hardly any fact which does not involve it. If you state that a man is in possession of an estate of £10,000 a year, the notion of possession is a legal notion, and involves knowledge of law; nor can any other fact in connection with property be stated which does not involve such knowledge of law. To state that a man is entitled to £10,000 Consols involves all sorts of law."

On the basis of this analysis, an assertion of title or other legal right without an explanation of the factual basis for the conclusion may properly be treated as a statement of fact—an

32 See infra, p. 993.
34 (1876) L. R. 4 Ch. D. 693, 702-703.
35 This familiar proposition is misleading. As stated by the Massachusetts court, in holding liable a defendant who had dishonestly made a statement of law to one who knew the facts, "This presumption means simply that ignorance of law is no excuse." Jekshewitz v. Growald, (1929) 265 Mass. 413, 164 N. E. 609, quoting from Witherington v. Eldredge, (1928) 264 Mass. 166, 162 N. E. 300.
opinion implying facts which will make it "true," that is, facts to support the title or right asserted. If such facts do not exist, there is a misrepresentation of fact. Whether such a misrepresentation is actionable will depend upon whether the relations between the parties were such as to justify reliance upon the complete accuracy of the statement, the reasonableness and competency of the opinion on the existing facts, or only on the honesty and sincerity of the party who made the statement. On the other hand, the statement of a legal conclusion upon known facts may be treated as a mere expression of judgment or opinion. Such an opinion, if honest and reasonable, is never actionable merely because it turns out to be inaccurate, unless there is an express contract of warranty. Whether an incompetent and erroneous opinion is actionable and whether a dishonest, though otherwise reasonable one is actionable if erroneous, depends upon whether the relations between the parties justify the plaintiff in expecting competency or honesty therein, in which respect, the principles of liability are identical with those which govern other expressions of opinion.

In all fields of law in which the question of the actionable character of written or spoken language is involved, analysis is rendered difficult because these problems are almost invariably treated as problems of "truth" or "falsity." "Falsity" is thus used in three distinct senses: First, a discrepancy between a statement of existing fact capable of demonstration and the facts thus represented. This meaning is applicable to statements implying fact as well as express statements of specific fact. Second, statements which constitute a mere appraisal of known or readily available facts. The statement is "true" if the unknown facts turn out to be such as to "justify" the interpretation placed upon them by the opinion, that is, if the opinion is an accurate one. Third, a statement of opinion even upon known facts which, while incapable of present demonstration, is capable of complete verification in the future. The statement is true if the opinion turns out to be an accurate forecast of future fact. It remains to ascertain the treatment which these various types of statement receive in the technicalities of rules of the law of misrepresentation and the social policy which these rules reflect.
IV. SITUATIONS IN WHICH PLAINTIFF IS ENTITLED TO RELY UPON THE EXISTENCE OF FACTS AS REPRESENTED, OR UPON THE VALIDITY OF OPINION OR COMMENT AS A GUIDE TO CONDUCT.

Where it is deemed desirable social policy to fortify a prevailing business practice with legal coercion and to confirm the tacit assumptions made by the parties, there is liability for misrepresentation, however innocently made. One giving information for the guidance of another in a business transaction of this sort must know whereof he speaks. Many cases of this type disclose a capacity on the part of the defendant for perfect accuracy of statement. He is in a position to know. Conversely, the recipient of the communication is seldom in a position readily to discover the facts or to confirm them as stated by the other. In other cases, although the defendant may not be in a position which affords a special opportunity for knowledge, he has made the representations in manner and form so positive as to convey an impression of complete personal knowledge, that is, knowledge beyond peradventure of doubt. Here it is not so much the opportunity for complete knowledge as the assumption of it that induces and justifies utter reliance.

When a person makes an unqualified statement, he thereby implies certainty. When he states it with emphasis upon the certainty of his knowledge, that is, when he makes express what otherwise is only implied, the psychological effect is notoriously much more pronounced, and reliance upon the existence of the facts thus stated, or upon an adequate factual basis for the opinion so expressed is more likely to be induced. The recipient in these cases relies not only upon the honesty and competence of the person who makes the statement, but upon the truth of the facts stated or implied in the opinion. Business is often conducted upon this basis. Business ethics justify the other's complete reliance upon the accuracy of the information imparted, that is, upon the certain existence of the facts as expressly or impliedly represented. So, too, does the law. The speaker acts at his peril. He must guarantee the truth of the information which he gives. Measured by such a standard, decisions are to be found in many states which testify to the uniformity of this result.36

Nor is it an adequate objection that the ideal reasonably prudent and cautious business man would not rely implicitly upon and be guided by such representations. The justifiability of reliance is to be determined largely by what the preponderant mass of men in fact do in such situations. Recent developments in the economic life of the nation, followed, as they have been, by current legislative trends directed toward the protection of the public in such transactions, bear witness to what actually happens. In nineteenth century law, greater stress was laid upon the plaintiff's self-protective duty than upon the defendant's duty of accuracy and, in many situations, than upon his duty of honesty. "Caveat emptor" was a rule of wide application, embodying therein a general

Sup. Ct. 493, 46 L. Ed. 1261) (same); Mears v. Acconac Banking Co., (1933) 160 Va. 311, 168 S. E. 740 (same); Laney-Payne Farm Loan Co. v. Greenhaw, (1928) 177 Ark. 589, 9 S. W. (2d) 19 (same); Drake v. Holbrook, (1902) 23 Ky. L. Rep. 1941, 66 S. W. 512 (vendor misrepresented price at which stock was selling on the market); Thompson v. Walker, (1931) 253 Mich. 126, 234 N. W. 144 (same); Owens v. Waterhouse, (1929) 225 App. Div. 562, 233 N. Y. S. 535 (same); Burke v. Pardey, (1928) 125 Or. 245, 266 Pac. 626 (same); Trust Co. of Norfolk v. Fletcher, (1929) 57 Va. 868, 148 S. E. 785 (same); Gunderson v. Havana-Clyde Min. Co., (1911) 22 N. D. 329, 133 N. W. 554; Nash v. Minnesota Title Ins. & Trust Co., (1895) 163 Mass. 574, 40 N. E. 1039; Purdy v. Underwood, (1918) 87 Or. 56, 169 Pac. 536 (vendor misrepresented number of acres in tract sold to plaintiff); Freeman v. Harbaugh Co., (1911) 114 Minn. 283, 130 N. W. 1110 (assignors of notes stated that makers were financially reliable); Braley v. Powers, (1898) 92 Me. 203, 42 Atl. 362 (inventor of machine induced plaintiff to invest by misrepresenting ability of machine); Pellette v. Mann Auto Co., (1924) 16 Kan. 16, 225 Pac. 1067 (vendor misrepresented that car was latest model); Chatham Furnace Co. v. Moffat, (1888) 147 Mass. 403, 18 N. E. 168, 9 Am. St. Rep. 727 (vendor of mineral lease misrepresented quantity of ore in mine); Bullitt v. Farrar, (1889) 42 Minn. 8, 43 N. W. 566 (agent of vendor misrepresented that lot was no more than seven feet below street grade in front); Palmer v. Goldberg, (1906) 178 Wis. 103, 107 N. W. 478 (agent misrepresented that purchaser's credit was good); Kuehl v. Parminter, (1923) 195 Iowa 497, 192 N. W. 429 (agent made misrepresentation as to the affairs of the company, inducing purchase); Whitehurst v. Life Ins. Co., (1908) 149 N. C. 273, 62 S. E. 1067 (insurance salesman misrepresented type of policy inducing plaintiff to take out insurance); Church v. Wickwire, (1931) 231 App. Div. 249, 247 N. Y. S. 100 (false statements in prospectus induced plaintiff to buy mortgage bonds); Edwards v. Sergi, (1934) 137 Cal. App. 369, 30 P. (2d) 541 (agent misrepresented boundary line); Anchor Lbr. Corp. v. Manufacturers' Trust Co., (1934) 242 App. Div. 656, 272 N. Y. S. 610 (bank made misrepresentations as to the account of a depositor).

"But in actions on the case for deceit, founded upon false affirmations, there has always existed the exception that naked assertions, though known to be false, are not the ground of action, as between vendor and vendee; and in regard to affirmations and representations respecting real estate, the maxim of caveat emptor has ever been held to apply. When, therefore, a vendor of real estate affirms to the vendee that his estate is worth so much, that he gave so much for it, that he has been offered so much for it, or has refused such a sum for it; such assertions, though known by him to be false, and though uttered with a view to deceive are not actionable." Medbury v. Watson, (1843) 6 Metc. (Mass.) 246, 39 Am. Dec. 726.
attitude of laissez-faire with regard to private business transactions. It was up to the plaintiff to look after himself and if he were overreached by his adversary, he was merely the loser in a business deal, and had only himself to blame for a bad bargain. A failure to exercise reasonable business caution was a defense in an action for deceit, and reliance even upon the honesty of the adverse party to the transaction constituted a lack of ordinary business caution.

This attitude, however, has been so far modified that not only is the plaintiff’s neglect to follow reasonable business practice and to take ordinary precautions not fatal to an action based upon the defendant’s deliberate fraud, but it is not always a complete failure. See Hamilton, The Ancient Maxim Caveat Emptor, (1931) 40 Yale L. J. 1133. “In penning a declaration of independence for the individual Adam Smith voiced the advanced thought of his day; his argument, in justification, that each person, in aiming only at his own advantage, ‘is led by an invisible hand to promote an end which is no part of his intention’ won a growing approval. The age of natural law of revolt against authority, of laissez-faire was emerging.”

“Not until the nineteenth century, did judges discover that caveat emptor sharpened wits, taught self-reliance, made a man—an economic man—out of the buyer, and served well its two masters, business and justice.”


That the modern tendency is to repudiate the maxim of caveat emptor, is supported by an impressive line of recent decisions.

Action for deceit. Burger v. Calek, (1923) 37 Idaho 235, 215 Pac. 981 (false representations as to seepage); McGuffin v. Smith, (1926) 215 Ky. 606, 286 S. W. 884 (false representations as to permanent supply of drinking water on farm); Champneys v. Irwin, (1919) 106 Wash. 438, 180 Pac. 405 (false representations as to amount of rental); Peck v. Robinson, (Tex. Civ. App. 1917) 194 S. W. 456, 631 (false representations as to amount of timber on land); Graves v. Haynes (Tex. Civ. App. 1921) 231 S. W. 383 (false representations that cattle were sound and free from disease); Werline v. Aldred, (1916) 57 Okla. 381, 157 Pac. 305 (misrepresentations of value and rent derived from land); Buckley v. Buckley, (1925) 230 Mich. 504, 202 N. W. 955 (sale of stock; false representations by purchaser as to value and corporate assets); Haskell v. Starbird, (1890) 152 Mass. 117, 142 N. E. 695 (sale of land in Canada; false representations as to location and quality of land as timber land); Christensen v. Jauron, (Iowa 1919) 174 N. W. 499 (land trade; misrepresentations as to quality and rental value of land; purchaser actually visited and looked at land); Hise v. Thomas, (1917) 181 Iowa 700, 165 N. W. 38 (purchase of business; misrepresentations as to amount and value of stock on hand); Gallon v. Burns, (1917) 92 Conn. 39, 101 Atl. 504 (purchase of stock; misrepresentations by officers and stockholders that corporation was solvent; purchaser had opportunity to inspect books of corporation); Warne v. Finseth, (1923) 50 N. D. 347, 195 N. W. 573 (land deal;
bar when the defendant has innocently made misrepresentations. However, as will be seen, it is one of the important factors in
misrepresentations that land was not stony and was fit for cultivation; purchaser actually visited land, but it was covered with snow at time and its character not apparent).


The attitude of courts of recent years is well indicated in Burger v. Calek, (1923) 37 Idaho 235, 215 Pac. 961, in which the court reversed the case for error in giving the following instruction: "If you believe from the evidence that the plaintiff, Burger, could by reasonable investigation and inquiry have ascertained the actual condition of the land involved, he cannot recover damage from the defendant." In the course of the opinion, the court explained the change from the older attitude: "In territorial days this court rendered a decision which supports the above instruction, Brown v. Bledsoe, 1 Idaho 746. At that time the weight of authority was perhaps to that effect. In later years this court and many others have been breaking away from that harsh rule, . . . We conclude that where the vendor makes material representations of fact concerning the condition or quality of land or article sold, of such a nature that a man of ordinary prudence might rely upon them, the vendee is justified in so relying and is under no duty to make an independent investigation."

Again, the supreme court of Alabama has held that, "If a false statement is made by one who may be fairly assumed to know that about which he is talking, it may be accepted as true without question and without inquiry, although the means of correct information were within reach." King v. Livingston, (1912) 180 Ala. 118, 60 So. 143. Further, the court said: "We apprehend that the improbability or incredibility of a statement, judged by ordinary standards of intelligence, is a matter that is ordinarily relevant only to the question of its acceptance as true by the other party, and that those qualities never of themselves forestall a right of action." So, too, the Minnesota court has indicated the decay of the maxim in Erickson v. Fisher, (1892) 51 Minn. 300, 53 N. W. 638: "The maxim caveat emptor is not to be carried so far that the law shall ignore or protect positive fraud successfully practised upon the unwary. As between the original parties, one who has intentionally deceived the other to his prejudice ought not to be heard to say in defense that the other party ought not to have trusted him."

In Fargo Gas Light, etc., Co. v. Fargo Gas & Electric Co., (1894) 4 N. D. 219, 59 N. W. 1066, the court said: "Ordinarily one who buys property has a right implicitly to rely upon representations of the seller; and if they were false and made with intent to deceive the purchaser, the seller will not be allowed to urge that the buyer, by investigation, could have discovered their falsity." In commenting upon the rule, the court observed that "it would, indeed, be a strange rule of law which, when the seller had successfully entrapped his victim by false statements, and was called to account in a court of justice for his deceit, would permit him to escape by urging the folly of his dupe for not suspecting that he the seller, was a knave."

Several cases have recognized the distinction between the duty to investigate and the rule which charges the plaintiff with that knowledge which he should acquire by the use of his senses. Thus, in Robertson v.
determining whether the situation is one of the sort in which a defendant can be held responsible for innocent misstatements.

The gradually narrowing area for the application of the maxim “caveat emptor” may be attributed to revised concepts of what the parties may justifiably expect from each other in the type of transaction in question. Because they may normally expect honesty in connection with a sale of land or goods, there is no duty, as against a fraudulent vendor, for the vendee to investigate the truth of the former’s statements.

In some of the cases, stress

Smith, (Mo. App. 1918) 204 S. W. 413, in which the defendant in an action for deceit relied upon the maxim of caveat emptor, the court pointed out that such a defense was available only where the falsity of the vendor’s representations was open and patent to the senses, but that one making a misrepresentation, the falsity of which was not open and apparent, could not shield himself by charging negligence on the part of the vendee in failing to discover the fraud. The same point is made in Mignault v. Goldman, (1919) 235 Mass. 205, 125 N. E. 189; Gallon v. Burns, (1917) 92 Conn. 39, 101 Atl. 504; Kliege v. Ries, (1917) 66 Ind. App. 610, 117 N. E. 262.


43The maxim is still applicable in cases in which the falsity of the defendant’s statement is obvious to the senses. “If one voluntarily shuts his eyes when to open them is to see, such a one is guilty of an act of folly (in dealing at arm’s length with another) to his own injury; and the affairs of men could not go on if courts were being called upon to rip up transactions of that sort. The vendee is held to know what his own eyes would disclose, and knowing, could not be deceived.” Judd v. Walker, (1908) 215 Mo. 312, 114 S. W. 979. “The recipient of a fraudulent misrepresentation is not justified in relying upon its truth if its falsity is obvious.” Restatement of Torts, Tentative Draft, No. 13, Sec. 617. In the comment, it is explained that “the rule stated in this section applies only where the recipient of the misrepresentation is capable of appreciating its falsity by the use of his senses.”

44“Until there be written into the law some precept or rule to the effect that the heart of a man is as prone to wickedness as is the smoke to go upward, and that everyone must deal with his fellow man as if he was a thief and a robber, it ought not to be held that trust cannot be put in a positive assertion of a material fact, known to the speaker and unknown to the hearer, and intended to be relied upon.” Judd v. Walker, (1908) 215 Mo. 312, 114 S. W. 979.


In some of the cases, it seems, the court allows a recovery not so
is placed upon the defendant’s knowledge or means of knowledge and the burden which an investigation would put upon the plaintiff. Such are cases involving the sale of land at a distance or in a condition that immediate examination to determine its quality or quantity would be impractical.\textsuperscript{43} Many modern cases, however, go even further and permit the vendee to recover from a dishonest vendor, even though the falsity of the misrepresentations could have easily been discovered by the plaintiff.\textsuperscript{44} The vendee in such cases can thus expect at least honesty from his vendor.

The comparative availability of the facts to the parties is of great significance, however, in determining whether the one may properly expect more, namely, complete accuracy of the information given.\textsuperscript{45} When there is proper reliance upon the accuracy of the representations, the entire transaction is based upon the existence of the facts represented. In the case of a sale, the subject of the sale is the thing designated or described by the representations of the vendor. If the subject is otherwise than as represented, immunity of the vendor because the representations were innocently, rather than fraudulently or negligently false, has the effect of holding the vendee to a purchase which he did not make. He is justified in expecting the bargain which he made, much because the plaintiff was acting properly, but because the defendant had acted more improperly. Apparently, there is here a quasi-punitive policy involved. Thus, the court in Rollins v. Quinby, \textsuperscript{(1908)} 200 Mass. 162, 86 N. E. 350, observed: “The law does not attempt to save parties from the consequences of their own improvidence and negligence; but it looks with even less favor upon misrepresentation and fraud.”\textsuperscript{46}

\textsuperscript{43}Haskell v. Starbird, \textsuperscript{(1890)} 152 Mass. 117, 142 N. E. 695; Ladner v. Balley, \textsuperscript{(1897)} 103 Iowa 674, 72 N. W. 787; Brees v. Anderson, \textsuperscript{(1922)} 154 Minn. 123, 191 N. W. 266; Gridley v. Ross, \textsuperscript{(1926)} 37 Idaho 693, 217 Pac. 989; Martin v. Jordan, \textsuperscript{(1872)} 60 Me. 531; Jackson v. Armstrong, \textsuperscript{(1883)} 50 Mich. 65, 14 N. W. 702, with which compare Boddy v. Henry, \textsuperscript{(1901)} 113 Iowa 462, 85 N. W. 771; Gordon v. Parmalee, \textsuperscript{(1861)} 2 Allen (Mass.) 212; Lee v. McClelland, \textsuperscript{(1898)} 120 Cal. 147, 52 Pac. 300; Moore v. Reeck, \textsuperscript{(1896)} 163 Ill. 17, 44 N. E. 868.

\textsuperscript{44}Dodge v. Pope, \textsuperscript{(1883)} 93 Ind. 480; Buckley v. Buckley, \textsuperscript{(1925)} 230 Mich. 504, 202 N. W. 955; Gallon v. Burns, \textsuperscript{(1917)} 92 Conn. 39, 101 Atl. 504; Crompton v. Beedle, \textsuperscript{(1910)} 83 Vt. 287, 75 Atl. 331; King v. Livingston, \textsuperscript{(1912)} 180 Ala. 118, 60 So. 143; Steen v. Weisten, \textsuperscript{(1908)} 51 Or. 473, 94 Pac. 834; Currie v. Mallory, \textsuperscript{(1923)} 185 N. C. 206, 116 S. E. 564.

\textsuperscript{45}“We think we may safely lay down this principle, that wherever a sale is made of property not present, but at a remote distance, which the seller knows the purchaser has never seen, but which he buys upon the representation of the seller, relying on its truth, then the representation, in effect, amounts to a warranty; at least, that the seller is bound to make good the representation.” Smith v. Richards, \textsuperscript{(1839)} 13 Pet. (U. S.) 26, 10 L. Ed. 42. This case was one of rescission, but the reasoning quoted would be applicable to an action for damages.
and only a liability of warranty on the vendor's part will assure him of this.\textsuperscript{46}

For the most part, case law during the early years of the nineteenth century restricted closely the rule of warranty by the vendor, applying instead the rule of caveat emptor to the vendee.\textsuperscript{49}

These decisions reflected the dominant spirit and ethics of the period, a policy of commercial individualism which permitted the purchaser at most to rely only on the honesty of his seller. The policy is understandable in an age of expanding commerce when

\textsuperscript{46}In Smith v. Richards, (1839) 13 Pet. (U. S.) 26, 10 L. Ed. 42, the court reasoned in this way:

"If, under these circumstances, the seller were not bound by his representation, we know not in what cases we ought to apply the well-known and excellent maxim, 'fides servanda est.' We have now compared the cases, and upon principle, have shown that they do not apply to this. But we will conclude our opinion, by referring to a case, later than all those which we have been examining, the reasoning of which is conclusive, as we think, in favour of the view which we have taken. It is the case of Shepherd v. Kain, 5 Barn. & Ald. 240. It was a case for the breach of warranty, as to the character of a ship. The advertisement for the sale of the ship described her as a copper fastened vessel; but there were subjoined these words: 'The vessel, with her stores as she now lies, to be taken with all faults, without allowance for any defects whatever.' It appeared at the trial, that the ship when sold, was only partially copper fastened, and that she was not what was called in the trade a copper fastened vessel. It appeared also, that the plaintiff, before he bought her, had a full opportunity to examine her situation.

"The court said, the meaning of the advertisement must be that the seller will not be responsible for any faults which a copper fastened ship may have. Suppose a silver service is sold with all faults, and it turns out to be plated; can there be any doubt that the vendor would be liable? With all faults, must mean, which it may have consistently with its being the thing described. Here, the ship was not a copper fastened ship at all, and therefore the verdict was right. This case decides, that even where the plaintiff had a full opportunity of examination, the term, all faults, did not exempt the seller from liability for any defect but what was consistent with its being the thing described; and, in effect, that the description amounted to a warranty. In the case before us, where the appellee had no opportunity for examination (and in that respect the case is much stronger in his favor than the one just cited) the terms of the sale, in our opinion, put upon the appellee no hazard or risk, but those which were consistent with the mine being such as it was described; that those terms in no degree exempted him from liability for misrepresentation; but if the mine had been such as described, then that they would have exempted him from any liability for failure in its anticipated produce.

"It may be that the appellant made the representation under the influence of delusion; but it is sufficient, to decide this case, for us to know that the representation was untrue in material parts of it."

In Barr v. Gibson, (1838) 3 M. & W. 389, the court was faced with the question whether a ship aground at the time it was sold, both vendor and vendee being ignorant of the fact, was a "ship" for purposes of sale. It was held that it was, caveat emptor.

emphasis is placed upon advantage to the dealer. Referring to the
decisions glorifying the caveat emptor rule. Professor Hamilton
has said:

"Behind it all, selecting, trimming, adjusting and directing the
stately march of the argument is reason as it was currently under-
stood. The judges knew that one man was as good as another;
they believed in the economic virtues; they made their decisions in
private actions a declaration of public policy. Their common
sense gave to a mass of verbal fragments from unknown climates
of opinion the pulsing life of American democracy."

Today a different social policy is indicated. Expansion of
trade is less important than mutual confidence between buyer and
seller. Encouragement for dealers is needed less than encourage-
ment for customers. The law again reflects reason as currently
understood, and caveat emptor declines as warranty and liability
for innocent misrepresentation increases.

Under both the Sales Act and modern decisions, the vendor
is held to warrant that express representations are accurate if
the buyer was in fact uninformed and the seller was in a position
to know the facts or purported to be informed with respect thereto.

Modern authorities permit a rescission and an action for
rescission in such a case. Implied warranties, without express
representation, assure the buyer that the goods are fit for the
purpose intended provided the seller makes the selection, and

50 Hamilton, The Ancient Maxim Caveat Emptor, (1931) 40 Yale L. J.
1133, 1182.
51 This tendency is more observable in America than in England, where
the twentieth century decision in Heilbut, Symons & Co. v. Buckleton,
[1913] A. C. 30, lent fresh vigor to caveat emptor.
52 Gotham Nat'l Bank v. Sharood, (C. C. A. 2nd Cir. 1928) 23 F.
(2d) 567; Springfield Shingle Co. v. Edgecomb Mills Co., (1909) 52 Wash.
620, 101 Pac. 233; Cunningham Auto Co. v. Drake, (Iowa 1929) 224
N. W. 48; McClintock v. Emick, (1888) 87 Ky. 160, 7 S. W. 903; Worden
363, 21 Atl. 612, 12 L.R.A. 693; Lalime v. Hobbs, (1926) 255 Mass. 189,
151 N. E. 59; Rittenhouse Co. v. Kissner, (1916) 129 Md. 102, 98 Atl. 361.

Where the seller makes representations regarding the goods upon
which the buyer justifiably relies as an inducement to the bargain, the
law imposes upon the seller the obligation to make such representations good.

"The buyer is ordinarily justified in relying upon the seller's represen-
tations relating to the goods where the buyer is uninformed regarding the
matter in question while the seller is or purports to be better informed."
Vold, Sales (1931) 443.
52 "A person who has paid money to another because of a mistake
of fact . . . is entitled to restitution from the other if the mistake was
induced . . . by his innocent and material misrepresentation." Restate-
ment of Restitution, sec. 28.
53 Minneapolis Steel Co. v. Casey Land Agency, (1924) 51 N. D. 832,
that the goods conform to sample or other description,56 or, if so sold, to both. Caveat emptor has, in all these respects, given way to caveat vendor.56 Business mores and practice have led purchasers to expect as much, and for this reason such expectations are justifiable. It is, in fact, a plausible position that business practices encourage still further expectations and reliance.

"The ordinary buyer gets the benefit of the common maxim—'the buyer is always right.' The modern seller will go to great lengths to please his customers. In practice, he does not stop at his legal obligations, but takes any reasonable steps to retain good will."57

Thus it is that the actual conduct of business has greatly increased the justifiable expectations of the buyer, and the law quite properly insists that he obtain these benefits. Moreover, it is regarded as beneficial to business as an institution. In discussing the gradual shift of business risks from buyer to seller, Professor Vold has concluded that:

"The business experience of the last century has abundantly demonstrated that commercial transactions as business is now organized are rather benefited than burdened by the seller's making good his representations if they turn out to be inaccurate. The satisfied customer returns with more business, and is himself a walking advertisement to bring still further business to the seller. Responsible sellers expecting to grow in business stature and develop commercial good will among their customers have found it expedient to stand behind their representations... Buyers, too, have found it convenient and economical to rely on the seller's statements or labels, he having the greater detailed information, rather than at each successive transfer in the course of distribution to incur afresh the burdens, delay, and expense of detailed inspection, investigation, or testing. Accordingly, the efficiency, dispatch, and economy of a 'trust the seller' attitude in marketing of goods has become so manifest that now sellers themselves whose representations can be confidently relied on find such reliance not


57See Vold, Sales (1931) 445.

a commercial burden but on the whole a tremendously valuable business asset."

While sweeping statements are to be avoided in a field in which there is so much litigation, it is not too much to conclude that strict liability is limited to cases which disclose some such factors as those just described. It is confined to situations where reliance upon the existence of the facts as expressly represented or implied, as a factual basis for an opinion, is justified because the relationship of the parties disclosed (1) peculiar and almost exclusive means of knowledge, or (2) a plausible means of knowledge of facts represented in statements made with emphatic certainty.

Measure of Damages.—In cases which fall within this group, what is and should be the measure of liability? The plaintiff thought he was entering a transaction which would gain for him certain economic advantages. This is the very function of a contract. His belief, and the action taken pursuant thereto, were justifiable. He has failed to obtain the advantage, the expectation of which induced him to enter the transaction. If he has dealt with the defendant as the other party to a contract, the amount of his recovery should not depend upon whether he or his lawyer calls the action one "in contract" or "in tort." Whether for breach of warranty or deceit or in any other form of action, if he demands it, it would seem good policy that he recover the value of the reasonable expectation which he has failed to obtain. Many cases allow him this recovery.\(^{59}\) If, however, he has suffered not only

\(^{58}\) Vold, Sales (1931) 444.


\(^{59}\) Vold, Sales (1931) 444.


In the following cases, the plaintiff asked for and was allowed merely the sum invested: Pellette v. Mann Auto Co., (1924) 116 Kan. 16, 225 Pac. 1067; Palmer v. Goldberg, (1906) 128 Wis. 103, 107 N. W. 478; Laney-Payne Farm Loan Co. v. Greenhaw, (1928) 177 Ark. 589, 9 S. W. (2d) 19; Trust Co. of Norfolk v. Fletcher, (1929) 57 Va. 868, 148 S. E. 785; Robinson v. Standard Stores, (1932) 52 R. I. 271, 160 Atl. 471.

In the following cases the tort measure of damages was applied, but it does not appear that the plaintiff asked for the contract measure and was denied it, nor does it appear that the contract measure would have been
disappointment but injury, if instead of failing to obtain a justifi-
cably expected advantage, the plaintiff has sustained actual loss,
he should, of course, recover therefor. In other words, if the
so-called tort measure of damages is greater than the contract
measure, he should be entitled to a recovery determined thereby,
provided the loss is the type of hazard against which it is the
policy of the law to protect him, namely, one arising out of the
falsity of the representation which induced him to enter into the
transaction. There seems to be a tendency to sustain this position.60

Whether the "contract" or the "tort" measure of damages is
applicable, there must, of course, be the appropriate relationship
between the falsity of the representations and the disappointed
expectations or loss of the plaintiff.61 In Beare v. Wright,62 the
court, in discussing this problem, said:

"It is therefore clear that that part of the loss which would
have resulted from the making of such a trade on the same terms
without deceit is due to plaintiff's own folly, and is not properly
chargeable to the false representation."
The court continued its discussion by referring to a New Hamp-
shire case.

"An instructive case on this subject is that of Page v. Parker,
43 N. H. 363, 80 Am. Dec. 172. The plaintiff had been induced
by false representations to purchase an interest in a marble quarry,
and pay therefor a sum much greater than its actual value. The
defendant had made many representations. Some were false, some
true and others immaterial. The plaintiff sued to recover damages
for deceit. The court held that the measure of damages in such
cases is the difference between the value of the property as it
actually was, and its value as it would have been if it were such
as it was represented to be in those particulars in relation to which
the false and fraudulent representations were made. The qualify-
greater: Freeman v. Harbaugh Co., (1911) 114 Minn. 283, 130 N. W.
Snider v. McAtee, (1912) 165 Mo. App. 260, 147 S. W. 136, affirmed in
(Mo. 1915) 178 S. W. 484; Bowman v. Van Felt, (1878) 91 Ky. App. 884.
60Matlock v. Reppy, (1886) 47 Ark. 148, 14 S. W. 546 (held that
plaintiff had an option as to the measure of damages); Baumchen v. Dona-
hoe, (1932) 215 la. 512, 242 N. W. 533 (plaintiff also recovered the amount
lost by reason of assessment of the stock); Bowman v. Parker, (1857)
40 Vt. 410 (same).
61Page v. Parker, (1861) 43 N. H. 363, 80 Am. Dec. 172; Van Epps
v. Harrison, (1843) 5 Hill (N. Y.) 63, 40 Am. Dec. 314; People v. S. W.
v. Parker, (1857) 40 Vt. 410; Beare v. Wright, (1905) 14 N. D. 26, 103
Atl. 121. But see Fottler v. Moseley, (1904) 185 Mass. 563, 70 N. E.
ing clause which we have italicized was said to be advisable in order to make it clear to the jury that the damages must be confined to such items of loss as were proximately caused by the representations which were false and material. To illustrate: If there were ten material representations, and only one was false, the plaintiff was entitled to compensation only to the extent that the value of the quarry was diminished by the nonexistence of the one fact which was falsely represented to exist."

In *Fottler v. Moseley*, a stockbroker was held liable for the depreciation of the plaintiff's stock which by fraudulent misrepresentations he had induced plaintiff not to sell, although the depreciation was caused by the embezzlement of an officer of the corporation, and had no connection with or relation to the falsity of the defendant's misstatements.

"The defendant," said the court, "if he fraudulently induced the plaintiff to keep his stock, took the risk of all such changes. . . . It would be unjust to the plaintiff in such a case, and impracticable, to enter upon an inquiry as to the cause of the fall in value, if the plaintiff suffered from the fall wholly by reason of the defendant's fraud. The risk of a fall, from whatever cause, is presumed to have been contemplated by the defendant when he falsely and fraudulently induced the plaintiff to retain his stock."

This reasoning and the policy reflected by the rule seem totally unconvincing. Just why the defendant should be required to assume all the risks of loss because he caused some risks does not readily appear. Just why it would be unjust to the plaintiff to inquire into the cause of the fall in value, is not apparent. The defendant's conduct is tortious because he has fraudulently made false statements. It would seem that policy requires only that he make good the loss (or the expected advantage, if the contractual rule is applicable) only in so far as it is connected with the falsity of his statements.

A more persuasive technique was employed in *Van Epps v. Harrison* where the complainant had paid much more than the property would have been worth even if the misrepresentations had been true.

"We must not go back to the date of the contract for the price," said the court, "and then come down to the present day for the actual value of the land, and charge the plaintiff with the difference. The defendant must bear the consequences of the prevailing delusion about prices and new towns under which the purchase was made. On the other hand, the plaintiff cannot say that his

63 (1904) 185 Mass. 563, 70 N. E. 1040.
64 (1843) 5 Hill (N. Y.) 63, 40 Am. Dec. 314.
fraud has worked no injury because everybody has now found out that the land never was worth anything for the purpose of building a town on it. The cause must, as far as practicable, be tried just as it would have been tried the day after the contract was made, if the question had arisen at that time. The jury must assume what the parties then believed, that the land was valuable as the site for a town and then inquire how much less the land was worth for building purposes, taking the surface as it actually existed, than it would have been worth for those purposes had the plaintiff’s representations concerning the surface been true.”

It seems unnecessarily harsh, and completely outside the policy of the law of misrepresentation, to require even a fraudulent defendant to insure against risks completely irrelevant to the matter misrepresented. Mistakes of the plaintiff not induced by the defendant’s misstatements should have no place in the rules of recoverable damages. Neither a fraudulent nor a negligent, much less an innocent defendant should be held to such insurance for the patent reason that the person who relies on the misrepresentations neither expects nor is entitled to expect such protection. To be sure, he was induced to enter into the transaction because he believed in the truth of the misstatements. But this means only that he should recover for losses related to their falsity. Normally he would not believe that because the misstatements were true there was no possibility of loss and, if he did so believe, he has found that he was mistaken. Losses which would have been sustained even had the misstatements been true should be borne by the person whose mistake subjected him to the risk thereof.

a. Statements of Fact. The types of situation where plaintiff may rely upon the existence of facts as represented are familiar. Whether described by the names of the legal doctrines employed to afford particular relief, i.e., estoppel by conduct, implied warranty, restitution, or deceit, these situations seem to have the common factors which make the relationship of the parties such as properly to bring it within the principle of strict or absolute responsibility. Whether the court is approaching the problem with one or another of the legal formulae available, its judgment is directed toward the same basic problem, viz. a determination of what the parties are entitled to expect in view of the social and economic context in which the transaction is set.

Most of the cases within this group involve persons who were parties to a contract of sale in connection with which the representation was made by the vendor. If the vendor has made “un-
qualified” statements “as of his own personal knowledge,” he is liable in an action of deceit in many jurisdictions. Stock transactions are common instances.65 The vendee in this type of case is usually ignorant of the facts upon which the value of the stock is based. Unless he is one of those rare persons who is in a position and has the ability and inclination to make his own investigation, he is apt to rely heavily upon information received from the vendor. The vendor himself may or may not be in a better position to know. He may be an officer of the corporation selling his own stock or, like the vendee, he may be an outsider with no more access to the facts in question than any other member of the public. The mere fact of ownership, however, at once suggests that he may have utilized the opportunities for knowledge that are equally available to others. If, now, he makes the representations in a manner which implies that he has availed himself of these opportunities and has acquired personal knowledge, the impression upon the vendee will be much the same as though the vendor had exclusive access thereto. Thus, if the vendor makes statements with sufficient emphasis of certainty to satisfy the “to his personal knowledge” formula, he may properly be required to guarantee their accuracy.

It may be that it is not the vendor who furnishes the information upon which the purchaser relied. It may be the vendor’s agent,66 or an officer67 or director68 of the corporation who is thus connected with the subject matter of the transaction so intimately that he is or may be supposed to be in a position to furnish accurate information or to have confirmed the unqualified statements which he makes. Whether the statements are technically “promises,” made by a party to the contract itself, or “representations,” made by such a party or by someone else closely related to the economic issue, is in itself unimportant.69 What is important is that state-

65See cases under note 36, supra.
69The difference between a “representation” and a “promise” seems to
ments are made by one who professes a plausible certainty of knowledge, or whose position makes accurate information peculiarly available to him. Not only parties to the contract itself, but those interested in and closely connected with the subject matter who, because of such connection, are in a position to furnish accurate information, or who purport to impart it, may well be held to answer here for even innocent mistakes.\(^7\)

The defendant's connection with the situation may be that of have been overstressed. "In either case there must be a correspondence between word and action, if the representation is to be true, or the promise to be kept. But the duty of the representor is 'to suit the word to the action;' of the promisor, to 'suit the action of the word.'" (Bower, Actionable Misrepresentation (1927) 38. This purely analytical distinction, however, is not particularly helpful. Normally, representations will apply only to matters of existing or past fact, while promises or undertakings will pertain only to future happenings. Yet, the existence or non-existence of present facts may be the subject of a promise or undertaking, that is, an undertaking to make good in damages if they do not exist. So, too, the happening of a future event may be the subject of a promise by way of warranty, that is a promise to make good in damages if it does not happen as warranted. By continued lip service to the rule of Derry v. Peek, however, and by insistence upon preserving the formal distinctions between actions contractual and delictual, English law insists that a statement must be one or the other and if it is clearly a promise, it is enforceable, if at all, as such, and does not create liability as a representation. (See Maddison v. Alderson [1883] 8 A. C. 467. It is "a promise or nothing." See Bower, Actionable Misrepresentations [1927] 43.) It is this attitude that Professor Williston deplored. See supra, note 3.

It has been pointed out that in many cases in which liability is imposed as for innocent misrepresentations, the misrepresentations were not in fact "innocent;" they were either consciously or negligently false. This very fact, however, indicates the basis for the rule of strict liability. The plaintiff, to the defendant's knowledge, relies upon the complete accuracy of the statement and because in the vast number of cases that will arise there will be no mistake unless there is fraud or negligence, neither of which is tolerated in the kind of transaction in question, he is justified in such reliance. The fact that ordinarily the defendant can ascertain the existence or non-existence of the facts which he represents justifies the plaintiff in interpreting the representation as an undertaking to be responsible for the truth of the facts stated. It is helpful to compare certain situations in which a similar rule is applied as to representations which, if false, threaten harm to person and property. While in most cases a party can expect only reasonable care on the part of the other with respect to the truth of such statements, there are cases in which liability is imposed for innocent misrepresentations. See Baxter v. Ford Motor Co., (1932) 168 Wash. 455, 12 P. (2d) 409, 15 P. (2d) 1118 (windshield glass which was shatterable represented as non-breakable). See Perkins, (1920) 5 Iowa L. B. 6, 86, discussing the liability for unwholesome food when there has been no negligence on the part of the manufacturer, who is held liable to a consumer with whom he has had no contractual relations, but who, because he is the manufacturer, has a close and obvious economic interest in its consumption. While ordinarily the mere production and marketing of an article entitles the consumer to expect no more than reasonable care and skill in its preparation to ensure its safe use, it may well be that in the case of foods and articles highly dangerous to life and safety, it is acceptable policy to permit reliance upon the truth of the representations.
an agent who misrepresents the authority which he has to act for his principal in the transaction in question. This is an obvious case. Of course, the agent better than anyone else is in a position to know the extent of his authority, and, of course, the third person purports to deal with the principal through the agent in justifiable reliance on such authority. Again, the defendant’s connection with the situation may be that of bailee or one who holds himself out as a bailee of goods, or one who is the obligor on a negotiable instrument, warehouse receipt or bill of lading, in which case still more obviously the public is entitled to rely upon the accuracy of the representations made with respect to the chattel or obligation in question. The policy here is so clear that, with occasional exceptions, there has never been any serious question as to the law. Business would be greatly upset if complete reliance could not be placed upon the existence of facts


In Chieppo v. Chieppo, (1914) 88 Conn. 233, 90 Atl. 940, it was held that “If the agent honestly believed that he had an authority which he did not possess, he may be sued on an implied warranty of authority. If he knew or . . . ought to have known that he had not the authority which he professed to have he may be sued in the action of deceit.”


Under the Uniform Negotiable Instrument Act, it is held that an agent who executes a negotiable instrument, though purporting to do so as agent, is liable on the instrument itself if he does not have the authority which he professes to have. Ryan v. Hebert., (1924) 46 R. I. 47, 124 Atl. 657; Austin Co. v. Gross, (1923) 98 Conn. 782, 120 Atl. 596; New Georgia Bank v. Lippman, (1928) 249 N. Y. 307, 164 N. E. 108.
without which the transaction would be impossible. Therefore, when a workhouseman innocently represents that he holds specified goods of another,\textsuperscript{71a} or when a carrier issues a negotiable receipt or bill of lading for goods,\textsuperscript{72} or when an obligor on such an instrument delivers the goods but fails to require surrender of the documentary evidence thereof,\textsuperscript{73} he is universally liable to one who deals with the bailor or shipper in reliance thereon and with no reason to suspect that the facts are not as represented thereby. The defendant's honesty and care are no defense.\textsuperscript{74}

\textsuperscript{71a}"Even apart from any legislation the doctrine of estoppel should be applicable. The common use of documents of title for transferring property makes it incumbent upon those who issue such documents to know that the statements contained therein are likely to be relied upon. If they are, therefore, relied upon to the detriment of a purchaser, the bailee should not be permitted to deny their truth." 2 Williston, Sales (1905) sec. 418.


\textsuperscript{72}On the theory that the agents of a carrier have no authority to issue bills of lading for goods not received, the English law did not apply to such bailees the doctrine of estoppel. See Grant v. Norway, (1851) 10 C. B. 665. In the United States authority is divided. See cases collected in 2 Williston, Sales (1905) sec. 419. The Uniform Bills of Lading Act eliminates the exception. See Sec. 23. The Act has a provision to similar effect relating to misdescription. See Sec. 23. So, too, the Uniform Warehouse Receipts Act has similar provisions as to the non-existence and misdescription of the goods. See Sec. 20. See Nashville, etc., R. Co. v. Flournoy, (1913) 139 Ga. 582, 77 S. E. 797; Chicago, etc., R. Co. v. Cleveland, (1916) 61 Okla. 64, 160 Pac. 328; Gleason v. Bamberg, etc., R. Co., (1923) 124 S. C. 88, 117 S. E. 188; Brooke v. New York, etc., R. Co., (1885) 108 Pa. St. 529, 1 Atl. 206; Sioux City, etc., R. Co. v. Bank, (1880) 10 Neb. 555, 7 N. W. 311.


\textsuperscript{74}It is a familiar argument that an estoppel does not create a cause of action and therefore cannot properly be regarded as a basis of legal liability. The legal consequences of estoppel by misrepresentation do not come within the scope of actionable misrepresentation. Estoppel is a rule of evidence, not a cause of action. The same facts which establish the estoppel may, of course, be ground for an action of misrepresentation; but this is only an accident. Estoppel as such merely removes a barrier
(b) Opinion or Comment. As in cases involving express statements of specific fact, there are certain relationships in which

in the way of, or interposes an obstacle to a cause of action, or ground of defense, which would otherwise fail or succeed in the respective cases.” (Bower, Actionable Misrepresentations (1927) 28, note d.) This explanation has been employed by English judges to avoid what they would otherwise regard as an inconsistency with the case of Derry v. Peek. (See Low v. Bouverie, [1891] 3 Ch. 82, 101, and see Weisiger, Bases of Liability for Misrepresentation, (1930) 24 Ill. L. Rev. 866, 868.) But such distinctions are largely ones of formal analysis. While estoppel may not thus constitute a basis for liability, it is most certainly a basis for legal responsibility.

An analytical distinction of this sort is useful and, therefore, justifiable for purposes of rationalization, that is, making intelligible and coherent existing phenomena. When, however, the logical form is regarded as possessing validity in other respects, so that its implications become a guide to action, its utility ceases and its abuse begins. This seems precisely the situation in English law where an action in which the real basis of liability is honestly and accurately presented may result in no recovery, whereas a fictitious presentation will entitle the plaintiff to damages. (See Tomkinson v. Balks Cons. Co., [1891] 2 Q. B. 614, in which a corporation was estopped from asserting the defense of the forgery of a share certificate which the plaintiff had bought on the strength of a certificate issued by the defendant. The case is discussed by Weisiger in [1930] 24 Ill. L. Rev. 866, 868 and Ewart, Estoppel [1900] 230 ff.) In other words, "if the facts are stated naturally and in support of the real ground of complaint the plaintiff will be beaten; whereas he will succeed if he state the case artificially—asserting as his grievance that of which he cannot complain." Ewart, Estoppel (1900) 236. This is indeed a sorry situation when a premium is thus placed upon sham.

It seems clear that estoppel is one formula by which responsibility is imposed for misrepresentation. Indeed, in English law, the judges sometimes concede that a cause of action is created between the parties. Thus, Lord Justice Brett in Simm v. Anglo-American Tel. Co., (1879) 5 Q. B. D. 207, after pointing out that although a warehouseman is not liable for deceit under the doctrine of Derry v. Peek and, although he is estopped to deny the plaintiff's right to the goods, cannot be compelled to deliver to him the goods because they are actually owned by a third party, observed: "In my view estoppel has no effect upon the real nature of the transaction: it only creates a cause of action between the person in whose favor the estoppel exists and the person who is estopped." There are, however, judicial views to the contrary. To this conflict, Ewart thinks there is no substance. "Whether an estoppel does or does not 'create a cause for action,' is, to the writer, largely a matter of words." (p. 187.) "If the subject be well understood," he continues (p. 187.), "it is a matter of comparative indifference." The "understanding" necessary to make it a matter of "comparative indifference" would seem to be some estimate of the situations involving misrepresentations which indicate when the fraud of Derry v. Peek is necessary to any legal responsibility, whatever the form of words employed by the courts in imposing it, and when responsibility, whether explained as estoppel or otherwise, is imposed irrespective of honesty and appropriate care.

It is highly significant that all the American cases in which an action of deceit has been successfully maintained for innocent misrepresentation have involved a type of factual situation in which the defendant is in a position to know the facts which he states, while the plaintiff does not have such an opportunity, or the representation is said to be made by the defendant "as of his own personal knowledge" or "to his personal knowledge." See Chatham Furnace Co. v. Moffatt, (1888) 147 Mass. 403, 18
common assumptions are made that in no event does the opinion of either party carry any misleading implications, either because one party is in a superior position to know and judge, or because the statement is couched in such positive terms that the other is led to believe that the factual basis for the opinion offered is known to be adequate. These cases include opinions as to the financial responsibility of persons, the quality of material and workmanship, the value, comparative and otherwise, of property, the soundness of investments, the suitability and utility of property, and the validity of the legal title to property or other legal right.\(^{75}\) The defendant in these cases, because of his superior

\(^{75}\) Broadus v. Binkley, (Tex. Civ. App. 1932) 54 S. W. (2d) 586 (broker made positive assertion that tenants were financially responsible); Conroy Piano Co. v. Pesch, (Mo. 1925) 279 S. W. 226 (vendor made positive assertions as to quality of material and workmanship, as compared with other makes); Harris v. Miller, (1925) 196 Cal. 8, 235 Pac. 981 (agent of vendor told purchaser of land that there was a $4,000 orange crop on the place); Aldrich v. Worley, (1925) 200 Iowa 1009, 205 N. W. 851 (vendor told plaintiff vendee that rice farm was a choice tract and suitable for raising rice); Hastings v. Swindle, (1920) 206 Mo. App. 74, 226 S. W. 71 (vendor told vendee that timber on the land was good, that cisterns and ponds were lasting water, and that it was a good buy); Horner v. Caldwell, (Tex. Civ. App. 1923) 256 S. W. 1023 (salesman told plaintiff that cotton seed had 90 per cent germinating quality); Kerr v. Shurtleff, (1914) 218 Mass. 167, 105 N. E. 871 (statement by one of authorities of college that college had authority to grant the degree of D. M. D.); Edmonds v. Wilcox, (1918) 178 Cal. 222, 172 Pac. 1101 (bank's statement as to value of stock and that they regarded the stock as ample security for its face value); F. H. Smith Co. v. Low, (1927) 57 App. D. C. 167, 18 F. (2d) 817 (positive assertion as to the value of property sold plaintiff); Coleman v. Night Commander Lighting Co., (1928) 218 Ala. 196, 118 So. 377 (vendor told purchaser that lighting plant would consume only 100 pounds of carbide in six months); Reinerz v. American Piano Co., (1926) 254 Mass. 411, 150 N. E. 216 (vendors told purchaser their phonograph was better than the Victor Phonograph); Bockes v. Union Mutual Casualty Co., (Iowa 1929) 224 N. W. 771 (statement by insurance company's president that insured's accident policy was void); Electric Paint & Varnish Co. v. Binghamton Woven Wire Spring Co., (1929) 134 Misc. Rep. 638, 236 N. Y. S. 337 (vendor said that paint would stand vibration without cracking, hardening or leaking); Roloff v. Hundebuy, (1930) 105 Cal. App. 645, 288 Pac. 702 (false statement by vendor as to location of land in distant state, quantity of timber thereon, and character of soil).
knowledge of the pertinent facts or means of knowledge thereof or because of the positive character of his statement, is held to a liability which is independent of the sincerity of his opinion or his reasonableness in entertaining it.\(^{76}\) He is required to insure the plaintiff against loss resulting from error of judgment on his part. Unless the defendant occupies a superior position to know the facts pertinent to his expressed judgment, however, or unless he has expressed his opinion in such dogmatic terms as fairly to lead the plaintiff to conclude that his opinion is the accurate inference from ascertained and verified facts, there is no liability unless the defendant is dishonest in expressing as his view what he does not in fact believe.\(^{77}\)

These cases are most frequently dealt with as statements in form expressions of opinion, but actually implied representations of fact.\(^{76}\) If the facts do not turn out to warrant the judgment, the defendant is liable, although his statements were honestly made and based upon facts which any reasonable man would have regarded as an adequate basis therefor. He is actually held to warrant the


\(^{77}\) State Trust Bank v. Hermosa Land Co., (1925) 30 N. M. 566, 240 Pac. 469 (estimate by vendor of number of cattle in herd) ; Sorrells v. Clifford, (1922) 20 Ariz. 448, 204 Pac. 1013 (same) ; Ramsey v. Reiniersen, (1923) 200 Ky. 624, 255 S. W. 274 (statement by defendant that third party would pay obligation if plaintiff would lend him money) ; Boston Gas Co. v. Folsom, (1921) 237 Mass. 565 (opinion of vendor’s agent as to comparative cost of operating gas boiler) ; Vian v. Hilber, (1923) 111 Neb. 232, 196 N. W. 153 (opinion as to third person’s credit) ; Podolsky v. Sandler, (App. Term 1916) 161 N. Y. S. 363 (opinion by defendant as to date of his graduation) ; Beckley v. Archer, (1923) 74 Cal. App. 598, 241 Pac. 422 (opinion as to cows with calf) ; Warren Sav. Bank v. Foley, (1928) 294 Pa. St. 176, 144 Atl. 84 (opinion as to credit and competence of third person).

existence of facts which will justify the opinion in the sense that the expected advantages of the transaction accrue to the plaintiff.\(^9\)

This absolute liability does not exist where the basis for the opinion is stated or is otherwise known to the plaintiff at the time. In such a case, the defendant's statement cannot reasonably be regarded as anything other than his opinion, based on the known facts, as to probabilities or future developments, and words of warranty are necessary to make him an insurer. Whether he is liable if, though honest, his prophecies were not reasonable, or whether he is liable if he was insincere in the expression of his judgment, or whether he is not liable even for fraudulent misrepresentations of his opinion depends upon other factors which determine the justification for the plaintiff's assumption of his competence or honesty.

Business may be conducted with the business risks all on one side, if the price of such security is paid. In the absence of express agreement, however, the allocation of such risks depends upon the basis of the transaction as revealed by the relation of the parties and the tacit assumptions thereby justified. While a party to a transaction is not always assured by law that he will get all that he thinks he is getting in the way of a good bargain, he is assured that the transaction will be conducted on the basis of his justifiable assumptions. When, therefore, the existence of certain facts, rather than the other party's honest or even reasonable belief in their existence, constitutes the very subject of the sale, the absence of such facts is fatal to the validity of the transaction. The party who is prejudiced by the non-existence of such facts may hold the other party to a warrantor's liability.

This situation may be illustrated by a misrepresentation of title or other legal right which is the subject of a transaction. If the facts are thoroughly known by both parties, an assertion of title as a legal conclusion is mere opinion and the vendee may properly be held to purchase a precarious legal claim, provided there has been no actual fraud. The subject of the sale is not the legal title or right, but such claim thereto as the vendor may have. The plaintiff must rely upon his own judgment, and not

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\(^9\)In some of these cases, the contract measure of damages is applied, thus carrying the theory of the plaintiff's "justifiable expectations" to its logical limits. Long v. Freeman, (1934) 228 Mo. App. 1002, 69 S. W. (2d) 973; Stumpf v. Lawrence, (1935) 4 Cal. App. (2d) 373, 40 Pac. (2d) 920. In some cases the measure of damages is immaterial as the amount of recovery would be the same under either. In other cases the problem is apparently not considered.
that of the defendant. Even a misrepresentation by the latter as to what his opinion may be cannot justifiably be relied upon save in exceptional circumstances, although many courts allow restitution. The deal is presumably consummated with proper allowances for the doubts or chances as to the validity of the title unless the price of a warranty is paid.\(^{80}\)

Where the facts are not known to the plaintiff and where the defendant is in a much better position to know them, or although the facts are equally accessible to both, the defendant assures the plaintiff of the validity of his asserted title or right, it may fairly be held that the subject of the transaction has become not such claims as the defendant may turn out to have had, but a valid claim or title, and the parties will be held to the assumed terms and conditions of the bargain. Stability of transactions requires not only that the purchaser of the non-existent legal right be permitted to rescind the bargain, but that the vendor make good in damages the invalidity of the claim. The parties should be put in the same position as though the thing purchased was as represented. The defendant is accordingly held to a warrantor's liability.\(^{81}\)

This is always the case in a sale of chattels or a contract for such sale, even though nothing is said as to the vendor's title. Usually, the facts upon which the seller's title depends are known only to him. The very offer of the goods for sale is a representation both of title and of the material facts upon which title depends.\(^{82}\) He is held, therefore, to an implied warranty of title unless, as in the case of a judicial sale, the conditions of the transaction are such that it is understood that he sells only such interest as he may have.\(^{83}\) Much the same thing may be said as to a contract for the

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\(^{80}\)See infra, p. 1003.


\(^{83}\)"Normally, the seller of a chattel warrants his title, and the purchaser has the alternative of maintaining an action for breach of contract or of getting the return of his consideration. On the other hand, the transaction may be conducted on the basis that even though no title passes by the transaction the purchaser is to take the risk. This is the normal inference in sales on execution by a sheriff or other officer, not requiring confirma-
sale of land. Unless otherwise stipulated, usage requires the seller to furnish a marketable title. It is otherwise, however, as to an actual sale of land. Here the assumption is that the vendor sells only such title as he may have, unless it is provided otherwise by the inclusion in a deed of a warranty of title. If the grantor, prior to the conveyance, makes express misrepresentations of fact with respect to his title, although he does not thereby become liable in an action for misrepresentation, unless he knew of the falsity thereof, nevertheless the vendee is entitled to restitution upon repudiation of the transaction. 84


84a In the absence of a provision otherwise, normally a contract for the sale of land includes inferentially an agreement that the seller is to furnish a marketable title and if money has been paid upon such a contract in anticipation of the receipt of title it may be recovered if such a title is not furnished, as in the case of any other contract which is unperformed by the payee. This is true although the seller does not contract to give a warranty of title.

"If, however, after a contract the buyer, whether or not entitled to more, accepts from the seller a deed of a freehold interest containing no warranties, usage indicates that the buyer accepts the risk that the seller had no title or a defective one, and in the absence of fraud or misrepresentation [otherwise than that which is implicit in the proffer of sale and mere act of transfer], the buyer cannot thereafter recover money which he paid either before or after the conveyance. . . . Although an express misrepresentation of facts as to ownership prior to a conveyance, even though innocently made, is sufficient to make the transaction voidable, the representations of ownership inferred from contracting to sell or from making a conveyance, if innocently made, are not such misrepresentations as make the transaction voidable. If, however, the seller knows facts from which he realizes that he has no title or only a doubtful title and also has reason to believe that the buyer does not know these facts, his failure
There is, in these rules relating to the sale of land, more than mere technical and fine spun distinctions. They cut to the very heart of the social policy of the law of misrepresentation. Subtle differences in psychological attitudes seem to require the differences in legal rules. A contract of sale, in the absence of explicit agreement, "naturally" carries the implication of a valid title as the subject of the deal. Men do not ordinarily contemplate any other kind of "land" sale. The practical viewpoint of the layman or even the real estate operator is that a contract for "sale of land" calls for a valid title to the land. Unless the stipulations or the known conditions suggest something different, the parties normally regard complete ownership as the subject of the transaction. The deal fails if the title fails. On the other hand, the practice of requiring covenants of warranty in deeds to land, sold on the assumption that the vendor transfers a title in fee simple absolute, and the uniformly recognized difference in the value of a quit-claim deed negate any such implication from the actual conveyance itself. Unless the vendor represents otherwise, the fact that no warranty is included in the deed indicates that the vendee, not the vendor, assumes the risk of defective title. The price is adjusted on this basis. The vendee, in the absence of assurance from his vendor, must, and normally does, make his own investigation and pays a price that he thinks the chances of validity justify. If, however, the vendor, although not by formal warranty, assures validity, the implied assumption of risk is recognized by an action for restitution. The vendee's failure to investigate facts presumably better known to the vendor than himself will not forfeit this protection. The parties now purport to consummate the transaction with reference to a valid title and, although both are innocently mistaken, the law will not, as between the parties, substitute some other deal. The vendee cannot enforce the warranty by direct action for misrepresentation, but he can escape the bargain which his vendor mistakenly substituted for the one both thought they were making.

V. SITUATIONS IN WHICH PLAINTIFF IS ENTITLED TO RELY UPON THE HONESTY, CAUTION AND COMPETENCE WITH WHICH REPRESENTATIONS WERE MADE

In many relations resulting from business transactions, although a party is not entitled to rely upon the absolute truth of
representations or infallibility of judgment of the other party and hence to expect the other to make good in the event of the falsity of the statements or invalidity of opinion, he is entitled to expect more than mere honesty and sincerity. He quite justifiably expects a certain standard of care and competence from the other as to such representations or opinion. Many transactions are conducted on the assumption that he who makes the important statements upon which the parties proceed is reasonably qualified to make such statements and that he has employed reasonable diligence to ascertain their accuracy.

Since the failure to employ reasonable competence and skill in ascertaining the truth of representations or the basis of opinion involves a form of negligence, the problem is amenable to the usual analysis employed in negligence cases, namely, breach of the duty to exercise care. Here, at once, there is noted a significant distinction between the duty to exercise care with respect to the person and tangible property of another, and the duty to exercise care and competence not to mislead another in connection with a business transaction. In the former case, there is always the negative duty not to create an unreasonable risk, that is, not to act so as unreasonably to expose others to risk of harm. It is only with respect to affirmative duties, that is, duties to assist others to escape harm, that some special relationship between them is necessary. This distinction, a common one in American law since Professor Bohlen's significant work on affirmative obligations, seems not to be recognized in England where judges and writers are still puzzled over Brett's formula in Heaven v. Pender and the apparent duplication in the test for duty and its breach.

In the case of liability for negligent misrepresentations, however, there is no such broad negative duty. Whereas one is always under a duty not, by his act, to threaten unreasonable harm to another's person or tangible property, there must be some special


84(1883) L. R. 11 Q. B. D. 503.

relationship between the parties to create such a duty in respect to misinformation negligently given.\(^8\) The reasons for this are clear. The distinction brings the law into conformity with common sense and general notions of fairness and propriety. The physical affairs of life are conducted on the assumption that everyone will so regulate his conduct as not unduly to expose another to risk of harm to person or property. Automobiles are operated in congested traffic upon this assumption. Houses and other structures are erected and demolished, industry is carried on, and, in short, all the physical activities of a complex society are carried on upon such mutual assumptions. One expects and is entitled to expect such precautions from others as will make their conduct reasonably safe in this respect. The law, therefore, imposes the general duty of care. It is otherwise, however, as to the use of language which, if relied upon, is likely to affect adversely another's pecuniary interest in a business transaction. No one is entitled to expect diligence or care from one, a stranger to a transaction and entirely disinterested therein, who makes casual statements or gives gratuitous advice with respect thereto. Here is conduct which is likely to cause loss if relied upon, but one at most can expect no more than honesty in such situations. One should not assume that any degree of care has been employed to insure the accuracy of such gratuitous information.

If, however, the person who makes the representations does

\(^8\)That a "special relationship" is required in the case of negligent language is recognized by English writers. They apparently assume the same necessity as to active negligence otherwise than by language. Thus, in Salmond, Torts (8th ed. 1934) 455:

"There is no liability for negligence unless there is in the particular case a legal duty to take care, and this duty must be one which is owed to the plaintiff himself and not merely to others. 'The ideas of negligence and duty are strictly correlative,' says Bowen, L. J., 'and there is no such thing as negligence in the abstract; negligence is simply neglect of some care which we are bound to exercise towards somebody.' This duty of carefulness is not universal; it does not extend to all occasions, and all persons, and all modes of activity. There are cases in which, although there is a duty not to cause harm intentionally, there is no corresponding duty to take care not to cause it accidentally. Thus, I must not deceive another to his own hurt by wilfully telling him lies, but I am commonly under no obligation to take care that the statements which I make to him are true [italics ours]. So a man may be under a duty of care towards one person, and yet in the same matter and on the same occasion under no duty of care towards another. The occupier of premises is bound towards persons lawfully entering on them to take care that they are free from concealed danger; but he owes no such duty to the trespasser. 'English law does not recognize a duty in the air, so to speak; that is, a duty to undertake that no one shall suffer from one's carelessness.'"
In the pursuit of a business or profession which requires special competence, he should have the competence thus professed. So too, if the information is given in the capacity of one in the business of supplying such information, that care and diligence should be exercised which is compatible with the particular business or profession involved. Those who deal with such persons do so because of the advantages which they expect to derive from this special competence. The law, therefore, may well predicate on such a relationship, the duty of care to insure the accuracy and validity of the information. If the person misled has dealt directly with the other and a contract exists between them, there is no doubt of the existence of the duty. There is recent authority, however, that the duty exists toward one who, though not in privy with the person supplying the misinformation, was known at the time it was given to be the person for whose guidance it was furnished.

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88 "One who in the course of his business or profession supplies information for the guidance of others in their business transactions is subject to liability for harm caused to them by their reliance upon the information if

(a) he fails to exercise that care and competence in obtaining and communicating the information which its recipient is justified in expecting, and

(b) the harm is suffered

(i) by the person or one of the class of persons for whose guidance the information was supplied, and

(ii) because of his justifiable reliance upon it in a transaction in which it was intended to influence his conduct or in a transaction substantially identical therewith." Restatement of the Law of Torts, Tentative Draft No. 12, sec. 628.

89 Glanzer v. Shepard, (1923) 233 N. Y. 236, 135 N. E. 275, 23 A. L. R. 1425 (public weigher, ordered and paid by seller, negligently certified weight of beans, so that buyer suffered loss); Doyle v. Chatham Bank, (1930) 253 N. Y. 369, 171 N. E. 574 (bank trustee of bonds negligently certified them); Tardos v. Bozant, (1846) 1 La. Ann. 199 (inspector of meat made negligent report as to its quality); Pearson v. Purkett, (1834) 15 Pick. (Mass.) 264 (same); Mulroy v. Wright, (1932) 185 Mich. 84, 240 N. W. 116 (officer liable for negligently certifying there were no assessments against realty).

In the following cases notaries public, justices of the peace, and other like officers were held liable: State ex rel. Gardner v. Webber, (1914) 177 Mo. App. 60, 164 S. W. 184; Figuers v. Fly, (1917) 137 Tenn. 358, 193 S. W. 117; Hatton v. Holmes, (1893) 97 Col. 208, 31 Pac. 1131; Rhodes v. Franz, (1916) 173 App. Div. 774, 160 N. Y. S. 66; People ex rel Curtiss v. Colby, (1878) 39 Mich. 455.

In the following cases recovery was denied: New England Bond & Govt. Co. v. Brock, (1930) 270 Mass. 107, 169 N. E. 803 (notary public); Kahl v. Love, (1874) 37 N. J. L. 5 (officer not liable for false certificate as to payment of taxes); Day v. Reynolds, (1885) 23 Hun. (N.Y.) 131 (clerk making certificate as to state of record); National Iron & Steel Co. v. Hunt, (1924) 312 Ill. 245, 143 N. E. 833 (company expert inspectors held not liable to subsequent purchaser of rails, since not in
(a) Facts. The problem in the cases involving negligent misrepresentations of fact is whether the parties deal on the assumption that reasonable care has been employed to assure the truth of the representations made, and whether in the light of common business practice, the relationship of the parties is such that these assumptions are justifiable. In other words, is a party who enters into a business transaction entitled to expect care and diligence from one who, though not employed by him, nevertheless in a professional or business capacity, with knowledge of the purpose for which it is to be used, furnishes important information for the guidance of the parties?

The New York court of appeals answered this question in the affirmative in Glanzel v. Shepard,91 the case of a public weigher who furnished an erroneous weight certificate upon which the plaintiff, who had not employed him, overpaid the vendor of a quantity of beans. It decided otherwise in the case of a certified public accountant who negligently furnished a financial statement upon which the plaintiff, who had not employed him, advanced money to an insolvent corporation.92 In Le Lievre v. Gould,93 the English court denied recovery to a mortgagee who had advanced money on the strength of a surveyor’s certificate furnished by the defendant which, because of negligence, contained misinformation as to the amount of work done by a builder in the erection of a house. Lord Esher and Bowen, L. J., each had distinguished the decision in Heaven v. Pender94 on the ground that the formula laid down in that case applied only to physical harm caused to persons within the danger zone.95

These conflicting decisions and the discussions of the courts indicate that the “duty” question is a crystallization in technical terms of the broad problem of what parties in the relationship in question are entitled to expect from each other. Lord Atkin, in a recent decision in which the House of Lords considered at length the duty problem, observed:

“At present, I content myself with pointing out that in English Law there must be and is some general conception of relations privity); Landell v. Lybrand, (1919) 264 Pa. St. 406, 107 Atl. 783 (public accountant negligently reported on corporate affairs and purchaser of stock relied on the report).

91 (1920) 233 N. Y. 236, 135 N. E. 275, 23 A. L. R. 1425.
94 (1883) L. R. 11 Q. B. D. 503.
95 See note 97, infra.
giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of 'culpa' is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay.\textsuperscript{96}

The issue in the case of a negligent misrepresentation upon which the court must exercise its judgment, then, is whether the parties in the type of transaction in question are in such a relationship as to bring them within "a general public sentiment of wrongdoing" if they fail to exercise care; whether business practice and the common assumptions which constitute the tacit psychological basis of their dealings are sufficiently important to justify the imposition of a legal duty to employ care in making material representations.

It is to be expected that the judgments of courts should vary as to what situations come within this description. The English courts are of opinion that only when the parties are in contractual relation are they entitled to expect such care and diligence.\textsuperscript{97} The New York court of appeals is apparently of the opinion that it is unnecessary that there be such a legally formal relationship as a binding contract between the parties, but that what can be called the "business intimacy" of the parties may be sufficient to entitle one party to expect care and diligence if the other is engaged in the business of furnishing such information, and knows the particular use for which it is furnished and the particular person for whom it is furnished.

This problem appears further in the cases involving the liability of an abstractor for a negligent report as to the title to land. In some jurisdictions, it seems that unless the plaintiff was the

\textsuperscript{97}In Le Lievre v. Gould, [1893] 1 Q. B. 491, 68 L. T. 626. Lord Esher said: "What duty is there between two people that one should not be negligent towards the other when there is no contract between them?"

Smith, L. J., remarked: "The defendant says he owed no duty to the plaintiffs, and it seems to me he is right, unless the plaintiffs prove that he was bound to them by contract to make true representations in the certificates."

Both judges thereafter distinguished the decision in Heaven v. Pender. "It establishes this point," explained the former, "that under certain circumstances, when two people are so physically near to other other that one might cause the other a personal injury or an injury to his property, in such a case a duty lies upon him to take reasonable care not to cause to the other any injury to his person or his property." The latter said of Heaven v. Pender, "That case relates only to the duty cast upon the owner of property or chattels to take care that his property or chattels do not cause any injury to persons in their neighborhood, and it has no application to the present case."
person who had employed the abstractor there can be no recovery. In several jurisdictions, however, although the plaintiff had not entered into a contract with the defendant, he may recover if the latter, at the time of supplying the certificate or report, knew the person who would rely upon it and the transaction in which it would be used. In some states, statutes go still further and eliminate the necessity for knowledge by the abstractor of the person and transaction; it is enough if he knows that the certificate is likely to result in loss to someone if the information is incorrect.

Cases involving the doctrine of estoppel disclose similar situations. As already noted, in certain situations one is estopped to assert the falsity of a misrepresentation although he acted honestly and carefully. These were relations in which the estoppel denier was in a position which would ordinarily insure the accuracy of his statements if he were honest and careful, and for this reason the other party properly expected and relied upon the accuracy thereof. There are other situations in which there is no estoppel unless there has been negligence and, indeed, still others in which fraud is required. In some of the "standing by"


100aSupra, note 74.

101It is believed that the estoppel cases show that there are situations where there is no liability without proof of fraud, such fraud as would come within the rule of Derry v. Peek; that there are other cases, that, while not requiring fraud, will fail without a showing of some fault or
cases, although some courts seem to require actual fraud, negligence is really enough to work the estoppel to assert title. This title is sometimes couched in terms of "constructive" fraud or "negligence which amounts to fraud." Thus, in a New York case, it was said that "actual fraud, or fault or negligence equivalent to fraud" is necessary to an estoppel. "While it is frequently said that fraud is an essential element of estoppel," said the Missouri court, "this must be taken to mean fraud either actual or constructive."

There are a number of situations in which what has been called "assisted misrepresentation" is actionable only when negligence is proved. Included in this class are cases of misrepresentation by the use of various commercial documents. Thus, the maker of a negotiable instrument is under a duty to employ care not to create a situation which a third person may utilize to defraud another, as by leaving blank spaces in the instrument.

There are still other situations in which a person is responsible for the misrepresentation of someone else, because by his negligence he is estopped to deny that it was his own misrepresentation, such as one who carelessly assists a third person to misrepresent negligence on the defendant's part. There is a third class where neither fraud nor negligence is required." Weisiger, Bases of Liability for Misrepresentation, (1930) 24 Ill. L. Rev. 866, 870.

Ewart apparently adopts a contrary view. He concedes that in some situations negligence is necessary to work an estoppel (see chapter IX), but he does not believe that fraud is ever necessary. See chapter VIII, pp. 84-85 in which he criticizes the following passage from Bigelow on Estoppel: "Estoppel arising in virtue of a misrepresentation is the converse of an action of deceit. The property or interest claimed by reason of the estoppel corresponds to the damages sought in the action of deceit; and in order to make good the claim of estoppel the same things, it should seem, are requisite that are necessary to the maintenance of the action mentioned." To this, Ewart objects, saying, "Nor can the present writer agree that for 'estoppel the same things are requisite as in the action for deceit. The latter, as we have just seen, must be based upon fraud and nothing short of that will suffice.' In estoppel on the other hand as we shall abundantly see, a perfectly innocent misrepresentation, or even innocent assistance rendered to a misrepresentation of another person, may be quite sufficient for estoppel."

Ewart, of course, had reference to the rigid adherence by English courts to the rule of Derry v. Peek, requiring scienter in an action for deceit. A large number of American cases have allowed what was in form an action of deceit although the misrepresentation was innocently made.

102 Trenton Banking Co. v. Duncan, (1881) 86 N. Y. 221.
104 Ewart, Estoppel, (1900) 101.
an authority to act for him as agent, or one who negligently fails to discover the forgery of a check which a bank has charged to his account.

(b) Opinion. In many relations, while the plaintiff may not justifiably expect infallibility of judgment on the part of the defendant, he is nevertheless justified in expecting a reasonable degree of competency in the formulation of the judgment and the care with which the data upon which the judgment is based have been collected. These include situations in which the plaintiff has knowledge of the factual basis for the opinion and those in which such basis is not revealed. Indeed, it may include situations in which the plaintiff himself furnishes the facts upon which the defendant bases his judgment. This liability, like that for negligent misrepresentations of fact, is based upon the negligence of him who honestly makes a representation of an opinion which is unsound as measured by the test of the reasonable man in the defendant's position. In terms of the analysis usually accorded problems involving negligence, the defendant has failed to exercise the duty of care which the law imposes upon him. This duty exists if the defendant by reason of his business or professional experience should be especially qualified to form an opinion. A person, by engaging in such a business or profession, purports to offer to the public those qualifications normally expected from members of the particular calling. His services are sought because of the assumption of special skill. A failure to exercise the skill and competency compatible with the particular profession subjects such a person to liability for negligence. While the plaintiff must bear the risk of loss resulting from reasonable errors in the performance of these services by the defendant, he is not required to bear the risk of unreasonable error in judgment.

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108 "Where the information consists of an opinion upon facts supplied by the recipient or otherwise known to him, the recipient is entitled to expect a careful consideration of the facts and competence in arriving at an intelligent judgment thereon. Where the supplier undertakes to give an opinion upon facts to be ascertained by him, the recipient is entitled to expect that he will make a careful investigation and will also give careful consideration to the data thereby discovered and will exercise competence in drawing intelligent inferences therefrom." Restatement of Torts, Tentative Draft No. 13, sec. 628, Comment d.
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Cases involving the liability of appraisers, attorneys, and others who render similar services in a professional capacity come within this rule.\(^{109}\) The principle is strictly analogous to negligent misrepresentations of fact\(^{110}\) made by persons in similar relations and the same variation in the application of the principle by the courts is apparent. As in cases involving negligent misrepresentation of fact, some courts take the position that no duty of care is owing unless the defendant knows the transaction in which the information is to be used and the persons for whose guidance it is intended.\(^{111}\) In such cases, the defendant undertakes only to render service. No one expects such service to be a warranty against loss. If the defendant's service involves furnishing an opinion as to the business risks of a transaction, no one could reasonably expect more than diligence in ascertaining data, not furnished by the client, and reasonable competency in the formation of judgment.

(c) **Comparison of liability for innocent and negligent misinformation.** Considered in the light of the cases imposing liability for innocent misrepresentations, does it appear that the cases involving negligently given misinformation disclose a rational policy? It is believed that in many respects they disclose a policy that is thoroughly understandable. In the first place, most cases of liability for innocent misrepresentation disclose the formal stamp of a contractual relationship between the parties. Moreover, usually the case is one involving a sale, if not between the plaintiff and the defendant, then between plaintiff and a third person. And finally, in every case of liability for innocent representation, the misinformation was one of fact "susceptible of accurate knowledge," or an expression of opinion capable of adequate factual support. Moreover, the statements were made either by one who had peculiar means of ascertaining pertinent data or by one

\(^{109}\) Anderson v. Spriestersbach, (1912) 69 Wash. 393, 125 Pac. 106; Brown v. Sims, (1899) 22 Ind. App. 317, 53 N. E. 779; Decatur Land, etc., Co. v. Rutland, (Tex. Civ. App. 1916) 185 S. W. 1064; Dickle v. Abstract Co., (1890) 89 Tenn. 431; Economy Bldg. & Loan Ass'n v. West Jersey Title Co., (1899) 64 N. J. L. 27, 44 Atl. 854. The South African Court, in Perlman v. Zontendyk, [1934] S. A. L. R., Cape Prov. Div. 151, apparently takes the position that it is enough to justify the expectation of care if one of the parties is in the business of furnishing such information although he does not know the particular transaction in which it will be used nor the particular person who will use it.

\(^{110}\) Supra, p. 982.

whose position made possible complete knowledge and whose statements fairly implied that he had it.

In many of the cases involving negligent misrepresentations, there is no contract between the parties to the action, and, although there is frequently a sale between the plaintiff and a third person, the information sometimes consists as much of a matter of judgment as of fact. The misinformation which is likely to cause loss may consist of a failure to discover pertinent data, or an unreasonable appraisal of accurate and complete data.\textsuperscript{112} Moreover, what is equally important, the cases involving innocent misrepresentation disclose situations in which the defendant professes complete knowledge of the facts or normally could be expected to know them without any special investigation. He is usually the owner of land, chattels, or intangible property which he is selling to the plaintiff, or he is a cashier or other officer in a bank or other corporation, so that the facts stated are not only susceptible of accurate knowledge, but he can be expected to have it, most certainly if he makes special claims to it. In the case of a public weigher, surveyor, accountant, abstractor, appraiser or other such person, the party relying on the information knows that the defendant obtained and furnished it only because he was employed by some one to do so. The information was obtained not from personal experience for personal use, but only to pass on to some one else as a matter of business or professional activity. In the one case, the information is given and accepted "as of the personal knowledge" of the supplier. In the other, it is given and accepted as the reasonable belief of the person supplying it after a reasonably careful and skillful investigation.

When a person buys a chattel or stock in a corporation, he buys it "as represented" by the vendor or, by some decisions, by an officer or director in the corporation. He is justified in expecting infallibility as to representations of fact. This is the basis of the transaction. On the other hand, when he employs a business or professional man to obtain information to guide him in a commercial transaction or when he uses information supplied by such a person, although employed by some one else, he knows the person supplying the information did so only by reason of his employment. Primarily, such person is employed to render service

rather than to supply information. Competence and care in the rendition of the service are all that he purports to make available. Consequently, the person using the information is entitled to expect only care and diligence to insure its accuracy. This is the situation whether the person who relies on the information resulting from the other's work is the person who employed him, or whether he is a stranger to the contract, but one for whom the information was obtained. In both cases, the reasonable and justifiable expectation is that care and skill have been utilized in the preparation of the statements made, not that they are correct. Therefore, there may be a recovery for negligent, but not innocent misrepresentation.

In some cases involving parties to a contract, liability is conditioned on negligence. Here, at once, the question is presented as to the relation of such cases to those involving liability for innocent misrepresentation as between parties to a contract. Most of the latter cases are actions between vendor and vendee in which the representation pertained to the subject of the contract. The difference between such cases and cases in which the contract was between a purchaser and an abstractor, or other person whose business or profession is primarily one to render service, has already been indicated. Some cases between vendor and vendee condition liability on negligence, however, and are therefore inconsistent with those cases which impose liability in such situations for innocent misrepresentations, unless the matter pertained to a fact as to which the vendor's position gave him no peculiar means of knowledge and none was professed. A fortiori, cases between vendor and vendee where liability is conditioned upon actual fraud are inconsistent with those which impose liability for innocent misrepresentations.


116 Tremaine Alfalfa Ranch Co. v. Carmichael, (1927) 32 Ariz. 457, 259
As to the measure of recovery for a negligent misrepresentation, it would seem that where the defendant is one whose business or profession it is to furnish information, the interest which the law is designed to protect is the interest in avoiding loss through reliance upon the negligently furnished misinformation. The recovery, therefore, should not exceed an amount sufficient to afford compensation for any such loss. This requires the so-called tort measure of damages. Where, however, the defendant is a vendor who is held liable for a negligently false representation concerning the article sold, then as in cases involving honest or dishonest misrepresentations, the defendant may properly be held to a measure of damages which is equal to the value of the bargain the expectation of which induced the other to complete the transaction.

VI. Situations in Which the Plaintiff is Entitled to Rely Only on the Honesty of the Person Making the Misrepresentations

There are many relations in which the business transaction is conducted upon the assumption that the parties are honest; otherwise they deal at arm’s length. There is no special relationship between them which makes it proper that one, in giving information to the other, be required to exercise any degree of care to...
insure its accuracy or validity. The interests of the parties ordinarily are adverse. Each is trying, within the limits of the ethics of business, to make as advantageous a deal as possible. Each may assume that the other will practice on him no conscious dishonesty, but he can properly expect nothing further. Each must employ self-protective care and diligence to ascertain the facts concerning the subject matter of the transaction and must formulate his own judgment thereon. He should not complain if, failing to do so, he is misled by the other's mistaken information or erroneous opinion, however unreasonable the mistake may be. If he chooses to take his adversary's word on a material fact, he must take it, unless it purports to be more, for an honest, but not necessarily cautious and certainly not an insured expression of the other's belief. So too, if he is willing to rely upon the other's opinion he may take it as a sincere, but certainly not a sound or unbiased judgment.

(a) Facts. The requirement of fraud, as a necessary element when the parties are not in contractual relationship and there is no other reason to expect more than honesty, is quite uniform. Even when the parties have entered into a contract, neither may be in a position which would justify the other in expecting assurance of accuracy or even care or caution to insure it. There are differences among the courts, however, as to when the relation between the parties is sufficiently tenuous as to require only honesty. Some courts impose liability in actions for deceit only when there is scienter in situations in which other courts appear to impose liability if there is either scienter or negligence, and still others irrespective of scienter and negligence. Most of this confusion exists in respect to actions by purchasers against vendors. Many of the cases of liability for innocent misrepresentation and some of liability for negligence involve situations of this character. At the same time, many cases of conscious misrepresentation are by vendees against vendors. When liability is imposed for intentional or negligent misrepresentation, the apparent inconsistency may to a certain extent be explained by rejecting the negative pregnant. Because a defendant is liable for intentional or negligent misrepresentation does not necessarily imply that he would not have been liable unless there was negligence or fraud. Liability in such cases may be based upon the a fortiori argument.

119See the cases in note 36, supra.
120See the cases in note 114, supra.
121See the cases in note 116, supra.
But where recovery by a vendor against a vendee is denied because of an absence of scienter or negligence, the inconsistency is unavoidable, unless the nature of the thing sold, the circumstances of the transaction and the business customs in connection therewith subtly account for the different patterns of justifiable assumptions of the parties.

Corresponding to the rule in actions for deceit, in many situations there is no estoppel unless there is actual fraud by the estoppel denier. Thus, in situations where one party who has an interest in land fails to disclose the same when another in his presence enters into a transaction with a third person with respect thereto in reliance upon the third person's title or interest, the one is estopped thereafter to assert his inconsistent interest if he realized the other's mistake.

"Where a man having an interest in property stands by and sees another man dealing with that property, as owner, with another person who is ignorant of the want of title in the person with whom he is dealing, equity will bind the one who stands by."^{122}

"The explanation and justification of the estoppel cases depend on the interests involved and the relation existing between the parties. The value of the plaintiff's interest may be so slight as compared with the defendant's interest in freedom of action or non-action that it will be protected only against conscious mis-representation. Most of the estoppel cases of standing by are illustrations. The defendant must know of his ownership and that the plaintiff is acting or may be expected to act in ignorance of it."^{123}

Thus, there is no estoppel in most cases unless the estoppel denier knew that he possessed the interest in the land in question.^{124} Ignorance by reason of a mistake of law will prevent the estoppel.^{125} Indeed, in some cases, it is held that the estoppel

\[122\] Mangles v. Dixon, (1852) 3 H. L. C. 702.
\[125\] Smith v. Hutchinson, (1875) 61 Mo. 83; Thompson v. Simpson,
denier must have intended that the other would be misled by his failure to disclose his interest, although it would seem that it would be sufficient if he knew that such was substantially certain to happen. "In all these cases," said the Pennsylvania court, "there is some ingredient which would make it a fraud in the party to insist on his legal right." So too, the Georgia court said, "We conceive that mere personal silence when an act is about to be performed affecting rights would be less convincing than an authority or positive consent to the doing, but neither would create an estoppel unless fraud was an element;" and in a Maine case, it was said, "the act or declaration of the person must be wilful, that is, with knowledge of the facts upon which any right he may have must depend, or with an intention to deceive the other party."  

(b) Opinions and Comment. If the relation of the parties does not disclose the defendant to be in a superior position to formulate a judgment as to the desirability of the transaction from the plaintiff's point of view, and if no such expressions of certainty accompany his expression of opinion as reasonably to induce the plaintiff to believe that he has an adequate factual basis for his judgment, the plaintiff certainly may not expect infallibility of judgment. Moreover, if the defendant has not advised the plaintiff in a professional or business capacity which itself justifies the plaintiff in expecting a certain professional standard of competence, there is no duty imposed upon the defendant to take precautions to insure the accuracy thereof. If none of these relations is present, the plaintiff, at most, can expect honesty from the defendant. In these cases, then, the facts are known or available to both parties. The defendant has no secret source of knowledge upon which he founds his opinion. Under such circumstances, the plaintiff must assume the business risks incident to erroneous judg-


129 Copeland v. Copeland, (1848) 28 Me. 525.

ment. If he chooses to rely upon the defendant's judgment as to the economic wisdom of the transaction, he is justified in expecting no more than honesty of opinion.

But it is not every opinion upon facts known or patent to both parties that may become the basis for an action even if the opinion is fraudulently given. The law assumes that everyone is capable of formulating a valuable judgment upon the ordinary affairs of life and that if he, in fact, does not determine his conduct according to his own judgment, he ought to do so. In other words, the individualistic philosophy provides a premise of complete freedom of judgment and action in ordinary affairs. It is assumed that a purchaser, knowing the facts, is as capable of formulating an appraisal as to the desirability of the transaction as his vendor unless there is something about a transaction and the relation of the parties thereto to make the case unusual. Each party must rely upon his own judgment. A misrepresentation of opinion by the other party, even though fraudulent, is immaterial. 131 This principle finds expression in the dogma that a purchaser may not rely upon the "puffing" or "trade talk" of his adversary. It is to be noted, however, that these considerations are pertinent only to the interchange of opinions between antagonistic parties to the bargain. Every one recognizes the known tendency of parties to a transaction to consummate it on terms as favorable as possible. 132 Where, however, an insincere opinion is offered by one who is a stranger to the deal, the matter is different. Such a person cannot fall back upon the principle of "puffing," and is held responsible for the honesty of his views.133

131 Bowen, L. J., in Smith v. Land & House Property Co., (1884) I., R. 28 Ch. D. 7, observed that "The statement of such opinion [on facts equally known to both parties] is in a sense a statement of a fact, about the condition of a man's own mind, but only of an irrelevant fact, for it is of no consequence what the opinion is." Compare, also, Campbell, J., in Picard v. McCormick, (1862) 11 Mich. 68: "If value can be regarded in any case as a material fact, then it may be the subject of a warranty."

132 "The law recognizes the fact that men will naturally overstate the value and qualities of the articles which they have to sell. All men know this, and a buyer has no right to rely upon such statements." Morton, C. J., in Kimball v. Bangs, (1887) 144 Mass. 321, 11 N. E. 113. And see Rockafellow v. Baker, (1861) 41 Pa. St. 319, 80 Am. Dec. 624; Bishop v. Small, (1874) 63 Me. 12.

133 And the distinction between the two cases is marked and obvious. In the one, the buyer is aware of his position; he is dealing with the owner of the property, whose aim is to secure a good price, and whose interest is to put a high estimate upon his estate, and whose great object is to induce the purchaser to make the purchase; while in the other, the man who makes the false assertions has apparently no object to gain; he stands in the situation of a disinterested person, in the light of a friend, who has
From an apparently disinterested person, the plaintiff may expect a more literal honesty than from one who, by his insincerity, can make a profit. When there is no occasion to expect insincerity, the plaintiff may justifiably expect sincerity.

In some transactions it is recognized that the parties are in a relation so unique that the general principle is inapplicable even though they are antagonistic parties. What ordinarily would be mere "puffing" or "trade talk" in the usual bargain may on occasion justifiably be taken as a genuine expression of the vendor's judgment. Common situations of this kind are those in which the defendant has or holds himself out as having special aptitude or training in appraising the situation in question.\textsuperscript{184} This is to be distinguished from cases in which the defendant has special knowledge or means of knowledge of the facts which, were they known to the plaintiff, might enable him to formulate an accurate judgment.\textsuperscript{185} The facts here are known to both parties, but one party because of unusual experience and training in appraising similar facts has a recognized advantage. If this advantage is sufficiently great, there will be a natural tendency of the other to be influenced by the opinion expressed and the law accordingly recognizes this tendency by requiring honesty of the defendant.

"It is a matter of every day occurrence," said the Michigan court,\textsuperscript{186} "to find various grades of manufactured articles known more generally by their prices than by any test of their quality which can be furnished by ordinary inspection. . . . In the case before us the alleged fraud consisted of false statements of a jeweler to an unskilled purchaser of the value of articles which none but an expert could be reasonably supposed to understand. The dealer knew of the purchaser's ignorance and deliberately and designedly availed himself of it to defraud him."

This situation is also to be distinguished from those in which the defendant offers an opinion in his capacity as a business or


\textsuperscript{185}See supra, p. 974.

\textsuperscript{186}Picard v. McCormick, (1862) 11 Mich. 68, per Campbell, J.
professional man engaged in furnishing advice to third persons in connection with transactions to which he is not otherwise a party. In such a case, the person to whom the advice is given may expect more than honesty; he may expect a reasonable competency and skill. 137 If, however, a specialist or an expert is himself a party to the transaction with the plaintiff, his capacity as an antagonistic party replaces that of one whose business it is to furnish information for others and he is not held to a standard of professional competency. He is held only to a standard of common honesty.

Again, what is ordinarily mere "trade talk" may properly become the basis for reliance by one who bears to such person a relation of trust and confidence in respects other than the transaction in question. 138 Persons who deal with members of their immediate family do not adopt the ordinary business attitude employed in transactions with strangers. This is also true as between persons who have long been associated together in other business connections. It may be true because of mutual membership in social, religious, or other organizations. 139 In short, whenever the parties to a transaction have been so associated in other relations that in their dealings with each other they may be expected to drop the business precautions and defenses, neither will be permitted to take advantage of such relations and, by abusing the confidence thus recognized, consummate an advantageous transaction by misrepresentation of opinion.

Here, again, statements of law are illustrative. If the facts are known to the parties, a fraudulent opinion as to the law pertaining thereto is not actionable as a tort unless the relation of the parties is so unusual as to justify reliance thereon, 140 as where the person expressing the opinion is a lawyer, or other person of special knowledge, 141 or is in a relation of trust or

137 See supra, p. 986.
139 See especially Comment c, sec. 619, Restatement of Torts, Tentative Draft No. 13.
confide. 142 Thus, in Gormley v. Gymnastic Ass'n,143 where a lessor had fraudulently told the lessee that he had a license which would enable the lessee to sell liquor on the leased premises, the court said: "The appellant (plaintiff) was just as much bound to know that the license of the respondent would not protect him in the sale of liquors, etc., as the respondent was. It was a question of law whether such licenses would protect the appellant, and a false or mistaken misrepresentation as to what the law is upon an admitted state of facts is no basis of an action, especially where there are no confidential relations between the parties." As a matter of fact, the defendant in this case did not himself have the license which he claimed to have. This, of course, was a misrepresentation of fact but an immaterial one, "for the reason that if it had been true it would not have protected the appellant from the consequences which followed." If the opinion as to the law had been accurate on the stated facts, the falsity of the facts would have made the statement actionable since the fraudulent statement of fact rather than the statement of law would have been the basis of the deceit.144

In Jekshewitz v. Groswald,145 however, the defendant was held liable for fraudulently representing to the plaintiff that certain formalities constituted a valid marriage, thus inducing the plaintiff to live with him as his wife. The plaintiff was a woman of foreign birth, ignorant of the laws and customs of this country, which ignorance the defendant utilized to perpetrate the fraud. Said the court:

"The defendant occupied a relation of trust and confidence toward the plaintiff because of their engagement to marry and was bound to act fairly and in good faith in his dealings with her.146 When a party occupies such a relation his misrepresentations of law may be actionable. The party with whom, because of that relation, he had the duty to deal fairly, would have a right to rely and act upon such representations if believed without negligence.147 Misstatements of law may also be a ground of liability


143(1882) 55 Wis. 350, 13 N. W. 242.
145(1929) 265 Mass. 413, 164 N. E. 609.
if a party possessed of superior knowledge takes advantage of the ignorance of the other to deceive him by such misstatements."

Liability for the fraudulent expression of an opinion as to the legal effects of certain facts is thus identical with liability for the expression of any other judgment upon known facts.

There is, it seems, a different rule as to restitution. Although there are cases which impose the same requirements to a recovery by the vendee of the amount paid for the land, the modern view imposes the duty of restitution in every case of a conscious misrepresentation of law irrespective of any confidential relationship between the parties. This may be explained on the ground that, even though the plaintiff was not justified in relying on the defendant’s opinion as to the application of the law to the known facts, the unjust enrichment of the vendor at the vendee’s expense, resulting, as it does, from the vendor’s fraud, is so unconscionable as to require the interposition of the law. The plaintiff may not be permitted to enforce the bargain as made because he was not justified in expecting an honest basis for dealing. He will be permitted to repudiate the whole transaction, however, because of the policy that it is better to protect an incompetent and foolish person than to encourage an unscrupulous and dishonest one. Moreover, there is authority that restitution is available even for an innocent misrepresentation of law if a con-

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149 If the representation as to a matter of law is a representation of opinion as to the legal consequences of facts known to the maker and the recipient or assumed by both to exist, the recipient is justified in relying upon it to the same extent as though it were a representation of any other opinion.” Restatement of Torts, Tentative Draft No. 13, sec. 621 (2).


151 “A person who has conferred a benefit upon another induced thereto by a mistake of law, is entitled to restitution thereof if his mistake was caused by reliance upon a fraudulent misrepresentation of law by the other.” Restatement of Restitution, sec. 55 (a).

To support this statement, the Reporter cites (Explanatory Notes, pp. 69-72) many cases which he regards as misrepresentations of law, but in which rescission was allowed by the court on the ground that they were misrepresentations of fact and other cases in which restitution was allowed because of inequitable dealing by one of the parties.
fidential relation between the parties made reliance thereon justifiable.\textsuperscript{152}

Honesty, but honesty alone, can be expected in representations of title to land or other legal right by a layman who has no special knowledge upon facts unknown although readily discoverable by the plaintiff,\textsuperscript{153} misstatements of the amount or quantity of the land, chattels or other things which are the subject of the transaction, and the estimated cost of operation or upkeep of the land or other article in question.\textsuperscript{154} If the plaintiff desires verification, he can obtain it, for the facts are accessible. If title to land is involved, he can procure the services of an attorney or an abstractor; if the quantity of land is in question, he can procure the services of a surveyor. Even then, he will be entitled to expect only reasonable care and competence to make the information accurate. If he wants insurance, he must buy it as such, either from the vendor or from a third person.\textsuperscript{155} But from his vendor, the purchaser is justified in expecting only honesty as to such representations.

In the case of a sale of goods or intangibles, this rule is inapplicable, for the reason that the purchaser will ordinarily have no way of determining the seller's title, the pertinent facts of which are usually known only to the latter. For this reason the implied

\textsuperscript{152}A person who has conferred a benefit upon another induced there to by a mistake of law, is entitled to restitution thereof if his mistake was caused by . . . justifiable reliance upon an innocent misrepresentation of law by the other." Restatement of Restitution, sec. 55 (b).


\textsuperscript{155}Here, again, there is support for the view that there may be restitution even though the misrepresentation of title was innocent if there was justifiable reliance thereon. Restatement of Restitution, sec. 47 (2) (e).
warranty of title is applicable thereto. If the seller accurately states the facts upon which his purported interest depends, there will be, of course, no implication of warranty, and the negotiations will proceed on the basis only of the seller’s honesty in asserting that the stated facts support his claims of title, the risk of its failure thus falling to the purchaser.

(c) Measure of Damages. As to the extent of recovery in cases of liability for conscious misrepresentation, there seems to be some justification for variation. If the liability is based upon a situation which would properly support liability for an innocent representation, it is clear that the same measure of damages should be awarded. If the plaintiff would have been entitled to recover had he not proved scienter and if such recovery would have entitled him to damages based upon the expectable advantage of the contract which he thought he was making, certainly he should not receive less because he went further than was necessary and established actual fraud. If, however, the case is not one in which he could have recovered for an innocent misstatement, he may well be limited to a recovery of his actual out-of-pocket loss. In the latter case, the plaintiff’s recovery is not based upon a situation which gave him the right to expect absolute accuracy, and, therefore, he is in no position to demand that he be put in the position which he would have occupied had the facts been as he properly supposed they must be. His recovery is based only upon his right to expect honesty. Therefore, he can properly receive no more than is sufficient to put him in the position which he would have occupied had the defendant been honest. If the defendant had been honest, he would not have made the false statement and the plaintiff would not have entered the transaction. His recovery, accordingly, may properly be limited to the loss suffered by reliance on the dishonest misrepresentations. A specious reason to justify the contract measure of damages in the normal case in which this measure exceeds the tort measure is the deterrent effect of the greater recovery. This, however, is an indirect way of imposing punitive damages. When a rule of

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1. See Restatement of Restitution, sec. 52 (1).
2. In the following cases the same measure of damages was applied to situations of intentional misrepresentation as was applied in situations of innocent misrepresentations: Dittcher v. Binkley, (1933) 251 Ky. 134, 64 S. W. (2d) 502 (conscientious misrepresentation); Exchange Bank v. Gaitskill, (1896) 18 Ky. L. Rep. 532, 37 S. W. 160 (innocent misrepresentation); Ritko v. Grove, (1907) 102 Minn. 312, 113 N. W. 629 (conscientious misrepresentation); Freeman v. Harbough, (1911) 114 Minn. 283, 130 N. W. 1110 (innocent misrepresentation).
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damages performs a quasi-punitive function, it seems desirable, in the interest of clarifying issues of policy, that it be frankly designated and classified as such rather than appear as a rule of compensation.

VII. SITUATIONS IN WHICH THE PLAINTIFF IS NOT ENTITLED TO RELY EVEN ON HONESTY OF PERSON MAKING MISREPRESENTATIONS

There are, in general, two types of statements which a party to a transaction must discount completely. He is not permitted by the law to place any significance whatever thereon. He is not justified in expecting accuracy, care or even honesty and sincerity. One type of statement is a representation of immaterial fact. The other is the representation, upon known facts, of the opinion of an adverse party who is not, by reason of special knowledge and skill, in a recognizably special position to formulate a judgment. In some instances, the latter type of statement is treated like the first—an immaterial representation. It is of no moment what such an adversary thinks of the desirability of the transaction for the plaintiff, and therefore it is of no significance that such a misrepresentation is insincere and invalid. The plaintiff must formulate his own opinion and be guided thereby.

(a) Facts. The justifiability of reliance even upon the defendant's honesty is limited by the rule, applied in all jurisdictions, of materiality. A fraudulent misrepresentation is not actionable if the fact or facts misrepresented are not material. Trivial misstatements, even though fraudulently made, are not actionable. The misrepresentation "like poison" must "taint" the transaction.

Materiality is important in two respects. In the first place, it is significant on the question of the plaintiff's actual reliance on the misrepresentation, for, of course, if the misstatement did not in fact induce action, there can be no recovery on grounds of lack of causation. If the fact misrepresented is insignificant,


160 Addington v. Allen, (1833) 11 Wend. (N.Y.) 374; Marshall v. Gilman, (1892) 52 Minn. 88; Shaw v. Gilbert, (1901) 111 Wis. 165, 86 N. W.
there will ordinarily be no reliance thereon. "It may be that the misstatement is trivial," said the Master of the Rolls in Smith v. Chadwick, 161 "so trivial that the court will be of opinion that it could not have affected the plaintiff's mind at all, or induced him to enter into the contract." On the question of actual reliance or causation, therefore, materiality is important as matter of evidence.

It seems, however, that courts have attached legal significance to it otherwise than as mere evidence whether the plaintiff was in fact misled.

"False representations, no matter how acted upon, will not be sufficient to set aside an agreement, otherwise valid, unless they were material. Inmaterial representations, whether true or false, cannot be made the basis of relief, even though coupled with the assertion that they were relied upon." 162

Here again, practical considerations prevail. A representation is material if the "existence or non-existence [of the fact misrepresented] is a matter to which a reasonable man would attach importance in determining his choice of action" in the transaction in question. 163 The rule requiring materiality does not reflect a policy to punish the imprudent nor to require the injudicious to suffer his own loss because of his eccentricity in relying upon statements to which ordinary men would not attach significance. The rule is merely another compromise with expediency. Administrative necessity requires it. Because it is impossible to demonstrate with exactness the factors which impelled the plaintiff, arbitrary limits are set. It is the same difficulty which inheres in all problems which require judgment on human conduct on the basis of psychological and ethical standards. Appraisal in such terms necessarily involves a wide margin of error. Administration of such standards is a baffling process and, in sheer desperation, courts resolve a technique studded with rules of thumb based on probabilities as determined by experience, itself marshalled with unscientific inexactitude. This is practical only in the sense that

161 (1882) 20 Ch. D. 27, 45.
163 Restatement of Torts, Tentative Draft No. 13, sec. 614 (a).
any alternative is equally or more unconvincing. There is comfort derived from the feeling that, in some vague way, justice and fairness will be attained in the great bulk of cases although in any particular case there may be unfortunate results.

Thus, an objective materiality is required on the theory that, in the large, any other kind will be statistically negligible and too shadowy to recognize.

"Anything short of this would be unsafe, and would render it exceedingly dangerous for parties to conduct the ordinary business transactions of the day. It frequently happens that representations are made, while negotiations are pending, not strictly true. They may relate to the subject matter, or have little or no reference thereto. Neither party may place the slightest reliance thereon, yet, should a dispute thereafter arise, how easy for the person who imagined he was injured to assert that he relied upon the representations made—believed them to be true—and, so believing, was thereby induced to make the contract in dispute. It would, indeed, be difficult to disprove such an assertion, if the materiality of the representations formed no part of the inquiry. The fraud must therefore be material to the transaction."

There is a further policy involved in requiring the fact misrepresented to be such that a reasonable man would regard it as important. Because of the social interest in the security of transactions, allowance may very well be made for the known tendency of most men for casual and loose talk. The rule requiring materiality in actions based even upon fraudulent misrepresentations is consistent with the rule of warranty in an action based upon innocent misrepresentations. Both serve well the policy of non-impairment of bargains. In the case of a sale, the warrantor is held to the bargain as made. In the case of deceit or fraud, the main outlines of the bargain stand while the law ignores the vocal by-play, even though fraudulently and effectively indulged. What is ordinarily regarded as a bargain stands according to its terms and is enforced, even though the defendant was the innocent victim of mistake. So too, it stands as made notwithstanding fraudulent side talk of a different tenor. The vendee may enforce the material aspects of the deal against an innocent vendor; he cannot enforce the trivial details of it against a fraudulent one.

(b) Opinion and Comment. "But, lest there be mistake about it caveat emptor is not yet a historical doctrine. The course of legal events has merely reduced its rule to a constitutional mon-

archy. The precept is still to be discovered behind enlarged rules of deceit, warranty and negligence, behind established tests, inspection and trade practice. The protection accorded the buyer is as yet neither broad nor certain. At best only a minimum of quality is assured and that in matters which do not invite great difference in opinion. Business is business and law is law, but neither insures quality to the book, long life to the garment, style to the furniture, or durability to the automobile."

Thus, the "puffing" opinion of the vendor is still to be discounted by the purchaser. He is not yet permitted implicitly to rely upon the honesty of his vendor's judgment as to quality, utility, durability, and other attributes which constitute value. To be sure, as the extravagance of the vendor's opinion decreases, the closer to the line of justifiable reliance do the parties approach. A slight variance from a truthful representation of opinion is not tolerated so much as a wide one, because it is more dishonest. "Dealer's talk" carries its own label. To this the purchaser must close his legal ears. The goods are "puffed" as a matter of business practice and technique, with perhaps a more or less vague expectation that the psychological effect upon the "prospect" will be favorable. It is only half serious, however. Extravagant claims for commodities on the part of the vendor are not regarded in the business world as unethical. The rules of the game permit such claims, because they are not intended to be taken seriously or literally.

A statement that a cigarette is made from the purest tobaccos grown, that an automobile is the most economical car on the market, that a stock is the safest investment in the world, that a machine is 100 per cent efficient, that a household device is absolutely perfect, that a real estate investment will insure a handsome profit, that an article is the greatest bargain ever offered, and similar claims are intended and understood to be merely emphatic methods of urging a sale. These statements are not

106aVulcan Metals Co. v. Simmons Mfg. Co. (C.C.A. 2d Cir. 1918) 248 Fed. 853; cert. den. in 247 U. S. 507, 38 Sup. Ct. 427, 62 L. Ed. 1241 (vendor said his machine was absolutely perfect and worked with the greatest efficiency); Schwitters v. Des Moines Commercial College, (1925) 199 Iowa 1058, 203 N. W. 265 (owner of business college told plaintiff, a prospective student, that she could complete the course and obtain a position in eight weeks' time); Prince v. Brackett, Shaw & Lunt Co., (1925) 125 Me. 31, 130 Atl. 509 (vendor, in selling a machine to plaintiff, said, "We unreservedly claim that this is the best sawmill power on the American market today"); Kulesga v. Wyhowski, (1921) 213 Mich. 189, 182 N. W. 53 (defendant told plaintiffs that if they would invest in certain timber
designed to affect the intellect. The effect is largely hypnotic. It is merely an accepted technique for urging the prospect to close the deal. These things, then, the buyer must disregard in forming a sober judgment as to his conduct in the transaction. If he succumbs to such persistent solicitation, he must take the risk of any loss attributable to a disparity between the exaggerated opinion of the purchaser and a reasonable or an accurate judgment of the value of the article. "The law recognizes the fact that men will naturally overstate the value and qualities of the articles which they have to sell. All men know this, and a buyer has no right to rely upon such statements."\(^{167}\)

In this area of business activity, caveat emptor still prevails. The area is bounded, first, by an equal availability of the essential facts upon which judgment depends; second, a substantial equality of ability to formulate a judgment on the known or available facts; third, the existence of the common psychological defenses which ordinarily exist against persuasion in business transactions; fourth, a limitation to statements which are judgments incapable of complete verification save as to their reasonableness, mere appraisals of existing facts. Within this area, a catch-as-catch-can struggle is permitted. Anything goes. The boundaries to this area are obviously somewhat vague and nebulous, and it is for this reason that uncertainty and apparent confusion exist in the decisions.

It is, of course, impossible to reconcile many of the decisions holding that exaggerated opinions are mere "dealer's talk," and many decisions holding similar expressions sufficient to justify reliance upon the honesty of the defendant. It is submitted, however, that the inconsistencies may be less than appearances would indicate. Judicial reactions to a situation may depend upon many

factors which are incapable of reproduction in the printed report. Much latitude should be allowed the trial judge who may pass judgment upon the justifiable character of the plaintiff's reliance in the light of many intangible factors which, while difficult to catch with a word, are nevertheless real in that people are in fact frequently influenced thereby. This has led to the suggestion that if, in the particular case, the vendor succeeds in an effort to win the confidence of the purchaser, he should be held to the honesty of his opinion even though it pertains to the value or quality of an article open to examination and, therefore, as readily subject to the appraisal of the vendee as to that of the vendor. In other words, "puffing" ceases to be such if the defendant intends it to be taken seriously and literally and is successful in inducing the vendee so to take it. If the parties actually deal on the strength of the honesty of the vendor's judgment, he will be held thereto.

This position is undoubtedly supported by the ethics of the situation, but until the moral atmosphere of business itself is cleared, there is much reason to expect the law to take into account the assumptions that underlie the normal business transaction, that the vendor's or manufacturer's tall talk concerning the superior quality of his commodity must be verified by experience on the part of the consumer. The vendee in the ordinary transaction must rely upon his own judgment in a capitalistic regime.

VIII. Conclusion

This study represents an attempt to discover a rationalizing medium for the various segments of the law of misrepresentation. It is necessarily incomplete in that every rule of law concerning misrepresentation is not considered. It is also imperfect in that the synthesis does not disclose completely harmonious patterns of policy. It is submitted, however, that in the light of the rational structure set up many of the inconsistencies in the law are dissolved into a not altogether unpalatable potion. Behind the technicalities of deceit, estoppel, warranty, negligence, etc., there emerges a certain coherence in policies that have their roots deeply imbedded in community-wide assumptions in connection with business prac-

168"The recipient of a fraudulent misrepresentation of the maker's opinion upon facts known to the recipient is not justified in relying thereon in a transaction with the maker unless the opinion is material and the maker has successfully endeavored to secure the confidence of the recipient." Restatement of Torts, Tentative Draft No. 13, sec. 618.
tice and ethics that make the net results relatively fair. These tacit notions of the implied rules of the business game constitute the inarticulate premises of the law. No critical appraisal is adequate without taking them into account as factors of primary, if not principal importance. To the extent to which the law conforms thereto does it accomplish its purpose as a means to an end.